

Written evidence submitted by the Law Society (FRE0081)

Follow up questions to the inquiry of the Committee on the Future Relationship with the European Union (House of Commons)

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?

1. The key priorities for the legal sector in terms of mutual recognition of qualifications is to have home title recognised *and* a clear path to requalify into host state profession.
2. Depending on the business priorities and the nature of the activities in question, each of the above will have its advantages and will give choice of a lawyer or law firm in question.
3. 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.
4. It is vital that the relevant competent authorities retain the ability to assess equivalence against minimum standards for safe and effective practice, for example through criminal record checks. This is key to safeguarding the profession and public trust.
5. We must also add that any future mutual recognition agreement (MRA) should not include any unnecessarily debilitating requirements, such as those of nationality.
6. Recognition of the home state title throughout the EU would allow our members at least to provide advice on UK laws (England and Wales, Scotland and Northern Ireland) and public international law. Such recognition would ideally be accompanied by other practice rights for lawyers from the UK and would allow for example entering into partnerships between UK and EU lawyers or entering into fee sharing arrangements.
7. UK lawyers' preferred method is to provide legal services using their 'home state' title. 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**) in EU cases; and

- ability to advise on EU law.
8. One of the key barriers for some of our members in some EU jurisdictions is that one needs an EU or EFTA nationality to requalify into host state profession.
 9. We 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.
 10. It must be noted that the priorities we outline are within the context of an ambitious precedent-based free trade agreement. While we are pleased the Government has been ambitious within these limitations, any of the plausible outcomes from the negotiations will still represent a significant loss in market access for the legal sector. It will negatively impact the UK legal sector's sizeable trade surplus, and may have an adverse effect on EU clients who have come to rely on UK legal service providers they have had a longstanding business relationship with.

Has the Covid-19 pandemic changed any of these priorities?

11. The Covid-19 pandemic has not changed any of the above priorities. The pandemic has shown, however, the importance of having clear rules in place that would allow for remote working. This experience may offer insights as to the issues around provision of remote legal services particularly if rules need to be put in place allowing for remote provision across borders.¹

What might be the consequences of a deal which does not meet these priorities?

12. This depends on the type of a deal and what scope of practice rights it will cover. All negotiation outcomes will result in a significant loss of market access for the UK legal sector, and our priorities are aimed at mitigating – rather than avoiding – this. In the event of an agreement that does not meet any of the priorities above, the profession will need to fall back on the provisions of the General Agreement on Trade in Services (**GATS**) and relevant national rules which are not covered by GATS.
13. These include numerous regulatory matters such as professional indemnity insurance, registering a firm or an individual lawyer, etc. More importantly, this means a regulatory patchwork across the EU which is costly to deal with. While the regulatory patchwork is also a real possibility under an FTA, this would be subject to reservations by the EU member states. In any case, having a deal that would not meet all of the priorities above would still be better as there are some provisions in FTAs that support trade in services

(such as domestic regulation or regulatory cooperation).

14. The agreement that does not reflect the priorities above would also not deliver sufficient certainty as to the delimitation of competences of the EU and national regulators in the matters concerning the conclusion of MRAs that do not have a pan-EU application.

To what extent did the UK Government consult your sector before publishing its negotiating aims and draft texts?

¹ See for example the Solicitors Regulation Authority (SRA) guidance on compliance during Covid-19 <https://www.sra.org.uk/sra/news/coronavirus-qa/> or the Law Society of England and Wales' resources on Covid-19: <https://www.lawsociety.org.uk/topics/coronavirus> (especially on remote authentication).

15. We have had significant engagement with various Government bodies and representatives over the past few years on the impact of the withdrawal of the UK from the EU on the legal services sector and the priorities of our sector.

How well does what the Government has proposed meet its needs?

16. It is difficult to provide the exact answer because the full extent of the proposal is not yet known. While both parties have published draft legal texts, the full extent of the market opening and the rules that will apply to trade in services will only be known once both parties present and then agree their respective services offers. This would require the relevant annexes to be published, in particular the specific annexe on legal services.
17. Having said that, we believe that the current wording in the UK text of the EU-UK Framework Partnership Agreement (FPA) offers a clear path to recognition of qualifications and represents the best option for the legal sector within the context of a precedent based FPA. 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.

What further provisions would you have advised the Government to seek?

18. At this point and given the considerations above, we would advocate for removing some of the national reservations in market access and national treatment that are likely to appear in the EU services offer. These include in particular the nationality requirements

to be able to requalify into the host state legal profession.

How do the UK and the EU's positions in the negotiations compare with regard to mutual recognition of professional qualifications?

19. The positions of the UK and EU are significantly apart.
20. The UK proposes a system which would bind national regulators to a set of requirements included in the agreement (as such the scope is already known). The new agreement would allow for the specified procedure for recognition of qualifications to apply once the agreement is ratified.
21. In contrast, the EU proposal follows the models included previously in CETA and EU-Japan EPA. This model includes a set of provisions allowing for competent authorities to enter into negotiations on a future MRA. This model would only allow for an MRA to be negotiated and concluded after the agreement between the EU and UK is ratified. Importantly, the scope of an MRA is unknown. So far, no MRAs have been concluded under the CETA and EU-Japan EPA frameworks.
22. While we are satisfied with the UK proposal, we believe that if that proposal is not retained, the UK Government should seek to secure provisions that would allow negotiation on an UK – EU framework for agreeing future MRAs. This would provide a clear route to reach EU-wide binding MRAs.

On which areas are the UK and EU's aims farthest apart? Where do their positions align?

23. Our current reading of both proposals suggests that the alignment of the positions is in the acceptance of the fact that there should be some modalities for allowing recognition of professional qualifications. However, the route to ensure that is different as outlined above.

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?

24. The EU proposal on mutual recognition of professional qualifications follows its approach in CETA and EU-Japan EPA. However, this can only be confirmed once the EU publishes its Annex SERVIN-6 (guidelines for arrangements on the recognition of professional qualifications).

To what extent are these FTAs suitable precedents for a UK/EU deal?

25. 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, and is therefore unsuited 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.

To what extent is the UK seeking provisions on mutual recognition of professional qualifications unprecedented in existing free trade agreements?

26. The previous EU FTAs did not include provisions on mutual recognition of professional qualifications that would determine the scope of that recognition *within* the agreement and would allow for immediate application of these arrangements.
27. What the UK Government has done, however, is to learn from the limitations of precedents, e.g. in the limited take-up of MRAs under the CETA and EU-Japan EPA frameworks. This position is welcome.

What would be the advantages and disadvantages of agreeing these provisions for each party?

28. The key advantage of the provisions proposed by the UK (if they are retained in the final text) are their immediate application and clarity as to what rules apply to recognition, with the existence of a clear path to requalification in the UK and all EU Member-States

How is responsibility for, and competence over, professional qualifications divided between the European Union, national governments, and trade associations and professional bodies?

29. At the moment, the regulation of the legal profession and provision of legal services remains national competence (and sometimes sub-national).
30. The EU-level regulations rely on the principle of mutual recognition whereby the national (or sub-national) competence is retained but is subject to a set of criteria of how that recognition is carried out in practice by competent authorities.
31. It is our understanding that it is only the EU that has the ultimate power to agree on a format of a pan-EU MRA or any MRA which touches on market access issues.
32. At this point, we are not sure what the exact delimitation of competences are in negotiating and concluding MRAs that would not involve all EU member states' competent authorities. In any case, we are aware that this is a contentious area in EU law and is likely to make negotiations in the area of recognition of profession difficult.

To what extent does this complicate the mutual recognition of professional qualifications

aspect of the UK/EU future relationship negotiations?

33. We would prefer not to comment in detail on the possible complications of the negotiating process save for one issue: the broader the negotiations are in terms of scope and parties involved, the longer it will likely take to arrive at a final agreement and to ratify it.

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?

34. We have engaged extensively with competent authorities in EU Member States so as to support the Brexit readiness of our respective members. In some instances, this has meant exploring whether the ‘unilateral’ liberalisation of one’s regulatory framework is necessary to preserve the economic viability and efficient working of the legal services sector in specific member states.

35. Progressing and agreeing mutual recognition of qualifications on a bilateral basis requires a clear legal basis though which complies with both WTO and (in the context of the UK-EU negotiations) with EU rules.

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?

36. We cannot think of any reason why it should restrict the UK’s ability to pursue an FTA which would cover mutual recognition of qualifications.

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?

37. If the agreement is not reached, the relationship between the EU and UK in all trade matters (including services) will fall back on the WTO framework (GATS in case of services). This would mean firms and lawyers would lose the ability to:

- provide advice on EU law and host country law;
- represent their clients in EU courts and bodies; and
- having lawyer-client communications protected by legal professional privilege (LPP) in EU cases.

38. Furthermore, falling back on the GATS rules would mean that firms and lawyers would face increased restrictions in such areas as:

- entering into partnerships with local lawyers;

- requalification into host country profession;
 - legal form and shareholding;
 - providing cross-border advice in person (fly-in fly-out or FIFO).
39. GATS leaves the possibility of concluding mutual recognition agreements pursuant to its Article VII. The MRAs concluded in that way are derogations from the most favoured nation (MFN) principle but should leave an option for other members to join.
40. Looking at the issue of requalification into the host state profession in particular, some EU member state competent authorities already have a clear path to requalification for third country (non-EU) lawyers, but many do not. For an individual UK solicitor/barrister/advocate, requalification could entail having to go back to university, taking the national bar examination (or equivalent) and/or fulfilling supervised training periods.
41. However, there are also several areas which are not regulated at the WTO level (but are regulated within the EU under two Lawyers Directives and MRPQ Directive). These include rules on professional indemnity insurance, code of conduct, etc.
42. As noted earlier, this would result in our members dealing with a regulatory patchwork and potentially having no means of 'redress' or a mechanism to resolve disputes between the parties involved (e.g. a solicitor complaining against an EU bar).

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)?

43. Provisions related to cross-border trade in services or labour mobility will determine the extent to which UK lawyers (solicitors/barristers/advocates) will exercise their practice rights, e.g. provision of advice through fly-in fly out (FIFO) and establishment) under their home title. In contrast, EU-level provisions will need to be cross-referenced against the schedule of national reservations on market access and national treatment for each of the 27 EU member states.

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?

44. At this point, it is not clear what the final shape of the EU-UK agreement will be, or if there will be an agreement. Before firms can prepare, they must know what is broadly agreed, then what reservations will be in effect, and then how this will interplay with 31 domestic regulatory regimes.
45. Preparations and contingency planning have taken place on the basis of a return to WTO

rules. Many large firms are well advanced in their contingency planning but this may not be the case for smaller national and regional firms which do undertake cross-border legal practice with EU member states on behalf of their clients.

46. We, as many other organisations, have carried out intense preparations for a no deal Brexit in the past and much of that advice still applies.

47. Knowing and understanding the final shape of the EU-UK agreement will enable us to refine our advice to members.

Do SMEs face any additional challenges?

48. While Para 42 applies here, it is also important to recognize that SMEs have much less resource to allocate to preparation for the multiple possible eventualities arising from negotiations, and are more likely to rely on external guidance. This guidance cannot be provided until an end state is clear.

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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/>

7 July 2020

Mr Paul Tennant OBE
Chief Executive
The Law Society

Dear Mr Tennant,

As you know, 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. Thank you for your extremely helpful written evidence submission. We also have some more specific questions on the mutual recognition of professional qualifications and would welcome any further contribution.

We hope that you would be willing to answer some of the more specific questions set out below.

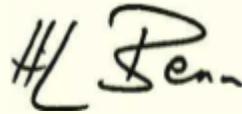
- What are the key priorities of your members and your sector in general regarding mutual recognition of qualifications in the negotiations between the UK and the EU? Has the Covid-19 pandemic changed any of these priorities? What might be the consequences of a deal which does not meet these priorities?
- 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'.

Hilary Benn
Chair of the Committee