

ANNEX 8

IPReg Assurance and Supervision Policy

Introduction

IPReg's role is to promote the regulatory objectives set out in the Legal Services Act (LSA). The LSA defines the regulatory objectives as:

- protecting and promoting the public interest;
- supporting the constitutional principle of the rule of law;
- improving access to justice;
- protecting and promoting the interests of consumers;
- promoting competition in the provision of services within subsection (2) (broadly, legal activities);
- encouraging an independent, strong, diverse and effective legal profession;
- increasing public understanding of the citizen's legal rights and duties;
- promoting and maintaining adherence to the professional principles.

In pursuing the regulatory objectives IPReg adheres to the principles of better regulation as defined by the Better Regulation Executive in 2000; proportionality, accountability, consistency, targeting and transparency.

IPReg has always had an outcomes-focused approach to regulation (OFR). This is a regulatory regime that focuses on the high level principles and outcomes that should drive the provision of services for clients.

This approach underpins IPReg's Code of Conduct, and the principles-based style adopted avoids prescriptive rule setting whenever possible.

The approach is designed to be:

- proportionate,
- targeted, and
- effective

Overall approach to Assurance and Supervision

It is the intention that this OFR approach will be replicated in relation to risk assessment and assurance and supervision.

Broadly, the regulatory objectives can be put at risk by:

- the firms that IPReg authorises and regulates;
- IPReg's own operations and decisions;
- economic and other external conditions or influences that affect the way that the legal services market functions, such as the sophisticated clients and business world which shape IP activity.

The risk assessment model which IPReg has recently developed is designed to identify and mitigate risks to the regulatory objectives caused by firms. The challenge for IPReg is to use the intelligence it generates well, to improve risk assessment and the allocation and prioritisation of its regulatory efforts.

It is the intention that IPReg will use the risk assessment at both the strategic level to set overall priorities and allocate resources, and at the frontline to decide those firms and individuals requiring its specific focus. Such focus does not equate to immediate intervention by IPReg. Rather the identification of risks and the subsequent regulatory and supervisory strategies require a sound evidence base to ensure that proportionate regulation is supported by appropriate safeguards.

Any intervention will be focused upon the problem, with the remedy being proportionate to the risks posed.

IPReg is non-prescriptive in its view of changes in IP business models as long as the underlying requirement for public protection remains or is enhanced. IPReg recognises that a key element of its activity is to allow, and indeed encourage, innovation and economic progress.

Only once other regulatory opportunities have been tried and failed will IPReg intervene where there is a clear case for public protection. IPReg's approach to formal enforcement is contained within the IPReg Enforcement Strategy¹.

¹ IPReg Enforcement Strategy.

The assessment model

At the level of the individual firm, it is of course the job of business owners and managers to identify and control risks arising from their activities. It is the job of the regulator, however, to assess whether this control is appropriate in the light of the risks posed, taking account of the likelihood of the event and its potential consequences.

IPReg's assessment of how these factors will be weighted in its risk assessment is a matter of judgment of

- the potential harm to the services user or the wider public;
- the firm's ability to manage the risks posed; and
- the firm's regulatory compliance history.

The assessment model identifies categories of risk. The categories of risk are then prioritised or weighted in terms of the extent of the risk to the regulatory objectives. Firms are risk assessed by applying a probability and impact score across each risk category.

The probability score consists of an assessment primarily of the likelihood of risk outcomes on delivery of the regulatory objectives, and subsequently on the IP market, of a regulatory failure at the firm. IPReg will identify the factors that would ultimately need to be present to lead to a low/medium/high outcome on the various categories of risk including business model risk, governance and operational risk, and staff competence or fitness and propriety.

Neither the risk model itself nor the risk assessment of each firm is therefore static. The risk model will need to be reviewed over time to ensure that it is accurate based on market developments, IPReg's experience of authorising and supervising firms, and economic developments. New risks will emerge particularly with changes to the legal services market due to the advent of Alternate Business Structures (ABS) and some risks will become less or more significant.

Engagement with firms may be triggered by events generated within or potentially impacting on a firm that mean that IPReg needs to check whether a firm's compliance might be at risk, or as a part of a piece of broader thematic work with a number of firms.

An **event** includes such things as:

- a report of misconduct against a firm and/or individual,
- significant change to a firm's composition or structure, and
- a downturn in a firm's financial indicators.

A **theme** might be a particular aspect of the work being undertaken, for example, the holding of client money or an issue such as complaints handling - where IPReg's interest lies in the approach of a number of firms to that particular activity.

For example, we are aware that proposed changes in the Code to the holding and management of client monies is likely to require, for many firms, significant upgrading to accounting records and additional staff training.

How will Assurance and Supervision work?

In broad terms, IPReg will take a two step approach to assurance and supervision. This work would generally be undertaken after an initial review of information supplied routinely (as part of annual renewal of registration for example) or following a specific exercise such as a re-run of the IPReg Questionnaire.

- **Desk-based supervision** involving immediate engagement with firms by telephone to discuss issues and request information. That information will be analysed and pertinent questions asked about what has been provided.
- **Visit-based supervision** involving visits to firms to address both discrete events and thematic risks. We would visit firms when we considered this necessary in order to properly assess the risks or issues identified.

Thematic work undertaken can include both desk- and visit-based supervision with information and 'lessons learnt' available on our website.

In autumn 2012 IPReg carried out an extensive audit of registered firms and their activities. Wide ranging questions covered matters including finance and management, business models, client relationships and professional competencies

This information is confidential and will not be published.

The information serves three immediate purposes:

- To underpin the risk based approach to assurance and supervision and enforcement of registered firms
- To identify any areas where there were immediate concerns
- To provide a base line against which IPReg can measure the success of its OFR approach

IPReg officers have analysed the information provided and risk-assessed firms/groups of firms to identify what we consider to be any key risks or issues.

IPReg acknowledges that there is no such thing as a “no failure” regime. Firms fail because of their own decisions, not due to regulation. Within the intellectual property profession, no firm has ever failed due to insolvency. This suggests that this risk is very small. However given the scope being afforded to firms to diversify ownership and management structures, this risk needs to be pro-actively and well managed.

Working with Others

In developing its assurance and supervision policy IPReg has drawn considerably on the stated approach of the SRA. IPReg makes no apologies for that decision.

Firms employ solicitors and other legal professionals as well as attorneys and it is right that a consistent approach be adopted wherever possible.

IPReg does not work in isolation. IPReg has signed a Memorandum of Understanding with other legal regulators to provide a framework for information sharing and a cohesive approach to supervision.

By far the vast majority of the profession is insured through PAMIA (a mutual insurance society) and where possible (within the bounds of confidentiality for example) IPReg would work with PAMIA to resolve issues.

To this end there may need to be changes in the attitude and behavior of firms so that firms:

- constructively engage in the supervisory process and with IPReg generally
- recognise that there may be times when IPReg may make a decision to formally contact a firm which in hindsight might be found to be wrong or premature
- recognise that this new approach may require greater resources and expertise than a reactive model

However the constructive response of the vast majority of registered firms to the questionnaire leads IPReg to believe that the profession endorses IPReg’s OFR and proactive approach to regulation.

However, IPReg will take enforcement action if:

- there is serious misconduct;
- we identify a risk to the public that cannot be mitigated promptly by working with the firm;
- the firm in question does not engage with IPReg so that the matter can be addressed under supervision and formal investigation is required.

Enforcement itself may not always take the form of disciplinary proceedings. Enforcement may take the form of formal regulatory undertakings given by attorneys and firms under Rule 20 of the Code of Practice which will enable close monitoring of the attorney and/or the firm. Equally enforcement may be in the form of conditions attached to registration and licensing.

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Development of approach to supervision

