

Q&A on EU / EFTA lawyers in the UK - Practice rights during and after the end of the transition period

CCBE UK delegation paper

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Introduction

This paper outlines how the framework of legal services operates in the UK.¹

The UK left the EU on 31 January 2020. The paper, therefore, covers:

- the provision of legal services during the transition period which started at that date and will end on 31 December 2020;
- the provision of legal services after the end of the transition period.

As the negotiations on the EU-UK future partnership agreement (**FPA**) are still underway, this 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 current position of third country lawyers in the UK.

The paper sets out first briefly the legal framework that applies during the transition period. It then continues with questions and answers.

Overview of the rights

Lawyers' practice rights during the transition period

The rights of EU lawyers in the UK are set out in the [Withdrawal Agreement \(WA\)](#) published on 12 November 2019. Please note that there are separate arrangements for Swiss lawyers on the basis of the [Swiss Citizens' Rights Agreement \(SCRA\)](#)² and for three EEA EFTA states under the [UK-EEA EFTA Separation Agreement \(UKESA\)](#).³ In addition, Irish and UK citizens enjoy rights of residence and practice under [Common Travel Area](#).

The WA text reads that all EU citizens arriving in the host State during the transition period, i.e. until 31 December 2020, have the same rights as EU citizens who arrived before the UK's withdrawal.

This means that the EU27 lawyers continue to enjoy their full rights under the EU *acquis* until 31 December 2020:

- Under the Lawyers' Services Directive ([Directive 77/249/EEC](#)), the right to provide legal services under the home State title throughout the territory of the UK outside the home State

¹ Altogether 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**).

² See also: Explainer for Swiss Citizens' Rights Agreement:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767005/Explainer_-_Swiss_citizens_rights_agreement.pdf

³ See also: Explainer for the UK-EEA EFTA Separation Agreement:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766998/Explainer_-_UK-EEA_EFTA_Separation_Agreement.pdf

- Under the Lawyers' Establishment Directive ([Directive 98/5/EC](#)), the right to establish an undertaking providing legal services under the home State title in the territory of any other Member State
- Under the Mutual Recognition of Professional Qualifications (**MRPQ**) Directive ([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.

In addition, in relation to lawyers, Article 27 (Recognised professional qualifications) of the WA sets out the following:

'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 (9), of Union citizens or United Kingdom nationals, and their family members, by their host State or their State of work shall maintain its effects in the respective State, including the right to pursue their profession under the same conditions as its nationals, where such recognition was made in accordance with any of the following provisions:

[...]

a) Title III of Directive 2005/36/EC in respect of the recognition of professional qualifications in the context of the exercise of the freedom of establishment, whether such recognition fell under the general system for the recognition of evidence of training, the system for the recognition of professional experience or the system for the recognition on the basis of coordination of minimum training conditions;

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

[...].'

Article 28 (Ongoing procedures on the recognition of professional qualifications) states:

'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. Articles 4a, 4b and 4e of Directive 2005/36/EC shall also apply to the extent relevant for the completion of the procedures for the recognitions of professional qualifications for establishment purposes under Article 4d of that Directive.'

The SCRA makes it possible for Swiss citizens and their family members to apply for a residence status through the EU Settlement Scheme.

Swiss lawyers in the UK will:

- continue to have their professional qualifications recognised where they obtained a recognition decision before the end of the transition period; and
- have a four-year grace period from the end of the transition period to start the application process for a recognition decision, provided they have obtained a qualification or were in the process of obtaining a qualification before the end of the transition period.
- continue to benefit from the current EU-Swiss 90 days' service provision rules for at least five years following the end of the transition period for written contracts which have been concluded and started before the end of the transition period.

Under the UKESA, Norwegian, Icelandic and Liechtenstein lawyers will:

- continue to reside in the UK if they had been lawfully resident before the end of the transition period. EEA EFTA nationals who have been living in the UK continuously and lawfully for five years at the end of the implementation period will have the right to reside permanently in the UK;
- EEA EFTA nationals will be able to apply for permanent residence under EU Settlement Scheme;
- continue to have their professional qualifications recognised, where they obtained or applied for a recognition decision before the end of the transition period. The explainer states that *'This will cover the European Professional Card, qualifications recognised under the Professional Qualifications directive for the purpose of establishment (but not for the temporary and occasional provision of services), **lawyers practising under host state title**, approved statutory auditors, and persons engaged in the trade and distribution of toxic products.'* (own emphasis);
- continue to have the right to pursue economic activity.

The Common Travel Area preserves the residency and other rights of Irish and UK citizens regardless of the FPA outcome. These are bound under the Northern Ireland Protocol of the WA.

Future regime on recognition of professional qualification

Between 25 August and 23 October, UK Government [has consulted](#) on its future system of recognition of professional qualification of foreign-qualified professionals (including lawyers). While the existing regulations and guidance in this paper still apply, please be advised that this is an area still under review and development. We advise any foreign-qualified practitioner to double check the latest regulatory position with regard to recognition of qualifications and to take it into account in their plans and expectations about acquiring practice rights in any of the three UK jurisdictions.

Question and answer section

1. *I am an EU / EFTA qualified lawyer and would like to re-qualify into local profession in England and Wales / Scotland / Northern Ireland. What do I have to do?*

The Withdrawal Agreement outlines that those automatic requalification processes that are ongoing during the transition period in respect of the persons covered, will be completed under Union law and will be grandfathered. This means that all requalification requests for European lawyers submitted **within** the transition period will remain as outlined below.

England and Wales

Law Society of England and Wales: EEA and Swiss qualified lawyers established in England and Wales under the Establishment Directive are still able to requalify as a solicitor following two routes until the end of the transition period:

- after three years of effective and regular practice of local law, including EU law, as a Registered European Lawyer (**REL**), pursuant to Article 10(1) and (3) of the Establishment Directive; and
- through the [Qualified Lawyers Transfer Scheme \(QLTS\)](#) overseen by the Solicitors Regulation Authority (**SRA**). EEA or Swiss nationals qualified in the EEA or Switzerland may apply for exemptions from part of the aptitude test. These procedures are pursuant to the EU MRPQ Directive.

REL status can be obtained by registering with the SRA. The new REL registrations will be accepted until the end of the transition period, i.e. 31 December 2020.

However, please note that:

- **the registration and practice as an REL will no longer be possible after 31 December 2020. All those registered as RELs at that date will automatically become Registered Foreign Lawyers (RFLs) unless they request otherwise to the SRA;**
- **RELs in England and Wales will be contacted by the SRA with details on this before the end of 2020;**
- **the cut-off date for the applications for the requalification under Article 10 (Establishment Directive) route for EEA lawyers is 31 December 2020, i.e. the three-year period must be completed by that date. This means in practice that the registration as an REL must have happened before 31 December 2017;**
- **the cut-off date for the requalification under Article 10 (Establishment Directive) route for Swiss lawyers is 31 January 2024;**
- in England and Wales, the QLTS will be replaced by the [Solicitors Qualifying Examination \(SQE\)](#) in Autumn 2021.⁴

Bar Council of England and Wales: EEA and Swiss qualified lawyers established in England and Wales under the Establishment Directive are still able to requalify as a barrister following two routes until the end of the transition period:

- after three years of effective and regular practice of local law, including EU law, as a Registered European Lawyer (REL), pursuant to Article 10(1) and (3) of the Establishment Directive; and
- through the Qualified European Lawyers scheme overseen by the Bar Standards Board (BSB). EEA or Swiss nationals qualified in the EEA or Switzerland may apply for exemptions from part or all of the Bar Transfer Test (BTT). EEA or Swiss nationals qualified in the EEA or Switzerland do not need to take the Bar Course Aptitude Test (BCAT) aptitude test.

⁴ See also: Transitional arrangements and SQE Regulations: <https://www.sra.org.uk/students/sqe/transitional-arrangements/>, Solicitors Regulation Authority, updated August 2020

REL status can be obtained by registering with the BSB. New REL registrations will be accepted until the end of the transition period, i.e. 31 December 2020.

Please note that once the transition period ends, RELs will no longer be registered with the Bar Standards Board (**BSB**).

Scotland

Law Society of Scotland: EEA and Swiss qualified lawyers established in Scotland under the Establishment Directive are still able to requalify as a solicitor following two routes until the end of the transition period:

- after three years of effective and regular practice of local law, including EU law, as a Registered European Lawyer (**REL**), pursuant to Article 10(1) and (3) of the Establishment Directive; and
- through the [Qualified Lawyers Assessment](#)⁵ overseen by the Law Society of Scotland. EEA or Swiss nationals qualified in the EEA or Switzerland are eligible for an exemption from part of the exam.

REL status can still be obtained by registering with the Society until the end of the transition period, i.e. 31 December 2020, although EU lawyers considering this route may wish to contact the Society to discuss their options.

Please note that:

- **the registration and practice as an REL will no longer be possible after 31 December 2020.**
- **the cut-off date for the applications for the requalification under Article 10 (Establishment Directive) route for EEA lawyers is 31 December 2020, i.e. the three-year period must be completed by that date. This means in practice that the registration as an REL must have happened before 31 December 2017;**
- **the cut-off date for the requalification under Article 10 (Establishment Directive) route for Swiss lawyers is 31 January 2024;**

[FoA]

Northern Ireland

[LSNI]

[BCNI]

2. I am an EU / EFTA qualified lawyer and regularly advise clients on various areas of law. Will my advice continue to attract legal professional privilege (LPP) in England and Wales / Scotland / Northern Ireland after the withdrawal date?

The UK exit from the EU makes no difference as regards LPP afforded to the clients of EU / EFTA 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

⁵ <https://www.lawsocot.org.uk/qualifying-and-education/qualifying-as-a-scottish-solicitor/requalifying-into-scotland/>

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;
- must also take care when instructing external lawyers to ensure that relevant lawyer/client relationships are clearly defined.

Most recently, the England and Wales High Court (Commercial Court) held in *PJSC Tatneft v Bogolyubov and others* [2020] EWHC 2437 (Comm) that legal advice privilege extends to communications with foreign lawyers, regardless of whether they practise in-house or independent. Moreover, the court should not enquire into the extent of their qualification or regulation, or whether legal advice privilege applies in their home jurisdiction.⁶

3. *I am an EU / EFTA 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 after the end of the transition period?*

Yes. Foreign qualified lawyers are able to practise under their home title. 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 avocat etc.

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

Yes, except for reserved activities. In England and Wales, there are only six areas which are reserved to qualified solicitors, barristers or other recognised regulated professionals. If a

⁶ [PJSC Tatneft v Bogolyubov and others \[2020\] EWHC 2437 \(Comm\)](#)

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.

England and Wales

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;⁷
- probate activities;⁸
- 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.

In addition:

- Under the Financial Services Act 2012, Solicitors and their partners are permitted to carry out certain categories of investment business without authorisation from the Financial Conduct Authority (FCA).
- Under the Immigration and Asylum Act 1999, only foreign lawyers who are partners or employees of UK solicitors can provide immigration advice and services

Legal activity that falls outside of the scope of the LSA and the other restrictions above 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

⁷ 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.

⁸ 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.

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).

Northern Ireland

In Northern Ireland an unqualified person cannot act as a solicitor.⁹ 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
- 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 or as part of any entity or arrangement other than in his or her capacity as a member of the Bar of Northern Ireland.

5. Will I be able to represent clients in English and Welsh / Scottish / Northern Irish courts after the end of the transition period?

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 lawyers may however apply to the Bar Standards Board for permission to appear in the English courts on an ad hoc basis ("temporary call"). The procedures for temporary call are set out in Rules rQ25-27 of the BSB Handbook.¹⁰

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'

⁹ [Solicitors \(Northern Ireland\) Order 1976](#) on Reserved Areas of Work, Section 19 (1).

¹⁰ BSB Handbook: <https://www.barstandardsboard.org.uk/for-barristers/bsb-handbook-and-code-guidance/the-bsb-handbook.html>

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 alternative dispute resolution (**ADR**) conducted in the UK.

6. *What requirements regarding the professional indemnity insurance will I have to fulfil after the end of the transition period? (note: both for establishment and temporary services purposes)*

In England and Wales, solicitors must carry professional indemnity insurance (PII) if they are working in an SRA-regulated entity or providing any reserved legal activities under the law in England and Wales. Barristers of England and Wales need to carry PII to the level stipulated by the BSB. There are no legal requirements concerning PII for foreign lawyers (unless they are RELs).¹¹

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”.¹² 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.

7. *I am an EU / EFTA 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 end of the transition period?*¹³

The answer to this question will depend on the result of the negotiations on the future partnership agreement (**FPA**) between the EU and the UK. This is not known at this point of time.

If the EU-UK FPA does not include provisions on registration with the host State bar, the following holds true for all foreign lawyers in the UK:

Unless they wish to enter into a partnership with UK qualified solicitors 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.

In England and Wales foreign lawyers have to register with the Solicitors Regulation Authority as Registered Foreign Lawyers only if they want to become a manager or owner of an authorised law firm in England and Wales.

¹¹ See: [SRA Indemnity Insurance Rules](#)

¹² Practice Rule D7 Registration of Foreign Lawyers

¹³ As per Article 3 of the Establishment Directive

Foreign qualified lawyers do not need to register with the BSB (or another approved legal regulator) to work as an employee in a BSB entity, so long as they are not carrying on reserved legal activities.

To be an owner/manager at a BSB entity, one must be an Authorised Person (e.g. authorised by the BSB or SRA). If an owner/manager of a BSB entity is not an Authorised Person, the entity would need to be licensed by the BSB as an Alternative Business Structure (ABS). BSB entities and ABSs must normally be registered and have a practising address in England and Wales.¹⁴

In Scotland, foreign qualified lawyers only have to register with the Law Society of Scotland if they want to joining a multi-national practice as a manager, or an incorporated practice as a member¹⁵.

8. Will the conditions for setting up a law firm in England and Wales / Scotland / Northern Ireland change after the end of the transition period?

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 end of the transition period?

Yes, any foreign lawyer can practise in-house (provided they do not practise in the reserved areas as set out in question 4).

Resources:

Bar Council of England and Wales (BCEW) / Bar Standards Board (BSB): <https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/current-requirements/transferring-lawyers/european-lawyers/>

Law Society of England and Wales (LSEW) / Solicitors Regulation Authority (SRA)

- on RELs: <https://www.sra.org.uk/trainees/admission/admission-criteria/rels/>
- on requalifying as a solicitor <https://www.sra.org.uk/trainees/admission/admission-criteria/qualified-lawyers-transfer-scheme/>
- other routes to admission: <https://www.sra.org.uk/trainees/admission/admission-criteria/>

Faculty of Advocates (FoA): <http://www.advocates.org.uk/about-advocates/becoming-an-advocate/information-for-other-lawyers>

¹⁴ See BSB Handbook Part C6 – Authorisation to practise: <https://www.barstandardsboard.org.uk/training-qualification/bar-qualification-manual/part-2-for-students-pupils--transferring-lawyers/c6-authorisation-to-practise.html>

¹⁵ <https://www.lawscot.org.uk/members/membership-and-fees/registered-foreign-european-lawyer/>

Law Society of Scotland (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/>

Law Society of Northern Ireland (LSNI): <https://www.lawsoc-ni.org/registered-european-lawyer>

Bar Council of Northern Ireland (BCNI): www.barofni.com/page/constitution