Bar Council - Written evidence (PBS0052)

About us

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

This submission addresses the topics the Committee has sought evidence on. While the questions posed relate to the professional and business sectors generally, the response will be made from the perspective of the Bar.

The importance of different UK professional and business service sectors to the UK's economy and trade in services

1. This question has been covered in the written evidence by TheCityUK to which the Bar Council has contributed. However, it is also important to appreciate the broader value of UK-based legal services to EU citizens and businesses.

2. The Bar is proud of the cross-border commercial work it undertakes alongside UK-based international law firms. The Bar is recognised across Europe for high standards of advocacy that it brings to court and arbitral proceedings. But its contribution to the overall European legal sector is much wider. Because members of the independent Bar operate as individual practitioners working on a referral basis, they act as a specialist resource for lawyers throughout the EU. Many of those also operate as individuals or small firms representing ordinary citizens and small and medium-sized enterprises (SMEs), often against commercial parties represented by much larger firms.

3. For example, in a complex international road traffic accident case (e.g. involving a Spanish citizen injured in a collision with a French tourist coach while holidaying in London), a Spanish abogado might instruct a barrister to advise and assist on cross-border legal or procedural issues in a dispute against an insurer represented by a large law firm. Likewise, in an international matrimonial financial relief or children dispute. In contrast with some areas of commercial work, these kinds of dispute are not undertaken primarily by a segment of London-based practitioners, but engage expertise found throughout the Bar of England and Wales and indeed its sister professions in Scotland and Northern Ireland.

4. Hence restrictions on the Bar's ability to offer its services across European borders impacts on the EU legal sector and on client choice. This is an access to justice issue and an economic one. Its value to the UK and EU cannot be measured in purely monetary terms.

Key priorities of different professional and business sectors for the future UK-EU relationship

5. Because the independent Bar does not operate within a corporate or partnership structure, and its members are not generally "established" in

EU Member States, barristers are particularly vulnerable to regulatory restrictions on provision of services and to controls on mobility of persons. Hence the Bar's priorities for the future relationship are:

a. **Reciprocal practice under home State title:** The agreement should grant UK lawyers generous rights to advise and represent EU clients on UK laws (i.e. laws of England and Wales, Scotland and Northern Ireland), on public and private international law, and where possible on EU law (which is an integral part of those bodies of law); and likewise EU lawyers to advise and represent UK clients on their national law and international/EU law. The areas of law and practice each jurisdiction reserves to holders of its own professional title should be kept to a minimum.

b. **A robust framework for mutual recognition of professional qualifications (MRPQ):** since there will inevitably be some restrictions on the scope of practice under home State title (especially in relation to national court proceedings) – inevitably greater than under the current EU Lawyers' regime -- it is important that UK qualified lawyers have a fast and affordable route to acquiring the professional title of EU Member States, and vice versa. This should include temporary grant of host State title, and availability of a limited title. If a comprehensive MRPQ framework cannot be agreed as part of the UK-EU future relationship, then at a minimum, the agreement should expressly preserve the right of national Bars and regulators to enter bilaterally into Mutual Recognition Agreements (MRAs) to give effect to MRPQ. These points are explained further at paragraph 14 onwards.

c. **Reciprocal mobility of persons in the provision of services:** it is especially important that the right to advise clients and provide legal services be exercisable by way of General Agreement on Trade in Services (GATS) Mode 1 (i.e. cross-border provision of services), and by way of GATS Mode 4 (i.e. the capacity to fly-in-fly-out to provide services), whether under home State or host State title. Restrictions on mobility otherwise risk rendering nugatory the rights granted by the regulatory provisions of the UK-EU agreement. We would also advocate for the introduction of a foreign legal consultant (FLC) status, where it does not already exist, to facilitate the establishment of UK lawyers in individual EU Member States and vice versa. As we explain below, both the EU and UK offers in the negotiations to date are deficient in various respects. It should be possible to reach mutual agreement on visa-free temporary stay for individual professionals exercising the rights granted by the services provisions of an agreement, without infringing either side's red lines on immigration policy.

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

6. Since the 2016 referendum, the Bar Council have presented a series of events aimed at members of the Bar and have posted information on our website which is periodically updated. That accommodates the possibility of an end to the transition period without a deal on the future relationship. We will update the information to the profession as the likely terms of a

deal on trade in services emerge (or if no deal emerges as the most likely outcome).

Provisions needed for the negotiations to minimise the potential barriers to trade, particularly for smaller operators

7. The vast majority of barristers are self-employed sole traders, and therefore qualify as "smaller operators".

8. The most important aspect of the new relationship for barristers is for the Government to agree a deal rather than allowing the transition period to end with no-deal. GATS contain no commitments for independent professionals and the limited commitments for business visitors are unlikely to permit barristers to do paid work. GATS focus on contractual service suppliers which would exclude barristers save where they are employed. Also, the absence of a deal will necessitate dealing with a patchwork of national regulations among EU members to an even greater degree than if a deal were agreed, which would increase the compliance burden significantly, and likely have a disproportionate impact on sole traders like barristers (and on many EU Member State practitioners who practise either as sole traders or in small structures)[1].

9. As for the nature of a deal and its provisions on barriers to trade, from the perspective of the growing and successful Commercial Bar, it is also important to understand how international their client base is (in terms of both lay and professional clients) and the work this generates. The great majority of cases before the Commercial Court (around 70%) involve one or more foreign parties and even more disputes are resolved by international arbitration in venues such as London, Paris, Stockholm, Geneva, Madrid, The Hague and Vienna (to name some of the leading European arbitration centres).

10. As explained above, barristers also provide their services in other kinds of cross-border dispute involving EU citizens and businesses. The scope and volume of these has also increased over the years as the legal frameworks have evolved and become more complex. That is true, for example, in civil fields such as consumer law and data privacy law as well as criminal and quasi-criminal fields such as anti-corruption and anti-money laundering law.

11. As a result, barristers today find themselves increasingly representing clients from the EU and beyond.

12. The priority focus for the Bar in the future relationship would be to address questions of the right to fly-in-fly-out as independent professionals, market access under home State title, and MRPQ.

Arrangements needed in negotiations for the mobility of professionals

[1] [1] More than 50% of EU27 professional, technical and scientific activities are carried on in micro structures of less than 10 persons employed: https://ec.europa.eu/eurostat/statistics-explained/index.php/Structural_business_statistics_overview#Size_class_analysis

13. At present both the EU and UK proposals on mobility are deficient in relation to professionals operating in the manner of the independent Bar.

14. Visa-free travel for both short-term business visitors (BV) (6 months, with a possible extension up to 12 months) and under an independent professional (IP) route (12 months, with a possible extension to 24 months) is essential. Both routes must not require a sponsor when seeking immigration permission to enter the host state.

15. These mobility routes will allow for the fly-in-fly-out provision of legal services and for those who have repeat business or the need for many visits. They are essential for UK lawyers to be able to offer their services alongside EU Member State lawyers, and with UK-based international law firms whose structure of maintaining local offices in the EU may mitigate some of the impacts of the post-Brexit regime. Independent UK practitioners need to be able to travel to EU jurisdictions in order to advise clients and to appear in those jurisdictions, often at very short notice (less than a week). Inability to do so because of visa restrictions imposed on them, or the need to secure a sponsor in the host state, would mean that UK barristers would be at a considerable competitive disadvantage.

16. On the UK side, we are concerned that there is an insufficient appreciation by the Home Office of the export needs of the professional and business services (PBS) sector and of the reciprocity that is expected by the UKs Trading Partners. If the Home Office impose visa and sponsor requirements on inbound professionals, reciprocal restrictions will very likely face UK professionals. The treaty ought not to leave open the possibility for such restrictive practices to be imposed.

17. On the EU side, it is important to realise that to date the proposed EU regime for BVs would not allow professionals to earn fees, whereas this would be possible under the IP route (details of the EU offer in respect of BVs and IPs have not yet been published). The IP route however allows for the imposition of a visa and a visa would normally be required. This would make barristers' practice near impossible. The IP route should be expressly visa-free for UK nationals and British citizens). The UK on the other hand allows lawyers entering under the BV route to earn fees in certain circumstances, potentially creating a mismatch which could leave the Bar stranded but EU lawyers with a workable arrangement. We hope that this is being addressed by the UK negotiators but in case of "No Deal" it be necessary for the UK to make unilateral adjustments to enable any bilateral MRA agreements to be practically useable. Further, to be a practical route for work, the BV route needs to allow a fee to be taken from a client in the host state for the duration of the visit.

Mutual recognition of professional qualifications

18. The current system under the EU MRPQ Directive allows the UK's related professional services sector, including legal professionals, a great deal of flexibility and freedom. Both sides have made clear (for different reasons) that the future relationship will not be based on the existing EU regime. However, MRPQ is a well-established feature of international trade agreements. In addition, there is a long-standing practice of EU Member State bars and regulators making their own MRPQ arrangements with the

bars and regulators of third States to provide ready access to each other's professional title. Such arrangements are not considered incompatible with either EU law or international trade rules.

19. As stated in paragraph 7, the Bar's firm preference is that the future relationship agreement itself should include a robust framework for MRPQ. At minimum, this framework should include:

a. Legally binding wording maximising reciprocal market access under home State title, i.e. without the need for acquisition of the host State title via MRPQ.

b. Comprehensive rules providing a clear path to requalification into the host State's legal profession. The UK draft CFTA goes some way to providing this, since it envisages that the Member States would be bound from the outset to have rules and procedures in place to enable requalification. However, the EU's proposal is based on EU-Canada Comprehensive Economic and Trade Agreement (CETA) Chapter 11, a cumbersome procedure which has proven to be ineffective in practice.

c. The MRPQ mechanism should also include two options for less than full requalification, which are not yet included expressly in either side's offer:

    i. The right to a "limited licence" or partial title that allows the holder to practise under the host title in the host State in matters of international law (e.g. commercial, human rights, etc.) only but not to provide legal services relating to the law of that host State. The concept of "limited licence" is a familiar one in the World Trade Organisation (WTO)/GATS regime. The requirements for compensatory measures (an aptitude test, period of training or experience, etc) should be considerably less than required for acquisition of the "full" host State title.

    ii. A temporary qualification for the purpose of appearing in a single case or series of related hearings. This is already available for third country lawyers in the UK jurisdictions (requiring merely submission of a certificate of good standing and payment of an administrative fee to the regulator). At the Bars of England and Wales and Northern Ireland this is known as "temporary call". This is increasingly important for clients wishing to have trusted counsel of their choice assist in hearings abroad in conjunction with a local lawyer. In practical terms this may become easier and more desirable through the COVID-induced acceleration of the popularity of online hearings (though that in no sense dilutes the importance of fly in, fly out (FIFO) mobility once the COVID crisis is over). The UK's offer could further benefit from clarifying the "compensatory measures" required to obtain the host title. We would propose to clarify that this should be an aptitude test which is limited to testing the differences between the two education and training regimes or an adaptation period. The offer could define more clearly the boundary between practice (i.e. market access) under home jurisdiction qualifications, and MRPQ proper, to commit the Parties to maximising the

scope of what can be done under home State title (as mentioned above).

20. In the absence of an agreement on the recognition of qualifications, UK nationals seeking recognition to work in regulated professions in the EEA or Switzerland will be subject to individual host states' policies on MRPQ, which creates uncertainty for those UK nationals and their potential clients. It also adds an unnecessary administrative burden for them.

21. It is very important that any UK-EU agreement on a mutual recognition framework for professional qualifications should not prevent UK professional bodies and regulators from concluding separate bilateral MRAs with EU Member State professional bodies and regulators. There is a risk that a partial "mini-deal" on services would leave the scope of that freedom uncertain. Even if it possible to reach agreement on an EU-wide minimum recognition standard, the agreement should make clear that it nevertheless remains possible to improve or supplement this via bilateral agreements between the professions of different countries.

Provisions on cross-border investment and rights of establishment

22. The interests of the members of the Bar are not generally engaged by provisions protecting cross-border investment and rights of establishment. The majority of English barristers would tend to provide cross-border services and to provide services on a fly-in-fly-out basis, rather than by investing or establishing in an EU country.

23. Members of the employed Bar would be assisted however by establishment rights as they often work for solicitors' firms or other legal business structures established in EU Member States. If a UK-EU agreement provides for mutual establishment by firms of solicitors and the equivalent, that is also likely to provide sufficient benefit for the small number of independent barristers who wish to practise via establishment in a Member State.

24. An agreement should allow legal services providers to advise via at least the GATS Modes covering the rights to provide services cross-border, and on a fly-in-fly-out basis. Any agreement should also forbid the imposition of any more additional bureaucratic requirements than are necessary to ensure that the new agreement functions properly.

Regulatory cooperation between the UK and the EU in professional and business services

25. As stated in paragraph 19 to 22, the Bar Council considers that an agreement should include an EU-level mutual recognition framework for professional qualifications, which also permits the UK to agree bilateral or multilateral arrangements with specific EU member States. The process of agreeing these bilateral or multilateral arrangements will necessitate discussions between regulators, and a degree of both initial and ongoing regulatory cooperation.

26. Adequacy and equivalence will also require continued co-operation between the EU and UK and their respective regulators, even if adequacy determinations are made. An adequacy determination in respect to data flows is unilateral, and for the UK and EU to grant respectively. However

continued cooperation in these areas will be needed to ensure that unintended regulatory divergence does not take place, such that the determinations are subsequently revoked with little warning. Uncertainty over underlying access conditions for services trade would have negative consequences on business confidence.

Lessons that can be learnt from the EU's existing trade agreements with other third countries

27. The Bar Council's view is that an agreement on services based on the CETA and/or the EU-Japan FTA would be better for the Bar than a deal based on the EU-South Korea FTA. The EU-South Korea FTA is problematic for employed and self-employed barristers providing services through Mode 4 because it does not provide any commitments above those in the General Agreement on Trade in Services (GATS).

28. Although the CETA provides for a high degree of liberalisation for professional services trade generally, in reality, it has achieved very limited market opening for legal services beyond that already accorded under the EU's GATS schedules. This is due to the scale and nature of EU member State national reservations to CETA and Canadian Bars' reluctance to make use of the system. The capacity for EU member States to make reservations to an agreement should therefore be carefully circumscribed in negotiations with the EU, and any agreed framework for MRAs should be as complete as possible.

29. CETA is also considered to make substandard provision for many of the areas of highest priority for UK legal services providers in a future UK-EU relationship. Examples include the mutual recognition of professional qualifications (MRPQ) and limiting reservations on corporate forms. CETA also allows member states to impose reservations on short term business visitors[2], which would impose significant constraints on the capacity of UK barristers to provide legal services in the EU.

30. One area in which CETA, as well as the EU-Japan free trade agreement, has made positive contributions is the fly-in-fly-out rights of legal service providers. Paragraph 8 onwards explains why this is especially important. The EU-UK agreement should continue this trend.

31. We cannot stress how much the absence of a permissive market access and mobility regime will harm IP and SME legal professionals throughout the EU and, more importantly, their clients who are often individual citizens and small businesses who find themselves embroiled in complex family, consumer, injury and other disputes with a cross-border element.

The potential impact for professional and business services of undertaking UK-EU trade under the WTO GATS framework

32. While the EU's GATS commitments confer degrees of freedom for professional services suppliers from other WTO members, these fall short of the full range of freedoms (full freedom of movement, for instance)

[2] https://blogs.sussex.ac.uk/uktpo/publications/can-ceta-plus-solve-the-uks-services-problem

provided by EU members to service-suppliers from within the EU, and which barristers from the UK currently enjoy in the EU.

33. The commitments of most EU countries under GATS in relation to legal services apply only for providing advice on home country law and on public international law. This is generally referred to as FLC status. However, the general starting point for EU countries is to limit FLC status to lawyers with at least 6 years' professional practice, which would limit opportunities for the junior Bar. Therefore, even where GATS provisions are applied to barristers, they are only benefit parts of the Bar.

34. Moreover, UK legal services providers would be subject to local restrictions maintained by each EU member state, listed as reservations[3] on the market access and national treatment of professional services providers set out in the EU schedule of GATS commitments. These reservations are the major disadvantage of trading with the EU on GATS terms. Some examples of national restrictions that the EU and its member states would be free to impose on UK businesses and sole traders under WTO rules include minimum qualification requirements, nationality and/or residency requirements, and restrictions on the fly-in-fly-out capacity of independent professionals. This does not mean that individual states are necessarily likely to impose such restriction, but under GATS they would be free to do so. A free trade agreement would hopefully reduce restrictions in our sector and give a degree of certainty and security which doesn't exist under WTO/GATS.

35. For all of these reasons, in the absence of a UK-EU agreement, UK barristers would find it harder to travel to the EU to work, to have their qualifications recognised within the EU, and to be able to advise and service the needs of their EU clients. The administrative burden of complying with local requirements in each of the EU's jurisdictions would disproportionately affect small enterprises and operations, including barristers who are often sole traders. Many may simply be forced to forego providing legal services in EU countries.

The implications for professional and business services if there were no reciprocal data adequacy arrangements in place between the EU and UK by the end of the transition period

36. The legal services sector depends on the free flow of data. As sole practitioners, barristers regularly carry documents or transmit data to their Chambers in the UK, including from clients based in the EU. It would be impracticable for barristers to provide legal services to EU clients were there to be a prohibition on doing so.

37. It is therefore vital that there are mutual adequacy determinations by EU and UK regulators under GDPR before the end of the transition period. Adequacy determinations are the most legally sound and stable option for

[3] For example see a table outlining cross border limitations in countries with respect to legal services here: https://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Map.aspx

ensuring the continued ability to transfer personal data between the UK and the EU/EEA.

38. Without adequacy determinations, firms would have to rely on provisions applicable to all transfers of data to non-equivalent third countries, such as Consent, Model Contracts and Legitimate Interests derogations, which we view as significantly inferior. In particular, the current European Court of Justice challenge to the use of standard contractual clauses as a basis for permitted data transfers is of concern. The recent initial opinion[4] from the Advocate General is to be welcomed as suggesting that standard contractual clauses may still be permitted; however, it is still possible that the Court of Justice of the European Union final ruling will find against the validity of such mechanisms, making them a currently uncertain substitute for an adequacy determination.

39. In the event no adequacy determination is reached by the end of December 2020, we would urge a period of non-enforcement (as per the Safe Harbour precedent) to safeguard personal data transfers, to avoid severe disruption to the work of barristers.

Opportunities for professional and business services after the transition period

40. Potential litigants will always enjoy certain benefits to choosing English law, and England and Wales as a jurisdiction or as a seat or location for arbitration. The trust placed in the English common law by business, the UK's strong and independent judiciary, and its reputation as a centre for legal excellence will endure. As a result, there are strong incentives for clients to continue to choose to litigate or arbitrate in the UK and to choose English law to govern their transactions, resulting in a need for English legal services.

41. However, there is no room for complacency. There is already evidence that some clients are advised to choose jurisdictions other than England & Wales due to the perceived uncertainties arising from Brexit and even though Brexit has no impact on the enforceability of arbitration awards. It is likely that continued uncertainty surrounding the likely legal and economic effects of Brexit will have affected willingness to use legal services in the UK.[5] If the UK is to remain a global centre for legal services, the Government needs to provide maximum certainty, such as ensuring that relevant Private International Law Instruments are in place, and to carefully and on an ongoing basis consider the implications for the competitiveness of the UK's legal services industry.

July 2020

[4] https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-12/cp190165en.pdf

[5] There is anecdotal evidence that US lawyers who would normally have used the English Bar for EU law cases at the CJEU have been instructed to find non-UK lawyers event though a number of UK barristers have joined the bars of EU Member States and are therefore qualified to appear at the CJEU despite Brexit.