



**Lords European Affairs Committee
Inquiry into the future UK-EU relationship
Bar Council written evidence**

About us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Scope of Response

This submission addresses majority of the questions on which the Committee has sought evidence on. Those left unanswered are not reproduced below.

Executive Summary

1. The current EU-UK relationship is at a low ebb, due in large measure to a lack of trust on the EU side, reinforced by UK government positioning on EU-related matters and its apparent willingness to breach its international commitments.
2. The direction of travel adopted, until very recently, by the UK administration would only serve to antagonise further relations with the EU, which has demonstrated little appetite to be co-operative with the UK in the requests made to amend the Trade and Cooperation Agreement (TCA). Were the present UK government to continue with this approach, it is difficult to envisage circumstances in which EU UK relations might improve, no matter how desirable such an outcome.
3. Indeed, we would expect the EU to pursue the infringement proceedings that are already underway, as well as taking other enforcement or retaliatory measures, potentially in other areas of EU-UK cooperation as foreseen in the TCA itself.
4. That said, if, as is beginning to seem more likely, the threatened or actual breaches by the UK of the existing EU-UK agreements were to recede, the Bar Council believes we would start to see some improvement in relations and thus engagement as regards the implementation of the existing arrangements, their planned review and in time, discussion around possible solutions in areas of mutual interest that are not currently or adequately provided for.
5. Particularly while EU-UK formal political relations are strained, much of the problem-solving in and around the relationship needs to take place through informal stakeholder cooperation in various forms and fora.

6. The need to so engage imposes significant resourcing pressures on businesses and professional bodies. That work will be further enabled by Her Majesty's Government (HMG) embracing more transparency, including through timely consultations and publications, on all aspects of the EU-UK relationship.
7. Looking ahead, the Bar Council notes that both the EU and the UK are pursuing legislative and policy agendas that could, whether by accident or design, impact the EU-UK relationship.
8. Among the most important potential changes to the relationship are those that may follow from the several pending reviews foreseen in the TCA itself. We call for careful and coordinated consultation and planning in the lead up to those reviews.
9. In any event, the Bar Council calls on HMG to confirm the UK's unequivocal commitment to the European Convention on Human rights (ECHR), the Rule of Law and non-diminution of individual rights, manifested not only in public statements but also in policy choices, both at national and international level.

PART 1: THE OVERALL POLITICAL, DIPLOMATIC AND INSTITUTIONAL RELATIONSHIP

Question 1: How would you describe the current state of UK-EU relations? Has this changed since the end of the transition period and, if so, how and why?

10. Wary, and yes, it has deteriorated over the past twenty months or so. Very recently there are welcome signs that the new Prime Minister is taking steps to repair the damage and "reset" this relationship.
11. The overwhelming sense on the EU side at the end of the transition period was one of relief that the complex negotiations were completed and agreement reached within the time limit – an agreement to which both sides were willing to sign up. Your Lordships will recall that the EU had been open to extending the transition period, but Her Majesty's Government (as it then was) (HMG) did not avail. Nonetheless, the EU was heartened by HMG's apparent commitment to all elements of the deal, in calling, and then winning, a UK general election on the back of it.
12. That was the high point of the UK-EU relationship post-the 2016 referendum. It did not last long. The ratification arrangements on the EU side, governed by Articles 217 & 218 Treaty on Functioning of the European Union (TFEU), provided for the Treaty to apply provisionally (as of 1 January 2021) to allow the European Parliament (EP) sufficient time to scrutinise the deal. EP debates during the period featured, even at that early stage, growing disquiet at what was expressly referred to as "political gamesmanship", most notably around the Ireland & Northern Ireland Protocol (INIP) to the Withdrawal Agreement (WA). The EP made clear that it would not consent to ratification of the Trade and Cooperation Agreement (TCA) if the UK was not implementing the WA in full and in good faith. In the end, the EP did consent, but

emphasising¹ that “a third country cannot have the same rights and benefits as a Member State.” The TCA was ratified and entered into force on 30 April 2021².

13. That background, reinforced by HMG’s refusal since then to fully implement the INIP, its attempts to renegotiate its terms, followed by announcements and then the tabling of draft domestic legislation unilaterally disapplying parts of the Protocol, have fed the downward trajectory of EU-UK relations. Even before HMG announced the plans that became the Northern Ireland Protocol Bill (NIP Bill) the Commission was operating an informal stonewall policy – in effect refusing to engage in discussion on substantive EU-UK related topics outside the scope of the WA / TCA unless and until the UK honours the terms of the WA. The Commission was always, however, willing to return to the negotiating table on the practical application and implementation of the INIP itself, as has happened recently.

14. The Commission’s first annual report on “The implementation and application of the Trade and Cooperation Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland 1 January – 31 December 2021”³, closes with a clear reiteration of its policy in this regard:

“The EU’s objective is to maintain a stable and positive relationship with the United Kingdom, which remains a major trading partner. However, the quality of the future relationship will depend to a large extent on the degree of compliance by the United Kingdom with the commitments undertaken in the TCA and the Withdrawal Agreement.”

15. To further underline the depth of EU concerns, in late May this year, and despite an agenda filled with more pressing EU priorities, the European Council adopted conclusions⁴ on the EU-UK relationship, the key messages of which were:

- a. The existing EU-UK agreements are final and not up for renegotiation.
- b. Let’s get on with implementing and applying it now, using the agreed governance structures and in the spirit of cooperation.
- c. The Heads of State will continue to dictate the pace on the EU side, as a union.
- d. The EU will not allow the UK to cherry pick the best bits of the Single Market.
- e. The UK should not try to pick off individual Members be that Ireland in context of the INIP or in terms of other bilateral arrangements.

16. The EP is nearing the end of work on its own initiative “Implementation report on the Agreement on the withdrawal of the UK from the EU”⁵, with the Foreign Affairs Committee adopting its opinion at the end of October. The UK’s non-implementation of the INIP is among the items singled out for specific criticism.

¹ The accompanying EP resolution: <https://bit.ly/3vQ4Ymv> (containing a good oversight of EP key concerns, demands and organisational planning viz the UK relationship)

² <https://bit.ly/3aYVVaz>

³ <https://bit.ly/3yy0bL0>

⁴ <https://bit.ly/2RUoZtF>

⁵ https://www.europarl.europa.eu/doceo/document/AFET-AD-735800_EN.pdf

17. At a formal level, there are outstanding EU infringement proceedings⁶ against the UK for non-compliance with significant parts of the INIP, “in clear breach of international law.”
18. The EU has also seen fit to launch a challenge before the World Trade Organisation, requesting consultations⁷ with the UK regarding its alleged discriminatory practices when granting support for green energy projects.
19. In addition, the Commission has stated its willingness to take further measures as needed. To that end, we note the ongoing progression through the EU legislature of the draft regulation⁸ tabled earlier this year laying down rules and procedures governing the exercise by the EU of its rights to implement and enforce the WA and TCA, including provisions allowing for the suspension of certain obligations therein. The regulation is intended to authorise the Commission to act quickly and with full EU authority should the need arise.

Question 1a: How would you characterise the current levels of trust between the UK and the EU?

20. As described above, on the EU side, trust in current HMG is low and casts an unfortunate shadow. The reasons are complex, some going back years, and exacerbated by threatened breaches of international law under the Internal Market Bill and the INIP; unilateralism in the context of the pandemic; warships in the Channel; the treatment of EU nationals at the UK border for perceived or actual visa irregularities and more recently the tabling of both the NIP Bill and the Bill of Rights. And of course, EU leaders and policymakers pay attention to UK social and domestic media, with all the insights into political and parliamentary developments that they provide.
21. We do of course welcome the recent more positive signals emerging from Government on many of these issues, which are reflected on the EU side, and trust that this will continue.

Question 1b: To what extent is the state of the overall political relationship affecting UK-EU cooperation in specific policy areas? If so, how and why?

22. It has become difficult to meet, let alone discuss substance with, Commission officials who are responsible for policy positions and developments in areas covered by the formal EU-UK relationship, much less address the gaps which UK stakeholders would like to see filled (e.g. civil judicial cooperation), except in the context of formal TCA fora or through stakeholder membership of bodies with which such officials continue to engage – in the Bar’s case, the European Services Forum (ESF), the Council of the Bars and Law Societies of Europe (CCBE), etc.

⁶ https://ireland.representation.ec.europa.eu/news-and-events/news/european-commission-launches-infringement-proceedings-against-uk-breaking-international-law-2022-06-15_en

⁷ <https://bit.ly/3Ph2Dev>

⁸ Procedure Reference: 2022/0068(COD)

23. The Commission has a well-documented tendency to dictate the framework for discussions, citing Treaty competence, legal basis etc. By way of pertinent example, since the UK was the first EU Member State ever to leave the bloc, it fell to the Commission to decide on the procedure to be followed in implementing Article 50 Treaty on European Union (TEU), alighting on the three-step process: withdrawal, transition and then negotiations towards a new relationship. Once authorised to do so by the EU27 countries and the EP in late 2016, it pursued this compartmentalised approach with zeal.
24. That said, once the negotiations were completed and the treaties governing both the “divorce” and the future relationship signed, we might have hoped for greater flexibility in its approach. However, as noted above, HMG distancing itself from aspects of the deal that it had itself negotiated, almost immediately following signature, together with the ongoing difficulties with the INIP, have reinforced EU resolve to pursue a more rigid approach. Doors that were creaking open early last year were pushed shut again. More generally, the EU regularly reminds us that “a third country cannot have the same rights and benefits as a Member State” and “The UK chose to leave the Single Market and the Customs Union and cannot now expect to benefit from their advantages.”
25. Arguably this rigidity is exaggerated in some areas. Your Lordships will have heard evidence from experts on the Horizon (research) Programme. An example of direct relevance to the Bar, the Commission cited the UK’s non-membership of the Single Market as a key reason for blocking UK accession to the Lugano Convention 2007⁹, though there is nothing in the Convention to so limit it. Indeed, as we have noted in our public positioning, the Council of Europe has urged its members to sign up to Lugano. Nonetheless, the reality is that the EU as a Convention signatory can block UK accession, and the Commission’s position has so far held sway with the Member States.
26. We have little expectation that that will change for so long as there remain doubts about the UK’s commitment to the Treaties it has signed up to, on which issue the INIP and now the NIP Bill have become totemic. The same could happen with the Hague Convention 2019¹⁰, to which the EU acceded at the end of August 2022. It is unfortunate that, meanwhile, HMG has yet to launch its promised consultation on the merits of UK accession, though informed stakeholders have long recommended it.
27. For better or worse, the negativity surrounding the political relationship has undermined trust and made progress on implementation and enhancing the de facto arrangements under the WA and TCA more complex and difficult. We would not expect to see any real change unless and until the trust issues are acknowledged and addressed.

⁹ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters - <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22007A1221%2803%29>

¹⁰ Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

Question 2: Are there any future developments in the EU or the UK that you would identify as having a significant impact on the UK-EU relationship?

28. As noted above, if the NIP Bill is enacted and contains terms that would breach commitments made in the Protocol itself, thus breaching international law, the EU may choose to take retaliatory measures across other parts of the relationship, potentially making the already serious consequences of the UK breach that much more sweeping.
29. Likewise, any attempt to revise the Human Rights Act along the lines of the Bill of Rights as tabled in June, or other action that would undermine the UK's commitment to fundamental rights, to the ECHR and its ongoing membership of the Council of Europe would negatively affect the overall EU-UK relationship as well as specific terms of the TCA / WA – see our response to question 3.c below.
30. On both the EU and UK sides, there are several legislative developments in the offing that could impact the EU-UK relationship. Some of these involve changes to internal laws. In the UK's case, for example, the wholesale loss or amendment of Retained EU Law were the Retained EU Law (Revocation & Reform) Bill to be enacted as tabled in September could, inter alia, lead to divergence with EU law including in fields covered by the Level Playing Field (LPF) provisions of the TCA, such as environmental, labour and consumer protection standards.
31. For its part, the EU has adopted, or is in the process of adopting, several ambitious and forward-looking pieces of landmark legislation, Artificial Intelligence, Digital Services and Digital Markets being but three good examples. It is correct to note that equivalent UK legislative developments have so far moved in parallel, though there is as yet no UK equivalent to the Digital Markets Act. Of particular interest to the Bar however, is the increasing digitalisation of justice in the EU. Whilst many such EU developments are neither directed at, nor directly impact, the UK, the EU may emerge as the standard setter in these fields. Were the UK not to keep pace or at least develop its own laws and procedures in parallel, there is a danger that procedural and other obstacles to cooperation, including in the judicial sphere, will emerge. And of course, there are fields, financial services regulation being the obvious one, where the relevant UK sector is more clearly in the EU legislators' sights.
32. The Bar Council also notes the number of recent or pending EU initiatives designed to upgrade EU processes and protect its Internal Market from hostile, anti-competitive or other negative forces emanating from outside the EU. Again, these may not be targeted at EU-UK trade per se, but they could certainly impact it. Significant among these, the Commission is expected to table a regulation before the end of this year revising the EU Customs Code to strengthen the legal framework for customs and better adapt it to today's business environment and technological developments, as well as improving security-related aspects. Other pertinent examples include the EU "Enforcement Regulation" (EU) 2021/167, the proposal for a regulation to "Deter and Counteract Coercive Actions by Third Countries", proposed amendments to Regulation (EC) No 2271/96, the 'Blocking Statute'; the proposal for a regulation on foreign subsidies distorting the internal market 2021/0114 (COD); and the recently in force EU International Public Procurement Instrument (IPI) (Regulation (EU) 2022/1031), to name but a few.

33. On the criminal justice side too, the EU has not been sitting still. Again, by way of example, the Commission recently published new Guidelines on Third Country Extraditions, intended to assuage concerns raised by some Member States regarding the “instrumentalisation” of certain criminal prosecutions launched by third countries against EU citizens, including requests for arrest and extradition. On a more positive note, the recent extension of Europol’s mandate extends the agency’s scope to cooperate with third countries to include the possibility of exchanging personal data where appropriate safeguards exist.
34. The most important potential changes are of course, foreseen in the TCA itself – the several pending review deadlines, some specific to individual measures, and some going to the whole agreement. Among the more significant are the review of GB-NI movement of goods by 30 June 2023; the review of cross-border data flows and of UK application of EU law in Northern Ireland by 31 December 2023; the review of trade aspects of TCA to take place during 2024 and the first five-year comprehensive review of the TCA which will follow in 2025. Given the potential changes these could bring to the EU-UK relationship, careful and coordinated consultation and planning in the lead up to those reviews is essential.

Question 2b: French President Emmanuel Macron has recently advocated the creation of a new European Political Community, which could encompass non-EU states such as the UK. Do you think this is likely to come to fruition? If it did, what are the implications for the UK and its relationship with the EU?

35. Since this inquiry was launched, the first meeting of the EPC has taken place, in Prague in early October. It attracted leaders from 44 European countries, including the EU27, UK, Turkey, Ukraine and the Western Balkans, which in and of itself was seen as an endorsement. It remains to be seen how significant a body it may become. For now, the focus is on political discussion about big-picture challenges, with no particular conclusions being drawn. Though even that, in such troubled times, is valuable. Whether the UK can and should seek to play a central role remains to be seen. One factor which could influence the options available to the UK is structural – will the EPC adopt a Communautaire model (e.g. with the EU providing secretariat services) or intergovernmental?

Question 3: Are the institutional architectures of the Withdrawal Agreement (WA) and the Trade and Cooperation Agreement (TCA) functioning as intended? If not, how could their functioning be improved within the existing framework?

36. In terms of formal oversight, the TCA establishes a **Partnership Council**, charged with monitoring its implementation and ensuring its smooth application. Below that are 19 specialist committees, four working groups and several other committees, making 32 bodies in total. All of these are manned by officials from both sides.
- a. Comment: The work rate of these various bodies to date has been rather uneven, with some Trade Technical Committees having met several times, and others hardly at all. We also have some concerns about transparency, which we develop further below.

37. The democratic scrutiny element is to be provided by **EU-UK Parliamentary Partnership Assembly (PPA)**, bringing together a total of 70 members (35 each) of the EU and UK parliaments to monitor the implementation of the TCA. The PPA is to be briefed on decisions by the **Partnership Council** and can make non-binding recommendations for amending the deal. It met for the first time in May and again in November.
- a. Comment: The meetings of the PPA appeared to go well¹¹. We note that several MEPs who are members of the EU delegation on the PPA are also members of informal pro-UK groups within the EP and have made themselves available to stakeholders and bodies wishing to engage at a more strategic level on improving relations. This is welcome and to be encouraged on the UK side too.
38. The formal interface with civil society takes place via the **Civil Society Forum (CSF)**, which is made up of the **EU and UK Domestic Advisory Groups (DAG)**, each with stakeholder membership drawn from across different sectors and representing different branches of civil society. The Bar Council is a member of the UK DAG and the CSF.
- a. Comment: As for the formal committee structure, so here too, the UK was slower to get organised. The EU DAG membership was settled by the end of 2021 and had already met for the first time before applications for membership of the UK DAG were closed. By the time of the first meeting of the EU-UK DAG in Brussels in early October this year, the EU DAG had met four times, the UK only once. That allowed the EU side to set the agenda and tone for the discussions. In addition, the membership of the UK DAG does not yet adequately reflect the interests of stakeholders from Scotland and Northern Ireland. These comments have been noted on the UK side.

General comments

39. The Bar Council of England & Wales:
- a. Welcomes the opportunities for cooperation in problem-solving and enhancing the EU-UK relationship offered by the governance architecture under the TCA.
 - b. Agrees with those who consider that some of the bodies so created have been slow to get going and insufficient in their reach and ambition, as noted above.
 - c. Considers that, particularly while EU-UK formal political relations are strained, much of the problem-solving in and around the relationship will need to take place through informal cooperation, in the context of e.g. membership of (Europe-wide) stakeholder bodies as well as informal stakeholder working groups to be set up on the fringes of the DAG structure, to name but two possibilities.
 - d. Stresses the additional resourcing problems for businesses and professional bodies that such engagement imposes.

¹¹ [Joint Statement \(PDF - 64 KB\)](#) and [Statement by Co-Chairs](#)

- e. Calls for even greater transparency in the work of the TCA governance bodies. For example, more timely publication of agendas and minutes of meetings.

Question 3a: Is the UK-EU institutional framework fit for purpose? If not, what changes could or should be made?

40. The EU (through the Commission) remains steadfast that it will not look for solutions outside the terms of the existing EU-UK Treaties or these structures. That may change if UK-EU relations improve, but that in turn is dependent on the UK honouring its existing commitments. So, whilst more flexibility in addressing the issues and their possible solutions in the various fora would undoubtedly be helpful, it may be premature to expect same.

Question 3b: Would UK/EU relations benefit from regular summit-level meetings? If so, what form and how frequent should these be?

41. Any regular EU-UK contact which enhances mutual understanding and cooperation is to be welcomed. Whether summit-level meetings, which to date have added little beyond political posturing, are the solution is not currently clear. Were the politics to change, that observation might too.

Question 3c: What role should the UK play in the Council of Europe now that it has left the EU?

42. The UK should confirm its unequivocal commitment to the European Convention on Human rights (ECHR), the Rule of Law and non-diminution of individual rights, manifested not only in public statements but also in its policy choices, both at national and international level. UK adherence to the ECHR is expressly referenced as a sine qua non for key elements of the ongoing UK-EU relationship e.g. in the INIP and TCA Part III, Law Enforcement and Judicial Cooperation in Criminal Matters.
43. With that in mind, we remind your Lordships that the Bar Council of England & Wales was among the many stakeholders to actively engage¹² with HMG's **Independent Human Rights Act Review 2021**, as well as the **Ministry of Justice's** follow-on consultation anticipating the replacement of the HRA with a modern Bill of Rights.
44. Unsurprisingly, the Bill of Rights¹³ as tabled in June was greeted with widespread concern, including informally from the Council of Europe itself¹⁴. It is not yet clear whether the now dormant Bill will be revived during this legislature, though the mere tabling of it in the current context has been damaging, both domestically and internationally. Its formal withdrawal would be desirable.

¹² Our written response to the IHRA review of March 2021 can be seen at <https://bit.ly/3P1E2> and to the HRA review of March 2022 at <https://www.barcouncil.org.uk/uploads/assets/77e0fd67-b3a2-46ef-9f148d871266c4d7/Bar-Council-HRA-submission.pdf>

¹³ <https://bills.parliament.uk/bills/3227>

¹⁴ <https://www.theguardian.com/law/2022/jul/04/senior-council-of-europe-official-urges-uk-not-to-repeal-human-rights-act>

45. The EU is continuing negotiations for its own accession to the Council of Europe, which will inevitably increase the profile and power of the Council itself. At a time of such challenge to the rule of law, its enhanced profile is to be welcomed. The UK should be seeking to play a more active, and indeed leading role, within the Council.

PART II: THE FOREIGN POLICY AND SECURITY RELATIONSHIP

Question 5: How would you assess the current state of UK-EU cooperation on foreign policy, security and defence?

Questions 6: Has the absence of an institutional framework for structured UK-EU cooperation on foreign policy, security and defence made it more difficult for the UK and the EU to work together in this area?

46. It is well known that the EU was frustrated at the UK's decision to forego a structured, legally binding framework of cooperation on foreign and security policy, as the EU had proposed. Early on after the end of negotiations, the EU pointed to provisions in the TCA on human rights, climate change, disarmament and non-proliferation, counter-terrorism and cybersecurity as a potential basis to start dialogues and cooperate with the UK in those areas.
47. The Russian invasion of Ukraine has accelerated the need for such cooperation. Now, in the autumn of 2022, both UK and EU officials acknowledge the success of EU-UK cooperation in that context. It is seen by many as indicative of what can be achieved, even absent a formal framework, and not just in the field of foreign policy, security and defence. Of course, defence is a particularly striking example of an area where even the most ardent nationalist would have to concede that near neighbours must cooperate, and where the lack of such cooperation is likely to lead to swift and potentially catastrophic, damage.

Question 6a: Previously, the Government has argued that an institutionalised framework is not necessary for the purposes of UK-EU foreign policy, security and defence cooperation. Do you agree with this position?

48. It is not necessary, but that leaves open the question of whether it may be desirable, on which see below.

Question 6b: Would an institutionalised framework for UK-EU foreign policy and security cooperation add value? What form might such a framework take if it is to be successful? Should the UK Government seek to deepen cooperation with the EU on foreign policy, security and defence and, if so, how?

49. It would seem self-evident that some form of framework would be beneficial. It does not require a rigid or elaborate framework, but a forum for exchange and coordination on foreign policy, security and defence. This could include regular meetings and joint committees of political representatives and officials respectively.

Question 6c: In your assessment, would the EU be amenable to deepening cooperation with the UK in this area? If so, on what terms?

50. Yes – see our response to question 6 above. They are likely to press for a rules - and/or Treaty-based relationship. However, given the current crisis the EU ought to be amenable to looser, UK-style form of cooperation.

Question 7: How would you assess the quality of UK-EU cooperation over the response to Russia's invasion of Ukraine?

51. Good and better than expected.

Question 7a: Should Russia's invasion of Ukraine trigger a wider rethink of UK-EU foreign policy, security and defence cooperation?

52. Yes, along the lines suggested above.

Question 8: What, if anything, are the possible implications for the UK of ongoing and future developments in the EU's Common Foreign and Security Policy (CFSP) and its Common Security and Defence Policy (CSDP)? You may wish to comment in particular on the following:

Question 8a: The implications for the UK of the EU's approach to 'strategic autonomy' in foreign policy;

53. This is not a legal question. Generally speaking, current geopolitics make it difficult to predict the implications. What is clear is that the UK remains too strategically important to exclude from EU initiatives altogether, including in foreign policy. It should also be acknowledged that whilst politically symbolic, EU initiatives have certain practical limitations which reduce their impact in any event.

Question 8b: The implications for the UK of a possible move towards Qualified Majority Voting in EU foreign and security policy;

54. This is primarily an internal matter for the EU, although one might speculate that it will give relatively greater weight to the views of the Eastern EU states, whose views on Ukraine and NATO (often UK) protection on their borders generally have a greater similarity to those of the UK.

Question 8c: The implications for UK defence procurement of the launch of the European Defence Fund.

55. The 2019 Declaration on the EU-UK future relationship states that the Parties agree (to the extent possible under EU law) to enable UK participation in: (a) **European Defence Agency (EDA)** projects; (b) projects supported by the **European Defence Fund (EDF)**; and (c) CFSP projects within the framework of **Permanent Structured Cooperation (PESCO)**, where exceptionally invited. The EU's March 2022 Strategic Compass Plan reaffirms "a broad and ambitious security and defence engagement with the United Kingdom". However, practically, UK participation in EDA before Brexit was in

decline. Further, EDF and PESCO funds (£1.2 billion EDF funding divided among 61 projects and a £500M PESCO budget) are small relative to a multi-billion pound annual national defence spend. This raises the question of the scale of benefit to be realised for UK procurement whatever the degree of participation or exclusion. In addition, whilst initially excluded from PESCO, the UK will participate in its military mobility scheme. This is a clear recognition of the UK's role in Ukraine which is likely to lead to additional participation. Most importantly, the UK and a number of EU Member States also continue to pursue defence procurement cooperation outside EU frameworks e.g. through NATO and bilaterally. Ultimately, the UK's current participation in EU defence procurement initiatives is likely to be viewed as a positive development in UK-EU relations more generally.

Question 9: How should cooperation with the EU on foreign policy, security and defence relate to the UK's participation in other international fora, such as the G7, NATO, and the Council of Europe?

56. There is no reason for it not to exist alongside it, viz the recent move to launch a “**European Political Community**” (EPC) (on which, see further our response to question 2.b), although it appears that defence was not on the table in that forum. On NATO procurement, see our response to question 8c above.

PART III: ENVIRONMENT AND CLIMATE CHANGE

Question 10: How would you assess the current state of UK-EU cooperation on environment and climate change matters?

Question 10a: To what extent are the UK and the EU aligned in their overall aims in this area?

57. The UK and EU have both committed to achieving climate neutrality by 2050. That commitment is also enshrined in the TCA. However, and despite the LPF provisions in the Agreement (on which see further below), the policy decisions to be taken and implemented to attain that goal provide ample scope for both divergence and potential incompatibility. This is especially so, not only in the face of competing economic and other priorities, but also in how the EU and the UK choose to react to unforeseen crises of the kind we have seen in recent years. We hope that clarity will emerge from the COP27 discussions at which both EU and UK leaders will be present.

Question 11: Should the UK seek to link its Emissions Trading Scheme (ETS) with that of the EU?

58. The ETS is both controversial and complex. The Bar Council does not take a position on this policy question, but notes that HMG's 2020 Energy White Paper heralded the UK ETS and noted “*the UK is open to linking the UK ETS internationally in principle and we are considering a range of options, but no decision on our preferred linking partners has yet been made*”.

59. Recent government guidance¹⁵ for operators of UKETS provides some further insight.

Question 12: A proposed EU Regulation on a Carbon Border Adjustment Mechanism (CBAM) potentially applies to Northern Ireland under the terms of the Protocol. Focusing on its wider policy implications, what impact would the EU CBAM have on policy in Great Britain?

Question 12a: The UK Government is currently consulting on introducing its own CBAM. If it did so, what would be the implications of this for the relationship with the EU?

60. EU CBAM is designed to function in parallel with the EU's Emissions Trading System (EU ETS), to mirror and complement its functioning on imported goods. It will gradually replace the existing EU mechanisms to address the risk of carbon leakage, in particular the free allocation of EU ETS allowances. It was first proposed in 2019 within the EU Green Deal and is an essential element of the EU's "Fit for 55 package".

61. Last year, the UK Environmental Audit Committee held an inquiry, from which emerged a series of reports, including one on Greening Imports¹⁶ produced in June 2022. The report states that

"The Government is clear that any policy or policies would need to carefully balance a range of priorities for the UK, both domestically and internationally, including compliance with WTO rules and our staunch commitment to free and open trade, alongside taking into account the needs of developing countries. As we determine our approach to carbon leakage, we will continue our ongoing engagement with our domestic and international partners."

62. The Bar Council does not consider it is best placed however to comment upon the implications of this for the relationship with the EU.

Question 13: Are there any changes you would like to see the Government pursue as far as the UK-EU relationship on environment and climate change is concerned?

63. The LPF provisions of the TCA require that parties do not weaken or reduce their levels of environmental protection below those in place at the end of 2020 – (so called non-regression). It will be important to ensure that non-regression means what it says, especially in terms of ecological and wider environmental protection when considering future development or indeed the operation of those developments.

64. By way of example, we note that the Levelling Up and Regeneration Bill (LURB) proposes a new system of environmental assessments called "Environmental Outcome Reports" (EOR) to replace the existing system of Sustainability Appraisals (SA), Strategic Environmental Assessments (SEA) and Environmental Impact Assessments (EIA). The purpose of EIA currently is to assess the likely significant effects of a project, which effects are then considered in any decision-making about that project. The LURB also proposes a non-regression duty on the Secretary of State to ensure that the EOR system "does not reduce the overall level of environmental protection".

¹⁵ <https://www.gov.uk/government/publications/participating-in-the-uk-ets/participating-in-the-uk-ets>

¹⁶ Greening imports: a UK carbon border approach: Government Response to the Committee's Fifth Report of Session 2021–22 <https://publications.parliament.uk/pa/cm5803/cmselect/cmenvaud/371/report.html>

However, it is not yet clear what is meant by an ‘environmental outcome’. The Bar Council is concerned, in the absence of further clarification, about the risk that EORs will prove to involve more of a balancing act between negative and positive as part of the report itself, rather than the current situation whereby an EIA acts to demonstrate the negative, neutral or positive impacts of a project before allowing the decision-maker to take all those matters into account when reaching a final balanced decision. Further it is unclear whether the Government has considered the apparent tension between LURB and the Retained EU Law (Revocation & Reform) Bill, which is under consideration by a House of Commons Bill Committee (see para 30 above).

Question 13a: To what extent would these require negotiation with the EU?

65. The Bar Council would encourage negotiation with the EU to try to find solutions were the crucial issue of non-regression to be called into doubt, including as described above.

PART IV: CULTURE, EDUCATION AND MOBILITY

Question 16. What has been the impact of the TCA’s mobility provisions on UK businesses and individuals, and particularly on young people?

66. To fully appreciate the impact of the TCA on the Bar’s ability to offer its services in and into the territory of the EU, it is necessary not only to look at its mobility provisions, but also its professional services offer. The two are inextricably linked for self-employed UK practitioners who are not called to an EU Bar, do not hold an EEA nationality and who wish to provide their services on EEA territory on a temporary basis, i.e. the bulk of our membership that practices EU law.
67. For these practitioners, the closest category of service professional, as defined by the TCA, that covers their fly-in, fly out work is Independent Professionals (IPs), though there is overlap with the category Short Term Business Visitors (under which no fees may be taken).
68. We note that the TCA defines IPs to exclude anyone with less than six years post-qualification experience (PQE). Thus, for our young practitioners, the TCA provides no guaranteed route by which they can offer their services in or into the EU territory in return for a fee. They are reliant on individual Member States taking a more expansive view. For incoming legal services, the UK has minimum requirements of 3 years PQE.
69. For UK practitioners who have more than six years post-qualification experience but have only their domestic qualification and no EEA nationality, the TCA offer is as follows:
- a. EU Member States make a positive commitment to permit barristers as IPs to provide their clients with *legal advice*¹⁷ on domestic (UK) law and *Public International Law (PIL)*¹⁸, based on their home title, in EU territory.

¹⁷ Article SERVIN 5.48 (g) (i) Definition of legal services - advisory

¹⁸ Article SERVIN 5.48 (a) Definition of designated legal services

- b. *These commitments do not include advice on EU law.* We remind your Lordships that no such limitation is imposed on EU-qualified lawyers providing legal services in the UK under Mode 4 - EU Law is an integral part of Member State national law and the UK deleted a reservation to exclude that).
 - c. *These commitments do not include representational services* (though the rules are slightly different for arbitrations, mediations etc). It is open to Member States to permit such activities, but they are under no obligation to do so.
 - d. These commitments do not apply to practitioners having *less than 6 years professional experience*, by dint of the limited definition of IPs.
 - e. Member States can impose *additional conditions*, including registration, an economic means test etc, and many of them have.
 - f. Member State *mobility provisions* for third country nationals apply, which variously may require visas, work permits, or limit paid work or the time that may be spent on the relevant territory.¹⁹
70. In addition, over and above the reduction in opportunities for UK lawyers to export legal services outlined above:
- a. There are important issues related to practice which need to be resolved, including ensuring that advice given is covered by legal professional privilege; and that their services are adequately covered by professional indemnity insurance.
 - b. The TCA's lack of directly effective rights²⁰, and the absence of, for example, measures in the field of civil judicial cooperation (pending alternative agreed solutions), reduce the range of remedies that lawyers can pursue on their clients' behalf.
71. Of course, the TCA is only part of the picture. The generic guarantees the TCA provides, coupled with the pertinent Member State commitments and reservations, are a baseline rather than a description of the actual rules that Member States currently apply to 3rd country service suppliers and specifically, to UK lawyers. A detailed understanding of relevant national rules is also necessary, including, most importantly, on mobility.

Comments

72. The TCA provides a baseline. Some Member States are more generous in welcoming the services of UK practitioners in and into their territory. At the time of writing by contrast, certain others are not complying with the TCA baseline.
- a. The onus is on practitioners to check the position, both in terms of the work they can undertake, including all the factors listed above, as well as the applicable mobility provisions and restrictions, for every case and every trip related to that case, that they undertake on EEA territory. The Bar Council and

¹⁹ Article SERVIN 5.49(1). See also Article SERVIN 4.4 and Annex SERVIN 4

²⁰ Save in relation to certain specified social security issues.

other equivalent bodies provide what advice and support they can, but case by case responsibility is held by the individual practitioner.

- b. The Bar Council is involved in ongoing negotiations with the Bars of several Members States, and they in turn, where necessary, with their national equivalent of the Home Office, to try to improve the scope of the work that our practitioners may lawfully undertake in and into the EEA.
- c. EEA Member States expect any loosening of their rules, including as to mobility, to be met with reciprocal easing on the UK side. The UK's market access provisions are comparatively generous. However, the same cannot be said for its mobility provisions for incoming (legal) services:
 - The typical route for a foreign lawyer wishing to provide legal services in the UK is the Immigration Rules provision for (short-term) Business Visitor (STBV), including those undertaking Permitted Paid Engagements (PPE). These rules apply both to those who require a visa prior to travel (visa nationals) and to those who need only satisfy the rules on arrival (non-visa nationals). The PPE route is the only one that allows a fee to be taken from a UK-based client.

73. There are two problems with the UK Immigration Rules for PPE visitors who are legally qualified lawyers:

- a. They permit a lawyer coming the UK to take a fee from a UK client only to provide advocacy services,²¹ not advice, whether that advice is related to a non-contentious matter or potential future litigation. NB The provision made in the Immigration Rules, Appendix Visitor: Permitted Activities PA 12.2 'An overseas lawyer may advise a UK based client on specific international litigation and/or an international transaction' is for general entry as a visitor and does not allow for a fee to be taken from a UK-based client.
- b. They apply for only a month at a time. If the hearing is going to last longer than a month, this route cannot be used.²²

Question 16d: Have Brexit-related restrictions to mobility become more apparent as international travel has resumed?

74. Yes.

²¹ The current PPE rules provides: "(d) a qualified lawyer coming to provide advocacy for a court or tribunal hearing, arbitration or other form of dispute resolution for legal proceedings within the UK, where they have been invited by a client".

The Home Office Visit Guidance v.11.0, 6 October 2021 provides: "In addition to advocacy and dispute resolution work, lawyers entering under these provisions are permitted to take an active role in the preparation of a hearing which may need one or more preparatory visit." (at p65 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1019544/Visit.pdf)

²² The Home Office Visit Guidance v.11.0 states that "Where it is clear from the invitation or other information the case is likely to last longer than one month, you must find out if the applicant's involvement will be required for the entire duration. If it is, you must refuse the application on the basis that they are not genuinely seeking entry for a period no longer than one month."

Question 17: Are there any changes you would like to see the Government pursue as far as UK-EU mobility is concerned?

75. Yes – see below.

Question 17a: To what extent would these changes require negotiation, either with the EU or bilaterally with Member States?

76. As noted above, relaxation of any of these rules, whether at multi-national or national level, will only occur on a reciprocal basis, inevitably requiring negotiation. By way of example, the six-year PQE requirement of the TCA for IPs would be a matter for negotiation with the EU, which would in turn of course, be guided by the instructions it received from the Member States.

77. We anticipate that this issue will be among those that are prioritised for discussion in working groups of the UK DAG, in turn leading to broader discussion with the EU DAG and beyond. In this way, we would hope that some informal progress can be made to complement and enhance any formal negotiations that need to take place to secure amendments.

78. Moreover, as can be seen from the response to question 16 above, the mobility issues cannot be dealt with in isolation from related TCA market access and professional services provisions.

**The Bar Council
November 2022**