

Justice Committee

Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft]

Written submission from the Law Society of Scotland

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Public Policy Committee welcomes the opportunity to consider and respond to the Inquiry by the Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019. The Committee has the following comments to put forward for consideration.

General comments

The Scottish legal tradition has always had a close relationship with the legal systems of Europe. From the earliest receptions of Feudal or Civil-Romano-Canonical Law and French law in the Medieval period to the significant influence of the Roman-Dutch law during the 17th and 18th centuries as part of the Enlightenment Scots Law has engaged with the law which applied across Europe. Lord President Cooper characterised Scots Law as "an original amalgam of Roman Law, Feudal Law and native customary law, systematised by resort to the law of nature and the Bible and illuminated by many flashes of ideal metaphysic."

We believe that although our relationship with the EU will change, nevertheless EU Law will continue to have an influence on our law. Furthermore, contact with the law of Member States is likely to develop as private international law, comparative law and public international law increase in importance. These legal influences combined with ties of family and commerce will ensure that contact between lawyers in Scotland and lawyers working in Member States will continue for the benefit of their clients.

We fully intend whatever the future relationship with the EU after exit to keep open, accessible yet robust routes to requalification for lawyers from any jurisdiction which

allow them to practise within Scotland whilst also reassuring clients of their competence.

In the short term, we await confirmation of the legal position so we can be sure of the precise nature of requalification procedures should we find ourselves outside of the EU without a transitional agreement in place.

We will continue to work cooperatively with bars and law societies across the EU on matters of mutual interest.

The regulation of cross-border supply of legal services.

The existing regime to regulate the cross-border supply of legal services and the rules designed to facilitate the establishment of a lawyer in another Member State have been in force for a number of years.

There are three key pieces of EU legislation that affect the legal profession:

A. The Lawyers' Services Directive of 1977 (77/249) implemented by the European Communities (Services of Lawyers) Order 1978

This Directive governs the provision of services by an EU/EEA/Swiss lawyer in a member state other than the one in which he or she gained his or her title - known as the 'host state'. Its purpose is to facilitate the free movement of lawyers, but it does not deal with establishment or the recognition of qualifications. The directive provides that a lawyer offering services in another Member State - a 'migrant' lawyer - must do so under his or her home title. Migrant lawyers may undertake representational activities under the same conditions as local lawyers, save for any residency requirement or requirement to be a member of the host Bar.

However, they may be required to work in conjunction with a lawyer who practices before the Judicial Authority in question. For other activities the rules of professional conduct of the home state apply without prejudice to respect for the rules of the host state, notably confidentiality, advertising, conflicts of interest, relations with other lawyers and activities incompatible with the profession of law.

B. The Lawyers' Establishment Directive of 1998 (98/5) implemented by the European Community's (Lawyer's Practice) (Scotland) Regulations 2000.

This Directive entitles lawyers who are qualified in and a citizen of a Member State to practice on a permanent basis under their home title in another EU/EEA member state, or Switzerland. The practice of law permitted under the Directive includes not only the lawyers' home state law, community law and international law, but also the law of the Member State in which they are practising – the 'host' state.

However, this entitlement requires that a lawyer wishing to practice on a permanent basis registers with the relevant Bar or Law Society in that state and is subject to the same rules regarding discipline, insurance and professional conduct as domestic lawyers. Once registered, the European lawyer can apply to be admitted to the host state profession after three years without being required to pass the usual exams, provided that he or she can provide evidence of effective and regular practice of the host state law over that period.

C. Recognition of Professional Qualifications Directive (2005/36) implemented by the European Communities (Recognition of Professional Qualifications) Regulations 2016.

Re-qualification as a full member of the host State legal profession is governed by this Directive. Article 10 of the Lawyers' Establishment Directive is essentially an exemption from the regime foreseen by the Recognition of Professional Qualifications Directive.

The basic rules are that a lawyer seeking to re-qualify in another EU/EEA member state or Switzerland must show that he or she has the professional qualifications required for the taking up or pursuit of the profession of lawyer in one Member State and is in good standing with his or her home Bar.

The Member State where the lawyer is seeking to re-qualify may require the lawyer to either:

- (a) complete an adaptation period (a period of supervised practice) not exceeding three years; or
- (b) take an aptitude test to assess the ability of the applicant to practice as a lawyer of the host member state (the test only covers the essential knowledge needed to exercise the profession in the host Member State and it must take account of the fact that the applicant is a qualified professional in the Member State of origin).

NB: The draft regulations currently before the committee do not affect the Recognition of Professional Qualifications Directive as they only relate to the Services and Establishment Directives. The Recognition of Professional Qualifications Regulations are covered by the [Recognition of Professional Qualifications \(Amendment etc.\) \(EU Exit\) Regulations 2018](#).

In addition, Directive 2006/123/EC on Services in the Internal Market which regulates the provision of services in the European Union also touches on the legal profession is implemented by the Provision of Services Regulations 2009 as amended by the Provision of Services (Amendment etc.) (EU Exit) Regulations 2018.

Leaving the EU with an approved Withdrawal Agreement

The Withdrawal Agreement dated 23 November 2018 contains provision to allow reciprocal arrangements to continue through the transition period under article 167 until 31 December 2020. This would allow EEA lawyers to continue to register as RELs in the UK.

Leaving the EU without an approved Withdrawal Agreement

The UK Government has issued a technical notice on providing services including those of a qualified professional if there's no Withdrawal Agreement in place. This states that should the UK leave the EU without a deal the reciprocal arrangements that currently exist under various EU directives would no longer apply. This would result in the end of the REL scheme. From exit day, EEA lawyers will be treated in the same way as other lawyers qualified in any other third country jurisdiction. EEA lawyers would therefore be subject to the rules that currently apply to lawyers from third countries if they wished to practice in Scotland.

Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019

The Regulations change the law which we have explained earlier in this note relating to the provision of legal services and the practice of law by European lawyers and Swiss lawyers in Scotland. They are designed to deal with the situation where there is no Withdrawal Agreement in place on exit day. In those circumstances the treaties will cease to apply, any reciprocal arrangements will disapply and the European Union (Withdrawal) Act 2018 will come into effect. This means that the European Communities Act 1972 which provides the legal basis for the existing legislation will be repealed and the category of retained EU law will apply.

Part 2 revokes the European Communities (Services of Lawyers) Order 1978 as it applies to Scotland and the European Communities (Lawyer's Practice) (Scotland) Regulations 2000.

Part 3 and the schedule make consequential amendments, including to the Solicitors (Scotland) Act 1980 specifically about REL's, and transitional and saving provisions.

The Regulations are made under paragraphs 1(1) and (3) of schedule 2, and paragraph 21(b) of schedule 7, of the European Union (Withdrawal) Act 2018 to address failures of retained EU law to operate effectively and other deficiencies arising from the UK's exit from the EU.

Analogous legislation relating to England and Wales has already been enacted:

The Services of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2019 and the Services of Lawyers and Lawyer's Practice (Amendment) (EU Exit) Regulations 2019.

Michael P Clancy
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