



JUDICIARY OF  
ENGLAND AND WALES

THE RIGHT HONOURABLE THE LORD THOMAS OF CWMGIEDD

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**Application from the Bar Standards Board  
for a recommendation for designation as a licensing authority**

Thank you for your letter of 22 July 2015 enclosing the Bar Standards Board's (BSB) application for designation as a licensing authority, together with advice from the Legal Services Consumer Panel and the Competition & Markets Authority (CMA).

As I am required to do by the Legal Services Act 2007 (LSA), I am pleased to provide the Legal Services Board (LSB) with my advice on whether the application should be granted, taking into account, in particular, the likely impact on the courts in England and Wales. The advice is of course subject to the general regulatory regime remaining the same. In providing my advice, I also bear in mind the Regulatory Objectives contained in section 1 of the LSA, having particular regard to the public interest, rule of law, and access to justice objectives.

Firstly, I share and repeat the concern of my predecessor about the premise upon which the LSA proceeds, namely that regulatory competition will improve regulatory standards, and, in so doing, further the public and consumer interest. Likewise, I am firmly of the view that the risk of "shopping around" for the least restrictive regulatory regime must be avoided.

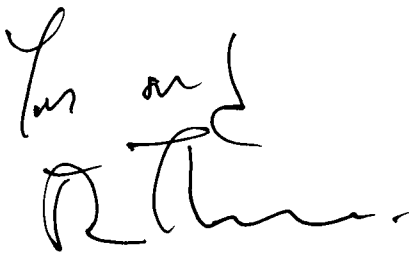
Second, in my view, one concern that underlies many, if not all, of the Regulatory Objectives is professional standards of practice required in litigation, which necessarily impacts upon the courts in England and Wales. On reading the application, I note that it is described as an extension of the BSB's entity regulation scheme, which was approved by the LSB late last year. The BSB plans to use its experience of regulating entities to inform its work as a licensing authority. In addition, I note that, at least initially, the BSB plans to be a niche licensing authority, regulating alternative business structures (ABSs) whose activities and regulatory risks are broadly similar to the Bar in general. This approach seems to me to be an eminently sensible starting point.

The approach taken by the BSB, as noted above, is reflected in the decision-making criteria that will be used to assess licence applications. The CMA has expressed concern about some of these criteria, in particular about what they perceive to be overly restrictive rules about non-lawyer owner-management of ABSs licensed by the BSB. I strongly disagree with the CMA's concerns. Beyond the fact the criterion is in any case discretionary, it is quite right that the BSB should use its licensing rules to emphasise the continuing importance of individual responsibility and accountability. It is absolutely critical that obligations on the ABS are buttressed by obligations on the individual barrister, or other authorised person. This is to make sure that, in particular, litigation is properly conducted and to maintain standards, and ensure that the duties owed directly to the court are strictly observed, so as to serve the public interest.

Third, I note that neither the Legal Services Consumer Panel nor the CMA have any serious or significant concerns with the application; however, I do also disagree with the CMA's suggestion that a "sunset clause" might be an appropriate way for some of the application criteria to be kept under review. In addition to disagreeing with the substance of the CMA's concern, described above, in my view, any such sunset provisions would introduce uncertainty into the regulatory framework.

Finally, the policy statement annexed to the application makes clear how the BSB considers the public interest to underpin the entirety of its regulatory framework and how the core duties will apply to all BSB-regulated persons. In addition, the statement emphasises the overriding duty to the court that, in turn, supports the rule of law. Further, the licence application will require applicants to submit a statement about how the proposed business could improve or impinge on access to justice. Whilst this statement is unlikely to form the basis for rejecting an application, I was particularly encouraged to see that the assessment spreadsheet considers access to justice broadly, so as to include catering for different languages, persons with disabilities, extended hours, and providing specialist services, in addition to pro bono efforts and accessible pricing. More broadly, the policy statement also makes the general points about competition and innovation improving the market and, therefore, access to justice.

Overall, and subject to the above advice, I am content with the BSB's application for designation as a licensing authority and supportive of the LSB making a positive recommendation to the Lord Chancellor.

A handwritten signature in black ink, appearing to read "Lord Chancellor". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.