



Law Society
of Scotland

Written evidence

Future UK-EU relations: trade in services

February 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Trade Policy Working Group and other relevant policy committees welcome the opportunity to respond to the EU Services Sub-Committee Inquiry on *Future UK-EU relations: trade in services*.¹ We have the following comments to put forward for consideration.

Consultation questions

Cross-cutting issues:

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

While a free trade agreement (FTA) is better than no agreement from a services perspective, the deal is largely focused on trade in goods. The impact on trade in services between the UK and EU will vary from sector to sector and in some is therefore likely to be severe. The new barriers faced by both goods and services may generate business for services firms involved in providing advice on how to deal with the new administrative and regulatory requirements. However, if the overall trade volume in goods and/or services trade decreases, supporting services provision is also likely to decrease in tandem, given the interconnected nature of goods and services trade.

Generally, the provisions on trade in services and investment could be stronger but there are a number of helpful aspects, including a specific section on legal services not usually found in a trade agreement. We note that Chapter 1 General provisions, Article SERVIN.1.4 provides for a review of commitments and reservations in services included in Annexes SERVIN1-4.

The chapter on cross-border provision of services includes provisions regarding market access, local presence, national treatment and MFN treatment. We welcome Article SERVIN.3.2, which bars the restriction

¹ <https://committees.parliament.uk/work/945/future-ukeu-relations-trade-in-services/>

on or requirements for 'specific types of legal entity or joint venture' as it ensures that eg LLPs (common in the legal services sector) would be able to provide services. Article SERVIN.3.3 prohibits requirements to establish or maintain an enterprise in order to provide services. Similarly, service providers cannot be required to be resident in the territory of the other party. However, we note that under Article Page 6 SERVIN.3.6 the provisions do not apply to non-conforming measures listed in Annexes SERVIN-1 and 2 so again these will need to be considered on a country-by-country basis – see Q2 below.

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

National reservations will detract from the market access benefits which appear to have been agreed in the main text of the Bill. The interplay of the various provisions and the annexes means it is difficult to ascertain immediately exactly what the agreement guarantees. National reservations may significantly reduce the benefits on a country by country basis, thereby detracting from the rights which an initial reading of the articles in the main body of the agreement would suggest has been achieved. Furthermore, the fragmentation resulting from this plethora of different requirements may, in itself, act as a barrier to trade as businesses will need to understand the impact on their business in each separate jurisdiction, rather than being able to rely on a uniform understanding of the rules, as was the case with EU membership.

Legal services are a prime example of an area where the potential benefits of commitments in the main body of the text will, in fact, be eroded by national reservations. See further below.

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

As anticipated, the mobility of professionals has been severely reduced as a result of withdrawal from the EU. To gain a full understanding of the impact of the new relationship, it will also be important to gain a greater understanding of the operation of the 9-day limits on Schengen and non-Schengen travel. There are a number of other related issues, with which businesses will need to get to grips in the coming months - for example tax implications of doing business overseas.

As with the reservations noted above, the need for professionals to familiarise themselves with the respective immigration regimes for each Member State to which they wish to travel and to understand the limits of what they are able to do while there, also presents a barrier in itself.

While we are pleased to see that specific provisions have been included on provision of legal services, these are of limited use in terms of being able to provide legal services given the prohibition on taking fees. See further at Q10 below.

We welcome a number of the provision around mobility of professionals within businesses, particularly those in relation to intra-corporate transferees and which allow for mobility of trainee professionals during the qualification process. However, we note that the usefulness of these provisions is limited to those businesses, which operate an establishment model and is therefore likely to be less beneficial to smaller businesses or

those which operate a referral type of collaboration model with overseas partners, for example through network organisations such as Lex Mundi.²

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

We note that Title V generally codifies existing EU and UK law regarding well-recognised intellectual property (IP) rights: trademarks, patents, copyright, unregistered designs, registered designs, plant variety rights. We note that the UK and the EU will in future be separate for the purposes of assessing exhaustion of rights.

The impact on intellectual property rights in themselves is therefore fairly low, although the requirement to protect IP in the UK and the EU separately will generate additional costs for businesses.

This is separate from the impact on the IP industry as a whole, by which we mean those providing IP advice, including solicitors – see further below.

Financial services:

- 5. How will the arrangements in the UK-EU Trade and Cooperation Agreement shape UK-EU trade in financial services?**
- 6. The Joint Declaration on Financial Services Regulatory Cooperation sets out that both sides seek to establish structured regulatory cooperation on financial services. What form should this dialogue take?**
- 7. Given the plans to delegate more powers to financial regulators, what form of Parliamentary oversight of these regulators would be appropriate?**
- 8. How might the financial services sector be affected by the changes in other, interrelated sectors?**

We have no comment on questions 5-8.

Professional and business services:

- 9. How will the new UK-EU framework for the mutual recognition of professional qualifications affect professionals and service sector businesses?**

Overall, the new framework fails to replace the significant advantages to those seeking recognition of their professional qualification in order to provide services across the EU. We will focus our comments on legal services, as other industries are better qualified to comment on the specifics of their own regimes.

We note the particular issues which arise in relation to legal services, given the fact that legal advice is often jurisdiction-specific. However, we also note that in an increasingly globalised and interconnected world, legal

² <https://www.lexmundi.com/>

advice to one client in relation to a single transaction may also have implications for multiple jurisdictions. Competition law advice in relation to a merger or acquisition is a classic example of this. Without the ability to continue providing this advice on an EU-wide basis, UK firms are likely to lose significant volumes of business.

Because of the sensitivities around legal services generally, exacerbated by these jurisdictional specificities, a separate EU regime was created to govern free movement of lawyers and establishment of lawyers and legal firms within the internal market. The benefits of participation in this regime have not been replicated in the new agreement.

The TCA provides for a framework for the adoption of future recognition mechanisms between the EU and UK, which is based on the EU-Canada (CETA) model. Specifically, it establishes a framework for the negotiation of EU-wide arrangements in the form of Mutual Recognition Agreements (MRAs). Under these arrangements, regulators can make joint recommendations to the Partnership Council regarding profession-specific arrangements. The provisions have to be read with SERVIN Annex 6 to the services sections regarding the requirements for recognition of qualifications. It should also be noted that the ability to qualify may be subject to residence and/or nationality requirements.

It is also possible for individual agreements to be negotiated with regulators in specific members states. BEIS has advised that “independent approaches to EU counterparts should always be made with the whole UK regulatory family” – ie recommending a united approach from all UK regulators. However, we have been advised by BEIS that the fact that the mechanism exists does not oblige regulators to use it when forming bilateral agreements with other bars. For example, if we chose to come to an agreement with an EU counterpart directly, there would be no expectation or requirement to involve other UK regulators, nor that this would involve the Partnership Council. We intend to initiate discussions with UK counterparts about what, if any, their plans are in respect of MRAs with individual EU bars.

Under national arrangements we know that it would be possible for UK lawyers to requalify in some EU jurisdictions (eg Ireland and France) but in others there may be no expedited route to requalification and therefore in countries where it is possible for foreign nationals to qualify, UK lawyers would need to go back to the start of the process. We also note that in the case of Ireland, Scottish solicitors are at a disadvantage with respect to their rUK counterparts in terms of ease of requalification. As noted above, residence and/or nationality requirements may mean that requalification in certain jurisdiction is impractical or entirely impossible for most UK lawyers.

While we welcome the fact that the agreement goes further than other EU trade agreements, it nevertheless reduces opportunities to export legal services and limits the ways in which the legal professions in the UK can serve their clients and provide advice to citizens and businesses. The TCA in this respect will put the professions at a competitive disadvantage as regards their EU counterparts.

We also consider that it would have been helpful to include some recognition of the provisions of the Northern Ireland Protocol relevant to this area. Annex SERVIN-6 Guidelines for Arrangements on the Recognition of Professional Qualifications, (see also Article SERVIN.5.13) are to be "taken into account" in the development of joint recommendations by professional bodies or authorities in the UK or EU ("joint recommendations").

These are expressed to be non-binding and non-exhaustive and to "set out the typical content of arrangements". They "should be taken into account by the Partnership Council when deciding whether to develop and adopt arrangements." This is a helpful provision for future development of arrangements on the recognition of professional qualifications.

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?

Legal services covered by the agreement include advice on home country law and public international law, as well as arbitration, conciliation and mediation. *The agreement contains positive arrangements regarding "home title"³ rights for lawyers, but these are subject to reservations, which may significantly detract from their utility in ensuring UK lawyers can provide cross-border legal services.*

Furthermore, these provisions only appear to address the right to advise clients and only in relation to advising on UK law, not EU law; crucially they do not cover legal professional privilege. This is a particular concern in areas such as competition law where the ability for the client to claim privilege is essential to their choice of legal advice. In practice this means that, while UK lawyers could advise eg a French client on UK merger control (unless French law prohibits this), they would be unable to advise a French client on EU merger control, and the advice would not be privileged. Similarly, anticompetitive agreements or conduct can involve infringement of substantially similar provisions of UK, EU and individual member states' competition laws, necessitating the provision of an integrated legal service. This lack of privilege is likely to have a devastating effect on UK lawyer's practice and ability to work in the area of EU law, even if in theory they are not prevented from advising, as clients will not wish to issue instructions without the protection of LPP.

In contrast in the UK, legal professional privilege is recognised as the right of the client. It is also considered that clients should be able to choose their legal adviser. These two principles together underpin the UK's recognition of legal professional privilege in relation to legal advice, no matter the location or qualification of the legal adviser. UK lawyers are therefore at a disadvantage in comparison to their EU colleagues who would be able to give privileged advice to UK clients. In addition, seeking to persuade individual Member States to recognise UK lawyers can only produce patchwork results and would not necessarily provide privilege for advice on EU matters, merely protection for advice on local law or UK so it does not really help those lawyers who have hitherto been able to advise on multijurisdictional impacts.

Furthermore, under Article SERVIN.5.48, "Legal services" do not include "legal representation before administrative agencies, the courts and other duly constituted official tribunals of a Party..." (eg the European Commission in cartel cases or before the CJEU). We also note that it is not clear how Sections 2 and 7 of Chapter 5 interact, but one might assume Section 7 prevails as being the more specific. It also excludes legal

³ ie the title under which a legal professional original qualifies, eg a Scottish solicitor or a German *Rechtsanwalt*.

advisory and legal authorisation, and documentation and certification services supplied by legal professionals entrusted with public functions in the administration of justice.

UK lawyers are in principle allowed to supply legal services in EU member states using their home title in relation to home jurisdiction law and public international law. However, EU member states can set registration requirements in their territory as a condition for UK lawyers to supply legal services. However, the registration process should not:

- (i) be less favourable than those which apply to lawyers from third countries in relation to third country law or public international law; or
- (ii) amount to or be equivalent to any requirement to requalify into or be admitted to the legal profession of the host jurisdiction.

Loss of access to the EU legal services market and associated rights will impact solicitors, advocates and barristers working in a range of legal practice areas, from international commercial law to family law, and from financial services advisory to private client.

In addition to the loss of general cross-border practising and establishment rights, there are a number of specific concerns in relation to certain types of work, including:

- Lawyers working in fields such as competition (both anti-trust, and mergers and acquisitions) whose clients could be subject to investigations for suspected breaches of EU competition law, need EU legal professional privilege (see EU legal professional privilege);
- Intellectual property lawyers are concerned about the loss of rights to represent clients before the European Union Intellectual Property Office (EUIPO) and the fact that UK lawyers will no longer be permitted to file applications on behalf of clients for EU-wide rights protection.

Anecdotal evidence from members highlights concerns that clients who are, or could be, subject to a European Commission investigation will generally be less likely to instruct UK-qualified lawyers following EU withdrawal, whereas before UK firms were routinely instructed to lead on EU-wide cases. Similarly, in relation to Intellectual Property, when UK-based clients are more likely to require representation before the EUIPO if they have no domicile or principal place of business in the EU or EEA, UK lawyers will no longer be able to provide that advice. The impact of this is loss of revenue, potential loss of jobs and a loss of capability and reputation that the Scottish legal profession has built up over decades of EU membership.

All these rights must also be read against the context of relevant immigration law provisions.

Lastly, we note that the removal of the so-called E-list of EU lawyers in the UK may impact upon the assessment of overseas Bars/ Member States in determining the extent to which additional rights might be returned to UK lawyers on the basis of reciprocity. We note that a specific list has been agreed under the current arrangements between the UK and Switzerland. It is to be hoped that the openness of the UK jurisdictions will be taken into account in ensuring a practical assessment on the part of the Member States, but it may be that the UK requires to create something more formal to pave the way for such reciprocal rights.

Research and education:

11. Under the future relationship agreement, the UK will become an associate member of Horizon Europe but will not associate with the Erasmus+ programme. What impact will this have on the UK's research and education sector and students in the UK and EU?

We are aware that over many years law students benefitted greatly from being part of the Erasmus programmes. These benefits are numerous: the ability to study at excellent universities across Europe; the chance and challenge of living in a different country immersing oneself in a different culture and learning a language deeply; and for some the rigour of learning about a different legal system which afforded them the opportunity to study their own system comparatively. Similarly, we know that those students from around Europe who chose to study law here in Scotland as part of their Erasmus programme added greatly to the student body and to legal study here.

12. 12. What is your assessment of the Turing Scheme - the Government proposed domestic alternative to Erasmus+?

It is too early to comment on the Turing Scheme.

Creative industries:

13. How will the provisions in the UK-EU Trade and Cooperation Agreement affect the creative industries sector?

We have no comment on this question.

Data and digital services:

14. The EU has granted the UK a six-month data adequacy 'bridge' to allow the free flow of personal data until the EU determines whether or not to grant a data adequacy decision to the UK. How would the absence of a data adequacy decision at the end of this bridging period affect trade in services?

Lack of a data adequacy decision would have a significant impact on trade in services. Free flows of data underpin all aspects of services provision.

This holds true also in the context of legal services. Cross-border family law cases or personal injury claims clearly rely on personal data, often of a sensitive nature, crossing borders. However, smaller pieces of personal data will also routinely need to cross borders as result of commercial transactions, for example as part of the due diligence process. Although the GDPR provides for cross-border transfer of data to third countries where there is no adequacy decision, the additional safeguards required are likely to present a

significant barrier. As evidenced by the recent Schrems II⁴ decision, even a specific agreement with the European Commission has been held to fail to meet the requirements of the GDPR, which may raise questions regarding the long-term guarantee of data flows to the UK, even with an adequacy decision, if specific concerns were raised regarding security of that data, for example as the result of a change in UK domestic law.

15. What impact will the arrangements agreed have on digital trade and trade in digital services between the UK and EU?

Digital contracts Article DIGIT.10 includes provisions on the conclusion of contracts by electronic means. The parties must ensure that domestic law “neither creates obstacles for the use of electronic contracts nor results in contracts being deprived of legal effect and validity solely on the ground that the contract has been made by electronic means.” However, this is subject to certain exceptions such as legal representation services, services of notaries public, contracts that require witnessing in person, contracts that establish or transfer rights in real estate and contracts requiring by law the involvement of courts, public authorities or professions exercising public authority and contracts governed by family law or by the law of succession.

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⁴ CJEU judgment C-311/18 “Schrems II”