RESPONSE BY THE UK CCBE DELEGATION TO THE POSITION PAPER SUBMITTED BY THE EU27 MEMBERS OF THE COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE: "ISSUES FOR LAWYERS AND LEGAL SERVICES IN THE EU"

Preface

In this response, we restrict our comments to the rights of lawyers set out in the Joint Report TF50 (2017) 19, together with the Joint Technical Note expressing detailed consensus on UK and EU positions on Citizens' Rights (both published on the TF50 website on 8 December 2017).[1]

The paper seeks to further clarify the categories of those who should be able to benefit from acquired rights and grandfathering provisions that were concluded after Phase 1 of the negotiations.

These comments are without prejudice to any transitional arrangements or a new international treaty providing a basis for market access and related rights that may be agreed. They also do not address any unique solutions that may be required to address the Irish/Northern Irish position. We remain hopeful that some of the principles we discuss here can be taken into consideration in future negotiations and that both a transition agreement and a new legal basis for market access will be concluded on a fully reciprocal basis.

Acquired Rights – Principles

1. We consider that all acquired rights must be set out in the withdrawal agreement between EU and UK. Primarily, these rights are granted to those citizens resident in the EU and UK territories, whether alone or in groups of citizens (not separate legal persons). However, as recognised in the paper "Issues for lawyers and legal services in the EU – Common positions of the Bars EU27" (hereinafter "CPP") which has been submitted to the European Commission, residency is not the only criterion for acquired rights to establishment.

2. Indeed, the TFEU does not provide a basis for residency as a requirement for such acquired rights and in fact the reverse is true – establishment rights give rise to residency rights.[2] As the CJEU has found, a lawyer can be `established' in EU law terms in multiple Member States. It follows that residency in a Member State is not necessary to 'effectively exercise' the right to establish there in *Gebhard* terms. The CJEU's approach is consistent with the Commission's current (correct) approach to frontier workers, albeit this is not directly applicable

[1] The Joint Report and Note are available at: https://ec.europa.eu/commission/publications/joint-technical-note-expressing-detailed-consensus-uk-and-eu-positions-respect-citizens-rights_en

[2] Rights of residence arose from case law developments to render the rights of free movement for workers and the self-employed effective. Establishment is a legal concept under the Treaty dating back to 1957 - the concept of establishment was defined in para. 25 of the Gebhardt judgment as being to 'participate on a stable and continuous basis in the economic life of a Member State other than the state of origin'.

to establishment. These workers live in one Member State but travel to work (and are thus "established") in another.[3]

3. We agree that reciprocity shall apply in relation to acquired rights as set out in the CPP.

4. Both the EU and UK negotiators have agreed that those citizens who continue to benefit from the current free movement right to live in either the UK or EU should also continue to have the right to work and engage in business activities. We support the view that this should include also those who have established themselves. These continued economic rights ensure the fulfilment and full effectiveness of the acquired rights. In our view they should include the continued recognition of qualifications and of professional title for all EU citizens concerned.

5. In the context of the legal profession, this means that all EU legal practitioners living or established in the UK and all British legal practitioners living or established in the EU, who are entitled to the acquired right to stay and work in the relevant territory, should be entitled to the continued recognition of their professional qualifications and be able to continue to exercise their profession.

6. We generally agree with the CPP that for an acquired right to arise, that right will have to have been effectively exercised at some point during the UK's membership of the EU, even if it is not being effectively exercised at the date of the UK's departure from the EU. However, the CPP does not appear to clarify how it is envisaged that this right will be applied in the context of provision of legal services.

7. We furthermore submit the following points, in particular about the operation of the Directive 77/249/EEC, when a person is entitled to have his qualification and establishment recognised as acquired rights:

- Once any persons are entitled to the acquired right they should be entitled to the rights provided in the EU framework to allow them to continue with their profession.
- UK lawyers who have requalified in an EU27 Member State should be considered as EU qualified, and thus granted the opportunity to continue to provide services and to set up an establishment, or requalify in another EU Member State under the EU rules, in the same way as host state lawyers. In our view those who have requalified in one of the EU jurisdictions, can continue to practice in the other EU jurisdictions without further conditions. Accordingly, it is our view that an EU lawyer from whichever jurisdiction, who has either established or requalified in an EU Member State, must not be required to fulfil any additional requirements as a condition for such of continued enjoyment of his or her EU rights.[4]

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[3] *See Joint Technical Note of 8 December 2017: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/648148/September_-_Joint_technical_note_on_the_comparison_of_EU-UK_positions_on_citizens__rights.pdf*

[4] Following the Court's case law in *Joined Cases C-58/13 and C-59/13 Torresi and Torresi*.

- EU law provides for the possibility that a national legal system requires EU citizenship as a pre-condition for an EU qualified lawyer to be able to provide services or become a REL. However, as acquired rights aim to preserve the rights of UK and EU27 citizens, we do not agree that UK citizens who have acquired rights should be required to obtain EU citizenship in order to benefit from them. This would frustrate the exercise of acquired rights.

8. Furthermore, our delegation makes the following specific comments on the EU27 papers, in support of the principles laid out above and to respond to the question of grandfathering, which is now included in the joint UK-EU agreement on acquired rights from 8 December.

Grandfathering rights

9. The EU 27 were asked by the Commission whether the rights of lawyers practising before the withdrawal date in another EU Member State but under their home country title should be maintained ('grandfathered'). This point is mentioned also in paragraph 32 of the Joint UK – EU text from the negotiators from 8 December 2017.

10. For the reasons which follow, the UK Delegation is respectfully of the view that the EU 27 approach is too restrictive.

11. Lawyers practising in another EU state fall into at least the following categories:

(1) Lawyers registered under Article 3 of Directive 98/5/EC with a host state bar for more than three years of effective and regular practice of host state law including EU law and who applied for or obtained the host state title under Article 10;

(2) Lawyers registered under Article 3 of Directive 98/5/EC with a host state bar for more than three years but who wish to continue to use their home state title and do not intend to take the host state title ("Registered European Lawyers");
(3) Lawyers registered under Article 3 of Directive 98/5/EC with a host state bar for less than three years at the moment of Brexit but who wish to achieve the period of three years and take the home state title
(4) Lawyers established in a host Member State in *Gebhard* terms (i.e. stable and continuous links with host Member) under the Treaty right;
(5) Lawyers providing regular services in host Member States under the Lawyers Services Directive.

12. It appears to be agreed that lawyers in the first, and arguably the first three categories, have acquired rights, though we accept that only the first is currently clear-cut. It is also agreed that, in the case of the UK leaving the Single Market, those in the fifth category have no acquired right to continue to provide services by virtue of their home state title, though that does not rule out the right to practice being otherwise preserved in the future relationship.

Optimal Approach

13. A preliminary question arises with regard to the basis on which the second to fourth categories (and any other unforeseen categories) are to be approached by Bars and Law Societies in the light of Brexit. The UK Delegation to the CCBE submits that at least the following factors are relevant to determining that approach:

- The public interest in the maintenance and protection of legal certainty, the rule of law and thereby of democracy, in particular through minimising the disruption caused by Brexit to citizens and businesses;
- The advancement of the core values of the legal profession as set out by the CCBE in the CCBE Charter of Core Principles of the European Legal Profession, not least because the object of defining such core values is to seek to identify the different facets of the public interest; and
- The need on rule of law grounds to ensure as far as possible that cross border cooperation between lawyers, judges and judicial/administrative authorities continues in the interests of citizens and businesses of both the EU 27 and the UK.

14. The outstanding categories will be considered in the light of that approach.

<u>Second category – Practice under home title, registered with but not integrated into host Bar (Registered European Lawyer)</u>

15. The second category concerns for example a French divorce lawyer established in London who practises French law for the French community in London. Requiring such a lawyer to become a solicitor would add a regulatory burden for no benefit to either the lawyer or the client. The EU 27 Response identifies no public interest or core value pursued by such an approach which also fails to give effect to the manifest intent of Articles 3 and 4 of Directive 98/5/EC which is to confirm and/or secure the <u>right</u> to practise under home state title. It is not apparent from the Joint Report TF50 (2017) 19 para. 32 that this has been recognised by the negotiators and we would welcome clarification of this matter.

16. This risks having a deleterious effect on the protection of the legal rights of citizens, public interest and ultimately the rule of law. If the continued rights of EU citizens to reside in the UK and of UK citizens to reside in the EU are to be effective, they need effective access to legal services.

17. An approach which fails to recognise the continued right to practise home state law under home state title for those who have registered fails to recognise the true scope of the Treaty right which has been exercised.

<u>Third category – Grandfathering registered EU lawyers with less than three years' practice in host state</u>

18. Such lawyers, as UK citizens in the EU, and EU citizens in the UK, who are entitled on basis of acquired rights to continue their temporary residence at the exit date to fulfil the requirements of the permanent residence, should be able to have an acquired right to continue their period to qualify in the host state. Acquired rights, which allow the continued residence for citizens should also include the right to continue with the exercise of profession. The

Commission's question on this to the EU27 Bars was preceded by the word 'should'. The notion that a lawyer in the process of qualifying for integration into the host profession under Art. 10 Directive 98/5/EC should lose the legal basis for their professional activity is inimical to the legal principles on which regulated professions impose regulation which is said to be as a means of guaranteeing the quality of services and furtherance of the rule of law.

19. Even for those persons who do not, on a bona fide assessment, qualify for the host state title on 30 March 2019, it is difficult to see what public interest justifies an approach which prevents them from continuing with their effective and regular pursuit of the host state law in order to obtain the relevant host state title within a reasonable time. Therefore, we seek urgent clarification from the negotiators whether the term "Recognition procedures" in para. 32 of the Joint Report of 8 December can be interpreted to include the whole of the 3 year qualification period under Article 10 Directive 98/5/EC, which we argue it should (as opposed to simply referring to the administrative process of applying for inclusion into the host profession at then end of the 3 year period).

20. The UK Delegation would argue both to its own regulators and also to the regulators and Bars of other Member States that such Registered European Lawyers should be allowed a continue their qualification process to satisfy the conditions for establishment under the host state title.

<u>Fourth category – EU lawyers established in another state but not registered with host Bar</u>

21. Persons who satisfy the *Gebhard* criteria for being established in another EU Member State have exercised a treaty right and can argue that a treaty right cannot be diminished or be subject to additional or supplementary conditions set out in a directive. The UK Delegation sees the force of such arguments both as a matter of interpretation and also as a matter of the objectives to be achieved by Bars and Law Societies acting in accordance with their core values albeit that the correctness of such arguments as a matter of acquired rights must be ultimately for the CJEU.

Court of Justice of the European Union

22. In relation to this section of the CPP, there are two categories of UK lawyer to consider. The first category is those who have been instructed under the regime of the EU Lawyers Services Directive and who are qualified and established in the UK only. In relation to this category, the position under the CPP is probably arguable, albeit deeply regrettable. There are other rule of law principles to which the Member States of the EU and their legal professions subscribe, such as "access to and the proper administration of justice", "best interests of the client" or "equality of arms", all of which support a position which would permit those instructed to exercise their mandate until proceedings have been completed. We shall make relevant submissions to the negotiators.

23. The second category are lawyers who have exercised their right to requalify before the withdrawal date. These lawyers fulfil the requirements of Article 19 of the CJEU Statute (i.e. be EEA-qualified - there is no nationality requirement) and may both continue to intervene in

proceedings which are ongoing on the date of withdrawal and initiate new proceedings subsequent to withdrawal. Their clients are also entitled to instruct them on the same terms as at present, including recognition by the EU institutions of legal privilege for professional communications and appearance rights before the institutions. We would therefore point out that the distinction drawn in the CPP between initiating new proceedings on the one hand and intervening before the court is not a relevant distinction here. The only relevant distinction is whether or not a lawyer fulfils the requirements of Article 19 of the CJEU Statute.

UK Delegation to the CCBE
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