



The Scottish Parliament
Pàrlamaid na h-Alba

Published 22 March 2019
SP Paper 499
8th Report, 2019 (Session 5)

Justice Committee Comataidh a' Cheartais

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

Draft Regulations laid before the Scottish Parliament under paragraph 1(7) of section 35 of the European Union (Withdrawal) Act 2018, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2019 No.

EXITING THE EUROPEAN UNION

LEGAL PROFESSION

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

Made - - - -

2019

Coming into force in accordance with regulation 1

The Scottish Ministers make the following Regulations in exercise of the powers conferred by paragraph 1(1) and (3) of schedule 2 and paragraph 21(b) of the European Union (Withdrawal) Act 2018(a) and all other powers enabling them to do so.

In accordance with paragraph 40(b) of the European Union (Withdrawal) Act 2018,
Secretary of State.

In accordance with paragraph 40(b) of the European Union (Withdrawal) Act 2018,
laid before the Scottish Parliament.

Published in Scotland by the Scottish Parliamentary Corporate Body.

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Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/justice-committee.aspx>



justicecommittee@parliament.scot



0131 348 5047

Committee Membership



Convener
Margaret Mitchell
Scottish Conservative
and Unionist Party



Deputy Convener
Rona Mackay
Scottish National Party



John Finnie
Scottish Green Party



Jenny Gilruth
Scottish National Party



Daniel Johnson
Scottish Labour



Liam Kerr
Scottish Conservative
and Unionist Party



Fulton MacGregor
Scottish National Party



Liam McArthur
Scottish Liberal
Democrats



Shona Robison
Scottish National Party

Introduction

1. At its meeting on 19 March 2019, the Justice Committee ("the Committee") considered the following Scottish Statutory Instrument:
 - [The Services of Lawyers and Lawyer's Practice \(EU Exit\) \(Scotland\) \(Amendment etc.\) Regulations 2019 \[draft\]](#)
2. The instrument was laid before the Parliament on 20 February 2019 under paragraph 1(7) of schedule 7 of the European Union (Withdrawal) Act 2018, and referred to the Committee. The Committee is required to report to the Parliament on the instrument by 31 March 2019. The instrument is subject to the affirmative procedure.
3. The purpose of this instrument is to end the preferential practising rights of EU and EFTA lawyers in Scotland, in line with a similar approach being taken in England, Wales and Northern Ireland. It will also provide for a range of rights for Swiss nationals, or others who are professionally recognised in Switzerland and who have Swiss legal qualifications to practice in Scotland under certain conditions.

Purpose of the instrument

4. The purpose of this instrument is to end the preferential practising rights of EU and EFTA lawyers in Scotland. These are provided for by a reciprocal European framework consisting of Directives and implementing legislation. The Directives will cease to apply in the UK on EU Exit and the reciprocity on which they depend will accordingly cease.
5. This instrument will, therefore, revoke the implementing legislation, thereby realigning the position of EU and EFTA lawyers with other "third country" lawyers. This is subject to transitional provision, to give certain EU and EFTA lawyers the time to make the necessary changes to their practice to comply with the new regulatory framework.
6. The instrument will also make provision in relation to the UK-Swiss Withdrawal Agreement dated 20 December 2019.

Protocol on the scrutiny of SSIs made using powers under the European Union (Withdrawal) Act

7. This instrument is made under the powers conferred on devolved authorities in the European Union (Withdrawal) Act 2018 to deal with deficiencies arising from EU withdrawal. A [protocol](#) has been agreed between the Scottish Government and Scottish Parliament which sets out the process for committees dealing with such instruments ("the protocol").
8. The protocol sets out three categories of SSIs – high, medium or low – to assist committees' prioritisation in terms of scrutiny. The Scottish Government has categorised the Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 as medium.


Consideration by the Delegated Powers and Law Reform Committee

9. On 26 February 2019, the Delegated Powers and Law Reform Committee (DPLR Committee) considered the scrutiny procedure under which the instrument has been laid. The DPLR Committee agreed that the instrument has been laid under the appropriate procedure.
10. The DPLR Committee considered the content of the instrument at its meeting on 5 March 2019 and agreed that it did not need to draw the instrument to the attention of the Parliament on any grounds within its remit.

Consideration by the Justice Committee

11. Under the protocol, the lead committee has the opportunity, in advance of its policy scrutiny, to recommend to the Scottish Government that the parliamentary procedure attached to the instrument should be changed. This is known as "sifting".
12. At its meeting on [26 February 2019](#), the Committee considered the procedure by which the instrument was laid. It was agreed the correct procedure was used.
13. The Minister for Community Safety has lodged motion S5M-16239 proposing that the Justice Committee recommends approval of the instrument.
14. At its meeting on [19 March 2019](#), the Committee considered the policy content of the instrument. The Committee took evidence on the instrument from Ash Denham, Minister for Community Safety, Denise Swanson, Head of Access to Justice Unit, and Emma Stevenson, Directorate for Legal Services, Scottish Government.
15. The Committee also received [written submission](#) on the instrument from the Law Society of Scotland ("the Law Society"), setting out its views of the provisions on the instrument.
16. The Minister set out the purpose of the instrument, which is to address a situation which may arise if the UK leaves the EU without an negotiated settlement being in place ('no-deal Brexit'). The approach being adopted in the instrument mirrors the approach also being adopted in England and Wales, and Northern Ireland.
17. The Minister informed the Committee that currently EU Directives allow specified lawyers who have qualified to practise law in a EU Member State, or a European Free Trade Area (EFTA) Member State, to provide regulated legal services in another EU Member State from the one in which they qualified, without having to register with that State's regulatory body. The EU/EFTA Member State in which such a lawyer provides such services is referred to as a Host State.
18. EU Directives specify the regulatory rules which are applicable in the Host State, and the services which can be provided by such lawyer. These are commonly called fly-in fly-out services. A specified lawyer may provide fly-in fly-out services in a Host State under their existing professional title ('Home State professional title').
19. EU Directives also allow lawyers to practise reserved legal activities in a Host State, on a temporary or permanent basis, under their Home State professional title. EU Directives also allow a lawyer to apply for admission to the Host State's legal profession, after three years' legal practise, without the need to go through the regular qualifying procedures of the Host State.
20. European lawyers practising in Scotland must register with a Scottish regulator as a 'register European lawyer'. As such, registered European lawyers can own and operate a legal practise in a Host State - like Scotland - without the need to employ a UK qualified lawyer.
21. In the event of a no-deal Brexit, the reciprocal arrangements available to EU and EFTA lawyers will no longer be available to the UK. The UK's service trading

relationship with the EU would then be governed by World Trade Organisation (WTO) rules.

22. WTO rules would prevent the UK from giving preferential market access to EU/EFTA qualified lawyers over other third country lawyers, in a no-deal Brexit scenario. The Minister informed the Committee that the purpose of the instrument is, therefore, to remove the preferential treatment of EU/EFTA qualified lawyers in Scotland, placing them on the same footing as third country lawyers from non-EU/EFTA countries.
23. Consequently, lawyers from another EU/EFTA Member State will no longer be able to provide fly-in fly-out services in Scotland, as a Host State, under their Home State professional title. Instead, they will be subject to the same regulations governing lawyers from non-EU/EFTA third countries in terms of providing legal services, or owning or operating a law practice, in Scotland. However, the instrument will provide a transition period of up to 31 December 2020, for EU/EFTA lawyers in Scotland time to comply with the new regulatory regime.
24. In regards to the UK-Swiss Withdrawal Agreement of 20 December 2019, the instrument will provide that Swiss nationals who have legal qualifications which are recognised by a regulator before the UK leaves the EU will have their rights recognised in Scotland permanently following the UK's departure. For qualified Swiss lawyers, or Swiss lawyers who have not completed their qualifications, they will be able to register up to 4 years after the date the UK leaves the EU. For Swiss lawyers and non-Swiss lawyers established or working for a Swiss law firm on a permanent basis, the instrument provides that they can continue providing services in the UK under contracts extant (live) on Exit Day for 90 days a year, for the length of the contract, up to 5 years, with scope to for extension if required.
25. The Minister stated that she regretted the position as her preferred position was for Scotland to remain in the EU, and therefore, for the existing provisions to remain in place. However, the Minister concluded, the risk of a no-deal Brexit meant the Scottish Government has to make provisions to deal with such a scenario.
26. In relation to the submission from the Law Society, the Committee welcomed the intention of Law Society when it stated that it—
 ...fully intended whatever the future relationship with the EU after exit to keep open, accessible yet robust routes to requalification for lawyers from any jurisdiction which allowed them to practise within Scotland whilst also reassuring clients of their competence.
27. There being no questions from Members, the Minister moved the motion in her name: S5M-16239—That the Justice Committee recommends that the Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft] be approved.
28. **The motion was agreed to without debate or division.**

Conclusions

29. The Justice Committee recommends to the Parliament that it approve the Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft].

