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

Part II PRACTICAL IMPLICATIONS OF THE END OF TRANSITION FOR (Cross border) CASE MANAGEMENT

Introduction: State of Play EU-UK negotiations

1. Following the departure of the UK from the EU[1] on 31 January 2020, and in accordance with the terms of the binding withdrawal agreement **2019** (WA) we are now in the latter stages of the Transition Period provided for in the WA 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[2], with the UK becoming a "third country" in the full sense. The right of UK-qualified practitioners to supply a full range of legal services in and into the EU / EEA therefore ends on 31 December 2020.

2. The current expectation is that there will be no, or at best a limited, FPA in place to replace /complement the Withdrawal Agreement by 31 December 2020. The likelihood is that it will not cover legal services adequately or at all, nor provide for future EU-UK judicial cooperation. Negotiations will inevitably continue thereafter, both at EU-UK level and bi and multi-laterally between competent bodies such as the Bar Council/BSB at national or regional level. We will continue to work tirelessly to try to secure maximum possible reciprocal access for legal services, in the interests of facilitating access to justice for our clients.

What rules will govern provision in and into the EEA of legal services from 1 January 2021?

3. As things stand, as of 1 January 2021, and absent a comprehensive EU-UK agreement, your right to continue to advise and represent clients on or into EEA territory will be governed by a combination of the WA, the WTO's General Agreement on Trade in Services (GATS)[3], and domestic law and regulations in the relevant EU / EEA Member State.

4. In order to help practitioners[4] to prepare for this change, the Bar Council's Future Relationship Working Group (FRWG) is developing a set of FAQs, presented in five inter-

[1] Note that, as the UK was a Contracting Party to the European Economic Area (EEA) Agreement (between the three EFTA States, Iceland, Liechtenstein and Norway and the EU) by virtue of its EU membership, 31 January 2020 also marked its departure from the EEA.

[2] The WA does preserve certain limited EU rights and obligations on and in the UK. Where relevant, these are expressly referred to in this paper.

[3] For a GATS overview and useful links, see: https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm

[4] 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.

dependent parts: implications for your practice rights; case management; key substantive and procedural law changes, mobility issues and career and study choices. These will be updated and supplemented as more is known. Below you will find advice on case management. However, we note that Part I, Practice Rights is directly relevant to, and frequently referred to in, this paper and should be read in conjunction herewith. All five parts will be carried on the Bar Council's Brexit webpage at: https://www.barcouncil.org.uk/policy-representation/policy-issues/eu/brexit.html

I CASES BEFORE THE COURT OF JUSTICE[5] OF THE EU (CJEU)

5. Rights of audience before the CJEU[6] are reserved to practitioners who are authorised to practise before the courts of an EU / EEA Member State (Article 19 of the Court's Statutes). To be clear, a legal representative must meet this requirement at all stages of the proceedings, up to and including the delivery of judgment. Since the UK ceased to be a Member State on 31 January 2020, UK qualified practitioners ceased to comply as of then unless they are called to an EU/EEA Bar. However, the provisions of the WA extend all UK practitioners' rights of audience before the CJEU *up to the end of transition* for all matters, and beyond that date for pending cases and certain categories of new cases that relate to the WA itself – on which see more below.

What, therefore, are your options if you are currently, or expect to be, instructed in a case involving proceedings before the CJEU after 31 December 2020?

Most comprehensive solution – immediate call to an EEA Bar

6. Part I of this series of FAQ papers outlines the unique and time-limited opportunity that the WA itself provides for UK qualified practitioners who have not already done so, to be called to an EEA Bar, based on the recognition of their UK qualification, thereby securing EEA practice rights, including rights of audience before the CJEU, which will be grandfathered beyond the end of Transition. To take advantage of this, practitioners must fulfil the relevant criteria and have completed the relevant application process, before 31 December 2020 - please see the detailed advice in Part I.

7. Note that UK practitioners involved in cases before the Court who already hold alternative EEA practising certificates are advised to lodge them with the Court's registry as soon as possible in order to protect their client's position.

8. Practitioners who have taken this step before 31 December 2020 are referred to hereinafter as "UK EEA-qualified practitioners". Reference to "UK-only-qualified practitioners" means

[5] For the purposes of this paper, the term CJEU should be understood to include both the Court of Justice of the EU and the General Court (GC), unless otherwise indicated.

[6] The rules are the same whether proceedings are in person or online

practioners authorised to practice before the UK courts, but not those of an EEA Member State, as of 1 January 2021.

UK-only qualified practitioners' rights of audience before the CJEU post-transition

9. The default position as stated in para 5 above, is that you will no longer be entitled to assist or represent parties before the CJEU after 31 December 2020. Moreover, Article 88 WA provides that the CJEU's rules of procedure shall apply to all judicial proceedings and requests for preliminary rulings relating to the WA as well.

Nonetheless, are there any categories of cases in which UK-only qualified practitioners can appear before the CJEU post-transition?

10. Article 91 WA itself provides for a number of exceptions to the-above stated default position. If you are instructed in a case that falls into one of the categories outlined below, you should be able to assist and represent your client in all stages of those proceedings before the CJEU after 31 December 2020, using your UK title.

Exceptions to Art 88 WA (1) Cases pending before the CJEU before 31 December 2020

11. Thus:

- A UK-qualified practitioner currently involved in a case pending before the CJEU (including where a preliminary reference is lodged at the last possible opportunity before the 31 December deadline), may continue to assist / represent that client in those proceedings including on appeal or if the case is referred back to the General Court (GC) (Article 91(1) WA).
- That right continues *after 31 December 2020* and until the proceedings are exhausted provided you were *already so instructed*, and the *proceedings duly lodged*, prior to that date. Article 91(1) WA.
- Note the double condition here – the case must be pending, *and* the lawyer instructed, prior to 31 December 2020. It follows therefore that if there were a change of legal team after the 31 December 2020, any replacement lawyer could not be UK-only qualified.

Exceptions to Art 88 WA (2) Categories of WA-related cases launched after 31 December 2020

12**.** UK-qualified practitioners will also exceptionally have rights of audience before the CJEU in new cases brought after 31 December 2020 in the following circumstances:

(i) When representing or assisting parties in new proceedings before the CJEU, brought by the European Commission against the UK within 4 years of the end of transition, for:
   - Failure to fulfil a Treaty obligation or an obligation under Part 4 WA (Citizens Rights) before 31 December 2020. (Article 87(1) – see 91(2) WA)
   - Failure to comply with a decision under Article 95 (1) WA, or failure to give legal effect thereto in the UK's legal order. (Article 87(2) – see 91(2) WA)

(ii) When representing or assisting parties in new proceedings brought before the CJEU under Article 95(3) WA concerning the legality of decisions taken under Article 95(1)WA (see Article 91(2) WA).

(iii) When representing or assisting the UK in proceedings covered by Article 90 WA in which the UK has decided to intervene or participate. (See Article 91(2) WA).
(iv) When representing or assisting parties in cases before the CJEU brought under the following provisions (See Article 161(3) WA):
- Article 158 (1) Reference for a preliminary ruling on a point of EU law arising in a case concerning Part Two, Citizens' Rights, brought before a court of first instance in the UK within 8 years of the end of the transition period (i.e. before 31 December 2028);
- Article 160 – certain provisions arising under Part Five, Financial Provisions
- Article 161 (1) WA References for a preliminary ruling from an EU Member State concerning the interpretation of the WA.

13. For the avoidance of doubt, beyond these limited exceptions, and pending the conclusion of a comprehensive and ambitious EU-UK FPA covering legal services, or bi-or multilateral mutual recognition agreements (all discussed in Part I of this series) UK-only-qualified practitioners will no longer be authorised to appear in cases before the CJEU from 1 January 2021.

Mobility

14. Representation before the CJEU (unless proceedings are online of course) necessarily involves the practitioner's physical presence before the Court in Luxembourg. As at the time of writing, it is not yet possible to say with any certainty what mobility provisions will be in place as between the UK-EU or UK and any individual Member State. That said, we would not expect visa or other entry restrictions to apply in circumstances where their effect would be to undermine specific protection afforded to practitioners by the provisions of the WA itself. Consistent with WA commitments, Luxembourg would be expected to grant entry to its territory to lawyers appearing before the CJEU. Nonetheless, the Bar Council is working hard to conserve reciprocal mobility rights for practioners generally, and we will provide updates on this aspect.

Immediate action

15. If you have not already done so, you are strongly advised to explore your options to be called to an EEA Member State Bar before the end of December 2020, and thus benefit from the protection of your acquired practice rights guaranteed by the Withdrawal Agreement – see above and in detail in Part I.

16. 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, 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.

17. If you are a UK-only-qualified practitioner and you are involved in a case in which the interpretation of a point of EU law is arising or is likely to arise outside of the exceptions to Article 88 WA listed above, then:
- Ideally, the court should refer the matter to the CJEU before 31 December 2020.

- If the reference cannot be made before 31 December 2020, you will need to take steps to preserve the continuity of your client's representation in proceedings before the CJEU launched after the end of transition, in particular by ensuring that a lawyer who is authorised to appear before the Court thereafter is instructed in the case.
- If the case is pending before the end of transition, but there is a foreseeable risk that there will be changes to the legal team before the case is completed, practitioners should consider options and take appropriate action pre-31 December 2020 in order to preserve the continuity of the client's legal representation, bearing in mind that a change of lawyer thereafter necessarily would require the new appointee be EEA-qualified.
- In cases in which you are instructed after 31 December 2020, in the interests of your client and to ensure continuity of representation, you should as a matter of course ensure that a practitioner who is authorised to practice before the courts of an EEA Member State is included in the legal team at the appropriate time.

Other EU – EEA linked tribunals: Cases before the EFTA Court, EUIPO and UPC

18. Just as for the CJEU, rights of audience[7] before the **Court of Justice of EFTA** (the EFTA Court) are reserved to lawyers authorised to practise before the courts of an EEA state, meaning that here too, UK-only qualified barristers lost their rights of audience on 31 January. However, the UK-EEA EFTA Separation Agreement mirrors the EU-UK WA in that rights of audience are extended to the end of this year, and beyond for lawyers instructed in cases pending before 31 December 2020. Thus, the main elements of the advice above should also be followed by those instructed in cases before the EFTA Court.

19. The Bar's Specialist Bar Associations are providing excellent advice and support to their membership in individual practice areas. For the sake of completeness therefore, we simply note that UK departure from the EU / EEA has had a similar impact on the rights of audience of UK-only qualified practitioners hitherto enjoyed before the **EU Intellectual Property Office (EUIPO**), situated in Alicante, Spain, and responsible for the registration of EU Trade Marks and registered Community designs. Again, exceptionally, the Withdrawal Agreement extended those rights to the end of the transition period, and beyond for cases pending before 31 December 2020, though that will not apply to any proceedings brought on appeal to the CJEU thereafter. As regards the new **Unified Patent Court,** the UK formally withdrew its ratification in July of this year and is thus no longer a party. We refer you to the Intellectual Property Bar Association for more detailed insight and advice in this field.

II. CASES BEFORE NATIONAL COURTS IN EU / EEA STATES POST TRANSITION

20. As noted in the introduction, the right of UK-only qualified practitioners to supply a full range of legal services in and into the EEA from the UK ends on 31 December 2020.

[7] The rules are the same whether proceedings are in person or online

21. The Bar Council, Law Society and others are striving to secure ongoing cross-border practice rights for our members going forward, both in the context of an eventual EU-UK level agreement and where possible, through bi- and multilateral arrangements with national regulators / competent authorities in the Member States. Even at this late stage however, it is unfortunately not yet possible to say with any degree of certainty what, if anything, will be in place to facilitate UK-only qualified practitioner provision of legal services into and in the EEA after 31 December 2020. We will provide updates as soon as we can.

Comprehensive solution – immediate call to an EEA Bar

22. In the absence of such EU-UK or bi-or multi-lateral agreements covering legal services, as for cases before the CJEU, the simplest solution for UK practitioners wishing to conserve their practice in and into EEA Member States is to be called to a host bar situated on the territory. Thus, we again refer you to para 6 et seq above, and Part I of this FAQ series on Practice Rights and urge those in a position to do so, to apply for call to an EEA Bar based on the recognition of your UK qualification before the end of this year. In so doing, you would secure the protection of Article 27 WA which provides that such practitioners enjoy the same right to pursue their profession on the territory of their host Member State as do its nationals. Thus, beyond preserving rights of audience before the CJEU, these practitioners will also enjoy rights of audience before the courts in their host state, as well the right to give advice on EU law there, all using the host state title and benefitting from legal professional privilege (on which, see more below).

23. Ideally, you would be called in the Member State with which your practice has the closest connection. This is because call to an EEA Member State Bar will not automatically confer practice rights in other EEA Member States unless you have EU citizenship (see Article 27 WA). More information, links and advice can be found in FAQs Paper I.

UK-only qualified practitioner rights to practise in and into EEA Member State territory from 1 January 2021

The problem in more detail

24. As things stand, as of 1 January 2021, and absent a comprehensive EU-UK agreement, your right to continue to advise and represent clients on or into EEA territory, will be governed by a combination of the WA, the WTO's General Agreement on Trade in Services (GATS), and domestic law and regulations in the relevant EU / EEA Member State. This is also explored in detail in FAQ Part I, but the broad lines are reproduced below for ease of reference.

25. 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

26. The default position under the GATS is that there is *no third country legal services access* unless members make specific commitments in the GATS to allow the provision of legal services on or into their territory by third country lawyers. Absent such member commitments, your right to provide legal services on or into the territory, and which services you can provide, are governed by the domestic law of each Member State.

27. The difficulty post-transition is that EEA Member States' GATS commitments are limited. Mode 1 and 2 commitments, for example, are restricted to advice on home country law and public international law (excluding EU law). This means that even if you are sitting in chambers in London, if you are providing advice to an EEA-based client remotely, or in physical conference, the particular Member State's commitments and reservations de jure apply, affecting your right to advise on EU law[8]. Luxembourg, for instance, requires registration as an "advocat" 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. Representation services in the field of arbitration are usually permitted or tolerated, but the position is not clear in all Member States. For the avoidance of doubt you may wish to verify the position with the relevant local bar association or competent authority. Employed barristers will for the most part fall into the category of 'contract service supplier' (CSS). Many Member States also recognise the category of Foreign Legal Practitioner (Art. VII GATS 1994) but note that their authorisation to practise on the host state territory is limited to giving advice under home title on home state law. (See Part I FAQs).

[8] There is no issue advising a client of whatever nationality on EU law as long as that client is not based in one of the EU Member States. You may moreover advise any client based in a 3rd country on EU law (or indeed other laws in which you are competent to advise) unless that country restricts your rights in this respect.

What then are the options for UK-only-qualified lawyers instructed in a case which will require the provision of legal services into or on the territory of an EEA Member State post-transition?

28. Again, absent an EU-UK or bi- or multilateral agreements covering cross-border legal services practioners will be obliged to inform themselves about the specific rules on the provision of legal services by third country lawyers on and into the territory of the Member State(s) concerned in their particular case, as, as described above, they vary from one country to another.

29. Thus, for legal advice and representation provided in GATS Modes 1 and 2, the first step would be to **c**heck the particular state's GATS commitments. For Mode 4, it will be necessary to check its domestic provisions on the type of legal services that may be provided by third country lawyers on their territories, and any conditions that apply thereto. As a starting point, see:

- EEA Member State-specific advice prepared by the Law Society at: https://www.lawsociety.org.uk/topics/brexit/preparing-for-the-end-of-the-transition-period.
- Table prepared by the Council of the Bars and Law Societies of Europe (CCBE) showing the 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.

We will add to this list shortly.

30. If the relevant GATS commitments / reservations or domestic rules exclude you from providing the service, or any part thereof, into or in the state's territory, you will need to take steps to ensure the continuity of your client's representation in the particular case, inter alia, by ensuring that a lawyer who is authorised to practise in or into that state is instructed, instead of, or in addition to you.

Mobility

31. Appearances before tribunals in EEA Member States (unless proceedings are online of course, though as noted above, the rules pertaining to rights of audience are unaffected), or the giving of legal advice on the territory, necessarily involve the practitioner's physical presence there. As noted at para 14 above in relation to appearances before the CJEU, at the time of writing, it is not yet possible to say with any certainty what mobility provisions will be in place as between the UK-EU or UK and any individual Member State. Absent an overarching EU-UK agreement, we expect practitioners will need to obtain entry to the Member State concerned as a visitor under the Schengen Borders Code or as a short-term business visitor under the particular immigration rules for the state concerned. Note though, that there are restrictions on length of stay, permitted activities and receipt of payment for said activities, which may further impede your ability to provide the relevant service, over and above the GATS-related restrictions described above. Rest assured, the Bar Council is working hard to try to conserve reciprocal mobility rights for practioners generally, and we will provide updates on this aspect, including in a specific Mobility-focussed FAQ Paper.

III. CASES BEFORE INTERNATIONAL COURTS IN EU / EEA STATES POST TRANSITION

32. The EEA territory (and Switzerland) plays host to several international (non-EU) tribunals, rights of audience before which are not EU /EEA-membership dependent and thus UK-only qualified practitioners should continue to enjoy them. These include the **European Court of Human Rights** (ECHR) situated in Strasbourg, France; the **International Criminal Court** (ICC), the **International Court of Justice** (ICJ) and the **Permanent Court of Arbitration** (PCA), all three situated in The Hague, Netherlands; the **International Tribunal for the Law of the Sea** (ITLOS), Hamburg, Germany; the **World Trade Organisation** (WTO) Dispute Settlement Body, Geneva, Switzerland; and the **European Patent Office** (EPO), headquartered in Munich, Germany but with a branch in The Hague, Netherlands.

33. As we now know, rights of audience are only part of the story in this new world. Practitioners who are instructed to appear in cases before any of these tribunals are advised to consult, well in advance, both the specific institutions' rules of procedure, and any agreement in place between the institution and its host state. Several of the latter contain provisions to the effect that representatives of parties before them shall enjoy privileges and immunities necessary for the independent performance of their functions. Thus, for example, in proceedings before the ICC[9], this expressly includes the enjoyment of "unimpeded entry into, exit from and movement within the host State" and that "visas shall be granted free of charge and as promptly as possible".

34. Thus, the key point for practitioners involved in cases before these tribunals after 31 December 2020, is that, absent an EU-UK agreement that facilitates reciprocal entry for professional services, they will likely need to obtain permission to enter as a visitor under the Schengen Borders Code, or locally equivalent visitor rules for non-Schengen states, allowing them entry to the territory. Specific agreements relating to appearances before such tribunals on the territory should facilitate the grant.

IV. LEGAL PROFESSIONAL PRIVILEGE

35. The WA protects your practice rights as an EU lawyer until the end of the transition period. That means that advice you give will attract LPP until 31 December 2020. The protection continues, in line with the provisions of Article 27 WA, if you are called to an EEA Bar, as described above and in FAQ Part I before the end of transition. What happens as regards advice given by UK-only qualified practitioners thereafter?

[9] Headquarters Agreement between the International Criminal Court and the Netherlands, Articles 25 and 37

Advising on EU Law after 31 December 2020

36. The settled case law of the CJEU[10] reserves legal professional privilege in matters before it to independent lawyers who have rights of audience before the courts of an EEA Member State. Even if you have found your way through the GATS and domestic rules mentioned above, thus allowing you to give advice on EU law in or into a Member State, and that Member State does afford LPP to third country lawyers, there is always the possibility that the case may involve proceedings before the CJEU at some stage.

37. Thus in order to protect your client's LPP in cases involving EU law, UK-only qualified lawyers advising on EU law matters after 31 December 2020, regardless of where, should ensure that:

- An EU/EEA qualified lawyer is present at the time advice is given; and/or
- An EU/EEA qualified lawyer countersigns the relevant documents.

38. By way of exception to the above, post-31 December 2020 lawyer-client communications that take place when advising on, or in the preparation of, cases that fall within the categories of pending and WA-related cases listed in Article 91 WA as exceptions to the general procedural rule set out in Art 88 WA (see paras 11 and 12 above) must logically also be protected by the WA and thus attract LPP.

Advising in cases before EEA domestic courts after 31 December 2020

39. Lawyer client communications are protected in all EEA jurisdictions. In some that is achieved by attaching to those communications the protection of legal professional privilege, in others by treating them as professional secrets. Either way, EU-qualified lawyers, just as barristers, are under an obligation arising from the lawyer-client relationship to keep confidential all communications between them that fall within the scope of the formal instructions. In some jurisdictions, the client can waive that confidentiality, though if it is based on professional secrecy, the obligation to keep communications confidential is almost always absolute. Indeed, in some jurisdictions, violation of professional secrecy by a lawyer is a criminal offence, not merely a breach of deontological rules. The extent to which LPP covers communications with a third country lawyer, whether employed or self-employed, also varies between the EEA states.

40. It will thus be apparent that UK-only qualified lawyers providing legal services in or into an EEA Member State, or who are involved in a case in which proceedings may come before its courts, should inform themselves of the rules of LPP/professional secrecy in that jurisdiction. If necessary, you should ensure that a locally qualified lawyer is present or countersigns advice. If the matter involves a point of EU law which could end up before the CJEU, such precautions should be taken in any event for the reasons described at para 36 et seq above.

[10] AM & S v Commission (C-155/79) and Akzo Nobel (C-550/07)

V. PROFESSIONAL INDEMNITY INSURANCE (PII)

41. The provisions of the EU lawyers' regime directives continue to apply until the end of the transition period on 31 December 2020. Thus:

- For lawyers established in an EEA Member State, Article 6(3) of the Establishment Directive allows the host state to oblige the lawyer to take out additional insurance, unless he or she can prove they have sufficient and equivalent cover according to the rules of their home state.
- For practitioners providing Modes 1-4 legal services from the UK, Article 4 of the Lawyers Services Directive sets out the provisions clarifying the scope of application of the host and home Member States rules according to the type of activity undertaken.

What about PII after the end of transition?

42. Future PII obligations, provision and coverage will depend on the form of the future EU-UK agreement, including as regards financial services, and also on the terms of any bi-or multi-lateral agreements reached between national authorities in the legal services field. In the absence of an EU-UK level agreement on financial services, there would be no passporting for UK insurance providers. Thus from the end of the transition period, the Bar Mutual Indemnity Fund, as a third country insurer no longer benefitting from the terms of the Withdraal Agreement, will lose its right to insure risks located in the EEA. It remains to be seen whether some less comprehensive arrangements for financial services could be agreed going forward which might facilitate competitive access to each other's insurance markets. As before therefore, we are unable to provide clarity on this at the moment but will keep you informed as matters progress.

43. In principle however, the following statements hold:

- Bar Mutual Indemnity cover for UK-based practitioners providing permitted Modes 1, 2, 3 and 4 legal services in and into the EEA will be on equivalent terms to those for a practitioner providing services to other third countries.
- UK-EEA qualified practitioners who are based in the UK will likely need to have PII coverage in both their host Member State to cover their practice there and before the CJEU and under the BMIF for their UK-based practice.
- UK-EEA qualified practitioners, resident in an EU country, who provide some legal services back into the UK will almost certainly not be eligible for BMIF cover. Practitioners in that position are advised to check the local host state insurance cover itself as well as its rules re third country insurance provision. If necessary, and provided their local, host state, insurance regime permits it, it may be that the BMIF will be able to cover their UK activity in reliance on the "reverse solicitation" provisions of the *Insurance Distribution Directive 2016 (IDD).* Further advice will be issued on this as the position is clarified.

VI. Data Protection and Data Transfers between the EU and the UK

Why is this an issue?

44. The General Data Protection Regulation 2016/679 (GDPR) (https://eur-lex.europa.eu/eli/reg/2016/679/oj), which operates in UK law together with the Data Protection

Act 2018, imposes a range of duties on 'data controllers' and 'data processors'. Both self-employed barristers and chambers are likely to be data controllers and/or data processors within the meaning of the GDPR.[11] The obligations imposed by the GDPR and DPA 2018 are strict, and practioners and chambers have adapted their data processing and storage systems accordingly.

45. The obligations imposed by the GDPR include obligations relating to international data transfers (i.e. transfers outside the EU/EEA). Such transfers are only lawful if they satisfy one of the criteria set out in Chapter V GDPR. While the UK remains bound by EU law, (by operation of the WA that means up to the end of the transition period), data transfers between the UK and EEA states are not subject to these rules, since all are subject to the terms of the GDPR. Thus, for now, a UK-based barrister may freely transfer personal data to and from EEA-based clients (subject to compliance with the other rules in the GDPR).

46. What about post 31 December 2020? At least initially, the UK's departure from the EU will not materially affect UK-based barristers' domestic obligations as regards data processing, retention, and storage. The Government has legislated to transpose the text of the GDPR into UK law (the "**UK GDPR**"), with consequent modifications to the DPA 2018.[12] The key principles, rights and obligations under the UK GDPR will remain the same at the outset, although it is open to the UK to seek to diverge from these principles if it wishes to do so.

47. From the EU/EEA perspective however, the UK will be a 'third country'. The rules relating to international data transfers will therefore apply to transfers of personal data from the EEA to the UK. (The UK also intends to put in place its own 'adequacy' regime, but has stated that it intends to permit transfers to the EEA. Data transfers from the UK to other third countries will need to comply with the existing UK GDPR transfer requirements. These are not covered in these FAQs.) At a practical level, the GDPR transfer rules will bite on EEA clients when they transfer data to a UK-based barrister. It will be necessary for those clients to have a lawful basis for that transfer.

48. The most straightforward basis for an international transfer is a transfer pursuant to an 'adequacy decision': a determination by the European Commission that the third country "*ensures an adequate level of protection*". Where a third country has the benefit of an adequacy decision, there are no specific requirements for a transfer (beyond compliance with the general obligations of the data protection legislation). An "*adequate level of protection*" is one "*essentially equivalent to that ensured within the Union*" (recital 104 GDPR).

49. The European Commission is presently conducting an adequacy assessment of the UK. Both the European Commission and the UK Government have stated that they hope to conclude

[11] The status of the entity processing data may vary depending on the particular data processed.

[12] Data Protection, Privacy and Electronic Communications (Amendments etc)(EU Exit) Regulations 2019. For the detailed changes to the legislation, see https://www.gov.uk/government/publications/data-protection-law-eu-exit.

this process before the end of the transition period. The adequacy process is separate to the negotiations concerning the FPA, but is being conducted on a similar timescale.

What do I need to do?

50. If the UK receives an adequacy decision from the European Commission before the end of the transition period, then at least in the short- to medium-term,[13] there will be no additional requirements for data transfers between EEA-based clients and UK-based barristers.

51. If the UK does not receive an adequacy decision from the European Commission before the end of the transition period because the assessment has not been concluded, then UK-based barristers will need to put in place alternative arrangements for such transfers. The mechanism that will generally be appropriate for self-employed barristers is the use of standard contractual clauses (SCC[14]s), by which the parties contract to observe GDPR-compatible data protection standards. If not, it *may* be legitimate for self-employed barristers to use the derogations available under art. 49 GDPR. This will require judgment by individual barristers. Further assistance on these options is available in the Bar Council's existing guidance 'Data transfers between the UK and the EU/EEA in the event of a no-deal Brexit' (https://www.barcouncilethics.co.uk/wp-content/uploads/2019/10/Ethics-Guidance-Data-Transfers-with-EU-under-No-Deal-1.pdf), which is applicable to this situation also.

52. If the UK is refused an adequacy decision by the European Commission, the implications of this for other forms of transfer, such as SCCs, will depend on the reasons why the UK's protections have been assessed as inadequate. However, it is possible that any such decision will also render questionable the legitimacy of SCCs for EEA-UK transfers. This is because the CJEU's recent judgment in the *Data Protection Commission v. Facebook* (Schrems II) case held in essence that any form of international transfer must provide an 'essentially equivalent' level of protection to that within the Union. If the reasons for a finding of inadequacy cannot be remedied through contractual provisions, that will have consequences for the utility of SCCs. The Bar Council will provide further guidance if such a situation comes to pass.

Bar Future Relationship Working Group
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[13] It is likely that any adequacy decision will be subject to considerable scrutiny, and in due course litigation in the CJEU: EU privacy campaigners have achieved substantial success in this field, persuading the CJEU to strike down two successive adequacy decisions in relation to EU-US transfers, and the concerns that led them to challenge the US adequacy decisions (in particular concerns about US national security data usage) are likely also to apply to any UK adequacy decision.

[14] The European Commission is working on revised SCCs, to reflect changes wrought by the GDPR and key CJEU jurisprudence, including the Schrems I and II judgments, but for the time being the current SCCs remain valid.