



BUNDESRECHTSANWALTSKAMMER

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On the withdrawal negotiations of the EU with the United Kingdom Here: European lawyers

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The Bundesrechtsanwaltskammer (The German Federal Bar, BRAK) is the umbrella organisation of the self-regulatory bodies of the German *Rechtsanwälte*. It represents the interests of the 28 German Bars and thus of the entire legal profession in the Federal Republic of Germany, which currently consists of approximately 164,500 lawyers, vis-à-vis authorities, courts and organisations at national, European and international level.

The European Commission's Draft Agreement on the United Kingdom's withdrawal from the EU, published on 28 February 2018, explicitly addresses the rights of lawyers who have obtained the professional title of the host State. It does not address, however, the rights of the European lawyer who is established in the United Kingdom under his home title, or the UK lawyer who is established in a EU Member State under his home title. This legal question shall be examined in the present position paper.

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The guidelines adopted by the European Council on 29 April 2017 regarding the Brexit negotiations state i. a. that

“Agreeing reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom’s withdrawal from the Union will be the first priority for the negotiations. Such guarantees must be effective, enforceable, non-discriminatory and comprehensive, including the right to acquire permanent residence after a continuous period of five years of legal residence.”

According to Article 9 of the European Commission’s Draft Agreement on the United Kingdom’s withdrawal from the EU, published on 28 February 2018, the rules set out in Part Two of the Draft Agreement shall apply to persons who as EU27 citizens reside in the United Kingdom, or, who as UK nationals reside in the EU27.

Title II, Chapter 3 of Part Two of the Agreement pertains to professional qualifications. Articles 25 to 27 expressly provide for the right of lawyers to pursue their profession. It is provided that lawyers who have obtained the professional title of the host State either via the aptitude test within the meaning of Article 14 of Directive 2005/36/EC on the mutual recognition of qualifications, or after having completed three years of practice in the law of the host State in accordance with Article 10 of Directive 98/5/EC on the establishment of lawyers, shall retain their rights to pursue the profession of lawyer in the host State, on the condition that they have gained the right to reside in the host State within the meaning of Article 9 et seq. of the Agreement.

Thus, the proposed provision pertaining to the preservation of acquired rights is considerably tighter than it would be if the Establishment Directive 98/5/EC were to remain applicable. For according to the Establishment Directive, an establishment in multiple Member States, irrespective of residence, would be possible. In the future, the possibility of establishment will be limited to the country where the lawyer concerned has his/her residence on the withdrawal date and fulfils the conditions for the applicability of Part Two of the Agreement, i.e. exercises the right to reside. The German Federal Bar expressly welcomes this provision. There is, however, one aspect, where it does not go far enough.

According to the current version of the Draft Agreement, the rights of European lawyers practising under their home title – which is the norm following the Establishment Directive 98/5/EC – to continue their professional activity, will not be safeguarded by the right to reside in the United Kingdom or in any of the EU27 States. They will lose the right to continue to practise in the law of the State in which they lawfully reside (and thus also EU law) under the title of the State in which they obtained the professional title of lawyer.

Their existing rights to exercise the profession in their country of residence under their home-country title, are rights which derive from EU law, just like the rights of the persons covered in Articles 25 and 26 of the Draft Agreement. Restricting them in the future to the rights granted by the host country in the framework of GATS and/or unilaterally, on the basis of the particular host country’s national law, is, in The German Federal Bar’s view, inadequate and, in particular, falls short of the European Council’s own standards, quoted verbatim at the beginning of this position paper.

If German lawyers who are established in the United Kingdom, or UK lawyers who are established in Germany and have their residence at the place of establishment within the meaning of the Agreement, were no longer able to practice in the law of the host State (and thus EU law), the right to continue living in the host State would be largely devalued, too.

Further-reaching rights of free movement within the meaning of the freedom of establishment and the freedom of services, such as, for example, the cross-border provision of legal services, the possibility

to practice in the law of other European jurisdictions, or to be established in several countries should be treated differently. The German Federal Bar is of the opinion that these rights should remain unaffected by the provisions of the Withdrawal Agreement.

The legal technical implementation of a preservation of acquired rights, limited to professional activity in the State of residence, would be simple:

As a factual precondition, the combination of establishment within the meaning of Article 3 of the Establishment Directive (registration with the competent authority, i.e. membership with the Bar) on the one hand and the right to reside in the country of establishment within the meaning of the Withdrawal Agreement on the other, is sufficient – in conjunction with the legal consequence that the practice rights obtained under EU law will be limited, from the withdrawal date onwards, to the State of residence in the framework of Directive 98/5/EC as implemented by that State.

With this provision, any free movement rights going beyond the necessary extent of preservation of acquired rights could simultaneously be removed, or could be reserved to the agreement on the future relations between the United Kingdom and the EU.

The German Federal Bar is therefore in favour of maintaining the possibility for lawyers established in the United Kingdom at the time of its withdrawal from the EU, to practice in the UK under home-country title, or for UK lawyers to practice in the EU Member States under their professional home title, provided this is where they reside. Here, the same restrictions and conditions shall apply as those applying to the professionals who are integrated into the profession of the host State. This position paper is without prejudice to the question regarding the professional activities of lawyers from the United Kingdom who wish to establish themselves in Germany after Brexit.
