Law Society of England and Wales – Written evidence (PBS0019)

How important are the different UK professional and business services sectors to the UK's economy and trade in services? Please include data where possible.

1. 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]

2. 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 2700 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 faciliatory role in wider international trade.

What are the UK's different professional and business services sectors' key priorities for the future UK-EU relationship? What are the key priorities of smaller professional and business services providers and providers from the UK's regions and devolved nations in particular?

3. It is important to recognise that, regardless of the outcome of the FPA negotiations, leaving the single market will cause a significant decrease in market access for legal services. It will also precipitate a significant increase in regulatory pressures on UK law firms operating across the EU, who will need to engage with differing and changing regulatory frameworks and reservations from individual member states. While an optimal FPA will mitigate some of this loss in market access, a negative impact on UK legal services exporters at the end of the transition period is unavoidable.

4. The EU-UK Future Partnership Agreement (FPA) should allow UK lawyers in all EU member states to:

    - advise clients on UK laws under home state title (England and Wales, Scotland, Northern Ireland) and public and private international law;
    - provide advice remotely, in person and through commercial presence (i.e. via all four GATS modes of supply);
    - have a clear path for requalification into the host state profession; and

[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/

- represent their clients in arbitration, conciliation and mediation in international proceedings.

More specifically, in case of commercial presence (GATS Mode 3 or Investment) this includes the ability to:

- set up a law firm under host or home state rules and forms. The former implies arguing for recognition of legal forms in force in the UK, e.g. limited liability partnership;
- employ local lawyers (where host state bar rules allow);
- be employed by local lawyers (where host state bar rules allow);
- form partnerships with local lawyers on an equal footing; and
- enable law firms to continue using their usual name.

5. Furthermore, in case of recognition of qualifications we advocate for having UK home titles[2] recognised and for UK lawyers to have a clear path to requalify into host state profession.

6. In the case of presence of natural persons for business purposes (Mode 4) our general request covers visa and travel facilitation in the field of activities of short-term business visitors and the provision of services by intra-corporate transferees, contractual services suppliers and independent professionals.

7. Finally, UK lawyers should have the ability to represent their clients in arbitration, conciliation and mediation in international proceedings that have their seat in the EU-27.

8. In case of the EU-UK FPA, the above needs can be met through:

Individuals

- clear provisions and commitments on the presence of natural persons for business purposes, especially short-term business visitors (**STBV**), contractual service suppliers (**CSS**), independent professionals (**IPs**) and intra-corporate transferees (**ICTs**);
- removing residence and/or nationality requirements in order to requalify into host state profession from the annexes on reservations on existing measures;
- maintaining ambitious provisions on mutual recognition of qualifications;
- removing the requirements for an economic needs test (**ENT**) from the annexes on reservations on existing measures:

Firms

- removing equity caps, limits on voting rights or limits on profit sharing for non-EU lawyers from the annexes on reservations on existing measures;

[2] There are six titles in three jurisdictions of the UK: solicitor (England and Wales), solicitor (Scotland), solicitor (Northern Ireland), barrister (England and Wales), barrister (Northern Ireland) and advocate (Scotland).

- removing the local content requirements (e.g. requirements to have a minimum number of local shareholders) from the annexes on reservations on existing measures; and
- removing the requirements for an economic needs test (**ENT**) from the annexes on reservations on existing measures.

9. Much of the above would still apply to smaller providers. However, of particular importance are low barriers to short term business travel (such as the administrative burden and cost of visas) and Government support for international trade activities such as provided by DIT[3], including international trade advisers, presence in key locations, funding assistance and the Overseas Market Introduction Service (**OMIS**). This helps smaller business navigate regulatory environments overseas.

What preparations (if any) have UK professional and business services providers made, or planned to make, ahead of the end of the transition period?

10. We have been closely following EU-UK FPA negotiations and assessing implications for the profession. However, without the finalised text and annexes to the FPA, it is impossible to assess the level of market opening and thus to advise accordingly.

11. Firms need time to adapt, which in turn requires certainty in terms of future relationships. Once this is known, firms will be able to effectively prepare, and the Law Society will support them with appropriate guidance and resources. As such, we would urge the Government to agree a deal as fast as possible, giving our members time to prepare.

What provisions should the Government seek to negotiate to minimise potential barriers to trade, particularly for smaller professional and business services providers? What steps should the Government take to preserve the competitiveness and innovation capacity of the UK's different professional and business services sectors?

12. There are two groups of provisions that are important in minimising barriers to trade in legal services:

    - rights to provide services by lawyers and law firms;
    - trade in services facilitation provisions.

13. These are of importance for both smaller and larger operators depending on their business operations and priorities.

14. The existing FTAs contain numerous provisions that can facilitate trade in services (especially in comparison with the General Agreement on Trade in Services or GATS). These include:

[3] See for example: https://www.great.gov.uk/international/?lang=en-gb

- **domestic regulation and good regulatory practice** provisions relating to licensing requirements, licensing procedures, qualification requirements, or qualification procedures. We have always been in favour of clear provisions on domestic regulation since they address domestic policies and rules that apply to services and thus oblige parties to be clearer as to the rules that apply to service providers. Such clarity is especially helpful for smaller operators. The proposals currently presented in the EU-UK FPA are interesting, especially the UK proposal to allow for an opportunity to submit comments on new regulatory measures (Article 12.11) though there is slight divergence between the UK and EU texts.

- **regulatory cooperation** which sets out the objectives and mechanisms for cooperation between parties on selected areas covered by the agreement, including cross-border supply of services. Some of the objectives of such cooperation include avoidance of unnecessary barriers to trade, enhancing efficacy of regulations, or facilitating bilateral trade and investment. Although such cooperation is not immediately or directly relevant to services providers, ultimately it can focus on regulatory solutions that would make trade in services easier. It is encouraging to see the UK's proposal on regulatory cooperation in services.

- **transparency provisions** that encourage each party to keep each other up to date with regulatory and legislative developments and to have relevant laws and regulations publicly accessible.

- **digital trade** which includes provisions on electronic contracts, electronic authentication and data flows. It is not new that technological change has an impact on the nature of services and their provision, as well as on the scale of operations. Therefore, the development of provisions on digital trade in the FPA merit further reflection, also for the sake of future UK FTAs. In this context, we noted with interest the UK proposals covering 'emerging technologies' such as artificial intelligence or blockchain.

- **governance** which includes provisions on how the agreement would be overseen and reviewed. Regarding the EU-UK FPA, we do not have a firm position on whether there should be a dedicated committee on services or not. The UK proposed several committees (of which services and qualifications are examples), while the EU did not (as it is waiting for more clarity as to the overall structure of the FPA before deciding on its governance). It would seem, however, that having a dedicated committee or sub-committee on professional and business services could help foster a better dialogue between the parties.

- **visa facilitation and immigration** which will be important as they will determine the true nature of the commitments taken under Mode 4.

15. Concerning the steps that the Government could take to preserve the competitiveness of the UK's services sector, we noted in question No 2 the Government's support for international trade activities which we find important.

16. In our submission to the International Trade Committee's inquiry on UK trade in services[4], we also noted that: '*Trade promotion activities and other tools to aid in the promotion of the international provision of services can be very helpful in clarifying the process and regulations surrounding foreign market access. A good example is the guide provided by the Canadian Trade Commissioner Services on the provisions of CETA and doing business with the EU. It addresses and clarifies a range of points, including the functioning of EU markets and how customs, food safety and product safety would work under CETA. This means Canadian businesses have an easily accessible guide to accessing the EU market by a reliable source*.[5]'

17. We support the Government's campaign Legal services are GREAT which are aimed to maintain the competitiveness and attractiveness of the UK's legal services sector and continue to work with the Government on this campaign.[6]

What type of arrangements should the Government seek to negotiate with the EU for the mobility of professionals?

18. It is vital that lawyers are able to make short term visits to support their clients. Therefore, in terms of an FTA, we would be looking for:

    - a general request that covers visa and travel facilitation; and

    - minimal restrictions (or reservations) in the field of activities of short-term business visitors and the provision of services by intra-corporate transferees, contractual services suppliers and independent professionals. These would cover restrictions on the permissible length of stay or the requirement for the economic needs test. We would also be interested in provisions that would provide alternatives to residency / commercial presence (as it is sometimes required in order for a professional to provide a service).

19. We note that the current proposals from the UK and EU are largely similar, though there are some discrepancies in the permissible length of stay for some categories as well as differences in definitions of some categories of personnel.

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[4] Written evidence by the Law Society of England and Wales: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-trade-committee/trade-in-services/written/95425.html

[5] The export guides are available at the Canadian Trade Commissioner Service's website: https://www.tradecommissioner.gc.ca/export_guides_statistics-guides_statistiques_exportation.aspx?lang=eng

[6] Legal Services are GREAT: https://www.gov.uk/government/publications/legal-services-are-great

How important are arrangements on the mutual recognition of professional qualifications to professional and business services providers in the UK and EU? How could a future UK-EU agreement best allow for this?

20. Mutual recognition of professional qualifications is vital to the legal profession. We understand recognition of professional qualifications as:

    - recognition of home state title; or
    - recognition of (part of) existing qualifications and academic experience for the purposes of requalification into the host state profession.

21. Our aim is to have home title recognised *and* a clear path to requalify into host state profession. Depending on the business priorities and the nature of the activities in question, each of the above will have its advantages.

22. UK lawyers' preferred method is to provide legal services using their 'home state' title. To date, most would only requalify into another country's legal profession for personal reasons. However, requalification into the host state profession within the European Economic Area (**EEA**) carries three important rights that are essential to a part of the UK legal profession:

    - rights of audience in front of EU courts;
    - protection of lawyer-client communications by legal professional privilege (**LPP**); and
    - ability to advise on EU law.

23. However, the current practice in some EU member states is that one needs an EEA nationality to requalify into host state profession. This is one of the key barriers for our members.

24. We believe that the current wording in the UK text of the EU-UK FPA offers a clear path for having qualifications recognised. It is vital that the UK and EU devote enough negotiation resource to the complex issue of mutual recognition of professional qualification to ensure that this area is not overlooked and an ambitious settlement is reached.

25. We also would like to see provisions that leave the possibility for national regulators to enter into mutual recognition agreements (**MRAs**) with equivalent regulators of their choosing (and not necessarily a pan-EU MRA) in full respect of the competences of the EU and member states.

What provisions should the Government seek to agree with the EU on cross-border investment and rights of establishment?

26. We think that the provisions in the EU-UK FPA should allow for broad establishment rights for service providers on both sides of the Channel.

These include provisions that prohibit restrictions on foreign capital, shareholding requirements and legal form.

27. At the moment, both EU and UK texts include provisions that satisfy the requirements above.

29. However, these provisions will be accompanied by annexes allowing for exceptions, known as reservations, on existing and future measures. These can limit the generosity of the market access and national treatment provisions. Historically, all recent EU FTAs significantly restrict the market opening for legal services through a range of reservations scheduled by individual EU member states. Therefore, in practice and with very few exceptions the EU offer on legal services has not moved significantly since its offer in the General Agreement on Trade in Services (**GATS**), though there are additions.[7] In our view, the Government should seek to remove as many of the restrictions from the annexes as possible.

Should there be regulatory cooperation between the UK and the EU on professional and business services? If so, what form should such cooperation take?

30. We think that cooperation in regulation on services would be beneficial as it would allow stakeholders to understand where both parties see the areas of improvement and the direction of development of regulatory policy. This is all the more important given the EU and UK's geographic proximity and intensity of trade in services.

31. These would not only reduce potential frictions, which will inevitably come as a result of the change of the status of the UK, but would also help inform broader trade in services policy.

32. The areas of cooperation could include not only the measures relating directly to the rights to provide services (e.g. practice rights and rights of establishment) but also, and importantly, a broader regulatory ecosystem that is essential for business operations and consumer protection.
33. We do not have any fixed views as to what form the cooperation could take. We do think, however, that the current UK proposals (Articles 25.10-14) offer one example of how such cooperation would be organised.

What lessons, if any, can be learnt from the EU's existing trade agreements with other third countries including services, or negotiations on trade in services?

34. In our experience, FTAs offer limited opportunities to open up legal services markets, despite their theoretical potential to do more. There are, however, important lessons to be learnt from the services negotiations that have taken place in the past and from some FTAs that are currently in force.

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[7] These are, for example, new categories of natural persons to be included in agreements (short-term business visitors that do not appear under GATS or, in case of intra-corporate transferees, graduate trainees).

35. In federal countries (or equivalent), regulation of professional services is a domain of provinces or states (or in the EU of its member states). It is important that they are sufficiently involved in relevant trade negotiations within their country. This is an important consideration because their involvement helps make sure that the commitments undertaken in an agreement are reflected in practice.

37. The experience of negotiating FTAs in the past has shown that it is important to know if a negotiating party makes reservations to certain parts of the trade agreement and what the scope of these reservations is (transparency of reservations). This has proven important in negotiations of the Transatlantic Trade and Investment Partnership (**TTIP**) between the EU and the US where the US has been seen as unwilling to provide full transparency of its reservations at sub-federal level and thus attracting criticism from some governments and business representatives. The EU's practice to date has been to provide full transparency of its reservations.

38. The experience of negotiating mutual recognition agreements (**MRAs**) in the field of legal services has not really materialised despite the presence of 'enabling clauses' allowing competent authorities to do so in the most recent EU FTAs. In our experience, the 'one-size-fits-all' approach to mutual recognition of qualifications has difficulties taking into account the diversity of the legal services sectors and the justice systems under which it operates, or it is not suited to the subtleties of the legal profession, the complexity of the legal services market and its importance for the administration of justice, as well as its independence from state regulators.

39. However, there is a clear appetite from some professional and business sectors to have relevant provisions in place and for trade policy to play a larger role in facilitating trade in services through provisions on professional qualifications and potentially cooperation on other regulatory matters that are important for professional services sector. In our view, it is an area worth exploring in the Government's trade policy approach.

To what extent could UK-EU trade in professional and business services continue in the absence of a UK-EU agreement covering services? How effective would the WTO General Agreement on Trade in Services be in supporting such trade, and what arrangements (if any) could be put in place to go beyond the WTO framework?

40. Trade in professional and business services between the EU and the UK will be able to continue but not on the same conditions. It would fall back on two sets of rules: the rules in the General Agreement on Trade in Services (GATS) and national regulations. In case of the legal sector, this has several implications.

41. First of all, the provisions of GATS apply to legal services defined as '*legal advice in home country law and public international law (excluding EC law).*' This represents a reduction of the scope of practice that currently is

afforded to UK lawyers under the EU Lawyers Directives (Establishment and Services). In addition, there are still national reservations that further limit the scope of practice or rights of establishment.

42. Secondly, there are important areas of practice that fall outside of the scope of GATS and, as a result, UK lawyers and law firms will fall back on numerous national regimes on legal services. These include, among others, rules on professional indemnity insurance, code of conduct, in-house practice or forming partnerships with foreign lawyers. However the GATS regime, including the notification requirement under Article III, achieves much in the way of transparency.

43. In our view, the past experience of the (now defunct) Trade in Services Agreement (**TiSA**) and the current negotiations on the joint statement initiatives (**JSIs**) on domestic regulation and investment facilitation clearly show that GATS has substantial shortcomings and there is appetite from a significant number of WTO members to have the rulebook updated. Having said that, we do acknowledge that GATS still has a role to play and the efforts of a large part of WTO membership to update the rulebook shows that the multilateral rules-based trade policy is still capable of delivering tangible outcomes for service providers. On this point, we note the UK Ambassador's to the WTO and UN statement about the UK's commitment to '*deliver a timely and meaningful outcome, with as much ambition as possible' in the negotiations on the JSI on domestic regulation*.'[8]

44. We are not aware of alternative arrangements that can be put in place that go beyond the WTO framework. The FTAs which liberalise services beyond GATS need to be compliant with economic integration agreements outlined in Article V of the GATS.

45. Under Article VII, GATS allows for the conclusion of mutual recognition agreements (**MRAs**). In the absence of an agreement between the EU and the UK, this could offer a way forward for professional services. Any mutual recognition agreements would also be compatible with GATS Article VII.2, allowing other parties to join if relevant requirements are met.

46. In addition to and in parallel to GATS and FTAs, the EU and the UK are engaged in regulatory cooperation under the umbrella of international organisations such as the Financial Action Task Force (**FATF**).

If there were no reciprocal data adequacy arrangements in place between the EU and UK by the end of the transition period, what would the implications be for professional and business services providers?

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[8] UK statement on the WTO Joint Initiative on Services Domestic Regulation: https://www.gov.uk/government/speeches/uk-statement-on-the-wto-joint-initiative-on-services-domestic-regulation

47. There are a number of alternative mechanisms to enable service providers to operate data flows in the event data adequacy is not approved, and many UK law firms have already been implementing these as part of their contingency measures to mitigate disruption. There are however a number of serious shortcomings, as compared with data adequacy, and if a firm has processing activities in both the UK and EU it would be subject to regulatory responsibilities (and associated costs) under both the EU and UK versions of the GDPR (Article 3 of the GDPR refers). This also brings potential exposure to sanctions and fines under both regimes.

48. We also highlight that in the field of lawtech it is likely that there will be costs for UK digital businesses associated with applying EU-acceptable contract clauses which may inhibit their ability to serve non-UK customers and hinder UK global leadership in law tech.

What opportunities (if any) could the UK's withdrawal from the EU offer to the UK's professional and business services providers?

49. We think that the UK's withdrawal does offer opportunities to pursue a more tailored UK trade policy. This, however, has to be weighed against the current perception of the UK as still having close ties with the EU and thus having its future position heavily influenced by the relationship it will establish with the EU.

50. We are pleased to see that legal services have been prioritised in the current live negotiations with the US, Japan and Australia. We hope these negotiations can be used to reach best-in-class market access arrangements for UK legal services providers. Ambition on services, and in particular legal services, is a golden opportunity and should not be sacrificed in pursuit of a quick deal.

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