Legal Services Provisions in the UK-EU Trade and Cooperation Agreement: Good but Incomplete

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As the UK continues to establish its own trade policy, it is vital that legal services, which provide more than £60 billion per year to the UK's economy, are paid sufficient attention in trade negotiations. UK legal expertise is high demand around the world and the service of international clients is a key source of revenue for many UK lawyers. Lawyers rely on the possibility of short-term visits to foreign jurisdictions for the purposes of providing legal advice (sometimes described as fly-in fly-out, or FIFO) as well as temporary secondment/establishment rights in a jurisdiction. While there are many lucrative, fast-growing markets in Asia, the ability for lawyers to continue to provide advice in these ways in the EU is an issue of some importance. The Lawyer's Establishment Directive ceased to apply to UK lawyers at the end of the transition period. Today UK lawyers seeking to provide legal advice in the EU must deal with 27 separate regulatory regimes.

Fortunately, the principle of home title practice was recognised in the EU-UK Trade and Cooperation Agreement (TCA), finalized at the end of last year. It should be pointed out that the inclusion of any material on legal services in a Free Trade Agreement is in itself a achievement since historically they have been ignored in international negotiations, with the Comprehensive Progressive Trans-Pacific Partnership (CPTPP) and the agreement in principle between the UK and Australia other notable exceptions. Under the home title principle, parties to the TCA agree to permit practice by lawyers of the other party under their home jurisdiction professional qualification with regards to advice on home country and public international law, as well as arbitration, conciliation and mediation. On their own these are already sizable areas of the legal services market for most UK lawyers serving clients in the EU.

There is some concern, however, that the language used in the text of the TCA appears to contemplate a restrictive interpretation of the home title rules. The relevant provision in the TCA (Article 194) expressly refers to the

categories of Contractual Services Suppliers (CSSs) and Independent Professionals but it omits other key categories of business visitors such as Intra-Corporate Transferees (ICTs) and Business Visitors for Establishment/Investment Purposes (BVEP/BVIP). Under the principle of treaty in interpretation which suggests that the express mention of a specific thing excludes other specific things which are not mentioned (*expressio unius exclusio alterius*), legal services provisions in the TCA appears only to apply to lawyers who qualify as either CSSs or IPs. This is a very small group, excluding many of the services normally supplied on the crucial fly-in-fly-out basis.

Furthermore, in terms of market access, the TCA's commitments on legal services, while better than most FTAs, do not offer much to UK lawyers compared to other non-EU lawyers dealing with the EU on WTO General Agreement on Trade in Services (GATS) Most Favoured Nation (MFN) terms. Although the TCA includes a revised schedule of reservations by individual EU Member States, which clarifies the current level of market access and locks it in as permanent commitments, actual market access is complicated, again because UK qualified lawyers are still subject to 27 different regulatory regimes across each EU Member State. Some States, such as Greece, maintain significant restrictions. Some jurisdictions are more permissive, such as Germany. Germany added solicitors among the non-EU professions that are eligible for Foreign Legal Consultant Status in Germany, meaning that UK lawyers can continue to advise clients on UK and public international law under their home title.

In negotiating enhancements of these commitments in the TCA, as well as in entirely new FTAs with other countries, the UK should seek mobility provisions which facilitate the secondment of lawyers to offices of those partner or law firms. Without mobility, theoretical market access rules for legal practitioners are meaningless. Legal services should accordingly be included in the permitted activities for short-term business visitors. There should further be an express acknowledgement in market access schedules, not simply of the right to meet clients, but also to provide services and receive payment. These activities should be permitted without the need for visas, work permits, economic needs tests or other burdensome procedures which operate as barriers to services trade. Furthermore, where they are required, visa processing times must be minimized and relevant eligibility criteria should be no more onerous than necessary.

When establishing its trade negotiation objectives for legal services, the UK government should take into consideration the way law firms are structured. Some jurisdictions may view law firm partners as employees, whereas others consider only associates fit into this category. This latter view renders the

category of Independent Professional impractical for most lawyers. Moreover, since many large and medium-sized law firms have branch offices across the world, their lawyers typically often cannot use the category of CSSs in foreign countries. Under Article 140 of the TCA, for example, a branch office in one EU member state disqualifies lawyers from using the CSS provisions in all member states.

Although the incomplete coverage of legal services (both market access and mobility) in the TCA is a cause of concern for some UK lawyers, whether it is a significant practical problem for the UK legal profession as a whole is unclear. The number of UK-qualified lawyers that had been providing advice on EU law or the laws of EU Member States was almost certainly small relative to the size of the profession and the value of transactions, even before Brexit. This aspect of client service was probably just as easily, or almost as easily, facilitated by the retaining of EU or specific Member State experts to supplement other forms of advice, a practice which remains permissible today.