EXPLANATORY MEMORANDUM TO

THE SERVICES OF LAWYERS AND LAWYER'S PRACTICE (REVOCATION ETC.) (EU EXIT) REGULATIONS 2020

2020 No. [XXXX]

1. Introduction

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

2. Purpose of the instrument

2.1 The purpose of The Services of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2020 ("this instrument") is to implement into domestic law the provisions relevant to lawyers practice rights and the recognition of legal qualifications in the EU Withdrawal Agreement, the European Economic Area (EEA) and European Free-Trade Association (EFTA) Separation Agreement and the Swiss Citizens' Rights Agreement (Swiss CRA) (collectively, "the Agreements").

2.2 These provisions ensure applications can be completed where European lawyers have applied to join one of the legal professions in England and Wales or Northern Ireland before the end of the Transition Period ("TP"); protect the rights of Registered European Lawyers ("RELs"), or those applying to be a REL, as set out in the Swiss CRA, implement transition arrangements for the provision of temporary services by lawyers under the Swiss CRA and implement the provisions in the Agreements relating to ensuring regulator cooperation.

2.3 In addition, this instrument will make several consequential amendments to various pieces of other legislation that make reference to European lawyers.

Explanations

What did any relevant EU law do before exit day?

2.4 EU law currently enables UK, EU and EFTA lawyers from one 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). In the UK, the European Communities (Services of Lawyers) Order 1978 ('the 1978 Order') implements the Lawyers' Services Directive (Council Directive (77/249/EEC)). The 1978 Order allows EU and EFTA 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.

2.5 The European Communities (Lawyer's Practice) Regulations 2000 ('the 2000 Regulations') implement the Lawyers' Establishment Directive (98/5/EC) in England and Wales and Northern Ireland. The Regulations allow EU and EFTA lawyers who have registered with the relevant legal services regulator in England and Wales or Northern Ireland, 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.

2.6 Under the Mutual Recognition of Professional Qualifications Directive (MRPQ), a European lawyer may seek admission as an English and Welsh or Northern Irish solicitor or barrister by requesting recognition of their qualifications. If the regulator deems the qualification not to be equivalent, then they must offer an aptitude test or adaptation period. However, under the 2000 Regulations, RELs are exempt from taking an aptitude test if they have three years of experience in host state law- including EU law. Regulators also have the discretion to accept less than three years' experience for said exemption. These Directives also apply to Switzerland (through Annex III of the EU-Swiss Free Movement of Persons Agreement (FMOPA)).

Why is it being changed?

2.7 As the UK has left the EU with a Withdrawal Agreement and agreed the EEA-EFTA Separation Agreement and Swiss CRA, we need to implement the terms of those agreements in readiness for the end of the TP. This entails removing the preferential practice rights of EU and EEA EFTA lawyers.

2.8 The current framework of legal service regulation implements cross-EU reciprocal arrangements, which enable specified lawyers from one EU Member State (and the UK) to practise and establish in another Member State (or the UK). This gives EU and EFTA lawyers preferential access to the UK legal services market, in the form of enhanced practice and establishment rights, compared to lawyers from the wider world. In February 2019, the Services of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2019 (the "2019 Regulations") were made. These 2019 Regulations prepared for an exit from the EU without a Withdrawal Agreement, by removing the preferential access rights of EU lawyers in England & Wales and Northern Ireland (derived from the UK's EU membership) to come into force on Exit Day. MoJ amended the 2019 Regulations through the Services of Lawyers and Lawyer's Practice (Amendment) (EU Exit) Regulations 2019 (the "2019 Amendment Regulations") in order to implement parts of the Swiss CRA in readiness for Exit Day.

2.9 The 2019 Regulations and the 2019 Amendment Regulations were not designed to come into force at the end of the transition period under a Withdrawal Agreement. Given that the UK secured a Withdrawal Agreement and a Separation Agreement with the EEA-EFTA states as well as the Swiss CRA, there are provisions in the 2019 Regulations which will not function correctly, such as not taking into account the transition period to ensure the right provisions come into force at the right time.

What will it now do?

2.10 This instrument will revoke the 2019 Regulations, the 2019 Amendment Regulations and the legislation that implemented the EU directives, the 1978 Order and the 2000 Regulations. However, it also contains provisions needed to implement the transitional arrangements from the Agreements.

2.11 This instrument will implement provisions in the EU Withdrawal agreement and EEA EFTA Separation Agreement which allow applications to be completed where lawyers have applied to join one of the legal professions in England and Wales or Northern Ireland before the end of the TP. In addition, this instrument will also legislate to implement provisions in the Swiss CRA which protects the rights of Swiss lawyers (within scope of that Agreement) who are established, registered and providing

services in England and Wales or Northern Ireland under their Swiss professional title. It will also implement a transition period of 4 years from the end of the TP for Swiss lawyers to register as a REL and practise under their Swiss professional title or to join one of the legal professions in England & Wales or Northern Ireland under the terms of the Swiss CRA. Additionally, it will implement provision in the Swiss CRA which allows lawyers established and employed in Switzerland to continue to provide up to 90 days' temporary services in a year, for at least five years, where this is under a contract agreed and started before the end of the TP. Given the terms of the Swiss CRA which will retain the preferential practising rights that come with REL status for those in scope of that Agreement, this instrument will retain provision in the 2000 Regulations making it an offence to pretend to be a REL.

2.12 This instrument will also implement provisions in the Agreements to facilitate regulator-to-regulator cooperation in relation to applications for admission to the host state legal profession and, in addition, in relation to registration as, and regulation of, a REL under the Swiss CRA. This includes provision enabling the exchange of information, a duty of confidentiality and the duty to notify a host state regulator of disciplinary proceedings.

2.13 This instrument will also make further provision to enable regulators in England and Wales and Northern Ireland to complete any ongoing disciplinary proceedings against EU and EEA-EFTA lawyers which commenced before the end of the TP.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

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. There are consequential amendments to legislation which will also extend to Scotland.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales and Northern Ireland although there are some consequential amendments which will also extend to Scotland.

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, Alex Chalk, has made the following statement regarding Human Rights:

"In my view the provisions of the Services of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1. Paragraphs 2.4-2.6 set out the current EU law in relation to the provision of legal services and the domestic implementing legislation.

6.2. 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. It is also made using powers in the European Union (Withdrawal Agreement) Act 2020 in order to implement the relevant provisions of the Withdrawal Agreement, the EEA EFTA Separation Agreement and the Swiss CRA relating to the recognition of professional qualifications of lawyers.

6.3. The instrument makes some minor corrections of errors in the regulations it is replacing but having discussed the matter with the Registrar, the Department does not propose to use the free issue procedure in relation to this instrument.

7. Policy background

What is being done and why?

7.1 The previous framework of legal service regulation, which implements cross-EU reciprocal arrangements to enable specified lawyers from one EU Member State to practise and establish in another Member State, gives EU and EFTA lawyers preferential access to the UK legal services market, in the form of enhanced practice and establishment rights, compared to lawyers from the wider world. In February 2019, the 2019 Regulations were made. This instrument prepared for an exit from the EU without a Withdrawal Agreement, by removing the preferential access rights EU lawyers enjoyed in the UK by virtue of the UK's EU membership, to come into force on Exit Day. The 2019 Regulations were amended through the 2019 Amendment Regulations in order to implement parts of the Swiss CRA in readiness for Exit Day. Without government intervention, this legislation will come into force at the end of the transition period. However, given that the UK secured a Withdrawal Agreement with the EU, this legislation will no longer function correctly.

7.2 This instrument will implement provisions in the EU Withdrawal agreement and UK-EEA EFTA Separation Agreement which allow recognition applications to be completed where lawyers have applied to join a host state profession before the end of the TP. It will also legislate to implement provision in the UK-Swiss CRA which protects the rights of Swiss lawyers who are established, registered and providing services under their home state title (RELs). It will also implement a transition period of four years from 31 December 2020 for Swiss lawyers to register as REL or join an England & Wales or NI legal profession under the terms of the UK-Swiss CRA.

7.3 This SI will implement provision in the UK-Swiss CRA which allows lawyers and law firms to continue to provide up to 90 days' temporary services in a year, for at least five years, where this is under a contract agreed and started before the end of the TP. Given the terms of the UK-Swiss CRA protecting RELs rights, this instrument will retain provision in the 2000 regulations making it an offence to pretend to be a REL and remedy an inaccuracy in the original implementing legislation, which erroneously made it an offence for EU lawyers to practise any legal services under home title.

7.4 This instrument will also implement provisions in the Agreements to facilitate regulator-to-regulator cooperation in relation to applications to transfer into the host

state profession and, in addition, in relation to registration to provide services under home title under the UK-Swiss CRA. For the UK-Swiss CRA, this includes provision enabling the exchange of information, a duty of confidentiality and the duty to notify the home state competent authority of disciplinary proceedings.

7.5 This instrument will make further provision to enable regulators to complete ongoing disciplinary proceedings against EEA-EFTA and Swiss lawyers which commenced before the end of the TP.

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 Two of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 This instrument revokes and re-makes, with modifications, provision contained in the Services of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2019 as amended by the Services of Lawyers and Lawyer's Practice (Amendment) (EU Exit) Regulations 2019.

10. Consultation outcome

10.1 This instrument implements the relevant provisions of the Agreements. There was, therefore, no further formal consultation process. However, we have engaged with relevant legal services regulatory bodies and devolved administrations throughout the process of drafting the instrument, in the interest of ensuring legal certainty and consistency of policy.

11. Guidance

11.1 No specific guidance is being published, but EU, EEA-EFTA and Swiss lawyers can contact the relevant legal services regulator in England and Wales and Northern Ireland for further advice.

12. Impact

12.1 The impact of this instrument on business, charities or voluntary bodies is not directly quantifiable: it depends on the nature of the work undertaken by EU, and EFTA lawyers, on how and where they are employed, and the individual choices they make in response to the end of the transition period, such as whether they choose to seek admission to the domestic profession, wish to undertake regulated activities (previously and in the future), or the way they choose to change their business model to comply with the new regulatory position. Key affected groups are EU and EFTA lawyers, legal businesses and the wider professional and business services sector. In England and Wales, the Solicitors Regulation Authority (SRA), has identified (as of June 2020), 783 RELs registered with the SRA. The Bar Standards Board (BSB) has

identified 17 EU and EFTA RELs registered with it, and 20 RELs who are non-practising. The Law Society of Northern Ireland identified 5 RELs, and the Northern Ireland Bar Council identified 1 REL.

12.2 For lawyers, we have identified the cost of losing practice and establishment rights afforded by REL status. These costs are partly mitigated by other practising options: carrying on unregulated activities, undertaking regulated activities under supervision, or transferring to the domestic legal professions, for example in England & Wales under the Qualified Lawyer Transfer Scheme, managed by the SRA and provided privately, or the Bar Transfer Test, managed by the BSB and provided privately (which are also open to third country lawyers and already a popular option for EU and EFTA lawyers). In addition, the transitional period under the terms of the Withdrawal Agreement has allowed them the time to complete these changes, if necessary, up until 31 December 2020.

12.3 This instrument will implement provisions in the UK-Swiss CRA, meaning the impact on Swiss lawyers differs to that of EU, EEA and other EFTA state lawyers. In protecting the rights of UK and Swiss lawyers to continue to provide services as they do now under certain conditions, providing a transition period to transfer under current arrangements, and allow the continued provision of temporary services for a time limited period under certain conditions, this instrument will provide Swiss lawyers with a degree of continuity not available to other lawyers in its scope. This is necessary in order for the UK to uphold its international obligations.

12.4 For legal services-specific businesses, the cost would be related to the loss of specialists and of the possibility of temporary "fly in fly out" services, and potentially the need to re-hire or restructure depending on REL business ownership or participation in practice. This has been partly offset by the transition period under the Withdrawal Agreement, and the possibility of reorganising, including becoming an alternative business structure.

12.5 For the wider legal sector, the impact also relates to the loss of specialism and of temporary services, subject to the same mitigating actions.

12.6 The benefits we identified are: clarity and certainty for affected lawyers, businesses and the wider sector and consumers on their status; facilitating regulator-to-regulator cooperation which provides lawyers with certainty about the status of ongoing or future recognition decisions; reputational advantage and compliance with the UK's international obligations as per the Agreements.

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, as well as enrolments in transfer examinations.

12.8 A full impact assessment is submitted with this memorandum and published alongside this memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses that are owned by and/or who employ the services of EU, EEA EFTA and Swiss lawyers.

13.2 These lawyers have had the transition period to adjust their regulatory position.

14. Monitoring & review

14.1 This instrument does not contain a statutory review clause, and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Alex Chalk, Parliamentary Under Secretary of State at the Ministry of Justice, has made the following statement:

"Parts of this instrument are made under the European Union (Withdrawal) Act 2018. No review clause is required for these parts. The accompanying impact assessment confirms there are no direct costs and that indirect costs are not quantifiable. Therefore, we do not consider that a review clause is required. This instrument is being made as a result of EU Exit and the UK's obligation to implement its international agreements. In addition, the future relationship is dependent on the outcome of the trade negotiations."

15. Contact

15.1 Jordan Auburn at the Ministry of Justice Telephone: +447866895222 or email: Jordan.Auburn@justice.gov.uk can be contacted with any queries regarding the instrument.

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

15.3 Parliamentary Under Secretary of State Alex Chalk, 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	Explain the good reasons for making the instrument and that what is being done is a

		23(1) or jointly exercising powers in Schedule 2	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 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.
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	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside	Statement setting out: a) the steps which the relevant authority

where amending regulations under 2(2) ECA 1972		the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	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, Alex Chalk 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 (Revocation etc.) (EU Exit) Regulations 2020 do no more than is appropriate". This is the case because the instrument amends deficiencies arising from withdrawal from the EU. In this case, the framework for reciprocal arrangements relating to the provision of legal services would no longer be in place. By revoking the 1978 Order and the 2000 Regulations, the instrument ensures compliance with WTO GATS rules.

2. Good reasons

2.1 The Parliamentary Under-Secretary of State, Alex Chalk 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".

3. Equalities

3.1 The Parliamentary Under-Secretary of State, Alex Chalk 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, Alex Chalk 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, Alex Chalk, 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

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