

Results of the SRA's consultation on entity regulation of European law firms and invitation to feedback on revised amendments to the SRA Handbook

Summary

1. This document summarises the responses to the SRA's consultation on the proposed changes to registered European lawyer (REL) regime which closed on 14 April 2014. The responses to the consultation were all generally supportive of the thrust of our proposal to allow RELs to practise through non-authorised REL bodies ('Exempt European Practices') provided they do not undertake reserved work. We did, however, receive some helpful suggestions for the finessing of the glossary definitions linked to this proposal and there was useful feedback on the question of the conduct regime that should apply to individual RELs working in Exempt European Practices ('EEPs'), as they will continue to be regulated as individuals by the SRA.
2. Comments received on the proposed conduct regime for individual RELs in EEPs reinforced the SRA's own internal reflections about how the SRA Code of Conduct should apply to RELs practising in such non-authorised bodies. We are therefore now proposing that, rather than create a new bespoke regime in the SRA Handbook for RELs in Exempt European Practices, we should apply the same regime that applies to solicitors and RELs employed in foreign firms, which follows the in-house provisions contained in Rule 4.19 and 4.20 of the SRA Practice Framework Rules. Since this is a development from the option we consulted on in the spring, we are seeking further feedback to ensure that there are no unintended consequences arising from this approach. Our intention remains to put our proposed amendments to the SRA Board in July and to include them in the next SRA Handbook update in October.

Background

A recap on our February consultation

3. In late February we published a consultation which proposed giving European law firms through which RELs are practising in England and Wales, the option of whether or not to become authorised bodies. We made this proposal because it was clear to us that the application of entity regulation to European firms practising predominantly in the law of their home jurisdictions was disproportionate and an unintended consequence of the requirement for individual European Lawyers to be registered by virtue of the application of the Establishment Directive (98/5/EC), the Legal Services Act 2007 and the SRA Handbook.
4. Under our proposal, RELs would additionally be permitted to practise from the office of an Exempt European Practice in England and Wales, provided they

did not undertake reserved legal activities. This would remove the need for those European law firms whose practice does not involve reserved legal activities to be authorised bodies. This means in practice that these entities would not be required to conform to the structures permitted under the SRA Practice Framework Rules, nominate a COLP and COFA or pay a turnover-based fee.

5. Individual RELs working within such EEPs in England and Wales would nonetheless still need to register with the SRA and would remain bound by our Code of Conduct, as required by the Establishment Directive. In our February consultation we sought views from others on how this application of the Code of Conduct to individuals should work in practice.

Results of consultation

6. We received seven responses to our consultation, four from professional associations and three from European law firms. Overall there was support for the SRA's objective of seeking a more proportionate regime for European law firms who were not practising English law, although the following general observations are worth noting:
 - Both the Law Society of England and Wales and the City of London Law Society (CLLS) argued that the proposed scope of practice that would be afforded to an Exempt European Practice was too wide and suggested instead that EEPs should be prohibited from practising 'solicitor like activities' as well as reserved activities, on the grounds that this would result in unfair competition. We felt that there was no justification for restricting EEPs beyond reserved areas of work, not least because this restriction does not apply to solicitors who are employed in foreign firms. We also felt that the issue raised by the CLLS was more about restrictions on solicitors' practices and this is being addressed through other consultations.
 - The Law Society expressed concerns about the proposed exclusion of the clients of RELs in non-authorised practices from the Legal Ombudsman's (LeO) complaints regime. It is the LSA that determines whether or not a complaint will fall within the jurisdiction of LeO and as RELs in EEPs will not be authorised to conduct reserved legal services it is our view that they are therefore outside LeO's purview.
 - The REL firms who responded generally welcomed our proposal but in some cases also expressed their preference for a complete opt out from SRA regulation. Whilst this might in practice be simpler for both sides and would treat such firms in the same way as other non-authorised foreign firms in England and Wales, the requirement for registration of European lawyers under the Establishment Directive and the provisions relating to application of professional conduct rules to RELs mean that this is not a viable option.
7. The following issues were also raised in the consultation responses and are all points that we have accepted in our redraft of the proposed changes:

- The City of London Law Society made a useful suggestion to improve the definition of an EEP by allowing a non-authorised REL firm to take an unincorporated form.
 - A number of respondents also expressed the concern that the proposed definition of an EEP would have the unintended consequence of excluding non-practising solicitors from the ultimate beneficial ownership of the European law firm of which it was a part. The view was that this would undermine the attractiveness of the dual qualification of 'solicitor of England and Wales', even if such a qualification was not used in active practice. We have therefore specified in our redrafted glossary definition that it is 'practising solicitors of England and Wales' who may not be beneficial owners in EEPs.
 - Two of the European law firms who responded wanted reassurance that they would not be required under this new regime to pay turnover-related fees. This is the logical consequence of permitting RELs to practise through non-authorised bodies in the form of EEPs and as a result, it will only be the individual RELs within EEPs who will be required to register and pay fees to the SRA.
8. We also explicitly requested views in our February consultation on how the code of conduct should apply to RELs in non-authorised bodies. In response, we received suggestions ranging from the exemption of RELs practising in EEPs from our Code of Conduct entirely, through to the application solely of the principles or of Chapter 13A of the Code, which applies to solicitors practising in other jurisdictions.
 9. Our further internal thinking on this point has however led us to the conclusion that the SRA Code of Conduct should apply to individual RELs in EEPs in the same way as it applies to employed solicitors working in foreign law firms. We believe this is an analogous situation because solicitors and RELs in foreign law firms, like RELs in EEPs, remain regulated individuals even though they are not working in regulated entities and are subject to the condition that they do not conduct reserved legal activities through such an entity. We therefore feel that it would be fair and proportionate to apply to RELs in EEPs, the full regime applying to solicitors and RELs employed in foreign firms. This would include the application of the Code of Conduct as it applies to solicitors working 'in house' and coverage by the compensation fund. Since the Solicitors Accounts Rules apply to solicitors and RELs who are working in house but who also handle client money, we believe that some accounts rules provisions should also apply to RELs practising through EEPs. However we have suggested that the overseas regime in Part 7 of the SRA Accounts Rules would be more appropriate to such practises.
 10. Given that we have slightly revised our proposals in the light of the consultation and would now apply the SRA Handbook to individual RELs in EEPs more broadly than originally set out; we are now seeking further feedback following on the previous consultation. We still aim to submit the revised proposals to the Board in July so that these changes could be incorporated into an October Handbook update.

Summary of revised proposal

11. The changes we are proposing in full are as follows:

- A change to rule 2.1 of the Practice Framework Rules which would allow a REL in England and Wales to work in an Exempt European Practice under the conditions that apply to solicitors and RELs who are employed in foreign firms.
- A change to rule 2.2 reflecting the changes to 2.1 of the Practice Framework Rules which governs REL practice in Scotland and Northern Ireland, where that REL has first registered with the SRA.
- Changes are proposed to the Code of Conduct to apply it to RELs in EEPs to the same extent as it applies to in-house solicitors and RELs working in-house.
- A number of consequential amendments to the SRA Principles, SRA Practising Framework Rules, Practising Regulations and Glossary are suggested.
- Changes to the SRA Accounts Rules which require individual RELs in Exempt European Practices to adhere to the accounts rules in Part 7 if they hold client monies.
- Changes are proposed to the Compensation Fund Rules to reflect the fact that in certain circumstances clients of RELs in EEPs will have recourse to the compensation fund.
- Finally, we have amended our proposed glossary definition of an exempt European Practice to reflect comments received.

Conclusions

12. This paper has set out the results of the SRA's consultation on proposed changes to the regulation of entities owned or managed by registered European lawyers and has explained how we intend to amend our proposal for Handbook changes as a result of this invitation to comment. The annex to this paper sets out the revised proposed rule changes. We are now seeking any final comments and, in particular, specific drafting suggestions on these proposed amendments.
13. This invitation to comment will be open until **24 June 2014**. Responses should be sent by email to international@sra.org.uk. Where this is not possible, hard-copy responses may be sent instead to:
Registered European Law Firm Consultation
Solicitors Regulation Authority
24 Martin Lane
London
EC4R 0DR

Annexes

Annex 1: Final amendments proposed to the SRA Handbook on the entity regulation of law firms owned or managed by registered European lawyers

Annex 2: Regulation of European law firms: impact statement

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(proposed changes in red typeface)

SRA Practice Framework Rules -Rule 2

2.1

(e) as the *employee* of another *person*, business or organisation, provided that you undertake work only for your *employer*, or as permitted by Rule 4 (In-house practice).

(f) *as a manager, employee, member or interest holder of an Exempt European Practice, provided that you meet the conditions set out under Rule 4.20 (a), (b) and (c);*

2.2

(e) as a *manager, employee, member or interest holder* of a business which is not required to be an authorised body, provided that it has no office in England and Wales *or is an Exempt European Practice*, and that it meets all the conditions set out in sub-paragraph (d)(i) to (iii) above, *and that you meet the conditions set out under Rule 4.20 (a), (b) and (c).*

SRA Practice Framework Rules - Rule 4

4.19 *Unless your employer is an Exempt European Practice you may provide legal services to your employer's clients....'*

Glossary

client account (overseas practice)

means an account at a bank or similar institution, subject to supervision by a public authority, which is used only for the purpose of holding *client money (overseas practice)* and/or *trust money*, *or for an REL practising from an office in England and Wales through an Exempt European Practice, an account at a bank or building society in England and Wales which is used only for the purpose of holding client money*, and the title and designation of which indicates that the funds in the account belong to the client or clients of a *solicitor or REL* or are held subject to a *trust*.

Exempt European Practice means

- a. *a lawyer's practice formed in an Establishment Directive state which is regulated as such in that State and which is a structure in which lawyers are permitted to practice in that State, and*
- b. *whose ultimate beneficial owners do not include any practising lawyers of England and Wales, and*
- c. *whose main place of business is situated and carried on in an Establishment Directive State other than the United Kingdom, and*
- d. *which does not carry on any reserved legal activity.*

firm

means:

...

- (ii) in the SRA Indemnity Insurance Rules:
 - (C) any partnership ..., unless that partnership is a non-SRA firm or an *Exempt European Practice*; or

private practice

- (i) for the purpose of the SRA Indemnity Insurance Rules:

...

but does not include

- (D) *practice* carried on through a *non-SRA firm* or by a REL through an *Exempt European Practice*

Code of Conduct - Rule 13 (Application Provisions)

13.1 Subject to paragraphs 2 to \below and any other provisions in this Code, this Code applies to you, in relation to your activities carried out from an office in England and Wales, if you are

- (a) a solicitor, REL (subject to paragraph 13.11), and you are practising as such...

13.11 This Code applies to a REL practising as a manager, employee, member or interest holder, of an Exempt European Practice to the same extent that it applies to In-house practice.

The Principles

Application Provisions

3.3 The Principles apply to you if you are a REL practising as a manager, employee, member or interest holder, of an Exempt European Practice.

Practising Regulations

Regulation 12.2

12.2 The register must contain, in respect of each REL, the following information:

...

- (n) whether the *lawyer* is practising through an *Exempt European Practice* and if so the name and address of the *Exempt European Practice*

Accounts Rules

Part 1

3.1...Part 7 of these rules applies to practice carried on from an office outside England and Wales **and the practice of an REL from an office in England and Wales of an Exempt European Practice.**

Part 7: Practice from an office outside England and Wales **and from an on office in England and Wales of an Exempt European Practice.**

47.1 The purpose of applying different accounts provisions

(a) to practice from an office outside England and Wales is to ensure similar protection for *client monies (overseas)* but by way of rules which are more adaptable to conditions in other jurisdictions.

(b) **to the practice of an REL from a Exempt European Practice from an office in England and Wales of an Exempt European Practice is to ensure similar protection for *client monies* but by way of rules which are more adaptable to such practices.**

Rule 48: Application and Interpretation

48.3 Part 7 of these Rules applies to the practice of an REL from an office in England and Wales of an *Exempt European Practice* but for this purpose only all references in these Rules to *client monies (overseas)* shall be substituted with *client monies*.

Guidance note

- (i) If you are an REL practising from an office in England and Wales of an *Exempt European Practice* and you hold or receive client money you must comply with Rules 49.2 and 49.3, 50.3 to 50.6 and 51.

The Compensation Fund Rules

8.1 For the avoidance of doubt, a grant will not be made in respect of the following:

(g) the loss incurred in relation to an overseas partnership... unless

...

(iii) the loss was incurred in relation to the *practise* of an REL in an office in England and Wales of an *Exempt European Practice*.

Annex 2: Regulation of European law firms: impact statement

1. This impact statement comprises an assessment of the impact of the rule changes proposed in relation to the regulation of European law firms wishing to establish in England and Wales as Exempt European Practices (EEPs).
2. The overall impact of these changes is limited as the regulated population affected by this proposed deregulation is very small: estimated to be around 20 firms established by European lawyers. We welcome the views of respondents on our assessment of what the potential impact of these proposals might be.

Protecting and promoting the public interest

3. These proposed rule changes will make it more attractive for European law firms to establish in England and Wales and will therefore contribute to the public objective of reinforcing the United Kingdom as a global centre for legal services. We believe that there are some European law firms who currently choose to provide legal services in England and Wales on a purely temporary basis outside of any SRA regulation who may, as a result of these changes, establish a full presence here under the EEP regime and choose to become regulated as individual RELs.

Improving access to justice

4. Although we expect the impact of these rule changes to be predominantly on firms based in London providing advice to corporate clients from their home Member States, the changes will also lower the regulatory burden on European law firms wishing to establish in order to provide legal advice to citizens from their home Member States. Communities of European migrants will therefore potentially be better served by legal advice on their home State interests as a result of these proposals.

Supporting the constitutional principle of the rule of law

5. By allowing European law firms to provide services, which might include non-reserved English law, without needing to become authorised bodies but maintaining the requirement for individual European lawyers to be registered, we believe that we are better reflecting the purpose as well as the literal requirements of the European Lawyers Establishment Directive (98/5/EC). The proposal will also apply the rules more equitably to European lawyers as they will be able to opt to be treated analogously to an English solicitor working for a non-authorised foreign law firm or to an English solicitor in an authorised firm.

Protecting and promoting the interests of consumers

6. These proposals will potentially increase the access of consumers to legal advice relating to other European jurisdictions. They include proportionate protections, since individual RELs will remain regulated by the SRA and subject to the Code of Conduct. RELs working in exempt European practices will also need to maintain and disclose their insurance cover and protect client money. Consumers will be able to make claims on the compensation fund in relation to RELs working

in EEPs to the same extent that they can in relation to solicitors working in foreign law firms.

Encouraging a strong, diverse and effective legal profession

7. This proposal will reduce the costs to European law firms of establishing in England and Wales and make it possible for some firms who have not been able to open here because of the nature of their home law firm structures, to do so in future. This proposal will therefore support the development of further diversity in legal service provision in England and Wales.

Promoting and maintaining adherence to the professional principles

8. We believe that this new regime will improve the adherence of European lawyers to the SRA's professional principles because they will need to make a conscious choice when they establish in England and Wales about the regulatory regime that they are governed by. We will also be supplementing these rule changes with additional guidance for RELs and European law firms which will be specifically designed to address their likely questions about the regime.

Question: Do you agree with our analysis of the potential impact of these rule changes?