The Bar Council

Professional Qualifications Bill
Briefing for Peers – Committee Stage

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.

Summary

The Bar Council welcomes the establishment of a statutory mechanism to fill the gap left by the proposed removal of the former EU mutual recognition of professional qualifications (MRPQ) regime from domestic law. However, we have a number of concerns about the Bill as introduced which is outlined below. We are particularly concerned about the restriction in Clause 2 on the Clause 1 power to situations of unmet demand for particular professional services. Government has offered insufficient justification for this measure, and it could negatively affect professional autonomy through an unintended effect on the scope of pre-existing regulatory powers to recognise overseas qualifications. Consideration should be given to introducing a simple amendment clarifying the position.

Background

The UK is the world's leading centre for international legal services with London as the capital of international law and a leading centre for international dispute resolution and arbitration. It is the largest legal services market in Europe and second only to the US, comprising 5-6% of the global legal services fee revenue. The Bar of England and Wales plays a vital role to the UK's leading reputation, with close to 2,000 members of the Bar working on foreign instructions which is an increase of 90% since 2008.

More importantly, the UK is home to individuals, and a base for businesses, of hundreds of different nationalities which include many EU citizens and businesses of all sizes. Conversely, large numbers of UK citizens and businesses have based themselves in the EU and beyond. MRPQ is a vital tool for enabling client choice in access to legal services while protecting the public interest in administration of justice by maintaining high professional standards. The reciprocal nature of the EU MRPQ regime meant that, just as an inbound legal professional could for example re-qualify as, an English Barrister or Solicitor by meeting the prescribed requirements (including passing an aptitude test in relevant areas of law and professional conduct), and English Barrister or Solicitor (and their Scottish and NI counterparts) could similarly re-qualify in another Member State, acquiring the ability to serve their clients under the local legal system and subject to its rules of professional conduct.

The MRPQ regime operated in addition to the former rules under the Lawyers' Services and Establishment Directives, which enabled lawyers qualified in one EU jurisdiction to serve their clients in another jurisdiction under their home title.

Replacement of the EU MRPQ regime

The EU MRPQ regime was generally considered by the UK's professional regulators to work effectively. In the case of inbound professionals, the requirement for "compensatory measures" to achieve equivalence with the corresponding UK standards, and the powers available to UK regulators (facilitated by the free flow of information to and from their counterparts in EU Member States) ensured high standards of protection for consumers and the wider public interest.

It is understandable that, following Brexit, the government should wish to remove the remaining elements of the EU MRPQ regime from domestic law and replace it with a set of rules potentially applicable to the UK's worldwide trading relationships. Nevertheless, we have three areas of concern with the approach proposed in the Bill.

Problems with the "unmet demand" constraint

Clause 2 subjects the power to make regulations under Clause 1 to an "unmet demand" test. While economic need, in some form or another, may well be treated as a condition for market access or entry to the territory by overseas professionals, treating it as a requirement to be met before a person who is otherwise sufficiently qualified/experienced (or would be after compensatory measures) can be admitted to the national profession is inimical to the concept of MRPQ.

That is because it is fundamentally for each profession, through its regulatory regime, to determine who meets the qualifications for admission. This is quite distinct from the question whether particular individuals should be entitled to enter or remain in UK territory to carry out economic activity. That is quite properly the domain of the UK State, which is free to adopt a market access or immigration regime that requires non-UK citizens to fulfil prescribed conditions in order to work on UK territory. Similarly, under the UK-EU Trade & Cooperation Agreement, a number of EU Member States have entered reservations under which market access to their territories and markets for UK service providers is subject to visa or work permit requirements, which may be subject to criteria such as economic need.

Each UK profession operates under a different legal framework. Some professions (such as the England and Wales legal professions, through the Legal Services Act 2007) enjoy a regulatory regime under which the competent authority has a complete set of powers enabling it to recognise the qualifications of EU and non-EU professionals for the purpose of entry to the UK profession. Regulators of some other professions will have less complete, and in some cases wholly inadequate, powers.

The government has indicated that Clause 1 is designed as a gap-filling measure to enable those authorities who would otherwise lack the necessary power, in the wake of removal of the EU MRPQ regime, to continue to admit overseas-qualified individuals to the relevant profession. But admission to a profession does not in itself confer any right to enter or stay in the UK to provide professional services. Clauses 1 and 2 appear wrongly to conflate these things. We can

see no justification for subjecting the power of *admission* to a profession to an economic test of unmet need or the like.

We are concerned that Clause 2 is therefore a misconceived statement of public policy. It might not only limit the powers available to professions dependent on the Clause 1 power but could also act as a constraint on the autonomy of those professions whose regulatory framework already provides a basis for admission of individuals with overseas qualifications. MRPQ nearly always operates on a reciprocal basis. Constraints on the scope for inbound professionals re-qualifying with a UK title would undoubtedly have consequences for outbound UK professionals seeking to re-qualify in an overseas jurisdiction.

We doubt that the consequences outlined in the last paragraph were intended by government. But it would be preferable for the Bill to make the position clear.

Clause 3 and international agreements

The Clause 3 is useful but limited to "international agreements", i.e. treaties to which the UK State is a party. The power would not be available to make or amend legislation to give effect to a mutual recognition agreement negotiated autonomously at the level of professional regulators. This is a further deficiency in the Bill.

Absence of saving power for necessary elements of the EU-derived MRPQ regime

Clause 5(1) effects a hard-edged revocation of the whole of the EU MRPQ regime in UK domestic law. Again, we fear the unintended consequences of this one-size-fits-all measure, given the constraint placed by Clause 2 on the gap-filling power in Clause 2. It would be sensible for the Bill to include a power to save, in an appropriate case, the effect of specified elements of the EU-derived MRPQ rules in relation to a particular profession or professions. We doubt whether Clause 5(2), even read with Clause 13(1)(c), provides a power to save the effect of any part of the remaining EU-derived MRPQ regime. We invite Peers to urge the government to think again about this aspect of the Bill.

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