

UK CCBE DELEGATION PAPER:

EU lawyers in the UK - Practice rights under the draft Withdrawal Agreement and Q&A

Introduction: Overview of the rights

This paper outlines how the current UK framework of legal services operates in different UK jurisdictions. There are three jurisdictions in the UK and six regulatory bodies: the Bar Council of England and Wales (BCEW), the Law Society of England and Wales (LSEW), the Faculty of Advocates (FoA, Scotland), the Law Society of Scotland (LSS), the Bar Council of Northern Ireland (BCNI) and the Law Society of Northern Ireland (LSNI).

The paper covers only the provision of legal services in the current context. As the negotiations on the future EU – UK agreement have not even begun, the paper does not aim to provide any insight to the future provision of legal services in the UK. As a comparison, the paper outlines the position of third country lawyers in the UK.

A brief analysis of the transitional arrangements is provided as at the moment the parties have published a draft agreement on the withdrawal of the UK from the EU, which includes transitional arrangements. It remains to be seen though if these arrangements will enter into force.

The paper sets out first briefly the current and transitional frameworks. After that it contains questions and answers

The current framework

EU27 lawyers currently enjoy their full rights under the EU *acquis*:

- Under the Lawyers' Services Directive, the right to provide legal services under the home State title throughout the territory of the UK outside the home State
- Under the Lawyers' Establishment Directive, the right to establish an undertaking providing legal services under the home State title in the territory of any other Member State
- Under the Professional Qualifications Directive 2005/36/EC, the right to acquire the professional title of another Member State and to practice under the same conditions as that State's nationals, on the basis of mutual recognition of academic and vocational qualifications. In conjunction with the Lawyers' Establishment Directive, this includes the right to acquire the host State title by integration in the local profession following three years' establishment in that State under the home State title.

Rights during the transitional period

The Draft Withdrawal Agreement ("DWA") published by the European Commission on 19 March 2018 sets out the rights arising for EU lawyers during the transition period. The text includes the position proposed by the EU that all EU citizens arriving in the host State during the transition period (currently set in the Draft Agreement as beginning with the UK's withdrawal on 29 March 2019 and ending on 31 December 2020) should have exactly the same rights as EU citizens who arrived before the UK's withdrawal.

In relation to lawyers, Article 25 (which is in green “agreed” text) sets out the following:

“Recognised professional qualifications

1. The recognition, before the end of the transition period, of professional qualifications, as defined in point (b) of Article 3(1) of Directive 2005/36/EC of the European Parliament and of the Council, of Union citizens or United Kingdom nationals by their host State or their State of work shall maintain its effects in the respective State, including the right to pursue the profession under the same conditions as its nationals, where such recognition was made in accordance with any of the following provisions:

[...]

- (b) Article 10(1) and (3) of Directive 98/5/EC of the European Parliament and of the Council in respect of gaining admission to the profession of lawyer in the host Member State;
...”

Article 26, also in green “agreed” text, states:

“Ongoing procedures on the recognition of professional qualifications

Article 4, Article 4d in respect of recognitions of professional qualifications for establishment purposes, Article 4f and Title III of Directive 2005/36/EC, Article 10(1), (3) and (4) of Directive 98/5/EC, Article 14 of Directive 2006/43/EC and Directive 74/556/EEC shall apply in respect of the examination by a competent authority of their host State or State of work of any application for the recognition of professional qualifications introduced before the end of the transition period by Union citizens or United Kingdom nationals and in respect of the decision on any such application.

Articles 4a, 4b and 4e of Directive 2005/36/EC shall also apply in so far as relevant for the completion of the procedures for the recognitions of professional qualifications for establishment purposes under Article 4d of Directive 2005/36/EC

Question and answer section:

- 1. I am an EU qualified lawyer and would like to re-qualify as a solicitor/barrister/advocate in England and Wales / Scotland / Northern Ireland. What do I have to do?**

a) at present

Currently, EU qualified lawyers established in the UK under the Establishment of Lawyers Directive 98/5/EC are able to requalify and obtain one of the six host state titles after three years of effective and regular practice of local law including EU law as a “Registered European lawyer” (REL). REL status can be obtained by registration with one of the six regulatory bodies for the UK legal professions listed in Art. 1 of the Establishment Directive: The Bar Council of England and Wales (BCEW), the Law Society of England and Wales (LSEW), Faculty of Advocates (FoA, Scotland), the Law Society of Scotland (LSS), the Bar Council of Northern Ireland (BCNI) and the Law Society of Northern Ireland (LSNI).

RELs who have fulfilled these requirements set out above may apply to the relevant regulatory body with whom they have registered to obtain their professional title without fulfilling any further requirements. Please note that you can only obtain REL status with one regulator in each UK

jurisdiction and you will have to choose one branch of the profession (either the Law Society or the Bar).

Alternatively, foreign qualified lawyers from recognised jurisdictions may requalify at any time via the relevant Transfer Schemes overseen by the six UK legal professional bodies. EEA or Swiss nationals qualified in the EEA or Switzerland and may apply for exemptions from part of the aptitude test. These procedures are pursuant to the EU Mutual Recognition of Qualifications Directive.

Please see the further information from the six regulators from:

- **BCEW (BSB):**¹ <https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/current-requirements/transferring-lawyers/european-lawyers/>.
- **LSEW (SRA):**² on RELs: <http://www.sra.org.uk/sra/regulatory-framework/establishment-lawyers-directive-98-5-EC.page> and on requalifying as a solicitor <http://www.sra.org.uk/solicitors/qlts/apply.page>
- **FoA:** <http://www.advocates.org.uk/about-advocates/becoming-an-advocate/information-for-other-lawyers>
- **LSS:** on RELs: <https://www.lawscot.org.uk/members/membership-and-fees/registered-foreign-european-lawyer/>. On requalification: <https://www.lawscot.org.uk/qualifying-and-education/qualifying-as-a-scottish-solicitor/requalifying-into-scotland/eu-lawyers/>

In Scotland, EU lawyers wishing to requalify as solicitors under the MRQD can currently apply to the Law Society of Scotland to sit an EU aptitude test. This is a different process to the one that lawyers elsewhere in the UK need to take and, also, different to the one for non-EU overseas lawyers. However, a new standardised process will be introduced for all lawyers qualifying into Scotland in due course and candidates will be able to apply for exemptions on the basis of past study and qualifications.

BCNI: A person who is entitled to seek to practise the profession of Barrister in Northern Ireland pursuant to Council Directives 98/5/EC and 2005/36/EC ('the Directives') and the implementing Regulations in Northern Ireland may apply to be admitted to the Inn of Court and to the degree of Barrister at Law in accordance with Rule 21 of the Rules of Admission (www.barofni.com/page/constitution).

Only holders of the degree of Barrister at Law may be called to the Bar of Northern Ireland by the Lord Chief Justice and admitted to practise in the Courts of Northern Ireland as members of the Bar of Northern Ireland.

A European lawyer who wishes to practise as a barrister on a permanent basis in Northern Ireland under his home professional title, may apply to the Executive Council to be registered as a registered European lawyer.

LSNI: On RELs: <https://www.lawsoc-ni.org/registered-european-lawyer>. On requalification: the Law Society of Northern Ireland does not administer a Foreign Lawyers Qualifying Scheme, rather non- EU lawyers applying must complete certain core subjects and complete the apprenticeship in the same manner as domestic applicants to the profession.

¹ The General Council of the Bar is the Approved Regulator of the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

² The Solicitors' Regulation Authority is the Approved Regulator of the Law Society of England and Wales.

b) during the transition period (if agreed);

The Draft Withdrawal Agreement outlines that those automatic requalification processes that are ongoing after the date of the UK's withdrawal from the EU (the date foreseen in the current draft being the end of the transitional period on 31 December 2020), in respect of the persons covered, will be completed under Union law and will be grandfathered.

This means that within the transition period the requalification process for European lawyers will remain as outlined above. Please note that Article 10(1) and (3) of the Establishment Directive allows for the re-qualification / full integration into the host legal profession after three years of effective and regular pursuit of a professional activity in the host state. While Article 26 specifically recognises this Article 10(1) and (3) right, it is currently unclear how this will be applied in practice, given the fact that the three-year period will end on 31 December 2020, i.e. the end of the transition period and the end date is currently thereby 31 December 2017. Therefore, it is still an open question how a lawyer will be able to use this route to requalify. It is our view that for procedures under Art 26 to be meaningful and reflecting the purpose of the DWA, EU lawyers should be able to register under Art. 3 until the end of the transition period and trigger therewith the three-year re-qualification period under Art. 10 (1) and (3). The UK delegation has requested a clarification on this from the negotiators.

2. I am an EU qualified lawyer and regularly advise clients on various areas of law.

- **Will my advice continue to attract the legal professional privilege (LPP) in England and Wales / Scotland / Northern Ireland after the withdrawal date?**

The UK exit from the EU will make no difference as regards LPP afforded to the clients of EU lawyers practising in the UK. All UK jurisdictions recognise that legal advice privilege applies to all qualified foreign lawyers and their clients. The privilege may apply whether the foreign lawyer is advising on local law or the law of his or her qualification, so long as there is a lawyer / client relationship and other requirements for privilege are satisfied.

In *IBM Corp v Phoenix International (Computers) Ltd* [1995] 1 All ER 413 the Court of Appeal stated: “*The fact that the advice given [by American attorneys] related predominantly to English law is irrelevant. It was advice of foreign lawyers, acting as lawyers, to be used by Phoenix to decide what strategy to adopt in carrying on business...*”.

In the UK, in-house lawyers can also claim LPP on behalf of their client (the company/organisation for whom they work). In the Court of Appeal in *Alfred Crompton Amusement Machines Ltd. v. Customs & Excise Communications (No. 2)* [1972] 2 QB 102 at 129, Lord Denning said that salaried legal advisers are “*regarded by the law as in every respect in the same position as those who practice on their own account. The only difference is that they act for one client only, and not for several clients... I have always proceeded on the basis that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege*”. Lord Denning went on to qualify this by limiting the LPP to communications made in the capacity of legal adviser. LPP cannot be claimed in respect of communications of an executive nature.

Therefore, an in-house lawyer (solicitors and non-solicitors) must take particular care to ensure that:

- There is a clear distinction between advice which is legal and that which is commercial in nature, since the latter will not attract legal professional privilege; and
- Must also take care when instructing external lawyers to ensure that relevant lawyer/client relationships are clearly defined.

3. Will I be able to continue providing advice on EU law in England and Wales / Scotland / Northern Ireland after the withdrawal date?

The answer to this question will depend on the negotiation result. This is not known at this point of time.

If there is nothing in the future agreement on this point, the situation is as follows for foreign lawyers:

England and Wales

Yes, except for reserved areas. In England and Wales, there are only six areas which are reserved to qualified solicitors, barristers or other recognised regulated professionals. If a foreign lawyer wishes to practise in the reserved areas of work, they must re-qualify as an English solicitor or barrister. However, unreserved areas of work can be carried out by EU lawyers.

According to the Legal Services Act 2007, the reserved areas are:

- the exercise of a right of audience;
- the conduct of litigation;
- reserved instrument activities;³

³ The LSA defines 'reserved instruments' as:

- the preparation of any instrument of transfer or charge for the purposes of the Land Registration Act 2002 (c. 9);
- the making of an application or lodging a document for registration under that Act;
- the preparation of any other instrument relating to real or personal estate for the purposes of the law of England and Wales or instrument relating to court proceedings in England and Wales.

'Reserved instrument activities' do not include the preparation of an instrument relating to any particular court proceedings if, immediately before the appointed day, no restriction was placed on the persons entitled to carry on that activity.

"instrument" includes a contract for the sale or other disposition of land (except a contract to grant a short lease which is defined as a lease such as is referred to in section 54(2) of the Law of Property Act 1925 (c. 20)), but does not include—

- a will or other testamentary instrument,
- an agreement not intended to be executed as a deed, other than a contract that is included by virtue of the preceding provisions of this sub-paragraph,
- a letter or power of attorney, or
- a transfer of stock containing no trust or limitation of the transfer.

- probate activities;⁴
- notarial activities; and
- the administration of oaths.

This means that the above activities can only be carried out by regulated / authorised persons who have to comply with regulatory objectives and are supervised by an approved regulator.

Legal activity that falls outside of the scope of the LSA is **unreserved** and includes:

- providing legal advice in connection with the application of the law or with any form of resolution of legal disputes, and
- any activity that does not fall within one of the six reserved legal activity categories. For litigation and advocacy, see question 4 below.

Scotland

In Scotland, the legal work that can be undertaken by a Scottish solicitor only is very limited. Similar to the 'reserved instruments' above, section 32 of the Solicitors (Scotland) Act 1980 restricts that work to the preparation of writs relating to court proceedings, the submission of writs relating to heritable or moveable estate and the preparation of papers to found or oppose an application for a grant of confirmation. To undertake work listed in section 32, or to exercise rights of audience in court would require requalification as a Scottish solicitor or as an Advocate (as appropriate). For more details see FAQ 4 below.

Northern Ireland

In Northern Ireland an unqualified person cannot act as a solicitor.⁵ This includes suing out "any writ or process, or commence, carry out or defend any action, suit or other proceeding, in the name of any other person or in his own name, in any court of civil or criminal jurisdiction, or act as a solicitor in any cause or matter, civil or criminal, to be heard or determined before any court or tribunal."

Furthermore, unqualified persons are not to prepare following instruments:

- Any instrument of transfer or charge or any other document for the purposes of the Land Registration Act (Northern Ireland)
- Any instrument relating to real or personal estate, or any legal proceedings
- Any instrument or other document or causes it to be lodged for registration in the Land Registry or the Registry of Deeds, or makes any application (other than an application to search in, or to receive copies of or extracts from, a register) to the Registrar of Titles, and
- Drawing or preparing any documents which to found or oppose a grant of probate or grant of letters of administration

For anyone seeking to practice as a barrister in Northern Ireland you are asked to note the details given under point 6 above and also to note that under the Code of Conduct of the Bar of Northern Ireland, a barrister must not enter into a partnership with another barrister, professional client or any other entity or individual and must not provide legal services within Northern Ireland in any capacity

⁴ The LSA defines 'probate activities' as preparing any probate papers for the purposes of the law of England and Wales or in relation to any proceedings in England and Wales. 'Probate papers' means papers on which to found or oppose a grant of probate, or a grant of letters of administration.

⁵ Solicitors (Northern Ireland) Order 1976 on Reserved Areas of Work, Section 19 (1).

or as part of any entity or arrangement other than in his or her capacity as a member of the Bar of Northern Ireland.

4. Will I be able to represent clients in English and Welsh / Scottish / Northern Irish courts after the withdrawal date?

Again, the answer to this question depends on the new agreement between the EU and the UK. Therefore, it is not clear yet whether the right will continue or not.

If the ability to represent clients in the UK courts is not included in the new agreement, following rules will apply:

Foreign lawyers do not have rights of audience in the courts, nor do they have the right to conduct litigation, nor the right to draw up court documents. In England and Wales, foreign lawyer may however apply to the Bar Standards Board for permission to appear in the English courts on an ad hoc basis (“temporary call”).

In most specialist tribunals there are no restrictions on rights of audience. However, this does not apply at the appellate level. For example, there are rights of audience to employment tribunals, but no rights in front of the Employment Appeals Tribunal or the Solicitors’ Disciplinary Tribunal, which are equivalent to courts. Nor there are rights of audience to Immigration Adjudicators or the Immigration Appeals Tribunal.

There is no restriction on rights to represent parties at arbitrations or in any other form of ADR conducted in the UK.

5. What requirements regarding the professional indemnity insurance will I have to fulfil after the withdrawal date? (note: both for establishment and temporary services purposes)

Again, this is not known as the future EU – UK agreement is not known.

There are no legal requirements for foreign lawyers to carry professional indemnity insurance in the England and Wales. In Scotland applicants to the Law Society who wish to exercise those rights as a solicitor are required to provide “such evidence as may be required by the Council that he has satisfied its requirements as to the professional indemnity insurance cover required of registered foreign lawyers as they apply to him”.⁶ In practice this might equate to no requirement if the practice unit is responsible for obtaining cover. In Northern Ireland, RELs are required to hold professional indemnity insurance in order to exercise their rights.

6. I am an EU qualified lawyer and would like to practise in England and Wales / Scotland / Northern Ireland. Will I be able to practise under my home country title?

Yes. Foreign qualified lawyers are able to practise under their home title (apart from the reserved areas, see above response to question 3). They should use their own untranslated professional title or by the word ‘lawyer’, together with a reference to the country or jurisdiction of their qualification e.g. Australian solicitor, US attorney, French lawyer etc.

⁶ Practice Rule D7 Registration of Foreign Lawyers

7. I am an EU qualified lawyer and would like to practise in England and Wales / Scotland / Northern Ireland. Will I have to register with the relevant law society/bar after the withdrawal date?⁷

While it is still unclear whether there will be a regulatory framework similar to the EU Directives for EU lawyers in the UK and UK lawyers in the EU, the following holds true for all foreign lawyers in the UK:

Unless they wish to enter into a partnership with UK qualified lawyers, a solicitor or join a multi-national corporate practice together with solicitors, foreign lawyers practising in the UK do not have to register with the legal regulators in the UK or be subject to any oversight by them. This applies to all but reserved activities highlighted in response to question number 3.

8. Will the conditions for setting up a law firm in England and Wales / Scotland / Northern Ireland change after the withdrawal date?

There is no difference between the treatment of law firms from EU Member States and law firms from outside the EU in the UK.

9. I am an EU qualified lawyer, currently working in-house in an EU jurisdiction where in-house lawyers are not members of the bar. Will I be able to work as an in-house lawyer in England and Wales / Scotland / Northern Ireland after the withdrawal date?

Yes, any foreign lawyer can practise in-house (provided they do not practise in the reserved areas as set out in question 3).

⁷ As per Article 3 of the Establishment Directive