



The Bar Council

## EU-UK FUTURE RELATIONSHIP: PREPARING FOR THE END OF TRANSITION FAQS FOR BARRISTERS

### PART I PRACTICE RIGHTS

#### **Introduction: State of Play EU-UK negotiations**

1. Following the departure of the UK from the EU on 31 January 2020, and as provided for in the binding [withdrawal agreement 2019](#) (WA) we are now in the latter stages of the Transition Period during which the EU and UK are negotiating the terms of their future relationship – the Future Partnership Agreement (FPA). There having been no UK request to extend it, the transition period will end at 11 pm GMT on 31 December 2020. As of that moment, all UK rights and obligations under EU law (which were temporarily extended during the Transition Period) will end<sup>1</sup>, with the UK then becoming a “third country” in the full sense.

2. In order to help you to prepare for this change, the Bar Council’s Future Relationship Working Group (FRWG) has developed a set of FAQs, presented in four parts: implications for your practice rights, case management, specifically with regard to cases before the CJEU or the domestic courts of EEA Member States; key substantive and procedural law changes and career and study choices. These will be updated as more is known.

#### **The impact of the end of Transition on (cross-border) Practice Rights**

3. The freedom for UK qualified practitioners to supply the full range of legal services in and into the EU from the UK, and to have their professional qualifications recognised in the EU (and vice versa) will cease on 31 December 2020. Whilst negotiations are continuing, the risk remains that in the short time that remains the parties will not achieve a fully comprehensive deal covering all aspects of goods and services. Practitioners should plan accordingly.

#### **Preparing for the end of transition with no agreement on (legal) services**

4. In the absence of an FPA covering Legal Services, or Bar-to-Bar arrangements to facilitate them (on which see more at para 18 et seq below), from 1 January 2021 the only international trade agreements that will apply to the provision of cross-border services in and into the EEA

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<sup>1</sup> The WA does preserve certain limited EU rights and obligations on and in the UK (e.g. Citizens’ rights), but as things stand, they do not materially affect the content of this paper.

based on UK qualifications will be those under the World Trade Organisation (WTO) General Agreement on Trade in Services (GATS). Absent WTO member commitments to open up their markets, the starting position under the GATS is that members' markets for legal services are closed to external trade. EEA Member State commitments on trade in legal services under GATS are much more limited than those under the current EU regime or even of drafts of the UK-EU FPA (again, see more at para 18 et seq below)

**The WA does, however, provide protection for cross-border practice rights that are already in place at the end of transition. To be able to take advantage of this, practitioners<sup>2</sup> who have not already done so, must act now. Please refer to the advice below, adapted to your situation.**

5. Such action should be considered not only by UK qualified practitioners who specialise in EU law, but also those whose practice is largely domestic, but who from time to time advise on EU law or are instructed in cases in which a point of EU law may arise (including relating to Brexit itself, such as the Withdrawal Agreement, on which see more in Part II), especially if that could lead to proceedings before the Court of Justice of the EU (CJEU) or the courts of an EEA Member State in the future.

6. The advice provided below should be read alongside the wealth of further information available online. Links to resources provided by the European Commission, UK Government, UK and European Legal professional bodies can be found at the end of this paper.

### **Practitioner categories**

7. Your immediate options depend broadly on which of the following categories you fall into:

- **Category A - Self-employed UK qualified practitioner, practising in England and Wales**, whose practice has or may have cross-border elements (including but not limited to advising clients on EU law, and/ or representing UK clients in proceedings before courts in the EEA; before the Court of Justice of the EU (CJEU) etc;
- **Category B - UK qualified practitioner who is living and practising in an EEA Member State, whether self-employed or employed.**
- **Category C - Employed UK-qualified practitioner, practising in England and Wales**, whose practice has or may have cross-border elements (including but not limited to advising clients on EU law, and/ or representing UK clients in proceedings before courts in the EEA; before the Court of Justice of the EU (CJEU) etc;
- **Category D – there are a handful of UK qualified practitioners, practising for the most part in England & Wales, but who may also be considered to be “established” in one or more EEA Member States, potentially also triggering the protection of the WA as a “frontier worker”** (Article 9b WA with reference to Articles 45 & 49 TFEU). For the

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<sup>2</sup> Every practitioner's position is unique. This note does not replace legal advice or a consultation on an individual basis with the relevant regulator(s). We cannot accept responsibility for the consequences of any action or lack thereof on the basis of the information contained in this note.

purposes of this paper, the assumption is that such practitioners have already taken the steps appropriate to their circumstances, and thus there is no specific mention hereafter.

Individual variations within those categories, such as nationality, are touched on under the headings below.

8. The GATS defines four Modes of Supply of services between (WTO) members, Modes 1 and 4 of which are of particular importance to the Bar due to the fact that the vast majority of our practising membership is self-employed:

- 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, is also of significant interest to the Bar but is much less problematic than Mode 4.
- 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 of course 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

#### **Withdrawal Agreement 2019 – relevant provisions**

9. Extracts from the relevant articles of the WA (link above):

- Article 27 of the WA states that *“recognition, before the end of the transition period, of professional qualifications of [...] EU citizens or UK nationals, and their family members, by their host State or their State of work shall maintain its effects in the respective State, including the right to pursue their profession under the same conditions as its nationals, where such recognition was made in accordance with: (as relevant to the legal profession)*
  - (a) Title III of **Directive 2005/36/EC on the Mutual recognition of professional qualifications (MRPQ)**; or
  - (b) Article 10(1) & (3), **Directive 98/5/EC, EU Lawyers’ Establishment Directive (LED)**”.
- Article 28 applies to *“Ongoing procedures on the recognition of professional qualifications”* as at the end of transition. There is some debate about its precise interpretation. We would argue that you are entitled to complete the process of obtaining the host title if you have formally commenced it before the end of the transition period. Please let us know if you encounter difficulties in this respect. We may be able to support you as appropriate.
- Article 29 requires the UK and EU Member States to cooperate with regard to pending applications referred to in Article 28, in order to facilitate its application.

*What do Art 27–29 WA mean for Category A - Self-employed UK qualified practitioners, practising in England and Wales?*

*During the transition period (up to 31.12.2020)?*

9. For members of the Bar who are established in England and Wales, only the first option under Article 27 WA - using the MRPQ directive is available.

- In a nutshell, this means having your “home” title of barrister recognised by the Bar of an EEA Member State, such that it will admit you to its own profession. This generally involves taking an aptitude test (usually involving one or more law papers and possibly a language paper where applicable) prior to being called to the “host” Bar.
- Appearances before the CJEU<sup>3</sup> or the local courts in your host state, as well as advice on EU law there, will then be conducted using your host state title. Article 27 makes it plain however, that the host title practice rights so acquired apply only in that Member State; in other words, à priori, you will not have free movement rights in the EU unless you also have an EU citizenship.
- Many barristers have already taken the necessary steps, most commonly being called to either the Irish Bar or one of the Belgian, especially Brussels, Bars. Guidance in relation to obtaining the Irish Bar title can be found on the Bar Council Ethics hub: <https://www.barcouncilethics.co.uk/documents/call-and-practice-at-the-bar-of-ireland/>
- If you have not already done so, you should waste no time in making contact and informing yourself of the specific requirements of your chosen Bar. There may be conditions attached which you would need to fulfil e.g. a need to show some form of effective practice on the territory concerned.
- However, provided your application is properly lodged prior to the end of the transition period, Article 28 obliges the Member State concerned to treat it as if coming from an EU Member State national.

Contact information: The Bars and Law Societies of EEA Member States are members of the CCBE. Details can be found at: <https://www.ccbe.eu/structure/members/> Please note that not all of them will be the competent authority for the purpose of cross-qualification, but they should be able to refer onwards as appropriate.

*After the transition period (from 1.1.2021)?*

10. If you have not taken advantage of Article 27 WA before the end of the transition period, in the absence of an EU-UK FPA/FTA or a bi- or multi-lateral agreement between the Bar Council and the national regulator by which your qualification can be recognised (on which see further from para 18 below), from 1 January 2021 the cross-border services you can provide in and into the EEA, based on your UK qualification, will be subject to the commitments made by the relevant State to allow cross border trade in legal services and arbitration under the GATs or, absent any commitment, the domestic law of each Member State. **Currently, most Member States have committed under GATS to allow the practice of law under home country title but this is restricted to advice on home country law and international public law (excluding EU law), and**

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<sup>3</sup> Art. 19 (4) CJEU Statute requires membership of an EU Member State legal profession but not Member State citizenship.

**does not extend to Mode 4 (presence of natural persons – see para 8 above) for Independent Professionals, which is most barristers.** Entry and temporary stay may be allowed under the Member State’s domestic law. **Representation services in the field of arbitration are usually permitted or tolerated, but the position is not clear in all Member States. For avoidance of doubt you may wish to verify the position with the relevant bar association or competent authority.**

11. We are also keeping a close eye on potential visa and other conditions (length of stay, receipt of fees on the territory etc) attached to entry into EU Member States by UK service providers and vice versa, which could also have a restrictive effect on the right to practice, even if the respective regulators wish to facilitate it. **Visa requirements are likely to come into effect as of 1 January 2021 as matters currently stand in the negotiations.** The Bar Council will work with HMG to reduce immigration hurdles on a bilateral basis over time. If you need to travel to provide legal services you will need to verify the immigration requirements of the relevant Member State(s).

*Do the answers change if I have an EU nationality?*

12. The advice here is identical to that above, save:

- Under para 9 the fact of having EU nationality likely will guide your choice of national Bar at which to seek recognition of your qualification, and
- Having an EU nationality would open up free movement rights within the EEA.

*What do Art 27-29 WA mean for Category B –UK qualified practitioner who is living and practising in an EU Member State, whether self-employed or employed.*

13. The answer to this depends on whether you have taken the necessary steps to secure both your rights of (professional) establishment and residence rights on the territory of the Member State in question, and if so, when you did so.

#### **14. Establishment**

- Article 3(1) LED requires a lawyer who wishes to practise in a Member State other than that where they obtained their professional qualification to register with the competent authority, e.g. a local or national bar association. They then practise on that territory under their home title as a “Registered European Lawyer” (REL).
- Article 10(1) and (3) LED allow a REL to re-qualify / fully integrate into the host legal profession after three years of “effective and regular” practice of host state law (including EU law) on that territory.
- Thus, if you registered before 31 December 2017, you will normally have completed 3 years continuous practice in the territory in conformity with Article 10 LED before the end of the transition period, thereby allowing you to be called to the host state bar. Ideally, that call will take place before 31 December 2020. In those circumstances, Article 27(b) WA acts to protect your host state title even once the transition period is ended.

- If, however, you registered later than 31 December 2017, but had already practiced in that territory, and your total exceeds the three years required by Article 10 LED, you are strongly advised to contact the host state bar to see if your previous period of (unregistered) practice can be taken into account in calculating the 3 year qualifying term under Article 10 LED. That will be at the discretion of the host bar. Please contact us if the relevant competent authority is taking a restrictive approach. We understand that the Bar Standards Board (BSB) is considering exercising its discretion in a more permissive fashion, possibly opening the door to reciprocity arguments.
- Regardless of when you registered, if you have not yet acquired the host state title by means of Article 10 LED, but have completed more than three years qualifying practice on the territory, even if the period was not contiguous, it is still worth asking the local bar/competent authority whether it is prepared to cumulate your periods of local practice for the purposes of complying with Article 10 LED. Again, that would be at the host bar's discretion.
- Note that, beyond the strict terms of Article 10 LED, individual Bars have the right to attach other, non-discriminatory, conditions to call to their Bar if they so choose. For example, the Brussels Bars have hitherto imposed an EU nationality requirement, though we understand that their recently-obtained legal advice holds that that would negate the intention behind Articles 27 and 28 WA. Nonetheless, in such circumstances, it is theoretically possible that a practitioner who is otherwise compliant with Article 10 LED and has been called to an EEA Bar, will no longer comply with the host Bar rules after 31 December 2020. They would therefore lose the protection of Article 27b) WA. As before, do please contact the Bar Council if you encounter such difficulties and we will try to facilitate a solution with the host bar.
- Again, as is the case under para 9 above, the protection afforded by Article 27 WA to the practice rights of a UK national, lawfully residing in an EU Member State as at 31 December 2020, who has been called to the local Bar in reliance on either the MRPQ Directive or the LED, is prima facie limited to the territory of that Member State. It would, however, as the law currently stands, give the practitioner rights of audience before the CJEU.
- If you fall outside the above scenario and thus cannot avail of the LED to acquire the host title by 31 December 2020, you should be taking steps immediately to have your UK qualification recognised by the MRPQ route, as outlined in para 9 above.
- If you fall within Category B, but are not currently registered with a local Bar because you work, for example, for an international organisation such as the EU institutions, it would still be wise to discuss your situation as soon as possible with the local bar if you wish to retain the option to (re)enter private practice at a later stage. Your in-house work may be counted towards the Article 10 LED period – again, at the discretion of the host bar. If you do not comply with the conditions outlined above giving you access to the host bar title after 3 years establishment on the territory, you are strongly advised to take the steps outlined under para 9 above before the end of the year.

## 15. Residency

- Article 10 of the WA clarifies that UK nationals acquire rights under its terms provided they resided in any EU Member State *'in accordance with Union law before the end of the transition period and continue to reside there thereafter.'* Article 13 WA further specifies the legislation to be taken into account in determining the applicable rights of residence. Provided you complied with the relevant EU and national legislation, you should be able to benefit from the acquired rights of residence. That typically involves registering your presence with the local authorities.
- In order to retain free movement rights, an EU nationality is required. Several Member States allow you to take local nationality after a provable period of continuous residency, provided you fulfil conditions attached, such as financial independence, integration into the community etc.
- Again, if this is applicable to you, you should take such steps before the end of this year.

### *What do Art 27-29 WA mean for Category C - Employed UK-qualified practitioner, practising in England and Wales?*

16. You should check to see what arrangements have been made by your employer. Many law firms, banks etc have established offices on EU territories, and expect to be able to move their lawyers between offices under GATS Mode 3 or Mode 4 Intra Corporate Transferees (ICT) commitments<sup>4</sup>, regardless of the individual practitioner's qualifications. Where your employer does not have an establishment in the EU, you may be able to provide services in person through the GATS Mode 4 contract service supplier (CSS) commitments made by some Member States. The Law Society's advice for practitioners has more detail on this aspect. See the links under "useful resources" at the end of this paper.

17. However, UK-qualified practitioners who are employed by law firms or as in-house Counsel but who may wish to retain flexibility in their career path going forward would do well to consider securing recognition of their professional title as soon as possible. See advice under para 9 et seq above.

### *If there is nothing further I can do as an individual, is the Bar Council doing anything to help me to preserve my practice rights in and into the EEA following the end of transition?*

18. As noted in the introduction, the most likely scenario is that there will be no EU-UK agreement adequately covering legal services in force at the end of transition. Negotiations will no doubt continue thereafter in one form or another (and at different levels) to try to achieve agreement(s), including for professional services. Nonetheless, there could well be a gap at the end of this year.

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<sup>4</sup> See further under para 18 et seq below

19. That being the case, the best advice is to take the individual action outlined above if that is still open to you.

### **Legal Services immediately post-transition if no EU-UK agreement is concluded**

20. Absent an EU-UK level agreement, again as noted above, EU-UK legal service provision will fall under the WTO GATS commitments or, where there are no such commitments, the domestic law of each Member State.

21. Again, as noted above, the difficulty post-transition, absent an EU-UK level agreement covering legal services, is that Member States' GATS commitments are limited. Mode 1 and 2 commitments, for example, are restricted to advice in home country law and public international law (excluding EU law). Luxembourg requires registration as an "avocat" to provide services in international law as well as host country law. Unlike the EU's existing trade agreements and the current draft EU-UK texts, there is no provision under GATS Mode 4 for independent professionals. That means that self-employed barristers do not enjoy any rights under GATS to enter for temporary periods to perform contracts and must fall back on the position under the domestic law of each State. Employed barristers will for the most part fall into the category of 'contract service supplier' (CSS) (see above).

22. To try to reduce such trade barriers, the Bar Council, Law Society and other UK professional bodies have long been engaged in discussions, not only with our own government regarding their market access requests, with the EU side to try to explain the mutual interest in reaching agreement on legal services, but also with bars and law societies of the EU to seek bi- or multi-lateral arrangements, whether in parallel to an EU-UK level FTA / FPA or in the absence of one. Thus:

- The Bar (and Law Societies) are exploring possible bi-lateral Mutual Recognition Agreements with the Bars of several EU Member States to cover Mode 4 services.
- We are also exploring half-way house options, such as temporary call, or call to a limited title (i.e. limited to certain fields of international practice), all of which would have to be available to EU lawyers wishing to practice in the UK if we wish to secure the rights in the EU.

23. We note that, in any such scenario, Member States may impose limitations or conditions on the types of services that could be provided, or the areas of law practiced, on their territories. Likewise, it is essential for immigration rules in the respective territories to provide for visa- and sponsorship -free access for persons providing such services, and we have thus been lobbying for same in the UK, since all such access will only be granted on a reciprocal basis.

24. You should inform yourself about the precise remit of practice rights offered in the relevant Member State in or into which you seek to provide services. The Law Society has published guidance on the position in several Member States. Please see the link in the list of



resources below. Further guidance will soon be available on request by contacting the Bar Council's Head of International Policy at [cwisskirchen@barcouncil.org.uk](mailto:cwisskirchen@barcouncil.org.uk).

*What might we expect from the EU-UK level negotiations on professional services?*

25. Where professional, including legal, services are concerned, the EU and UK are approaching the future FPA from different starting points. As mentioned above, a deal on an FTA that includes professional services is unlikely. If professional services are covered it is unlikely that legal services provision will be significantly greater than the existing position under the GATS, given what we know about the ambition of both sides.

26. Although we are having to adapt our ask to the evolving situation, the Bar Council and other representatives of the UK legal profession continue to lobby for the preservation, to the maximum extent possible, of cross-border practice rights going forward. Given the continuing uncertainty, we are pursuing this in a number of parallel contexts, by seeking to secure:

- Within any future FPA, the principle that members of the Bar will continue to have access to the host country title, based on ambitious Mutual Recognition Agreements (MRAs) whether at EU or bilateral level. Were the EU-UK agreement to cover this, it would ideally call on Member States to provide for this route, rather than leaving it to individual Member States themselves to decide if they wish to do so or not. The question of where competence lies as between the EU and its Member States to negotiate MRAs is moot.
- Accordingly, that the terms of any future FPA do not prevent national regulators, in our case the Bar Council, from entering into bi-or multi-lateral agreements with other Bars for the Mutual recognition of qualifications.

Bar Future Relationship Working Group,  
13 October 2020

**Useful resources:**

Bar Council Brexit Webpage: <https://www.barcouncil.org.uk/policy-representation/policy-issues/eu/brexit.html>

**UK Government - [Get ready for Brexit toolkit](#)**

Guidance: [Recognition of professional qualifications](#)

Guidance: [UK lawyers practising in the EU, Norway, Iceland or Liechtenstein from 1 January 2021](#)

Guidance: [Provision of services regulations: guidance for UK service providers and Competent Authorities](#)

Guidance: [SOLVIT problem solving service](#)

Guidance: [EU lawyers in the UK from 1 January 2021](#)

**European Commission**

Communication and sector-specific readiness notices, some updated from earlier no deal preparedness notices: [https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership/getting-ready-end-transition-period\\_en](https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership/getting-ready-end-transition-period_en)

August 2020 EU text on Recognition of Professional Services:

[https://ec.europa.eu/info/publications/additional-draft-text-agreement-new-partnership-united-kingdom-7-september-2020-recognition-professional-qualifications\\_en](https://ec.europa.eu/info/publications/additional-draft-text-agreement-new-partnership-united-kingdom-7-september-2020-recognition-professional-qualifications_en)

### **UK bars and law societies**

Q&A on UK lawyers' practice rights in the EEA and Switzerland during the transition period

CCBE UK delegation paper: <https://www.barcouncil.org.uk/uploads/assets/74612fbd-24fa-4cbc-a26fa7811f459961/practicerightsuklawyersintheeuqarevisednov2018.pdf>

Law Society of Scotland's Brexit guidance: <https://www.lawscot.org.uk/research-and-policy/international-work/brexit/>

Law Society of England and Wales guidance: <https://www.lawsociety.org.uk/topics/brexit/>, including the practice rights position in some Member States at:

<https://www.lawsociety.org.uk/topics/brexit/preparing-for-the-end-of-the-transition-period>

Solicitors Regulation Authority: [UK's Exit from EU – Possible non-negotiated outcome at end of transition period \(31 December 2020\)](#)

### **Council of Bars and Law Societies of Europe (CCBE)**

'Guidelines for Bars & Law Societies on Free Movement of Lawyers within the European Union': <https://bit.ly/3kNIcWM>

'Conditions for the admission of lawyers from non-EU Member States to the title of the local legal profession in each EU Member State and conditions under which lawyers from non-EU Member States can perform temporary services in each Member State under their own home title': <https://bit.ly/369mhFg>