

Q&A on UK lawyers' practice rights in the EEA and Switzerland during and after the transition period

Introduction

This paper outlines:

- the current regime for UK lawyers providing legal services in the EU (on the basis of the [Withdrawal Agreement](#)) and in Switzerland (the latter on the basis of the [Swiss Citizens' Rights Agreement](#)); and
- the position after the end of transition.

The paper is based on the assumption that there will be no provisions on legal services in the EU-UK future partnership agreement (FPA).

We would like to stress that every lawyer's position has to be considered on a case by case basis and this note does not replace legal advice or a consultation on an individual basis with the relevant regulators. We cannot accept any liability resulting from any action or lack thereof on the basis of the information contained in this note.

1. I have lived and practised law in the host country (EU) for more than three years but have not registered with the host state Bar. Are my rights to reside and practise in the host state acquired?

Your rights to practise may not be capable of being acquired as you have not fulfilled the requirements of the Lawyers' Establishment Directive (LED - see clarifications below). Your rights of residence, however, may, provided you complied with the relevant national and EU laws.

With regards to residence, Article 10 of the [withdrawal agreement](#) (WA) clarifies that the acquired rights apply to UK nationals who resided in any EU member state '*in accordance with Union law before the end of the transition period and continue to reside there thereafter.*' Article 13 WA further specifies the legislation to be taken into account in determining the applicable rights of residence. Provided you complied with the relevant EU and national legislation, you should be able to benefit from the acquired rights of residence.

With regards to establishment, Article 3(1) LED requires a lawyer who wishes to practise in a Member State other than that in which they obtained their professional qualification to register with the competent authority, e.g. a local or national bar association.

Your registration as an EU lawyer in an EEA member state will lapse at the end of the transition period.

Please note that there are different rules that apply to Switzerland following the conclusions of the [Swiss Citizens' Rights Agreement](#):

- UK lawyers registered and working in Switzerland, on a permanent basis under their home professional title before the end of the transition period, will continue to be able practice as they do now, while they remain registered in Switzerland.

- UK lawyers have a 4-year period from the end of the transition period to register, or to start their application to register, to work in Switzerland under their UK professional title on a permanent basis.

Please note that Article 10(1) and (3) LED allows for the re-qualification / full integration into the host legal profession after three years of effective and regular practice of host state law (including EU law). While Article 28 WA specifically recognises this Article 10(1) and (3) LED right, it is currently unclear how this will be applied in practice, given the fact that the three-year period would end on 31 December 2020, i.e. the end of the transition period. This means that the end date to have registered as an EU lawyer by would have been 31 December 2017. It is still an open question whether and how a lawyer will be able to use this route to requalify if they registered as EU lawyers after 31 December 2017.

In addition, you can use another route, that of the Mutual Recognition of Professional Qualifications (**MRPQ**) Directive, to re-qualify into the host state profession. See question 5 for more details.

2. I am not full-time resident in the host State (hence not registered with the Bar) but I do practise there (our firm has an office there). Will I have the right to continue doing so after the end of the transition period?

Until the end of transition period on 31 December 2020, you will be able to continue to practise in the EEA and Switzerland in the same way as before the withdrawal date, i.e. 31 January 2020.

After the end of the transition period and in the absence of a new EU-UK agreement, this will depend on:

- national rules in the EEA whether you need a residence in an EU Member State to be able to continue to practise in that Member State; or
- [Swiss Citizens' Rights Agreement](#) (see below for details on practising in Switzerland).

In case of practising in the EEA and in addition to rights of residence, you must take into account the following:

- a). whether you have qualified in an EEA jurisdiction or Switzerland; and (for some jurisdictions)
- b). whether you have an EEA / Swiss nationality.

To be able to continue to practise in these Member States, you may need to have an EEA / Swiss qualification to provide some or all legal services (as defined in the relevant Member State) and in some jurisdictions additionally an EEA or Swiss nationality. Please contact the bar of the EEA member state where you practise for further information.

In case of practising in Switzerland, the [Swiss Citizens' Rights Agreement](#) contains provisions applicable to lawyers. These are in particular:

- UK lawyers registered and working in Switzerland, on a permanent basis under their home professional title before the end of the transition period, will continue to be able practice as they do now, while they remain registered in Switzerland.

- UK lawyers who have transferred to the Swiss professional title before the end of the transition period will continue to be recognised and will continue to be able to practice as they do now, provided they remain registered in Switzerland.
- UK lawyers have a 4-year period from the end of the transition period to register, or to start their application to register, to work in Switzerland under their UK professional title on a permanent basis.
- UK law firms can continue to serve existing Swiss clients for up to 90 days in each calendar year for at least five years following the end of the transition period where written contracts which have been concluded and started before the end of the transition period. An extension to the five-year limit is possible through the agreement of a UK-Switzerland joint committee.
- Restructuring may be required if a law firm in Switzerland intends to benefit from rights of audience and represent its clients before the Swiss courts. If not (e.g. if the law firm is solely interested in providing English law advice and has no need to appear in front of Swiss courts) firms may be able to continue operating as LLPs.

3. I have recently moved to the host State and registered with the Bar.¹ Will I be able to integrate into the host legal profession (under Article 10 LED) after the end of the transition period, given that I will not have completed the necessary three years of regular and effective practice of host state law?²

This will depend on whether national Bars are willing to give any grace period to UK lawyers who do not complete the necessary three years of registration and regular and effective practice of host state law by the end of the transition period.

While Article 28 WA specifically recognises this Article 10(1) and (3) LED 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. This means in practice that, if national bars do not grant any grace period, a lawyer would have had to register before 31 December 2017 in order to be able to requalify pursuant to Article 10 LED.

Please contact the bar of the EEA member state where you practise for further information.

4. I have recently moved to the host State and registered with the Bar.³ Will I be able to integrate into the host legal profession (under the Mutual Recognition of Professional Qualifications Directive) after the end of the transition period?⁴

No, unless this matter is covered in the future UK-EU partnership agreement which is still being negotiated. Without such agreement, you will be able to requalify under the conditions set out in Chapter III WA only if you start the recognition procedure before the end of the transition period, i.e. 31 December 2020. The WA sets out conditions for recognition of qualifications obtained before the end of the transition period and to the ongoing recognition procedures (Article 27 and 28 respectively).

¹ Pursuant to Article 3 LED

² As set out in Article 10 LED

³ Pursuant to Article 3 LED

⁴ As set out in Article 10 LED

Article 28 WA reads '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 the 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.'

This means that if you have started the recognition procedure and meet the requirements before the end of the transition period, your qualifications will be recognised under the withdrawal agreement.

Importantly, they apply to Article 4 (Effects of recognition), Article 4d (European Professional Card for establishment purposes and for temporary provision of services), Article 4f (Partial access) and Title III of the [Directive 2005/36/EC](#) (which includes the provisions on the conditions for recognition and compensation measures such as an aptitude test or an adaptation period).

Article 29 WA obliges the relevant authorities of the UK and the EU member states to facilitate the application of Article 28.

The conditions for requalification after the end of the transition period are unclear as the EU-UK negotiations are still ongoing. Each EEA member and Switzerland has its own requalification procedures for third-country lawyers.

5. Will I be able to practise on a permanent basis in the EU under my home country title after the end of the transition period?

These rights are currently ensured until the end of the transition period, i.e. 31 December 2020. You should also be registered with the host bar as per Article 3 of the Establishment Directive.

After the end of the transition period, the ability of a UK legal professional to establish in the EU under their home country title will depend on the form of the future EU-UK agreement and / or relevant national rules.

In case there is no EU-UK agreement (or the EU-UK agreement does not cover legal services), the relationship between the EU and the UK will be regulated by the rules of the World Trade Organisation (WTO), in particular the General Agreement on Trade in Services (GATS). Currently, many member states allow the practice of law under home country title but restricted to home country law and international public law (usually excluding EU law). Others however do not allow the practice of law by non-EU lawyers in any form, not even under home country title. Many member states also place restrictions on the form of establishment.

Please note that following the [Swiss Citizens' Rights Agreement](#), the following rules apply:

- UK lawyers registered and working in Switzerland, on a permanent basis under their home professional title before the end of the transition period, will continue to be able to practise as they do now, while they remain registered in Switzerland.
- UK lawyers who have transferred to the Swiss professional title before the end of the transition period will continue to be recognised and will continue to be able to practice as they do now, provided they remain registered in Switzerland.

- UK lawyers have a 4-year period from the end of the transition period to register, or to start their application to register, to work in Switzerland under their UK professional title on a permanent basis.

6. I have just started my training contract with a medium-sized firm in England and Wales / Northern Ireland / Scotland which has presence in the EU. Will I be able to spend one of the seats in an EU country after the end of the transition period?

In principle yes, however, this will depend on the decisions within your firm and the regulations applicable to intra-corporate transferees (ICTs).

At the moment, graduate trainees can transfer freely within their employers' organisations within the EEA and Switzerland.

After the end of the transition period, the situation will depend on the future form of the EU-UK agreement. If the issue is not addressed in the agreement, the national law and EU law framework which is applicable to third country nationals will be applied.

Please note that at EU level the [EU ICT Directive](#) provides common rules with regard to intra-corporate transferees.

7. I am an English and Welsh / Northern Irish / Scottish law student who would like to specialise in EU trade and competition law. Will I be able to practise that area of law within the EU after the end of the transition period?

At the moment, these rights are included in the withdrawal agreement until the end of transitional period, i.e. 31 December 2020. After that, the answer will depend on the terms of the new EU-UK relationship if an agreement is reached, failing which on the relevant national provisions will apply.

If there is no EU-UK agreement on practice rights, the relationship between the EU and the UK will be regulated by the rules of the World Trade Organisation (WTO), in particular the General Agreement on Trade in Services (GATS). Currently, many member states reserve the right to practise EU law to their domestic legal professions and historically have been hesitant to extend this right to foreign lawyers.

If the above is the case, it may also be possible for the UK Law Societies and Bars to agree on bilateral arrangements with the EU bars and law societies. These arrangements may facilitate the access of lawyers qualified in the UK to practise EU law in specific jurisdictions. These agreements do not deal, however, with issues related to rights of audience in front of EU courts and legal professional privilege.

8. I am an English and Welsh / Northern Irish / Scottish solicitor and have been working as an in-house lawyer in the host state. The host state does not require registration of in-house lawyers. Will I be able to stay and continue with my employment after the end of the transition period?

Until the end of the transition period you should not, in principle, face any obstacles, provided that you fulfil the residency requirements to remain in the host state.

These are set out in Article 13(1) of the [withdrawal agreement](#) which reads that '*Union citizens and United Kingdom nationals shall have the right to reside in the host State under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU and in Article 6(1), points*

(a), (b) or (c) of Article 7(1), Article 7(3), Article 14, Article 16(1) or Article 17(1) of [Directive 2004/38/EC](#).⁵

It is unclear what provisions will apply after the end of the transition period as this will depend on the new EU-UK agreement.

9. I am a partner in a medium-sized firm with a considerable presence in England and Wales. Recently, the firm considered expanding and by seeking to work for clients in other parts of the EU. To provide legal services in the EU after the end of the transition period, would our firm need to be established in the EU?

Until the end of the transition period, i.e. 31 December 2020, the UK businesses will still be able to benefit from their rights under EU law and your firm should be able to provide services in the EU without the need to establish commercial presence.

It is difficult to predict what arrangements will apply after that date as it will depend on the new EU-UK relationship.

If there is no agreement in place, the relationship between the EU and UK will be regulated by the rules of the World Trade Organisation (WTO), in particular the General Agreement on Trade in Services (GATS). It is possible that some EU member states will require commercial presence if your firm would like to provide legal services.⁶

10. I am an English and Welsh / Northern Irish / Scottish solicitor/barrister advising on EU competition law. Will legal advice in that area of law benefit from the legal professional privilege (LPP)? If not, what do I need to do to make sure it does?

The advice given by you will attract the LPP until the end of the transition period, i.e. 31 December 2020. It is not clear what arrangements will apply after the transition period is over.

Currently, there are different rules that apply to privileged information at national level and at EU level.

At national level, the protection of privileged information is and will continue to be governed by national law.

At EU level, according to settled EU case law, legal advice of lawyers qualified outside the EU/EEA **does not** attract LPP before the GCEU and CJEU.⁷ While it may attract LPP before the national courts in selected EU member states, one should always consider the possibility of litigation reaching the EU courts.

⁵ These include conditions for residing legally in a member state (for less or more than three months), conditions for retaining the right to residence and conditions for acquiring permanent residence.

⁶ See 'Useful resources at the end of this document'

⁷ Paragraph 190 of [AG Kokott's opinion](#) in the appeal in Akzo Nobel ([C-550/07](#)) reads (on affording privilege to lawyers from third countries) '*unlike in the relationship between the Member States, in the relationship with third countries there is, generally speaking, no adequate basis for the mutual recognition of legal qualifications and professional ethical obligations to which lawyers are subject in the exercise of their profession. In many cases, it would not even be possible to ensure that the third country in question has a sufficiently established rule-of-law tradition which would enable lawyers to exercise their profession in the independent manner required and thus to perform their role as collaborators in the administration of justice. It cannot be the task of the Commission or the Courts of the European Union to verify, at considerable expense, that this is the case on each occasion by reference to the rules and practices in force in the third country concerned, particularly since there is no guarantee that there will be an efficient system of administrative cooperation with the authorities of the third country on every occasion.*'

The current practice in international law firms where a third country lawyer advises a client based in the EU is to have either an EU/EEA qualified lawyer present at the time advice is given or an EU/EEA qualified lawyer countersigning relevant documents.

11. I am an English and Welsh / Northern Irish / Scottish solicitor advising on EU law. Will I continue to have the rights of audience before the European courts, i.e. General Court of the EU (GCEU) and the Court of Justice of the EU (CJEU) after the end of the transition period?

At the moment, these rights are included in the withdrawal agreement until the end of transitional period, i.e. 31 December 2020. With the exception of the situations referred to in Articles 87,90 and 95(3), there is no longer right to represent clients after the transition period, even if the case originates from the UK courts under Article 158.

Article 91 of the [withdrawal agreement](#) allows the rights of audience to continue after the withdrawal date during the transition period and in some cases after the end of the transition period (regarding the latter, see Article 87 below). More specifically, it reads that:

1. *‘Without prejudice to Article 88, where, before the end of the transition period, a lawyer authorised to practise before the courts or tribunals of the United Kingdom represented or assisted a party in proceedings before the Court of Justice of the European Union or in relation to requests for preliminary rulings made before the end of the transition period, that lawyer may continue to represent or assist that party in those proceedings or in relation to those requests. This right shall apply to all stages of proceedings, including appeal proceedings before the Court of Justice and proceedings before the General Court after a case has been referred back to it.*
2. *Without prejudice to Article 88, lawyers authorised to practise before the courts or tribunals of the United Kingdom may represent or assist a party before the Court of Justice of the European Union in the cases referred to in Article 87 and Article 95(3). Lawyers authorised to practise before the courts or tribunals of the United Kingdom may also represent or assist the United Kingdom in the proceedings covered by Article 90 in which the United Kingdom has decided to intervene or participate.*
3. *When representing or assisting a party before the Court of Justice of the European Union in the cases referred to in paragraphs 1 and 2, lawyers authorised to practise before the courts or tribunals of the United Kingdom shall in every respect be treated as lawyers authorised to practise before courts or tribunals of Member States representing or assisting a party before the Court of Justice of the European Union.’*

The cases referred to in Article 87 of WA are matters where:

‘the European Commission considers that the United Kingdom has failed to fulfil an obligation under the Treaties or under Part Four of this Agreement before the end of the transition period’ within 4 years after the end of the transition period;⁸

the United Kingdom does not comply with a decision referred to in Article 95(1) of this Agreement, or fails to give legal effect in the United Kingdom’s legal order to a decision, as referred to in that provision, that was addressed to a natural or legal person residing

⁸ Part Four ‘Transition’ of the DWA covers Articles 126 to 132.

or established in the United Kingdom, the European Commission may, within 4 years from the date of the decision concerned;'

The cases referred to in Article 95 concern '*Decisions adopted by institutions, bodies, offices and agencies of the Union before the end of the transition period, or adopted in the procedures referred to in Articles 92 and 93 after the end of the transition period, and addressed to the United Kingdom or to natural and legal persons residing or established in the United Kingdom [...].'*

Except for what is outlined above, your right of audience before the European courts after the end of the transition period will depend on the form of the future EU-UK agreement.

In the absence of any agreement, you will lose your right of audience before EU courts unless you requalify into one of the EU/EEA legal professions.

12. What conditions will I have to fulfil with regard to professional indemnity insurance (PII) in an EU jurisdiction after the withdrawal date?

The current provisions of the Lawyers' Directives will continue to apply until the end of the transition period, i.e. 31 December 2020.

Article 6(3) of the Establishment Directive allows the host state to oblige the lawyer to take out additional insurance. However, if the lawyer can prove that he or she has sufficient and equivalent cover according to the rules of the host state, he or she may be exempted from that obligation.

Similarly, Article 4 of the Lawyers Services Directive sets out the provisions clarifying the scope of application of the host and home member state rules according to the type of activity undertaken.

The future PII obligations will depend on the form of the future EU-UK agreement. In an event of no agreement, the national rules will apply.

Useful resources:

UK Government

- [Get ready for Brexit toolkit](#)
- Guidance on [Recognition of professional qualifications](#)
- Guidance for [UK lawyers practising in the EU, Norway, Iceland or Liechtenstein from 1 January 2021](#)
- Guidance for [Provision of services regulations: guidance for UK service providers and Competent Authorities](#)
- Guidance on [SOLVIT problem solving service](#)
- Guidance for [UK lawyers practising in the EU, Norway, Iceland or Liechtenstein from 1 January 2021](#)
- Guidance for [EU lawyers in the UK from 1 January 2021](#)

European Commission

'Brexit readiness checklist' for companies doing business with the UK

UK bars and law societies

- Law Society of Scotland's Brexit guidance: <https://www.lawscot.org.uk/research-and-policy/international-work/brexit/>
- Law Society of England and Wales guidance: <https://www.lawsociety.org.uk/topics/brexit/>
- Solicitors Regulation Authority: [UK's Exit from EU – Possible non-negotiated outcome at end of transition period \(31 December 2020\)](#)
- Bar Council of England and Wales: <https://www.barcouncil.org.uk/policy-representation/policy-issues/eu/brexit.html>

Council of Bars and Law Societies (CCBE)

- CCBE guidelines '*Guidelines for Bars & Law Societies on Free Movement of Lawyers within the European Union*':
http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EU_LAWYERS/EU_L_Guides_recommendations/EN_FML_2016_Guide.pdf
- CCBE guidelines '*Conditions for the admission of lawyers from non-EU Member States to the title of the local legal profession in each EU Member State and conditions under which lawyers from non-EU Member States can perform temporary services in each Member State under their own home title*':
http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/INTERNATIONAL_LEGAL_SERVICES/ILS_Position_papers/EN_ILS_20050125_Conditions-for-the-admission-of-lawyers-from-non-EU-Member-States-to-the-title-of-the-local-legal-profession-in-each-EU-Member-State-and-conditions-under-which-lawyers-from-non-EU-Member-States-GATS.pdf