

Business and Regulatory Impact Assessment

Title of Proposal

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

Purpose and intended effect

Background

The European Communities (Services of Lawyers) Order 1978/1910 implements the Lawyer's Services Directive Council Directive (77/249/EEC) which allows European Union (EU) and European Free-Trade Association (EFTA) 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 2000/121. These Regulations allow 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.

These instruments provide EU and EFTA lawyers preferential access to the legal services market in Scotland, and there are reciprocal practice and establishment arrangements for lawyers practising in Scotland who wish to provide legal services in the EU.

The UK Government entered into the UK-Swiss Citizens' Rights Separation Agreement. This agreement recognises that when the UK leaves the EU, the UK will no longer be party to the Swiss-EU Free Movement of Persons Agreement which governs the free movement rights of citizens of EU Member States and Switzerland, including the recognition of professional qualifications. To provide for rights secured in the agreement, this instrument makes provision in connection with the provision of legal services by Swiss lawyers.

Objective

- **Rationale for Government intervention**

The objective of this instrument is to end the preferential practising rights of EU and EFTA lawyers in Scotland, in the event that the UK leaves the EU without a negotiated settlement (ie without a deal).

These preferential rights are provided by a reciprocal European framework consisting of Directives and implementing legislation. If the UK leaves the EU without a negotiated settlement, the reciprocity on which these rights depend will cease to exist. This instrument will realign EU and EFTA lawyers with

lawyers qualified in third countries.

In terms of the UK-Swiss agreement, this instrument will enable two groups - Swiss lawyers qualified as of Exit Day and those who have started to obtain their qualifications as Swiss lawyers before Exit Day - the right to start recognition procedures or apply to join a legal profession in Scotland within 4 years of Exit Day. It will grant Swiss lawyers (or other nationals established or permanently employed, and professionally recognised in Switzerland) the right to continue providing services in Scotland, in the service of contracts that are extant on Exit Day, for up to 90 days per year, for the duration of the contract (though limited to 5 years in the first instance, with scope for a Joint Committee to extend in 5-year periods).

Consultation

- **Within Government**

The Scottish Government has consulted with the Secretary of State in accordance with paragraph 4(b) of schedule 2 of the European Union (Withdrawal) Act 2018 in the development of these Regulations.

- **Public Consultation**

Time did not allow for a consultation on the draft SSI. The policy note and also the UKG SI, which is similar to terms to this instrument, was shared with the Law Society of Scotland, the Faculty of Advocates and the Scottish Legal Aid Board. The representative bodies for solicitor and advocates both recognised the need to prepare for a “no deal” Brexit and in that context advised they were content with the policy intent and made no comments that should be taken account of in our drafting. The instrument will have no impact on the provision of legally aided services or the legal aid Fund.

- **Business**

The representative body for solicitors and advocates in Scotland were consulted in the development of these Regulations as stated above.

Options

Option 1: Do Nothing

If this option was chosen, EU and EFTA lawyers would continue to have preferential rights of access to the legal services market to qualified lawyers from third countries. The Scottish Government does not consider this to be a viable option in the event of no deal, given that reciprocity for Scots law qualified lawyers will no longer be in place. In addition, should the UK leave the EU without reaching an agreement, all nations of the UK will remain 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). Without this instrument there will be no alignment with the WTO commitments that the UK is subject to.

Option 2: Make the Regulations

The Scottish Government believes that staying in the EU is the best option for the whole of the UK and Scotland. The Scottish Government's preferred option is another referendum which includes the choice to remain in the EU. Failing that, the Scottish Government supports a compromise option: continued membership of the European Single Market and Customs Union. However, if the UK leaves the EU without a deal, the Scottish Government needs to take appropriate action.

In this instance, the Scottish Government considers that if the UK leaves the EU without a deal, the best approach is to ensure compliance with World Trade Organisation rules.

This option would remove the current legal framework giving EU and EFTA lawyers preferential market access and transition EU and EFTA lawyers to the same level of market access as lawyers from third countries. By revoking the 1978 Order and the 2000 Regulations, the instrument ensures compliance with World Trade Organisation rules. There is provision for a transition period to mitigate consequences for those affected by these provisions and allow them reasonable time to take action to comply with the new regulatory framework.

This option gives effect to the terms of the agreement entered into with Switzerland by the UK Government.

Benefits - Should Scotland continue to offer EU and EFTA lawyers preferential qualification and practice rights, there might be challenges by WTO members seeking similar treatment in Scotland for lawyers qualified in their jurisdictions. These challenges may escalate from informal procedures to dispute settlement panels, to requiring compensatory measures in the form of lowering trade barriers, or to retaliatory measures from other GATS members

if non-compliance with MFN rules is found. This instrument negates such a risk.

Few legal professionals will be impacted by the instrument. The Faculty of Advocates advises there are no Registered European Lawyers registered with the Faculty. The Law Society of Scotland advises there is currently one Registered European Lawyer registered with the Society, and there have not been more than five registered at any time in the last decade; it is more common for legal professionals from the EU to seek requalification in Scotland by way of an EU Aptitude Test, with 15 candidates sitting the Aptitude Test in 2018, 14 candidates in 2017 and 9 candidates in 2016. Of these candidates, three have been Swiss lawyers. The Society intends to unify routes to requalification for all legal professionals qualified outside Scotland, meaning the current EU Aptitude Test will be replaced by a Qualified Lawyers Assessment which, in the event of a no deal Brexit, will have regard to relevant international trade considerations when offering terms to EU candidates.

The transitional period will provide the Law Society of Scotland and the Faculty of Advocates sufficient time to prepare appropriate amendments to rules in the respective regulatory frameworks, to take account of changes in this instrument. The transitional arrangements also ensure that the regulatory bodies retain any regulatory and disciplinary control which are currently exercised with regard to Registered European Lawyers in order to secure continued protection of consumers in this regard.

Costs - There are no known direct costs. Indirect costs and non-monetised costs would relate to the steps EU and EFTA lawyers choose to take to adjust their services, practice or business model to align with the new regulatory position, dependent on their individual circumstances. These costs are not quantifiable. Costs associated with changes to fly in fly out arrangements can be not quantified.

Scottish Firms Impact Test

As stated in the consultation section, consultation took place with the Law Society of Scotland, which negotiates with the Scottish Government on behalf of the solicitor profession. The very low number of Registered European Lawyers and of EU lawyers choosing to requalify in Scotland means the impact on Scottish Firms will be negligible.

Competition Assessment

The primary purpose of these Regulations is to realign EU and EFTA lawyers with lawyers qualified in third countries, and secondly to recognise the

separate arrangements the UK has agreed with Switzerland in connection with legal services, so do not directly or indirectly limit the number or range of suppliers. The regulations do not limit the ability of suppliers to compete or reduce suppliers' incentives to compete vigorously.

As more than two questions have been answered in the negative, there was no requirement to complete a full Competition Assessment.

Test run of business forms

There will be no requirement for new forms.

Legal Aid Impact Test / Financial Implications

There will be no impact on the provision of legally aided services or on the legal aid Fund.

Enforcement, sanctions and monitoring

The proposals do not, otherwise, create any new enforcement or monitoring mechanisms.

Implementation and delivery plan

The instrument is due to come into force on the day the UK leaves the EU, and provides a transitional period ending 30 December 2020 so that relevant lawyers are given adequate time to make alternative arrangements to comply with the new regulatory framework.

If the UK does leave the EU without a deal, the Scottish Government will consider what guidance may be required for the bodies that regulate legal services providers in Scotland.

Post-implementation review

If the UK does leave the EU without a deal, the Scottish Government would intend to monitor the impact of Brexit generally, including the impact on the provision of legal services. Negative impacts on the legal profession would be reported to Scottish Government by the Law Society of Scotland and the Faculty of advocates.

Recommendation

It is recommended that the regulations are made (**Option 2**).

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:**Date:**

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