



BEG COMMENTARY ON LEGAL SERVICES IN THE TCA¹

Overview

The UK-EU Trade and Cooperation Agreement (“TCA”) was published on Christmas Eve, signed on 31 December 2020 and is expected to be ratified by 28 February 2021. Until then it is under provisional application².

In this paper, BEG focusses on the provisions dealing with legal services and mutual recognition of professional qualifications.

Legal Services

It was always expected that the TCA would be largely silent on services so it was encouraging to see a specific Section 7 for Legal Services – one of six specialist sectors included³.

In overview, Section 7 permits UK qualified solicitors and barristers to provide legal services under their home professional title, subject to a possible requirement to register with a competent authority in a EU27 State⁴. Member States cannot require UK lawyers to requalify or become established in a local law firm and must afford them no less favourable treatment than other third country lawyers⁵.

However, beyond that, the freedom is basically equivalent to a no-deal WTO scenario, by which, subject to additional formalities required in several Member States (e.g. economic needs tests), UK lawyers have Modes 1,2 and 4 access (see more below) under the EU’s GATS Schedule, for home country and public international law, *but not EU law*.

The TCA makes clear that the EU27 and the UK are free to regulate and supervise the supply of designated legal services within their territory⁶. The EU27 are also free to implement future measures that restrict or limit certain activities⁷. Annex SERVIN-3 is clear that the non-discrimination provisions in the TCA do not mean that the EU27

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² FINPROV11.

³ The others concern Postal and Courier services, telecoms, digital services, financial services and maritime.

⁴ SERVIN 5.49(1).

⁵ SERVIN 5.49 (2).

⁶ SERVIN 5.47(2).

⁷ SERVIN 5.50(2).

States have to accord UK qualified lawyers the same treatment as lawyers from other EU Member States.⁸

The UK having left the Single Market, UK qualified lawyers will not benefit from the full passporting arrangements under the EU Directives. Indeed, ANNEX SERVIN 3 and 4 sets out a “negative list” of existing “non-conforming measures” that each EU27 State is entitled to maintain in place governing access to the profession in their territory, which include work permits, limited length of stay, the imposition of an “economic needs test” which may limit the number of service providers allowed in the light of the relevant market situation in the host State. Independent legal professionals, such as barristers, providing advice on UK and PIL only, will be subject to an economic needs test in 14 EU27 States⁹. By contrast, the UK has largely imposed no restrictions on incoming EU lawyers¹⁰.

Scope of legal services permitted

In some ways, the rights under the TCA are narrower than the WTO since the TCA only permits foreign lawyers to advise on their home jurisdiction law and public international law; UK lawyers cannot for instance advise on EU law when acting in another EU27 State¹¹, or even, strictly speaking, when advising an EU client in the UK or remotely from the UK.

Further, the scope of the services that they may provide is limited; they may only provide legal advice and arbitration services; the permitted activities do not include legal representation before the EU Commission or national administrative authorities and agencies or national courts.¹² So a UK qualified solicitor or barrister would not be able to represent a UK or overseas client in a merger case, antitrust or state aid investigation before the EU Commission or in a telecoms, pharma or regulatory dispute before the national competent authorities under many EU harmonised regulatory frameworks. Moreover, without a full qualification in a EU27 State, giving them rights of audience before its courts, they would also not be able to act in subsequent appeals before the General Court or CJEU. That means that UK companies will remain subject to antitrust, consumer, data, environmental and other regulatory investigations and fines by the Commission and EU27 authorities but will not be able to instruct UK solicitors and counsel to represent them during the administrative phase or in any appeals under EU law.

⁸ Para 4 of ANNEX SERVIN 3. See also page 535 TCA which makes clear that the EU27 will not afford the same treatment to law firms established in the EU27 unless they possess an effective and continuous link with the economy of one of the Member States.

⁹ Table at page 752 TCA - Belgium, Bulgaria, Czech Republic, Denmark, Greece, Spain, Finland, Hungary, Italy, Lithuania, Malta, Romania, Slovenia and Slovak Republic.

¹⁰ Table at Page 761 TCA.

¹¹ SERVIN 5.48(a)

¹² SERVIN 5.48 – Definition of Legal Services.

Modes of Supply

Lastly, there are complicated modes for supplying services. UK barristers may provide legal services (on home and PIL) remotely (over the internet, by phone etc) to clients in other EU27 States (Mode 1), or to EU clients who come to them (Mode 2). The TCA also envisages that (subject to individual requirements of the EU27 States¹³) lawyers can operate by setting up a branch or establishment or joining a legal entity in a EU27 State but those options are likely to be unattractive to most independent barristers. That also rules out some of the means of providing services (such as via secondment or contracted services). Most barristers will want to provide services to EU27 clients on a temporary fly-in-fly-out basis (Mode 4). They will be able to do this but again only to give advice on home state and PIL, and in several Member States, even that is subject to an economic means test. Mobility rules will also impose conditions on entry and supply of services in individual EU territories. Further, barristers will need to research the local rules regarding privilege, confidentiality and data transmission as privilege in particular will depend on individual national regimes.

Mutual Recognition of Qualifications

The provisions on mutual recognition are set out in SERVIN 5.13 and ANNEX SERVIN 6. The professional bodies and authorities in the EU27 and UK may make joint recommendations, based on the guidelines in Annex SERVIN 6. Those guidelines are not exhaustive and are subject to further development by the Partnership Council, who may make recommendations to facilitate simplification and mutual recognition. However, that process is expected to take some time to develop.

In order for a UK lawyer to be registered as a lawyer in a host EU27 State and therefore able to advise on local law or EU law, the host professional bodies are still entitled to apply their own requirements for registration, which may include permanent residency, training under supervision from a local lawyer, having an office within the jurisdiction or having the qualifications to practice local law¹⁴. There may also be restrictions on advocacy rights before certain courts, limits on partnership or shareholdings or a requirement for reciprocity.

Conclusion

It is likely that negotiations will continue, following the end of transition, either bilaterally between the UK Bar Council/Law Society and the EU27 professional bodies or multi-laterally within the Partnership Council (or more likely the Specialised Committee on Services, Investments and Digital Trade), to facilitate the supply of legal services into the EU going forward.

¹³ See residency requirements for partners – page 535-538 TCA.

¹⁴ Page 545- 553 TCA

It is hoped that most qualified barristers will have taken the necessary steps to be recognised in another Member State before the end of the transition period, thereby taking advantage of the grandfathering protections offered by the Withdrawal Agreement¹⁵.

¹⁵ See <https://www.barcouncil.org.uk/uploads/assets/87a69ddd-e8c5-492c-9cef52e374821004/8393a03a-b588-422e-8dcbe5bf6e1874ab/Transition-FAQs-Part-I-Practice-Rights-13-October-2020-final.pdf>