

Written evidence submitted by the Bar Council Future Relationship Working Group (FRE0049)

About us

1. The Bar Council is the representative body for the Bar of England and Wales, representing approximately 17,000 barristers. The independent Bar plays a crucial role in upholding and realising the constitutional principles of government accountability under law and vindication of legal rights through the courts.

Scope of response

2. This submission responds to issues regarding intellectual property and the following strand of the Committee's inquiry:

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?

3. The proposals have been guided by:
 - Access to justice for citizens and effective protection of rights
 - The ability for UK lawyers to provide services in the EU/EE
 - The ability for non-UK citizens to provide services in the UK

Recommendations

Mutual recognition of professional qualifications (MRPQ)

4. Although the primary focus tends to be on financial services, UK legal service providers have done very well in the EU. There is a disparity of interest: EU27 providers have done relatively less well in the UK. Also, legal services (apart from activities such as higher court advocacy) are not reserved activities in the UK. Thus, the UK has a specific need here. The Bar, as self-employed professionals, provides services through a relatively small number of lawyers, but to a high standard. Barristers cannot easily establish in other EU states due to the fact that many EU Member States retain high barriers in relation to third country lawyers and that barristers as sole practitioners cannot establish offices in Member States that retain residence requirements.
5. Hence the Bar's priorities are:
 - (i) to maximise the scope of practice under home State title in relation to key areas of law, notably home jurisdiction law (i.e. English law), public international law and so far as possible EU law;
 - (ii) to ensure a rapid route to acquisition of host State title in relation to activities reserved to holders of that title - including temporary call (or equivalent) and where possible a "limited licence" excluding pure host State law;

- (iii) to ensure mobility for self-employed professionals to enter and remain in the host State to carry out activities permitted through either of those routes.
6. This ought to be achievable within an FTA, even a CETA/EU Japan FTA model. It should be based mainly on the home professional title itself (and/or professional experience). It may be a self-regulating framework of bar associations, operating through mutual recognition agreements (MRAs). The Bar also wishes to include in MRAs reciprocal rights to market access under home State title.
 7. In the absence of EU/UK agreement on services, direct bilateral or multilateral MRAs between national regulators/bars become the only mechanism for securing rights to practise under home State title, and to acquire the host State title, in excess of each Member State's General Agreement on Trade in Services (GATS) commitments/reservations. In theory, on the "no deal" scenario, there should be no competence block on direct agreement of MRAs, but in practice the Commission may seek to intervene (indeed one or more Member State bar associations may invite it to do so) to prevent it. So even on this scenario, the Government should (a) obtain at least some understanding with the EU that the absence of agreement should not prevent, as regards the UK, continuation of the established practice of direct MRAs with third State bars/regulators, and (b) unilaterally relax the mobility rules for self-employed legal professionals from EU Member States to maximise reciprocity for outbound practice by Barristers.

Civil justice Cooperation (CJC) – jurisdiction and reciprocal judgment enforcement and recognition

8. In the absence of an EU-UK agreement that provides parties with an agreement on jurisdiction of private disputes and the reciprocal recognition and enforcement of judgments, the Bar calls for the contracting parties to consent to UK accession to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded at Lugano on 30 October 2007 ("the Lugano Convention"). That is because these rules ensure that those involved in cross-border trade and transactions, or family or succession disputes, or who were, say, injured in a road traffic accident abroad, are protected and have access to justice regardless of their financial resources.
9. The UK formally applied in April 2020; so far the EU has not shown itself willing to accept UK accession. The EU has referred to this being a matter of trade interest. However, it is one of enabling proximate access to justice in the mutual interest of parties everywhere in Europe.
10. If we reach the end of the transition period without an agreed EU-UK solution, the rules on jurisdiction, recognition and enforcement of cross-border judgments as between the UK and EU Member States could be changing three times: from the EU Brussels I system to the common law and, once a long term solution is found, be it through UK participation in the Lugano Convention or other agreement, from the common law to those rules. And, for the next few years, there would be cases ongoing in judicial systems which would need to be worked under various different rules, depending on when the cases arose. The avoidable complexity and cost is obvious.

11. These problems can be avoided through UK ratification of the Lugano Convention before the end of the transition period, so that it can apply from day 1 thereafter. Lugano is a stand-alone Convention, which does not give access to a wider range of EU instruments on private international law nor it is linked with the EEA or Swiss arrangements with the EU. Furthermore, as it is already in operation between the EU and the EFTA, it provides an existing and known solution on how to enforce judgments.
12. Whilst not providing the full protection of the latest EU regime, Lugano nonetheless provides the vast majority of the relevant safeguards to millions of individuals and businesses, both EU and UK, in so far as they have legal relationships or are involved in disputes that extend across the new legal boundary.
13. Facilitating legal remedies and their enforcement is a horizontal matter that goes to the heart of providing access to justice for citizens and businesses, both in the EU and the UK. It is not, as some have suggested, a matter of self-interest for EU or UK legal practitioners. On the contrary, individuals and (small) businesses, faced with the complexity of multiple suits or the uncertainty that would follow if enforcing their judgments becomes more complex, would need more legal support, not less. Many may not be able to afford the time nor have the necessary resources to pursue their claim, potentially leading to denial of justice. Large companies with generous legal budgets can generally overcome such hurdles without undue difficulty, although unnecessary legal disputes and delays are inevitably liable to increase costs and inefficiencies across the UK and EU economies. Small companies and individuals are likely to find it very difficult if not impossible to address such new barriers which are likely to be on the increase due to the impact of Covid-19 on contracts.

A Short-term Business Visitor Route into the UK

14. The provision of short-term services by UK citizens will depend upon reciprocity. The route should be for EU citizens, EEA nationals, Swiss citizens, and for Third Country Nationals lawfully resident and authorised to work in the territory of an EU state, an EEA state or Switzerland. Otherwise, businesses with multi-national/Third Country national staff and self-employed professionals similarly situated in an EU state, EEA state or Switzerland will not be able to provide services on a basis equal to the way in which we wish to deliver services in these jurisdictions. Hence, it will lack the requisite mutuality.
15. All beneficiaries should be able to enter visa-free, needing only to secure leave to enter on arrival at port. This is not controversial for EU citizens, EEA nationals, Swiss citizens. But it should also apply to all Third Country Nationals lawfully resident and authorised to work in the territory of an EU state, an EEA state or Switzerland, even where they would otherwise be visa nationals. This would ensure services are provided on an equal basis.
16. The UK draft FTA proposes a short-term business visitor route of 90 days (i.e. three months) in six months, see Article 11.11. That is less than is currently available to EU citizens under transitional arrangements. Under existing rules (if applied after the

end of the transition period) EU citizens would be able to come to the UK for up to six months at a time.

17. The draft EU FTA contemplates business visitors entering for 90 days in a twelve-month period, see Servin 4.3(3). Again, this is less generous than the current inbound UK route for business visitors.
18. At the very least, the UK should be seeking to agree something as least as generous as that already generally applicable to business visitors from the United States or Brazil. Otherwise, the dedicated inbound route for EU citizen business visitors' risks being an empty shell.
19. The UK proposal should be that business visitors should be able to come for up to six months in any twelve-month period, with the possibility of an extension for up to a maximum twelve months if appropriate evidence for the business need can be provided.
20. Further, the Bar Council requests that the list of 'general activities' in the UK Immigration Rules be amended to include consultations. The Bar Council also requests that the rules for 'Legal' business visitors are extended to include, as permitted by host state professional regulation, a 'qualified lawyer' to provide all legal advisory work; and also all work in, and all forms of representation (including advocacy) before, courts and tribunals; such permitted activities including advice, work, and representation in the fields of dispute resolution and international alternative dispute resolution such as mediation, conciliation, and arbitration.
21. Such a change would not expand the scope of what is permitted by host state professional regulation (indeed legal business visitors would be bound by such regulation) but it would introduce a straightforward and easy to follow rule for Immigration Officers to be able to apply to business visitors travelling visa-free and seeking entry on arrival.

Intellectual Property - legal services issues

22. The Bar Council has asked the Intellectual Property Bar Association (a professional association recognised by the Bar Council which has previously assisted a Lords EU Sub-Committee on this issue) to make a separate submission addressing the specific Intellectual Property questions raised in a letter from the Committee Chair dated 11 June 2020. In the interim, the Bar Council draws particular attention to the following areas of concern with respect to professional issues affecting the Bar in this area:
23. First, UK withdrawal from the EU system of unitary trade marks and designs under the EU Trade Mark Regulation in which UK barristers had rights of audience (and undertakings had the right to use their services) risks diminishing the activity of all of the UK IP professions in this area, including the Bar, and the availability of local UK representation for UK undertakings. This is likely to have a particularly adverse impact on smaller enterprises.
24. This issue has been inadequately addressed by the Government which has been insufficiently active in protecting existing UK rights in this area. This is reflected in recent Parliamentary Questions. An [answer](#) recently given by the Minister

responsible for intellectual property states that rights of representation, whether before domestic courts in Member States or EU institutions, such as the EU Intellectual Property Office, are the preserve of the Single Market and "so do not form part of the UK approach to negotiations with the EU". The Government appears therefore not to be taking any serious steps to secure reasonable continuity of long-standing procedural rights in this area for UK businesses large and small.

25. Second, UK withdrawal from the potential Unified Patent Court (UPC) risks creating two kinds of disadvantage for UK industry. First, it means not-participating in a potentially valuable system which was well-supported by industry. Second, the UK has actively set up, at a considerable cost, a new system for European countries from which it has now excluded itself and which is potentially competing for authority over patent decision-making in Europe. The UPC is also likely to have a considerable impact on UK undertakings (including SMEs) with respect to their activities in the EU and, if it goes ahead in its current form, would involve no UK involvement or influence over the direction of the law. Moreover, rights of representation of UK barristers under the existing agreement are currently more limited than they are in (for example) the European Patent Office which the Government has not addressed.
26. While there is a legitimate debate about the Unified Patent Court and the concept of central patent adjudication, the Government's stated reason for not participating in the Unified Patent Court system (namely that the existence of some Court of Justice of the European Union (CJEU)) involvement on questions of EU law means that participation would be inconsistent with the Government's aim of becoming an independent self-governing nation) does not bear scrutiny. The Government remains committed to the European Patent Office (EPO) system, whose final decisions as regards revocation of European Patents in the UK are no less binding on UK courts than infrequent decisions of the CJEU would be regarding patents. It also remains committed to other trading systems such as the WTO whose adjudications would also be binding on the UK. A state's agreement to participate in a common patent court system, which applies technical standards in a narrow area, providing industry with practical and cost advantages from single adjudication is not incompatible with that state being a self-governing nation.
27. The Intellectual Property (IP) Bar is an important part of a flourishing UK IP ecosystem. The Government risks prejudicing the position of its professions including the Bar by its approach of seeking complete procedural disengagement from institutions which incorporate some EU element - however minor. It has not been suggested that any corresponding benefits are likely in terms of market access for professionals, or are even being sought by the Government, in any other negotiations.
28. The Bar Council is unaware of any reasoned studies suggesting that the approach taken by the Government is likely to be advantageous to UK industry or professional services.



Committee on the Future Relationship with the European Union

House of Commons, London, SW1A 0AA

Email: freucom@parliament.uk Website: <https://committees.parliament.uk/committee/366/committee-on-the-future-relationship-with-the-european-union/>

2 July 2020

Mr Malcolm Cree CBE
Chief Executive
Bar Council

Dear Mr Cree,

The House of Commons Committee on the Future Relationship with the European Union is inquiring into the progress of the negotiations between the UK and the EU. Under normal circumstances, the Committee holds regular oral evidence sessions in Westminster. However, measures to prevent the spread of the coronavirus make this difficult.

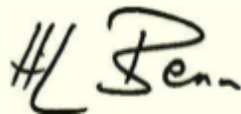
The Committee is keen to gather as much evidence as possible to inform its deliberations so I am writing to you to ask whether you would be willing to help us with our work by making a written submission. We welcome general responses to our [call for evidence](#), which was published on 4 March. We also hope that you would be willing to answer some of the more specific questions set out below on the mutual recognition of professional qualifications. Submissions need not address every bullet point and can include other matters that you think are relevant to the negotiations and should be drawn to the attention of the Committee.

- What are the key priorities of your members and your sector in general regarding mutual recognition of qualifications in the negotiations between the UK and the EU? Has the Covid-19 pandemic changed any of these priorities? What might be the consequences of a deal which does not meet these priorities?
- To what extent did the UK Government consult your sector before publishing its negotiating aims and draft texts? How well does what the Government has proposed meet its needs? What further provisions would you have advised the Government to seek?
- How do the UK and the EU's positions in the negotiations compare with regard to mutual recognition of professional qualifications? On which areas are the UK and EU's aims farthest apart? Where do their positions align? What is your assessment of the level of technical detail the negotiators have grappled with on this topic to date?
- How does the EU's position on mutual recognition of professional qualifications compare to that which it held in negotiations on CETA with Canada and the EU-Japan FTA? To what extent are these FTAs suitable precedents for a UK/EU deal?
- To what extent is the UK seeking provisions on mutual recognition of professional qualifications unprecedented in existing free trade agreements? What would be the advantages and disadvantages of agreeing these provisions for each party? Why might agreeing such provisions prove difficult?
- How is responsibility for, and competence over, professional qualifications divided between the European Union, national governments, and trade associations and professional bodies? To what extent does this complicate the mutual recognition of professional qualifications aspect of the UK/EU future relationship negotiations? What impact might it have on the implementation of any future deal?
- To what extent have you engaged with your counterparts in EU Member States to progress mutual recognition of qualifications on a bilateral basis, outside the framework of a future UK/EU agreement; and if you have, what progress has been made?
- Could you sketch out a possible compromise between the UK and the EU on mutual recognition of professional qualifications and how it might be achieved?

- Based on the parameters set out by the UK and EU draft legal texts, could reaching an agreement with the EU restrict the UK's ability to pursue a free trade agreement covering mutual recognition of professional qualifications with third countries? If so, how?
- What would happen if agreement was not reached between the UK and the EU on mutual recognition of professional services? What would be the international legal baseline they would fall back on? What would be the consequences of this for your members and your sector in general?
- What implications could other provisions of a future UK/EU agreement have on your members and your sector in general (for example, those related to cross-border trade in services or labour mobility)?
- Is it clear what your members and employers in your sector must do to prepare for the end of the transition period? How much progress have been made on preparations so far? Do SMEs face any additional challenges?
- What provisions exist in the Ireland/Northern Ireland Protocol on mutual recognition of professional qualifications? How might the all-island economy be affected by the UK leaving the transition period with different forms of UK/EU future relationship?

The Committee staff will be happy to discuss the inquiry, any issues raised, or the process for submitting written evidence. You can contact them at freucom@parliament.uk.

Yours,

A handwritten signature in black ink, appearing to read 'H Benn', written in a cursive style.

Hilary Benn
Chair of the Committee