

EXPLANATORY MEMORANDUM TO
THE LEGAL SERVICES ACT 2007 (REGISTERED
EUROPEAN LAWYERS) ORDER 2009

2009 No.

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. **Purpose of the instrument**

2.1 This instrument is made pursuant to amendments introduced to the existing regime for the regulation of legal services by the Legal Services Act 2007 (“the 2007 Act”), to align the regulation of solicitors and registered European lawyers. This is achieved through amendments to the European Communities (Lawyer’s Practice) Regulations 2000 (“the 2000 Regulations”). This instrument also updates the regulatory powers of the Law Society in regulating registered European lawyers, to ensure appropriate and proportionate regulation in both protecting consumers and the integrity of the legal profession as a whole. This operates largely through the application of provisions in the Solicitors Act 1974 (“the 1974 Act”) to registered European lawyers. Furthermore, this instrument amends the 2000 Regulations to accommodate the future statutory roles of the Legal Services Board (“the Board”) and the Office for Legal Complaints (“the OLC”), established by the 2007 Act.

2.2 In summary, in amending the 2000 Regulations, this instrument:

2.2.1 aligns the procedure and powers of the Law Society in respect of the registration of European lawyers and solicitors’ applications for practising certificates, including the application of the regime of sole solicitor endorsements to European lawyers seeking to act as sole practitioners;

2.2.2 aligns the procedure and powers of the Law Society with regard to the imposition of conditions and suspension of registration of European lawyers and solicitors’ applications for practising certificates;

2.2.3 prohibits European lawyers who have been struck off the register from being employed in a legal practice without approval of the Law Society and prohibits a European lawyer failing to disclose the fact of having been struck off the register from seeking employment in a legal practice;

2.2.4 aligns the jurisdiction and powers of the Solicitors Disciplinary Tribunal in respect of solicitors and registered European lawyers;

2.2.5 extends the disciplinary and information powers of the Law Society in respect of registered European lawyers. The instrument enables the Law Society to request documentation from a registered European lawyer by written notice, rebuke or fine a registered European lawyer and extends the offence prohibiting the destruction, concealment or falsification of documents required in the investigation of a registered European lawyer and;

2.2.6 updates the 2000 Regulations to remove references to repealed or obsolete legislation.

2.3 This instrument also amends the European Communities (Recognition of Professional Qualifications) Regulations 2007 to achieve consistency in appeals lying to the High Court and not the Master of the Rolls and also applies these regulations to registered European lawyers.

2.4 Modifications are incorporated into this instrument to ensure that provisions applicable to solicitors are operative in respect of registered European lawyers.

2.5 This instrument is to come into force in conjunction with the commencement of relevant provisions of the 2007 Act. It is anticipated that the majority of these amendments will come into force in July 2009, with other amendments coinciding later with the Board or the OLC assuming their statutory functions.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1. The purpose of this instrument is to modify the 2000 Regulations and make an amendment to the European Communities (Recognition of Professional Qualifications) Regulations 2007 (S.I. 2007/2781). The 2000 Regulations implemented Council Directive No. 98/5/EC (“the Directive”), dated 16th February 1998, to facilitate the practice of the profession of lawyer on a permanent basis in Member States other than the State in which their professional qualification was obtained. The 2000 Regulations ensure that all European lawyers practising in England and Wales are registered with the relevant regulatory authority. The amendments to the 2000 Regulations incorporated by this instrument relate to the regime of regulation of registered European lawyers by the Law Society. This is achieved largely through the application of statutory powers and duties applicable to solicitors to their European counterparts.

4.2 The amendments to the 2000 Regulations made by this Instrument result from the 2007 Act. The timing of these amendments coincides with the commencement of the Law Society’s new powers relating to practising certificates and sole solicitor endorsements, achieved through amendments to the 1974 Act.

4.3 This instrument is made under section 208(3) of the 2007 Act, which enables the Lord Chancellor to amend any provision of an Instrument in consequence of any provision made by or under the 2007 Act or in order to give full effect to that Act.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales

6. European Convention on Human Rights

The Parliamentary Under Secretary of State, Bridget Prentice, has made the following statement regarding Human Rights:

In my view the provisions of the Legal Services Act 2007 (Registered European Lawyers) Order 2009 are compatible with Convention rights.

7. Policy background

- *What is being done and why*

7.1 The 2007 Act reforms the way in which legal services are regulated in England & Wales. The Act received Royal Assent on 30th October 2007. The aims of the Act are to simplify the existing regulatory framework by establishing an oversight regulator, the Board and improving consumer confidence in the way in which complaints are dealt with by establishing an independent complaints handling body; the OLC.

7.2 The 2007 Act also provides greater choice and flexibility for consumers, and opportunities to develop a more innovative and efficient organisation of legal practices by providing for alternative business structures (“ABS”). The ABS framework, set out in Part 5 of the 2007 Act, permits different kinds of lawyers and non-lawyers to work together, and allows for external investment. This will be subject to a licensing regime set out by the Board.

7.3 Together with these broader reforms, the 2007 Act amends existing legislation, to update and streamline the Law Society’s regulatory powers. This includes the Law Society’s powers in respect of disciplinary action and powers of investigation into alleged misconduct. Some of these reforms were necessary to enable the Law Society to effectively regulate the limited form of ABS, LDPs. LDPs have been permitted to emerge in advance of full ABS, which must await the Board assuming its statutory functions under the 2007 Act. LDPs enable different types of lawyers and non-lawyers to own and manage law firms, whilst their activities are limited to the provision of ‘solicitor services.’ In light of these reforms, the purpose of this instrument is to amend the regime of regulation of registered European lawyers to ensure consistency in the Law Society’s regulatory powers. The regime for LDPs was commenced by the Legal Services Act 2007 (Commencement No.4, Transitory and Transitional Provisions and Appointed Day) Order 2009¹, which came into force on 31st March 2009. This instrument extends the Law Society’s powers in respect of registered European lawyers, acknowledging

¹ 2009 No. 503 (C. 34)

the new regulatory risks resulting from the emergence of LDPs and ultimately ABS firms.

7.4 This instrument also extends the investigatory powers of the Law Society, ordinarily applicable to solicitors, to registered European lawyers. It will enable the Law Society to require the provision of information or documentation, by notice, pursuant to an investigation into alleged misconduct of a registered European lawyer. This instrument will further extend offences associated with the concealment or falsification of such information or documentation in the course of investigations of registered European lawyers. Powers of the Law Society to rebuke and/or fine a solicitor up to £2,000 for misconduct or failure to comply with a requirement are also applied to registered European lawyers, together with the statutory routes of appeal against such decisions. The disciplinary powers of the Solicitors Disciplinary Tribunal are similarly extended to operate in respect of registered European lawyers as they do for solicitors.

7.5 This instrument applies the regime of solicitors' practising certificates, sole solicitor endorsements and fees to the registration of European lawyers. This includes the extension of appeal routes available to solicitors to registered European lawyers, save in the event that an appeal route is expressly provided for in the 2000 Regulations themselves. Appeal routes have been transferred from the Master of the Rolls to the High Court, in accordance with the broader policy of the 2007 Act. The overall effect will be to harmonise the regime of registration of European lawyers and applications for practising certificates made by solicitors.

7.6 This instrument also incorporates minor changes to the regulation and practise of registered European lawyers. Such amendments will achieve consistency of approach between registered European lawyers and solicitors in respect of accounts rules, the compensation fund and the intervention powers of the Law Society with regard to legal services bodies in which registered European lawyers practise.

7.7 This instrument now applies the European Communities (Recognition of Professional Qualifications) Regulations 2007, which replaced those of 1991. The instrument simultaneously transfers appeals from the Master of the Rolls to the High Court, to achieve consistency with appeals made by solicitors under the 2007 Act.

7.8 This instrument incorporates modifications to the applied legislation, ensuring that provisions are applied appropriately to registered European lawyers. A table of modifications is inserted into Schedule 4 to the 2000 Regulations to ensure appropriate application of the provisions and to assist in their interpretation.

- ***Consolidation***

7.9 This instrument amends the existing 2000 Regulations and there are therefore no issues relating to consolidation.

8. Consultation outcome

8.1 The 2007 Act is the result of extensive consultation both before and during the Parliamentary process. The key groups that were consulted were consumer organisations, regulatory bodies, other professional representative bodies and other key stakeholders, such as the Offices of the Legal Services Ombudsman and Legal Services Complaints Commissioner. In particular, the Government consulted following the 2001 report on competition in the professions by the Office of Fair Trading², and published a report into competition and regulation in the legal services market.³ Further to that, in 2003, Sir David Clementi was appointed by the Government to conduct an independent review of the regulation of legal services⁴, which was the basis for the proposals set out in the Government's White Paper, *The Future of Legal Services: Putting Consumers First*, published in October 2005. A summary of the responses to the White Paper are included in section 2 of the Regulatory Impact Assessment ('RIA') which is attached to this memorandum. A supplementary RIA was prepared in June 2007, updating and supplementing the full Impact Assessment of November 2006.

8.2 The draft Legal Services Bill was published in May 2006 and was subject to pre-legislative scrutiny by a Joint Committee of both Houses of Parliament. The Joint Committee reported in July 2006, and the Government published its response to this in September of the same year.

8.3 The Secretary of State's Consumer Advisory Panel was also established in 2005 to advise on the development of the 2007 Act, and it continues to advise on the implementation of the legislation. In addition, the Government continues to consult with relevant stakeholders during the commencement of the legislation and has set up the Implementation Working Group (established in April 2006) which includes representatives from existing legal regulators and consumer groups, amongst others.

8.4 In the course of preparing this instrument, the Law Society and its regulatory arm, the Solicitors Regulation Authority ("the SRA"), have been fully consulted and are in full support of the amendments proposed. The Department of Innovation, Universities and Skills also supports the proposed amendment, in relation to professional qualifications.

9. Guidance

9.1 The SRA will be responsible for issuing guidance relating to rules applicable to registered European lawyers, as it continues to do so in respect of its regulatory activities.

² Office of Fair Trading, 2001, *Competition in the Professions – A Report by the Director General of Fair Trading*

³ Department for Constitutional Affairs, 2003, *Competition and Regulation in the Legal Services Market – A Report Following the Consultation "In the Public Interest?"*

⁴ Clementi, Sir David, 2004, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*

10. Impact

10.1 A full regulatory impact assessment was prepared for the Legal Services Bill in November 2006, and a supplementary memorandum was published in June 2007. The full RIA can be found at <http://www.dca.gov.uk/risk/ria-legal-services.pdf> and the supplementary memorandum can be found at <http://www.justice.gov.uk/docs/RIA-Supplement-v021.pdf>. The full RIA includes sections 4-6, which examine the options considered and our reasoning for the final recommendations which were brought forward in the 2007 Act.

11. Regulating small business

11.1 This Instrument does apply to small businesses in which registered European lawyers operate.

11.2 In developing the wider reforms of the 2007 Act, the regulation of small business was considered in detail. Section 7 of the full RIA sets out the Small Firms Impact Test, in particular relating to the Board and ABS. In developing the Impact Test, the Small Business Service and Federation of Small Businesses were consulted and were content with the approach.

12. Monitoring & review

12.1 Certain rules made by the Law Society are subject to the approval of the Lord Chancellor, pending the Legal Services Board assuming its statutory functions in this regard.

12.2 The regulation and registration of European lawyers will be monitored throughout the process of implementation and commencement of the 2007 Act.

13. Contact

Alex Faulkner at the Ministry of Justice (Tel: 020 3334 4226 or email: alex.faulkner@justice.gsi.gov.uk) can answer any queries regarding the instrument.