

Practice rights in the EU in the context of Brexit – Q&A

This paper was prepared by the UK Delegation to the CCBE

This note is aimed at UK legal practitioners providing legal services on a temporary and / or permanent basis in one or more EU member states. It describes the current state of play regarding lawyers' practice rights under the Draft Withdrawal Agreement (DWA) and clarifies understanding of the acquired rights as set out in the draft withdrawal agreement as they apply to lawyers.

This paper does not deal with any rights that may yet be negotiated as part of the Future Partnership Agreement (FPA) for the post-transition period. Any comments that are made relate to a situation where there are no provisions on legal services in the FPA (or not FPA is concluded) and where UK practitioners would be considered as third country lawyers. The latter may arise due to the UK and EU not concluding the Withdrawal Agreement ("no deal" scenario), or after the expiration of the transition period in a situation where the parties have not concluded any new agreement on legal services.

After the envisaged withdrawal date, i.e. 29 March 2019, the DWA foresees a 21-month transition period which, if agreed, would end on 31 December 2020. During the transition period, EU law would continue to apply in the UK and its citizens would enjoy the same rights as they currently do. At this point, it is impossible to state what regime will apply to legal services insofar as they are not covered in the DWA after the end of the transition period since this is yet to be agreed by the EU and the UK.

In case the Withdrawal Agreement is not concluded, you would be only entitled to those rights afforded by the national regulators to third country nationals. This would take effect directly from 30 March 2019. Alternatively, the same may apply from 1 January 2021, if there is no agreement on a new legal services regime after the transition period.

This paper also aims to inform the profession of the activities undertaken by the UK Law Societies and Bars in the field of practice rights. To the extent possible, we also recommend actions and steps to be taken by practitioners to make sure they comply with the regulatory framework in place and are ready for the changes to come.

We would like to stress that every case has to be considered on a case by case basis and this note does not replace legal advice or a consultation on an individual basis with the relevant regulators. We cannot accept any liability resulting from any action or lack thereof on the basis of the information in this note.

1. I have lived and practised law in the host country (EU) for more than three years but have not registered with the host state Bar. Are my rights to reside and practise in the host state acquired?

Your rights to practise may not be capable of being acquired as you have not fulfilled the requirements of the Lawyers' Establishment Directive (LED - see clarifications below). Your rights of residence, however, may, provided you complied with the relevant national and EU laws.

With regards to residence, Article 9 DWA clarifies that the acquired rights apply to UK nationals who resided in any EU member state *'in accordance with Union law before the end of the transition period and continue to reside there thereafter.'* Article 12 DWA further specifies the legislation to be taken into account in determining the applicable rights of residence. Provided

you complied with the relevant EU and national legislation, you should be able to benefit from the acquired rights of residence.

With regards to establishment, Article 3(1) LED requires a lawyer who wishes to practise in a Member State other than that in which he obtained his professional qualification to register with the competent authority, e.g. a local or national bar association.

If you have not registered yet, you should do so as soon as possible by following the procedures of the relevant bar association or another competent body of the country where you are established.

Please note that Article 10(1) and (3) LED allows for the re-qualification / full integration into the host legal profession after three years of effective and regular practice of host state law. While Article 26 DWA specifically recognises this Article 10(1) and (3) LED right, it is currently unclear how this will be applied in practice, given the fact that the three-year period would end on 31 December 2020, i.e. the end of the transition period and the end date to have registered by would thereby have been 31 December 2017. Therefore, it is still an open question how a lawyer will be able to use this route to requalify. It is our view that for procedures under Art 26 DWA to be meaningful and reflecting the purpose of the draft withdrawal agreement, EU lawyers should be able to register under Article 3 LED until the end of the transition period and trigger therewith the three-year re-qualification period under Article 10 (1) and (3). The UK delegation to the Council of Bars and Law Societies of Europe (CCBE)¹ has requested a clarification on this from the negotiators.

In addition, you can use another route, that of the Mutual Recognition of Professional Qualifications (MRPQ) Directive, to re-qualify into the host state profession. See question 5 for more details.

2. I am an English and Welsh solicitor (or barrister) who has requalified in Ireland but have UK nationality. Will I be able to practise EU law after the withdrawal date?

If there is a withdrawal agreement with a transition period agreed: Yes, you can continue to practice EU law and your advice will benefit from legal professional privilege (LPP) in front of the EU institutions during the transition period on the basis of your English title as well as your Irish title.

However, in case of no deal as long as you remain a practising Irish solicitor, i.e. you have paid the practising certificate fee and not simply stayed on the roll in Ireland. You will have the rights of audience before the EU Courts and your relevant advice will attract LPP.

If you are a barrister of England and Wales you should not just rely on your call to the Irish Bar but ensure that you are able to prove “effective practice” in Ireland. One way of evidencing this might be to take up a seat in the Bar Library in Dublin.

According to Article 19 of the Statute of the Court of Justice of the EU (CJEU) ‘*only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court.*’ The Article does not include any nationality or residence requirements.

You may continue to intervene in proceedings which are ongoing on the date of withdrawal and initiate new proceedings subsequent to withdrawal. Your clients are also entitled to

¹ The CCBE UK delegation includes representatives from The Law Society of England and Wales, The Law Society of Scotland, The Law Society of Northern Ireland, The Bar Council of England and Wales, the Faculty of Advocates and The Bar of Northern Ireland.

instruct you on the same terms as at present. This includes the recognition by the EU institutions of LPP for professional communications.

3. I am not full-time resident in the host State (hence not registered with the Bar) but I do practise there (our firm has an office there). Will I have the right to continue doing so after the withdrawal date?

If there is a withdrawal agreement with a transition period agreed: you will be able to continue to practice the same way as currently until the end of transition period.

Thereafter, or in case there is no deal, it depends on the national rules whether you need a residence in an EU Member State to be able to continue to practise in that Member State. Most national regimes do not include this requirement. In such cases, what matters is a). whether you have qualified in an EU/EEA jurisdiction or Switzerland and (for some jurisdictions) b) whether you have an EU / EEA / Swiss nationality. To be able to continue to practise in these Member States, you may need to have an EU qualification to provide some or all legal services (as defined in the relevant Member State) and in some jurisdictions additionally an EU / EEA nationality. Please contact the bar of the EU member state where you practise for further information.

4. I have recently moved to the host State and registered with the Bar.² Will I be able to integrate into the host legal profession (under Article 10 LED) after the withdrawal date, given that I will not have completed the necessary three years of regular and effective practice of host state law?³

This depends on whether the three years of effective and regular practice of host state law would be completed before the end of the transition period, i.e. 31 December 2020. While Article 26 DWA specifically recognises this Article 10(1) and (3) LED right, it is currently unclear how this will be applied in practice, given the fact that the three-year period will end on 31 December 2020, i.e. the end of the transition period and the end date is currently thereby 31 December 2017.

Therefore, it is still an open question how a lawyer will be able to use this route to requalify. It is our view that for procedures under Art 26 DWA to be meaningful and reflecting the purpose of the draft withdrawal agreement, EU lawyers should be able to register under Article 3 LED until the end of the transition period and trigger therewith the three-year re-qualification period under Article 10 (1) and (3) LED. The UK delegation to the Council of Bars and Law Societies of Europe (CCBE)⁴ has requested a clarification on this from the negotiators.

However, the text of the agreement may be interpreted differently, and its clarification is one of the UK legal profession's top priority in the ongoing withdrawal process.

In its observations regarding the practice rights of lawyers set out in the agreement, the UK delegation to the Council of Bars and Law Societies of Europe (CCBE) argued that lawyers with less than three years' practice in the host state should be able to have an acquired right to continue their period to qualify in that state. These observations were submitted to the European Commission. Even though the initial indications from Article 50 Task Force were not in agreement with the UK position, and they argue that a practitioner will need to have

² Pursuant to Article 3 LED

³ As set out in Article 10 LED

⁴ The CCBE UK delegation includes representatives from The Law Society of England and Wales, The Law Society of Scotland, The Law Society of Northern Ireland, The Bar Council of England and Wales, Faculty of Advocates and The Bar of Northern Ireland.

completed the three year period at the end of the transition period, this can be questioned. More recently, the German regulator BRAK⁵ has published its own position where it sets out that for its jurisdiction the Article 3 rights will be grandfathered.

5. I have recently moved to the host State and registered with the Bar.⁶ Will I be able to integrate into the host legal profession (under the Mutual Recognition of Professional Qualifications Directive) after the withdrawal date?⁷

Yes, you will under the conditions set out in Title III DWA and only if you start the recognition procedure before the end of the transition period, i.e. 31 December 2020. The [draft withdrawal agreement](#) sets out conditions for recognition of qualifications obtained before the end of the transition period and to the ongoing recognition procedures (Article 25 and 26 respectively).

Article 26 DWA reads ‘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 their 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.’

This means that if you have started the recognition procedure, your qualifications will be recognised under the withdrawal agreement.

Importantly, they apply to Article 4 (Effects of recognition), Article 4d (European Professional Card for establishment purposes and for temporary provision of services), Article 4f (Partial access) and Title III of the [Directive 2005/36/EC](#) (which includes the provisions on the conditions for recognition and compensation measures such as an aptitude test or an adaptation period).

Article 27 DWA obliges the relevant authorities of the UK and the EU member states to facilitate the application of Article 26.

6. Will I be able to practise on a permanent basis in the EU under my home country title after the withdrawal date?

Yes, these rights are currently ensured at least until the end of the transition period, i.e. 31 December 2020, if agreed. You should also be registered with the host bar as per Article 3 of the Establishment Directive.

According to the current wording of the [draft withdrawal agreement](#), the acquired right only applies to those lawyers that started the re-qualification procedure under Article 10 of the Establishment Directive or under the relevant provisions of the Mutual Recognition of Qualifications Directive.

After the end of the transition period, the possibility of a UK legal professional establishing in the EU under their home country title will depend on the form of the future EU-UK agreement and / or relevant national rules. In case there is no agreement, the relationship between the

⁵ German Federal Bar’s (BRAK) position paper No 22/2018: <https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-europa/2018/juni/stellungnahme-der-brak-2018-22.pdf> (German only), English version available at the Czech Bar Association’s (CAK) website: https://www.cak.cz/assets/pro-advokaty/mezinarodni-vztahy/brak_position_no--22_brexit_june-2018.pdf

⁶ Pursuant to Article 3 LED

⁷ As set out in Article 10 LED

EU and the UK will be regulated by the rules of the World Trade Organisation (WTO), in particular the General Agreement on Trade in Services (GATS). Currently, many member states allow the practice of law under home country title but restricted to home country law and international public law (usually excluding EU law). Many member states also place restrictions on the form of establishment.

7. I have just started my training contract with a medium-sized firm in England and Wales / Northern Ireland / Scotland which has presence in the EU. Will I be able to spend one of the seats in an EU country?

In principle yes, however, this will depend on the decisions within your firm and the regulations applicable to intra-corporate transferees (ICTs).

At the moment, graduate trainees can transfer freely within their employers' organisations. This would remain to be the case until the end of the transition period, i.e. 31 December 2020, if agreed.

Beyond the end of the transition period, the situation will depend on the future form of the EU-UK agreement. If the issue is not addressed in the agreement, the national law and EU law framework which is applicable to third country nationals will be applied.

8. I am an English and Welsh / Northern Irish / Scottish law student who would like to specialise in EU trade and competition law. Will I be able to practise that area of law within the EU after the withdrawal date?

Yes, these rights are included in the draft withdrawal agreement, until the end of transitional period, i.e. 31 December 2020, if agreed. After that, the answer will depend on the terms of the new EU-UK relationship if an agreement is reached, failing which on the relevant national provisions.

During the transition period, EU law, including the Lawyers Directives, will continue to apply in the UK and with regard to those solicitors who practise in the EU.

If there is no EU-UK agreement on practice rights, the relationship between the EU and the UK, will be regulated by the rules of the World Trade Organisation (WTO), in particular the General Agreement on Trade in Services (GATS). Currently, many member states reserve the right to practise EU law to their domestic legal professions.

If the above is the case, it may also be possible for the UK Law Societies and Bars to agree on bilateral arrangements with the EU bars and law societies. These arrangements may facilitate the access of lawyers qualified in the UK to practise EU law in specific jurisdictions. These agreements do not deal, however, with issues related to rights of audience in front of EU courts and legal professional privilege.

9. I am an English and Welsh / Northern Irish / Scottish solicitor and have been working as an in-house lawyer in the host state. The host state does not require registration of in-house lawyers. Will I be able to stay and continue with my employment after the withdrawal date?

Until the end of the transition period you should not, in principle face any obstacles, provided that you fulfil the residency requirements to remain in the host state.

These are set out in Article 12(1) of the [draft withdrawal agreement](#) which reads that '*Union citizens and United Kingdom nationals shall have the right to reside in the host State under*

*the limitations and conditions as set out in Articles 21, 45 or 49 TFEU and in Article 6(1), Article 7(1)(a), (b) or (c), Article 7(3), Article 14, Article 16(1) or Article 17(1) of [Directive 2004/38/EC](#).*⁸

It is unclear what provisions will apply after the end of the transition period as this will depend on the new EU-UK agreement.

10. I am an English and Welsh / Northern Irish / Scottish solicitor/barrister practising in an EU member state for the last six years and have registered with the local bar. However, I am also considering re-qualifying in Ireland. Do I have to have a practising certificate (PC) or is it enough to be on the roll? And what are the conditions of keeping the qualification (e.g. CPD requirements, professional indemnity insurance, etc.)?

We encourage you to acquire the practising certificate, simply being on the roll is not enough. We advise you to liaise with the Law Society of Ireland directly to discuss your case. To be a practising Irish solicitor, you will have to pay your PC fee and must hold a valid EU/EEA passport.⁹ As a barrister you will need to transfer to the Irish Bar to benefit from rights to practise before the EU Courts beyond the final EU exit date, guidance can be found at: <http://www.barcouncilethics.co.uk/subject/international/>.

11. I am a partner in a medium-sized firm with a considerable presence in England and Wales. Recently, the firm considered expanding and by seeking to work for clients in other parts of the EU. To provide legal services in the EU after the withdrawal date, would our firm need to be established in the EU?

Until the end of the transition period, i.e. 31 December 2020, if agreed the UK businesses will still be able to benefit from their rights under EU law and your firm should be able to provide services in the EU without the need to establish commercial presence.

It is difficult to predict what arrangements will apply after that date as it will depend on the new EU-UK relationship.

If there is no agreement in place, the relationship between the EU and UK will be regulated by the rules of the World Trade Organisation (WTO), in particular the General Agreement on Trade in Services (GATS). It is possible that some EU member states will require commercial presence if your firm would like to provide legal services.¹⁰

12. I am an English and Welsh / Northern Irish / Scottish solicitor/barrister advising on EU competition law. Will legal advice in that area of law benefit from the legal professional privilege (LPP)? If not, what do I need to do to make sure it does?

The advice given by you will attract the LPP until the end of the transition period, i.e. 31 December 2020, if agreed. It is not clear what arrangements will apply after the transition period is over.

Currently, there are different rules that apply to privileged information at national level and at EU level.

⁸ These include conditions for residing legally in a member state (for less or more than three months), conditions for retaining the right to residence and conditions for acquiring permanent residence.

⁹ Solicitors from England and Wales and Northern Ireland are not obliged to pass any additional tests but must apply for the Certificate of Admission. One of the condition for obtaining it is the EU/EEA nationality: <https://www.lawsociety.ie/globalassets/documents/education/qltt/certadminform.pdf>

¹⁰ See 'Useful resources at the end of this document'

At national level, the protection of privileged information is and will continue to be governed by national law.

At EU level, according to settled EU case law, legal advice of lawyers qualified outside the EU/EEA **does not** attract LPP before the GCEU and CJEU.¹¹ While it may attract LPP before the national courts in selected EU member states, one should always consider the possibility of litigation reaching the EU courts.

The current practice in international law firms where a third country lawyer advises a client based in the EU is to have either an EU/EEA qualified lawyer present at the time advice is given or an EU/EEA qualified lawyer countersigning relevant documents.

13. I am an English and Welsh / Northern Irish / Scottish solicitor advising on EU law. Will I continue to have the rights of audience before the European courts, i.e. General Court of the EU (GCEU) and the Court of Justice of the EU (CJEU) after the withdrawal date?

Yes, these rights are included in the draft withdrawal agreement at least until the end of transitional period, i.e. 31 December 2020, if agreed. It is not clear what arrangements will apply after the transition period is over.

Article 87 of the [draft withdrawal agreement](#) allows the rights of audience to continue after the withdrawal date during the transition period. More specifically, it reads that:

'Where, before the end of the transition period, a lawyer authorised to practise before the courts of the United Kingdom represented or assisted a party before the Court of Justice of the European Union in proceedings brought before it or in requests for preliminary rulings referred to it before the end of the transition period, this lawyer may continue to represent or assist that party in those proceedings or requests. This right shall extend to all stages of proceedings, including appeal proceedings before the Court of Justice and proceedings before the General Court after a case has been referred back to it.

2. Lawyers authorised to practise before the courts of the United Kingdom may represent or assist a party before the Court of Justice of the European Union in the cases referred to in Article 83.'

Beyond the transition period, the rights of audience will no longer apply unless the new relationship agreement between the EU and the UK includes relevant provisions.

It is not yet clear whether those lawyers who represented their clients in proceedings which commenced before the withdrawal date and continued after the transition period has ended will have rights of audience before the GCEU and CJEU. In the CCBE UK delegation's view,

¹¹ Paragraph 190 of [AG Kokott's opinion](#) in the appeal in Akzo Nobel ([C-550/07](#)) reads (on affording privilege to lawyers from third countries) *'unlike in the relationship between the Member States, in the relationship with third countries there is, generally speaking, no adequate basis for the mutual recognition of legal qualifications and professional ethical obligations to which lawyers are subject in the exercise of their profession. In many cases, it would not even be possible to ensure that the third country in question has a sufficiently established rule-of-law tradition which would enable lawyers to exercise their profession in the independent manner required and thus to perform their role as collaborators in the administration of justice. It cannot be the task of the Commission or the Courts of the European Union to verify, at considerable expense, that this is the case on each occasion by reference to the rules and practices in force in the third country concerned, particularly since there is no guarantee that there will be an efficient system of administrative cooperation with the authorities of the third country on every occasion.'*

these rights should continue in order to safeguard the right to fair trial and act in the best interest of the client.

Qualifying in Ireland may give you continued access to practice rights before the EU Courts and to related LPP (see above 10).

14. What conditions will I have to fulfil with regard to professional indemnity insurance (PII) in an EU jurisdiction after the withdrawal date?

Article 6(3) of the Establishment Directive allows the host state to oblige the lawyer to take out additional insurance. However, if the lawyer can prove that he or she has sufficient and equivalent cover according to the rules of the host state, he or she may be exempted from that obligation.

Similarly, Article 4 of the Lawyers Services Directive sets out the provisions clarifying the scope of application of the host and home member state rules according to the type of activity undertaken.

These provisions will continue to apply until the end of the transition period, i.e. 31 December 2020, if agreed. The future PII obligations will depend on the form of the future EU-UK agreement. In an event of no agreement, the national rules will apply.

Useful resources:

1. Brexit Q&A – Law Society of Scotland: <https://www.lawscot.org.uk/research-and-policy/international-work/brexit/brexit-qa/>
2. 'Exiting the EU: An update for lawyers' Solicitors Regulation Authority: <https://www.sra.org.uk/risk/resources/exiting-eu.page>
3. 'Brexit: the end of cross-border practice?' The Journal (Law Society of Scotland): <http://www.journalonline.co.uk/Magazine/62-1/1022713.aspx>
4. CCBE guidelines 'Guidelines for Bars & Law Societies on Free Movement of Lawyers within the European Union': http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EU_LAWYERS/EU_L_Guides_recommendations/EN_FML_2016_Guide.pdf
5. CCBE guidelines 'Conditions for the admission of lawyers from non-EU Member States to the title of the local legal profession in each EU Member State and conditions under which lawyers from non-EU Member States can perform temporary services in each Member State under their own home title': http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/INTERNATIONAL_LEGAL_SERVICES/ILS_Position_papers/EN_ILS_20050125_Conditions-for-the-admission-of-lawyers-from-non-EU-Member-States-to-the-title-of-the-local-legal-profession-in-each-EU-Member-State-and-conditions-under-which-lawyers-from-non-EU-Member-States-GATS.pdf
6. Advice for qualifying at the Bar of Ireland: <http://www.barcouncilethics.co.uk/documents/call-and-practice-at-the-bar-of-ireland/>