

POLICY NOTE

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

SSI 2019/XXX

The above instrument was made in exercise of the powers conferred by paragraph 1(1) and (3) of schedule 2, and paragraph 21(b) of schedule 7, of the European Union (Withdrawal) Act 2018. The instrument is subject to affirmative procedure.

Summary Box

<p>The purpose of this instrument is to end the preferential practising rights of EU and EFTA lawyers in Scotland, in line with a similar approach being taken in England, Wales and Northern Ireland. It will also provide for a range of rights for Swiss nationals, or others who are professionally recognised in Switzerland and who have Swiss legal qualifications to practice in Scotland under certain conditions.</p>

Policy Objectives

The purpose of this instrument is to end the preferential practising rights of EU and EFTA lawyers in Scotland. These are provided for by a reciprocal European framework consisting of Directives and implementing legislation. The Directives will cease to apply in the UK on EU Exit and the reciprocity on which they depend will accordingly cease. This instrument will, therefore, revoke the implementing legislation, thereby realigning the position of EU and EFTA lawyers with other “third country” lawyers. This is subject to transitional provision, to give certain EU and EFTA lawyers the time to make the necessary changes to their practice to comply with the new regulatory framework.

The instrument will also make provision in relation to the UK-Swiss Withdrawal Agreement dated 20 December 2019. Swiss nationals who have legal qualifications recognised by a regulator before Exit Day will have their rights recognised in Scotland permanently; for qualified Swiss lawyers or Swiss lawyers who have not completed their qualifications to register up to 4 years after exit day; for Swiss lawyers and non-Swiss lawyers established or working for a Swiss law firm on a permanent basis, to continue providing services in the UK under contracts extant (live) on exit day for 90 days a year, for the length of the contract, up to 5 years (with scope to for extension by the Joint Committee).

Explanation of the law being amended by the regulations

In the UK, the European Communities (Services of Lawyers) Order 1978 implements the Lawyer’s Services Council Directive (77/249/EEC) which allows EU , EFTA and Swiss lawyers to provide services in the UK on a temporary or “fly in fly out” basis, under their home state professional title.

The Lawyer’s Establishment Directive (98/5/EC) (LED) was implemented in Scotland by the European Communities (Lawyer’s Practice) (Scotland) Regulations 2000. These Regulations allows lawyers who have registered with the relevant legal services regulator to practise activities that are normally reserved to solicitors and advocates (with some restrictions) under

their home state professional title on a permanent basis. Such lawyers, termed “registered European lawyers” (REL) may establish joint practices with solicitors or other lawyers or practise as sole practitioners in much the same way as Scottish solicitors or advocates. They may also seek admission as solicitors or advocates following three years of practice in Scotland or may seek to gain admission as solicitors or advocates through a transfer examination.

Directive 2002/309EC implements the Swiss-EU Free Movement of Persons Agreement in EU law, extending the two relevant Directives – the Lawyers Services Directive and the Lawyers Establishment Directive to Swiss Nationals.

Reasons for and effect of the proposed change or changes on retained EU law

If the UK leaves the EU without a deal, the relevant EU Directives that allow for reciprocal practice and establishment arrangements will no longer apply to the UK. This instrument will realign EU and EFTA lawyers with lawyers qualified in third countries so that they are subject to the same regulatory framework. The provision of temporary services under the Lawyer’s Services Council Directive 1977 will cease in Scotland should the UK leave the EU without a deal. Registered European lawyers will also no longer be able to practise under their home state professional title or be able to seek admission as a solicitor or advocate under the ‘three years’ experience’ route in Scotland. However, they will be able to gain admission as a solicitor or advocate through alternative examination routes open to third country qualified lawyers.

The instrument provides transitional arrangements (up to 11 pm on 31 December 2020) so that relevant lawyers are given adequate time to make alternative arrangements to comply with the new regulatory framework, such as changing practice or transferring qualifications.

Should the UK leave the EU without reaching an agreement, the UK will still be subject to World Trade Organisation (WTO) General Agreement on Trade in Services (GATS) rules. Specifically, ‘most favoured nation’ (MFN) rules prohibit preferential treatment of any signatory state above another (unless one of the permitted exceptions applies). This instrument ensures alignment with the UK’s WTO commitments, and ensures robust regulatory oversight of third country lawyer access to the provision of regulated legal services in Scotland.

EU and EFTA lawyers who have transferred to the Scottish legal profession through the three years’ practice route under the 2000 Regulations or who have taken any transfer examination will be able to retain their Scottish professional title.

The UK Government has negotiated a separation agreement with Switzerland, dealing with the bilateral issues arising from EU law ceasing to apply to the UK, when the UK leaves the EU. The agreement applies from the end of the transitional period as proposed in an Act of Parliament as from Exit Day or from Exit Day in the case that a UK-EU Withdrawal Agreement is not agreed.

This SSI reflects the provisions of the UK-Swiss Separation Agreement applicable to the provision of legal services in Scotland. The Agreement provides continuity for Swiss lawyers working in Scotland, allows Swiss lawyers to provide services on a temporary basis in Scotland for up to 90 days per calendar year under a contract extant on exit day for up to 5

years (subject to extension by Joint Committee), whilst providing certainty or Swiss lawyers intending to work in Scotland on a permanent basis in the future.

Statements required by European Union (Withdrawal) Act 2018

Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate

The Minister for Community Safety, Ash Denham, has made the following statement “In my view the Services of Lawyers and Lawyer’s Practice (Amendment etc.) (EU Exit) (Scotland) Regulations 2019 does no more than is appropriate”. This is the case because instrument amends deficiencies arising from withdrawal from the EU. In the event of EU exit with no deal, the framework for reciprocal arrangements relating to the provision of legal services would no longer be in place. By revoking the 1978 Order and the 2000 Regulations, the instrument ensures compliance with World Trade Organisation rules. The instrument provides for a transition period that would mitigate consequences for those affected by these provisions and allow them reasonable time to take action to comply with the new regulatory framework.

Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action

The Minister for Community Safety, Ash Denham, has made the following statement “In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action given that the reciprocal arrangements in respect of lawyers practice in the EU and EFTA (with the exception of Swiss-qualified lawyers) will no longer apply.

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

The Minister for Community Safety has made the following statement “In my view the Services of Lawyers and Lawyer’s Practice (Amendment etc.) (EU Exit) (Scotland) Regulations 2019 does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

The Minister for Community Safety, Ash Denham, has made the following statement “In my view the Services of Lawyers and Lawyer’s Practice (Amendment etc.) (EU Exit) (Scotland) Regulations 2019 have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare

This heading is not applicable.

Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

This heading is not applicable

An indication of how the regulations should be categorised in relation to the significance of the change proposed.

Medium – Ministers have a limited policy choice but with more significant implications in so far as the instrument removes existing individual rights to practise and establish in Scotland.

Statement setting out the Scottish Ministers’ reasons for their choice of procedure

We do not consider that this instrument is subject to the affirmative procedure for any of the reasons set out in paragraph 1(2) of schedule 7 of the European Union (Withdrawal) Act 2018. However, we believe that it should nonetheless be taken forward under that procedure for two reasons. First, the instrument removes existing individual rights to practise and establish in Scotland. The instrument primarily ensures compliance with international obligations. Secondly, in terms of ensuring consistency with precedent in relation to Parliamentary procedures, the 1978 Order itself was adopted by affirmative procedure. The 2000 Regulations were adopted by negative procedure. Further, the instrument makes amendments to primary legislation, affecting the operation of the Solicitors (Scotland) Act 1980.

Further information

Consultation

No formal consultation was carried out in relation to the Services of Lawyers and Lawyer’s Practice (Amendment etc.) (EU Exit) (Scotland) Regulations 2019. However, we have engaged with relevant legal services regulatory bodies during the process of drafting this instrument.

Impact Assessments

Full impact assessments have not been prepared for this instrument. The instrument seeks to do no more than is necessary to realign EU and EFTA lawyers with lawyers qualified in third countries so that they are subject to the same regulatory framework, and to make separate arrangements for Swiss lawyers further to the UK Swiss Separation Agreement. Accordingly, there are no equality, children’s or privacy impact issues. The instrument does not alter Scottish Government’s current environmental policies and priorities and, therefore the amendments do not have a significant impact on the environment.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on businesses providing legal services is negligible. The bodies regulating legal services in Scotland will require to make amendments to rules in the regulatory frameworks.

Scottish Government
Justice Directorate

18 February 2019