EXPLANATORY MEMORANDUM TO

THE SERVICES OF LAWYERS AND LAWYER'S PRACTICE (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. X

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Act.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The purpose of this instrument is to implement the UK-Swiss Separation Agreement for lawyers, by amending the legislation that removes practise rights for Swiss (and EEA) lawyers in a No EU Deal scenario (The Services of Lawyers and Lawyers Practice (Revocation etc.) (EU Exit) Regulations 2019). It will grant Swiss nationals who have Swiss legal qualifications recognised by a UK regulator (Registered European Lawyer (REL) status) before Exit Day the right to transfer into an English & Welsh or Northern Irish profession. It will prevent the revocation of REL status for Swiss lawyers and 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 England & Wales or Northern Ireland 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 the UK, 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).

Explanations

What did the relevant EU law do before exit day?

2.2 EU law currently enables lawyers from one EU state (the "home" state) to practise and establish in another state (the "host" state) under their home state professional title (i.e. without having to requalify and join the host state's legal profession). Directive 2002/309/EC implements the Swiss-EU Free Movement of Persons Agreement (FMOPA) in EU law, extending the two relevant EU Directives – the Lawyers Services Directive, and the Lawyers Establishment Directive – to Swiss nationals.

2.3 In the UK, the Lawyers Service Directive (77/249/EEC) (LSD) is implemented by the European Communities (Services of Lawyers) Order 1978 ('the 1978 Order'). The Order allows EEA and Swiss lawyers to provide services in the UK on a temporary or "fly in fly out" basis, including legal services normally reserved to advocates, barristers or solicitors (with some restrictions), under their home state professional title.

2.4 The Establishment Directive (98/5/EC) (LED) in is implemented by the European Communities (Lawyer's Practice) Regulations 2000 ('the 2000 Regulations') in England and Wales and Northern Ireland. The Regulations allow lawyers who have registered with the relevant legal services regulator, to practise activities that are normally reserved to solicitors and barristers (with some restrictions) under their home state professional title on a permanent basis. Such lawyers, termed "registered European lawyers" (RELs) may establish joint practices with solicitors or barristers or other lawyers, or may practise as sole practitioners in much the same way as solicitors or barristers. RELs may also seek admission as solicitors or barristers following three years of practice in England and Wales, Scotland or Northern Ireland, and in the law of England and Wales, Scotland or Northern Ireland. Alternatively, they may seek to gain admission as solicitors or barristers through a transfer examination in England and Wales (Northern Ireland does not offer this option). The legislation which this instrument amends (The Services of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2019) removes these rights for all EEA/EFTA citizens, retaining transitional provisions only for RELs who have until 31st December 2020 to join the domestic profession under existing arrangements.

Why is it being changed?

2.5 If the UK leaves the EU with a deal, the Withdrawal Bill will extend the applicability of the Free Movement of Persons Agreement (Directive 2002/309/EC), Lawyers Services Directive (77//249/EC) and Lawyers Establishment Directive (98/5/EC) until the end of the Transition Period. The Withdrawal Bill will also delegate appropriate authority to implement the Separation Agreement with Switzerland at the end of the Withdrawal Bill's transition period. This instrument uses a power under the European Union (Withdrawal) Act because it is amending deficiencies arising from the UK's withdrawal from the EU, whilst addressing operability issues including the loss of provision for regulatory cooperation.

2.6 If the UK leaves the EU without a deal, the Swiss-EU Free Movement of Persons Agreement, and will no longer apply to the UK. The UK-Switzerland Separation Agreement will apply from Exit Day, and this instrument is needed to implement the terms of the UK-Switzerland separation agreement that apply in the UK on Exit Day.

What will it now do?

2.7 If the UK leaves the EU without a deal, The Services of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2019 ("Revocation Regulations") will revoke the legislation implementing the Lawyers Services Directive (77/249/EC) and Lawyers Establishment Directive (98/5/EC) as it applies in England and Wales and Northern Ireland; the European Communities (Services of Lawyers) Order 1978 and the European Communities (Lawyer's Practice) Regulations 2000.

2.8 This SI amends the Revocation Regulations to prevent the removal of certain existing practice rights for Swiss (and EEA) lawyers as provided for in the UK Swiss Separation Agreement. It will grant Swiss nationals who have Swiss legal qualifications recognised by a UK regulator (Registered European Lawyer status) before Exit Day the right to transfer into an English & Welsh or Northern Irish profession. It will prevent the revocation of REL status for Swiss lawyers and 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 England & Wales or

Northern Ireland 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 the UK, 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).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 We do not consider that this instrument is subject to the affirmative resolution procedure for any of the reasons set out in paragraph 1(2) of the Schedule 7 to the European Union (Withdrawal) Act 2018. However, we believe that as with the instrument that this instrument amends, it should nonetheless be taken forward under that procedure.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument includes Northern Ireland.

3.3 The application of this instrument is the same as the extent of this instrument. This instrument extends to England and Wales and Northern Ireland.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales, and Northern Ireland.

4.2 The territorial application of this instrument is England and Wales, and Northern Ireland.

5. European Convention on Human Rights

5.1 The Parliamentary Under-Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding Human Rights:

"In my view the provisions of The Services of Lawyers and Lawyer's Practice (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1. Paragraphs 2.2 and 2.3 set out the current EU law in relation to the provision of legal services and the domestic implementing legislation. This instrument is being made using powers in the European Union (Withdrawal) Act 2018, in order to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union.

7. Policy background

What is being done and why?

7.1 The UK government has negotiated a Separation Agreement with Switzerland, dealing with the bilateral issues arising from EU law ceasing to apply to the UK, when the UK leaves the EU. The agreement applies from the end of transition period as proposed in

an Act of Parliament as or from Exit Day in the case that a UK-EU Withdrawal Agreement is not agreed.

7.2 This SI implements the provisions of the UK-Swiss Separation Agreement applicable to the recognition of legal professional qualifications, by amending the legislation that removes existing practice rights for Swiss (and EEA) lawyers in a No EU Deal scenario (The Services of Lawyers and Lawyers Practice (Revocation etc.)(EU Exit) Regulations 2019), as set out in para 2.1.

7.3 This instrument applies to legal services, which are a transferred matter for Northern Ireland under section 4(1) of the Northern Ireland Act 1998. The UK Government remains committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. We have been considering how to ensure a functioning statute book across the UK including in Northern Ireland for exit day absent a Northern Ireland Executive. With Exit Day less than two months away, and in the continued absence of a Northern Ireland Executive, the window to prepare Northern Ireland's statute book for exit is narrowing. UK Government Ministers have therefore decided that in the interest of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. The instrument is also made under paragraph 21 of Schedule 7 to the European Union (Withdrawal) Act 2018 relating to consequential, transitional or saving provisions. In accordance with the requirements of that Act, the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 Consolidation is not applicable to this instrument.

10. Consultation outcome

10.1 There was no formal consultation process.

11. Guidance

11.1 Practical guidance for Swiss lawyers working (or intending to work in the UK) will be published.

11.2 The current Technical Notice for Professional Business Services (including Legal Services) is available at: <https://www.gov.uk/government/publications/providing-services-including-those-of-a-qualified-professional-if-theres-no-brexit-

deal/providing-services-including-those-of-a-qualified-professional-if-theres-no-brexit-deal>

12. Impact

12.1 The key affected group affected by this instrument is Swiss lawyers, whilst by extension, businesses employing Swiss lawyers and Swiss law firms owned by Swiss lawyers will be affected. Lawyers of other nationalities working permanently for (or owning) a Swiss firm are also affected. UK businesses will benefit from continuity of service from Swiss lawyers and law firms.

Swiss lawyers

12.2 This legislation principally ensures that the Swiss lawyers and relevant non-Swiss lawyers do not: immediately lose practice rights; the right to obtain REL status; or establishment rights afforded by REL status. In the short term, this lets the parties avoid incurring the costs of adjusting their business models and pursuing other practice options, including carrying out unregulated activities, undertaking regulated activities under supervision, or transferring to the domestic legal professions under the Qualified Lawyer Transfer Scheme, managed by the Solicitors Regulation Authority (SRA) and provided privately, or the Bar Transfer Test, managed by the Bar Standards Board (BSB) and provided privately (which are also open to EU and EFTA lawyers). The rights are extended to those studying legal qualifications as well as already qualified Swiss lawyers.

12.3 In England and Wales, the SRA, has (as of December 2018) 10 Swiss RELs. The BSB has no Swiss RELs registered with it. Neither the Law Society of Northern Ireland nor the Northern Ireland Bar Council has identified any Swiss RELs. More Swiss lawyers are likely to be providing services in the UK on a temporary short-term basis than are registered as RELs.

Businesses

12.4 This instrument provides a number of benefits for Swiss lawyers and law firms with interests in the UK. The status of Registered European Lawyer (for Swiss nationals only) will remain while they comply with the relevant conditions, whereas under static acquis this status will cease to exist on 31st December 2021. This means that existing Registered European Lawyers would not need to exercise provisions in the original instrument requiring them to join an English & Welsh or Northern Irish profession before 31st December 2020 to continue having their qualifications recognised. This instrument will also make applications to become a Registered European Lawyer by a Swiss lawyer possible until 4 years after Exit Day.

12.5 Swiss lawyers (and other nationals who own are employed permanently by a Swiss firm) with contracts extant on Exit Day will continue to be able to serve clients in the UK for up to 90 days per year, initially for up to 5 years, subject to extension in 5-year periods in accordance with the provisions of the UK-Switzerland Separation Agreement. This also represents a benefit for UK businesses and individuals using the services of a Swiss law firm, particularly where this service is high specialised. Swiss lawyers and businesses employing Swiss lawyers that were intending to change their business structure to achieve regulatory compliance - whether before Exit Day or the end of transitional arrangements provided under The Services of Lawyers and Lawyer's Practice (Revocation etc.)(EU Exit) Regulations 2019 - may no longer need to do so. For example, a Swiss Registered European Lawyer who owns a firm in the

UK and was intending to become Registered Foreign Lawyer or change the legal structure of their firm (to an Alternative Business Structure, for example), no longer needs to do so. A Swiss Registered European Lawyer who was not intending to join an English & Welsh or Northern Irish profession and instead enter the unregulated market (by ceasing to undertake 'reserved legal activities') before 31st December 2020 can now opt to remain registered and provide a full range of services.

Charity & Voluntary sector

12.6 There is no significant impact for charities and the voluntary sector, except where they employ a Swiss lawyer and will no longer need make adjustments to achieve regulatory compliance.

Public Sector

12.7 There is no significant impact on the public sector. Relevant regulators will take on the burden of managing and enforcing regulatory rule changes and changes in practice and ownership status. This may be managed by reallocating existing administrative resources or increasing them.

12.8 A full impact assessment will laid before the parliamentary debates and published alongside this memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 The legislation is relevant to law firms owned by Swiss nationals, small businesses employing Swiss nationals, and customers of Swiss lawyers and/or Swiss law firms.

13.2 This instrument will provide continuity for small businesses, whether as an employer of Swiss lawyers of as a consumer of legal services from a Swiss firm or lawyer. It will ensure continuity of contract provision, and will not mandate any changes to law firm's business models.

14. Monitoring & review

14.1 As this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required.

15. Contact

15.1 James McGoay at the Ministry of Justice (telephone: +447840002072 or email: james.mcgoay@justice.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Amelia Wright at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Parliamentary Under Secretary of State Lucy Frazer QC MP, at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 The Parliamentary Under-Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Services of Lawyers and Lawyer's Practice (Amendment (EU Exit) Regulations 2019 do no more than is appropriate".

1.2 This is the case because the instrument amends deficiencies arising from withdrawal from the EU and addresses operability issues including the loss of provision for regulatory cooperation. In this case, the framework for reciprocal arrangements relating to the provision of legal services would no longer be in place. This instrument ensures that this framework remains in place, allowing Swiss nationals (and foreign lawyers working permanently or established in Switzerland) to continue servicing existing contracts in the UK (subject to restrictions), whilst Swiss nationals can continue to become Registered European Lawyers or join domestic professions in England & Wales or Northern Ireland (for a period of 4 years after exit day, subject to conditions).

2. Good reasons

2.1 The Parliamentary Under-Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action". These are set out in subparagraphs 7.1, 7.2 and 7.3 of this explanatory memorandum.

3. Equalities

3.1 The Parliamentary Under-Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement(s)

"The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts, and section 75 of the Northern Ireland Act 1998".

3.2 The Parliamentary Under-Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the draft instrument, I, Lucy Frazer, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010 or section 75 of the Northern Ireland Act 1998."

4. Explanations

The explanations statement has been made in paragraph 2 of the main body of this explanatory memorandum.