The Bar Council

Lords EU Services Sub-Committee
Inquiry into the Future UK-EU relations on trade in services
Bar Council written evidence

About us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Scope of response

This submission addresses the questions posed under the headings "Cross-cutting issues" and "Professional and Business Services" on which the Committee has sought evidence, with particular focus on the impact of the EU-UK Trade and Cooperation Agreement (TCA) on trade in legal services.

Overview

1. At this early stage, a matter of weeks since the agreement and provisional entry into force of the TCA, we are drawing on our preliminary analysis of, and discussions around, the new arrangements, rather than any real practical experience. However, our comments are informed by experience of other, comparable international agreements relating to trade in services.
2. The TCA itself is largely focussed on trade in goods. Whilst its coverage of services is more extensive than many expected, it is far from comprehensive, leaving much yet to be achieved. We stress that the success of future trade in legal services depends in part on the successful conclusion of other elements of the EU-UK relationship, most notably long-term arrangements for the protection and exchange of data, and solutions in areas such as civil judicial cooperation.
3. It is important to remember that at the heart of these topics lie the interests of huge numbers of businesses and private citizens in the UK and EU, with complex economic ties built up during more than 40 years of UK membership of the EU, and who will continue to work, trade and travel across European borders. A UK citizen living or working in France may well seek advice on his or her rights from a UK-qualified, English-speaking lawyer; and vice versa for a French citizen living or working in the

UK. An EU-based business may buy goods or services online from a UK-based supplier under a contract governed by English law (as many commercial contracts will continue to be). Maintaining client choice in situations like these is not simply an economic matter but a fundamental facet of the rule of law and access to justice.

Executive Summary

4. The Bar Council:

    a. Welcomes the fact that the EU and UK concluded the TCA, paving the way for its provisional entry into force before the end of the transition period provided for under the Withdrawal Agreement 2019 (WA), and providing a foundation for future EU-UK cooperation.

    b. Notes that the TCA is a baseline agreement and must be read in conjunction with Member State commitments and reservations, as well as, for trade in legal services, applicable national rules.

    c. Underlines that in the area of cross-border legal services, whilst the TCA provides greater clarity in the drafting as compared to the most ambitious pre-existing EU trade deals, it provides little by way of advances on the substance.

    d. Notes, in particular, that for the majority of our membership, engaged as it is in self-employed practice, the TCA merely commits EU Member States to permit such barristers to provide their clients with legal advice on domestic (UK) law and Public International Law (PIL)[1], based on their home title, in and into the EU territory, subject to possible registration requirements, reservations and relevant mobility provisions.

    e. Underlines therefore, that there is no positive commitment to permit such barristers to provide advice on EU law (in contrast to the position for in-bound EU lawyers), nor, with limited exceptions, to provide representation services on EU territory.

    f. Notes, moreover, that for junior self-employed practitioners having less than six years professional experience, the TCA contains no guaranteed route to providing even these limited services on a fee-earning basis.

    g. Acknowledges that whilst in principle it is open to individual Member States to be more liberal, the onus is placed on individual practitioners to inform themselves, in advance, of their rights and obligations in the relevant territory, applicable mobility requirements to gain entry thereto, as well as about ancillary (to the TCA) but essential practice issues such as legal professional privilege and professional indemnity insurance coverage.

    h. Underlines that, quite apart from the reduction of opportunities for UK lawyers to provide legal services, the TCA also reduces the range of remedies that lawyers can pursue on their clients' behalf, through for example, the almost total absence of directly effective rights and of measures in the field of civil judicial cooperation, to name but two lacunae.

[1] Article SERVIN 5.48 (a) Definition of designated legal services

Question 1: What is the impact for trade in services of the UK and EU reaching a free trade agreement?

5. It is worth remembering that, had the TCA not been agreed and/or had not covered Services, from 1 January 2021 the only international trade agreements that would have applied to the provision of cross-border legal services and arbitration, mediation and conciliation services in and into the EEA based on UK qualifications would have been those under the World Trade Organisation (WTO) General Agreement on Trade in Services (GATS). The starting position under the GATS is that there is no commitment to allow access into members' markets for legal services other than for home country and public international law. Existing EEA Member State commitments and reservations on trade in legal services and arbitration, mediation and conciliation services under GATS would, in principle and subject to specific Member State reservations, have resulted in UK lawyers enjoying Modes 1 and 2 access[2] to service their clients under the EU's GATS Schedule on legal services, for home country and public international law, but not EU law. There is more limited Mode 4 access for lawyers and, with the exception of Denmark, no commitments to allow access for independent professionals or contract service providers to provide their clients with legal services, with slightly more access to more Member States for services related to management consulting (under which arbitration, mediation and conciliation services fall).

6. The fact that the TCA was agreed and provisionally entered into force by the end of the transition period, is to be welcomed. It provides a solid foundation on which future EU-UK co-operation, at all levels, can be built, and, in principle, in a more positive atmosphere. The analysis of its impact is not straightforward however - the generic guarantees that the TCA provides, coupled with the pertinent Member State commitments and reservations, are a baseline rather than a description of the actual rules that Member States currently apply to 3rd country service suppliers and specifically, will apply to UK lawyers. A detailed understanding of relevant national rules is therefore also necessary.

7. Though the Bar Council's membership includes employed barristers, the vast majority is in independent self-employed practice. The bulk of these practitioners have tended to offer their client advisory services through Modes 1 and 2, and advocacy services

[2] Mode 1, cross border provision of legal services, from the territory of one member into the territory of another member (e.g. by phone, videoconference, email), without the physical presence of the supplier in the Member State where the service is being received.

- Mode 2, by which the client travels from another member, to, in this case, England & Wales to receive the service.
- Mode 3, by which the service is provided by a service supplier of one member through commercial presence in the territory of another member, is important to the minority of barristers who work, generally but not exclusively as employees, for law firms or other businesses having established offices in EU Member State(s).
- Mode 4, by a service supplier of one member, through the temporary presence of natural persons in the territory of any other member. This means a presence short of establishment, i.e. "fly in, fly out" supply of services

on a Fly in, fly out (FIFO) Mode 4 basis in EU27 jurisdictions, including through giving advice in person, appearing before their courts, administrative bodies, in arbitrations etc. They may be instructed by a firm of UK solicitors or an EU-based law firm, as part of an international consortium or directly by in-house lawyers within EU corporates or in some cases by lay clients. The closest category of service professional, as defined by the TCA, that would appear to cover this work is Independent Professionals (IPs), though this is not available to all our practitioners (notably excluding those with less than six years' experience) and there is likely to be some overlap with the category Short Term Business Visitors (under which no fees may be taken).

8. Members of the Committee will be aware that the WA affords protection to the acquired rights of practitioners who were called, or as applicable, had completed the application to be called, to the Bar of an EU Member State prior to 31 December 2020. Some members of the Bar may also be able to claim protection of their acquired rights as "frontier workers" under the WA. In addition, UK-qualified holders of an EEA nationality retain freedom of movement, even if their market access rights based on their professional qualification are subject to the new regime. Accordingly, our responses below focus on the practice rights of UK-only qualified members who do not hold an EEA nationality, unless otherwise indicated.

9. By the terms of the TCA, EU Member States make a positive commitment to permit barristers as IPs to provide their clients with legal advice[3] on domestic (UK) law and Public International Law (PIL)[4], based on their home title, in EU territory, subject to possible registration requirements and to reservations in some Member States (including, in 14 Member States, an economic means test), and subject to relevant mobility provisions, which variously may require visas, work permits or limit the ability to undertake paid work on the territory of a Member State.[5] The TCA also contains the standard FTA provisions included in previous EU FTAs (specifically with Canada (CETA) and Japan) on market access and national treatment subject to EU and Member State reservations.[6]

10. Whilst it is acknowledged that there is greater clarity[7] in the drafting as compared to the most ambitious pre-existing EU trade deals, i.e. CETA and EU-Japan, there are no real advances on the substance when compared to those agreements and little when compared to the GATS counterfactual outlined above. The only notable substantive "gains" are a mini most favoured nation (MFN) clause: where registration of a lawyer is required, the terms of such should be as favourable as for a lawyer from any other 3rd country; and a positive commitment that no requalification as a domestic lawyer or local office may be required in order to provide legal advice on home state law and PIL.

[3] Article SERVIN 5.48 (g) (i) Definition of legal services - advisory
[4] Article SERVIN 5.48 (a) Definition of designated legal services
[5] Article SERVIN 5.49(1). See also Article SERVIN 4.4 and Annex SERVIN 4
[6] Article SERVIN 3 and Annexes SERVIN 1 and 2.
[7] Notably Member States' descriptions of their non-conforming measures on market access for legal services under Mode 1 and 2 in ANNEX SERVIN-1, as well as the section on legal services in section 7 of Chapter 5 of Title II)

11. Advice on EU law is expressly excluded from the positive commitments in Articles SERVIN 4.4 and 5.49. It is noted that no such limitation is imposed on EU-qualified lawyers providing legal services in the UK under Mode 4 - EU Law is an integral part of Member State national law and the UK deleted a reservation to exclude that. That creates an asymmetry because EU rules also remain part of the law of the United Kingdom (and will do so for the foreseeable future) under the arrangements for "retained EU law" in the EU (Withdrawal) Act 2018. Moreover, the TCA does not commit to a right to provide representational or advocacy services before administrative authorities, regulators and courts (except in the context of arbitrations, mediations etc). It is open to Member States to permit such activities, but they are under no obligation to do so.

12. Thus, whilst the fact that the agreement goes a little further than other EU trade agreements is welcomed, it unquestionably reduces opportunities for UK lawyers to export legal services and limits the ways in which they can serve their clients. There are also many important practice issues, not covered elsewhere in this response, but which will need to be resolved, including how to ensure that advice received from the practitioner in the instant case is covered by legal professional privilege; and that their services are adequately covered by professional indemnity insurance. In addition, and again outside the scope of this response, the lack of directly effective rights[8], and the absence of, for example, measures in the field of civil judicial cooperation (pending alternative agreed solutions), reduce the range of remedies that lawyers can pursue on their clients' behalf.

Question 2: What effect may national reservations to the UK-EU Trade and Cooperation Agreement have on trade in services with the EU?

13. An understanding of the TCA Annexes (1, 2 and 4) containing lists of non-conforming measures, or reservations, that can limit the applicability of the rights contained in the main text is essential to an understanding of the real scope of rights for UK lawyers under the TCA. Member States can variously impose additional conditions on the provision of legal advice or services into or on their territory, including, but not limited to registration with the local bar, an economic means test, a residency or establishment requirement, and/or a nationality requirement. The analysis involved is multi-faceted, an exercise familiar only to those practitioners who are specialists in trade law and daunting for even the most able non-trade specialist. The Bar Council is engaged in trying to assist its membership with this aspect.

14. In terms of the practical impact, whilst there are always going to be individual exceptions, the bulk of EU-UK trade in legal services is focussed in a handful of EU Member States. Consequently, those countries' reservation schedules are of greatest general concern. Within that list are several Member States or regional Bars which have reaped the benefit of having an open market for legal services, and whose reservations are therefore limited and/ or whose legal services regulatory regime is more welcoming of third country lawyers than others. It is hoped and believed that this will remain the case. The reality is however, that UK practitioners will be faced

[8] Save in relation to certain specified social security issues.

with a degree of uncertainty on such matters going forward. Again, the Bar Council is still in the process of collecting and analysing this data.

Question 3: What effect will arrangements on the mobility of professionals have on trade in services between the UK and EU?

15. At its simplest, the new mobility arrangements may merely add complexity, cost and delay for non-EU / UK national lawyers seeking to provide legal services in the other's territory. Beyond that, some activities will no longer be possible, or will require a significant change of approach.

16. For self-employed barristers who habitually provide clients with services on EU territory on a fly in fly out basis, sometimes at short notice, there appear to be only two immigration categories which may cover them, both drawing on CETA and EU-Japan, and each bringing its own limitations.

    a. **Short-term business visitors (STBVs):**

        i. The TCA contains no commitment to the taking of fees on either parties' territory (Permitted Paid Engagements (PPE) in English law) at all. It is not allowed[9]. Hence it is up to the UK Home Office and each EU Member State to deal with PPE under local visitor entry rules.

        ii. The list of permitted visitor activities is limited[10]. Advocacy and dispute resolution are not on the list. The structure of the agreement is to treat paid services under the provisions for Mode 1-2 and temporary access for natural persons on other bases such as the IP route set out below.

        iii. The TCA STBV rule permits 90 days in a 6-month period. The UK inbound rule is 6 months at a time.

    b. **Independent professional (IP) route:**

        i. There is nothing in the TCA to stop the Home Office insisting that an inbound IP obtain a visa prior to travel, or evidence of a contract for services (which would appear to fall short of a requirement to show a UK sponsor). EU states could insist on similar, effectively ruling out acting on last-minute instructions[11].

        ii. IPs can stay for up to 12 months or the contract duration (whichever is less) but only for the following activities: legal advisory services in respect of public international law and home jurisdiction law; in other words, not advocacy and dispute resolution. Members of the Bar would need to check the national rules in the Member State in question in order to ascertain whether they need to secure ex ante, a work permit to do the latter.

[9] Art Servin 4.3(1)

[10] Annex Servin 3, para 8

[11] Article Servin 4.4, Annex Servin 4

17. Thus, overall, UK-based self-employed barristers receive little in migration mobility terms: just a 12-month Mode 4 IP route (for which they must have at least six years' professional experience), to provide certain legal advice to a client in a host state, subject to local visa requirements. Moreover, there are no guarantees for any IPs who are established in the EEA territory. All the movement guarantees provided by the TCA in relation to establishment seem to apply to employees, managers and others who are not self-employed service providers. In other words, a UK IP established in Belgium could not freely provide their legal services in France.

18. As regards employed barristers, it seems that:

    a. Business visitors for establishment purposes are only covered by the 90-day rule;

    b. Intra-corporate transferees can stay for a period of up to three years for "managers" and "specialists" and up to one year for "trainee employees";

    c. Short-term business visitors are (subject to conditions) only covered by the 90-day rule;

    d. Contractual service suppliers can only work in specified sectors but can stay for a cumulative period of 12 months, or for the duration of the contract, whichever is less.

19. Thus, whilst the Bar of England & Wales and others are endeavouring to compile data for the assistance of its members, in principle, a practitioner intending to provide services on the territory of a Member State would need first to check its immigration rules to ascertain one or more of the following, according to their individual case:

    a. Whether that state imposes visa requirements for IPs, or a work permit to allow the practitioner to undertake the particular service if outside the TCA commitments;

    b. The administrative requirements, costs and delay for IPs to secure visas;

    c. Whether that state allows IPs to engage in activities beyond the provision of legal advice, in areas such as arbitration, dispute resolution, representation, etc;

    d. Whether that state allows IPs to stay beyond 12 months and/or to switch to residence and/or establishment if applicable;

    e. Whether that state allows practitioners with less than six years' professional experience, to enter as IPs or as members of a liberal profession;

    f. Whether that state allows business visitors to undertake additional activities;

    g. Whether that state imposes a visa requirement for short-terms business visitors to undertake particular activities:

        i. when taking a fee, and

        ii. when not taking a fee.

Question 4: How will the intellectual property provisions set out in the Agreement affect UK-EU trade in services?

20. As noted at the outset, this response is specific to the impact of the TCA on cross-border legal services, and as such the impact of the changes to Intellectual Property rights per se on cross-border services will not be explored.

21. For the many members of the Bar of England and Wales who practice Intellectual Property law, the limitations and challenges discussed elsewhere in this response apply equally to their cross-border offer. Intellectual Property law is a practice area where, especially now post Brexit, advice on both UK domestic and EU law is frequently needed in tandem, which will raise its own specific issues in light of the reservations and commitments discussed in response to questions 1 – 3 above.

22. Looking at representation services, the UK's departure from the EU / EEA deprived UK practitioners of the rights they hitherto enjoyed before the EU Intellectual Property Office (EUIPO), situated in Alicante, Spain, and responsible for managing EU Trademarks and registered Community designs (though the Withdrawal Agreement extended those rights for cases pending before 31 December 2020).

23. As regards the new Unified Patent Court (UPC), the UK formally withdrew its ratification in July 2020 from the UPC Agreement and is no longer a party. However, UK Intellectual Property practitioners retain rights of audience in the European Patent Office (EPO) (which is a non-EU institution), situated in Munich, Germany, but with a branch in The Hague, the Netherlands.

24. This has given rise to practical issues mainly relating to mobility. Practitioners who are due to appear before the EPO may now be obliged to consult, well in advance, both the EPO's rules of procedure, and any agreement in place between the institution and its host state as regards access to the territory for third country practitioners.

Question 9: How will the new UK-EU framework for the mutual recognition of professional qualifications affect professionals and services sector businesses?

25. Article SERVIN 5.13 provides for professional bodies across all service sectors, including legal, to engage with their opposite numbers in the EU Member States to develop and provide joint recommendations on the recognition of professional qualifications to the Partnership Council established to oversee the TCA. We note that this approach was also adopted in both CETA and EU-Japan, and to date has not yet resulted in the entry into force of an operational Mutual Recognition Agreement (MRA) though work on an EU-Canada MRA in the field of architecture is reportedly at an advanced stage.

26. It is understood that the fact that the joint recommendations need only be supported by an evidence-based assessment should make them simpler to justify than under the CETA framework. Thus, for example, the need to facilitate future judicial cooperation should, in principle, provide a sound basis for an MRA in legal services.

27. However, an MRA entered into on the basis of the framework envisaged in the TCA would have to have the same territorial scope as the TCA itself i.e. involve all 27 Member States. In order to avoid a situation where one or more competent Member State authorities could veto such a plan, the TCA provides for a more flexible approach than the usual rigid standards-setting by which a qualification may be recognised,

instead providing for a particular sector to define a joint process with criteria for assessment.

28. The UK legal profession enjoys very longstanding and close ties with many bars and law societies across the EU. Its constituent Bars and Law Societies remain active members of the Council of the Bars and Law Societies of Europe (CCBE) as well as of other European legal professional bodies. The Bar Council's experience of relevant discussions within such fora would not encourage an expectation that the competent authorities in all 27 Member States would support such an MRA. That said, it is noted here that the text also provides for the Parties to enter into MRAs based on other, as yet undefined, criteria. In that context, it is understood that one of the options may be a non-sector-specific MRA, an EU-UK equivalent to the Mutual Recognition of Professional Qualifications Directive.

29. It is early days, and the Bar Council is open to the possibilities the framework may offer. However, we will also continue to explore other possible arrangements for the mutual recognition of professional qualifications with EU national and regional Bars.

Question 10: What will be the impact of the Agreement's provisions on the cross-border supply of services and rights of establishment, such as commitments on local presence and economic needs tests?

30. Coupled with the other restrictions on the supply of legal services by UK qualified practitioners outlined in response to earlier questions, such commitments and reservations will inevitably limit the numbers of professionals who meet the necessary criteria, including especially, at the junior end of the profession. Moreover, in the medium term, this will likely dissuade new entrants to the profession from choosing to practice in areas in which they are confronted by such obstacles, leading to a narrower domestic offer.

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