

# **Legal Services Board - Consultation on Designating new Approved Regulators and approving rule changes**

Response from the Office of Fair Trading

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# 1 BACKGROUND

- 1.1 In its consultation paper<sup>1</sup>, the Legal Services Board ('LSB') sets out its proposed procedures for applications for designating new Approved Regulators and approving rule changes. It then asks stakeholders to respond to a number of consultation questions regarding the proposed procedures.
- 1.2 The OFT already has an important role under the current processes to approve rule changes by bodies authorised to grant rights of audience or rights to conduct litigation, and we welcome the opportunity to contribute to this consultation. In our response we have answered the consultation questions of the LSB where appropriate. We have also offered some general views of the OFT on the proposed procedures.

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<sup>1</sup> The consultation paper is published on the LSB's website:

[http://www.legalservicesboard.org.uk/what we do/consultations/2009/pdf/210709.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/2009/pdf/210709.pdf)

## 2 OFT RESPONSE TO CONSULTATION QUESTIONS

### **Question 1: Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the LSB's approach to the requirements for the contents of Applications?**

- 2.1 The Legal Services Act 2007 (the 'Act') reforms the way legal services in England and Wales are regulated. It is designed to encourage competition in the legal services market and, more particularly, it enables legal services to be provided under new business structures (or alternative business structures ('ABS')). The Act has granted the LSB the power to recommend to the Lord Chancellor that he approve further regulators. This power is designed to allow new entrant Approved Regulators to create competition for the licensing of ABS firms. This is on the basis, as stated in the consultation paper, that 'regulatory diversity within a framework of oversight regulation would help to drive standards of regulation and hence also improve the performance of regulated firms'.
- 2.2 However, as recognised by the LSB's consultation paper, there are risks to the designation of additional Approved Regulators. In particular, there is a risk that new Approved Regulators may lower standards in the market to a level that is detrimental to the public, or that regulation may become too confusing for consumers.
- 2.3 The balance between creating competition between regulators and protecting the public interest is a fine one. Consequently we support the fact that the LSB has recommended that the OFT be specifically consulted on every application by a new regulator seeking designation as an Approved Regulator or by a current Approved Regulator to expand its services. The OFT is the UK's consumer and competition authority and therefore is in a good position to offer specialised advice to the LSB regarding the effect on both competition and consumer protection of any application by a potential or current Approved Regulator.
- 2.4 The LSB has chosen to follow a 'principle-based' approach to the new designation approval process: providing main criteria for approval but not

being prescriptive about the precise form of evidence. The draft rules require an Application to 'contain sufficient information to allow the Board to make a proper consideration of the Application and to provide sufficient information to the Consultees to enable them to consider the Application in a meaningful way'. The draft rules include a detailed list of 'administrative information needed to enable processing of an application' and 'evidence in relation to regulatory arrangements'. However it is left to the discretion of the applicant to decide which evidence is required and which is not.

- 2.5 However we query whether this lack of detailed specific guidance could slow down or confuse the application process for applicants. For example, an applicant may prepare and include documents that are not required, or may not include documents that the LSB requires to make a decision. We note that the LSB expects to review the Rules by the end of 2011/12. At this time, we would suggest that the LSB either provide more guidance in the rules for applicants based on the type of application they are making, or produce separate guidance as its experience of applications for designation approval evolves.

### **Question 3: What additions or alterations to the Application process would you suggest?**

- 2.6 The draft rules specify that the OFT, when consulted by the LSB, will be given a deadline to give advice which will be 'reasonable, published and variable dependent on the volume and complexity of the Application received'. If the OFT does not provide its advice within the deadline prescribed it will be deemed to have elected not to provide any advice.
- 2.7 We propose that the LSB should discuss this deadline with the OFT before setting it. Given that the OFT will be providing specialist competition advice regarding Applications, the LSB may not initially realise the complexity (or lack of complexity) of the Application in relation to these issues (and therefore the deadline required). Additionally other factors may influence the ability of the OFT to provide advice within the deadline provided by the LSB. The OFT also believes that the application process should ensure that the applicant provide

appropriate information to allow the OFT to produce its advice within the deadline. The draft rules specify in paragraph 5 that an Application 'must...provide sufficient information to the Consultees to enable them to consider the Application in a meaningful way'. If any Application did not contain such information the OFT would need to extend any timeline allowed. In practice we have found in other areas that pre-notification discussions have proved a useful tool in ensuring that all relevant information is submitted so that deadlines can be met.

- 2.8 To increase transparency and predictability, following discussion with the OFT, the LSB may wish to publish guidelines on how much time the OFT would likely be given to provide its advice in different types of case.

**Question 10: Do you agree with the Board's view that the process suggested is the most effective way to address the Regulatory Objectives and the Better Regulation Principles in relation to approaching potentially low impact rule changes? If not, then please can you suggest how the Objectives and Principles could be better addressed?**

- 2.9 Under the process described in the consultation document, the Board has the power to specify that a proposed alteration is an 'Exempt Alteration' and does not need to go through the Board's full consideration. Where the applicant believes that an alteration is *not material*, it can simplify its application. The application will be posted on the LSB's website. The Board will automatically deem the application to be granted if within 28 days of receipt a) it regards the alteration as non-material, and b) it has received no representations from other Approved Regulators or other interested parties (including the OFT) suggesting the alteration should not be exempt.
- 2.10 The process therefore gives only 28 days for interested parties (including the OFT) to object to the designation as an exempt alteration. We would hope that there would be some flexibility to adjust this timeline if requested by the OFT or other parties within the 28 day period,

particularly, for example, if the OFT had not been supplied with sufficient information to make a decision regarding the rule change.

2.11 We would also suggest that either the rules provide further information, or more detailed guidance is issued at a later date, regarding:

- How the LSB will exercise its discretion to issue a warning notice,
- What constitutes 'materiality' for these purposes, and
- How the LSB will decide whether or not to consult the OFT in these circumstances.

**Question 11: Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the requirements specified above? If not, why not? What alternative or additional requirements would you recommend?**

2.12 We would suggest that the following additional requirements be included:

- The process in the consultation document specifies that any application must include 'details of the proposed Alteration'. The OFT suggests that the application also provide a copy of the rule change clearly marked in a suitable form, such as "track changes" in Microsoft Word,
- A full background to the proposed amendments including any consultations, any responses to consultations and any competition impact assessments carried out, and
- A narrative as to the reasons for the changes proposed.

2.13 We would also suggest that the applicant provide further details regarding background as to market description, market information and supporting documentation (e.g. evidence of market share, evidence of geographical extent of market etc) if requested by either the OFT or the LSB in the course of any investigation.

**Question 13: Bearing in mind the Regulatory Objectives, the Better Regulation Principles and the need to operate efficiently in relation to the Freedom of Information Act, please could you suggest improvements to the suggested process?**

- 2.14 Under the suggested process, the LSB gives itself 28 days to reply to an application for a rule change. When it initially replies, it can either, a) grant an approval notice, b) issue a warning notice, or c) allow the application to be deemed granted. The LSB will ask for advice only where it has issued a warning notice. This limits the situations where the LSB could potentially consult the OFT for advice. There are situations where rule amendments may appear simple and unlikely to cause any competition law issues. However this may not always be clear and we would propose that the LSB informally consult with the OFT where there may be uncertainty.
- 2.15 Additionally the LSB is not under any requirement to consult formally with the OFT even where it has issued a warning notice. This approach relies on the LSB recognising any potential competition law issues in a rule change. Again, as competition issues can be complex, we would propose that the LSB informally consult the OFT in any case where there may be uncertainty.
- 2.16 We would suggest that the Rules state the criteria the LSB will use when deciding whether to consult the OFT or guidance be provided at a later date following discussions between the LSB and the OFT. This would provide additional clarity for both organisations regarding the consultation process.
- 2.17 Where the LSB does consult the OFT (whether at the instigation of the LSB or because the OFT has requested consultation) we would wish the Rules to specifically oblige the LSB to provide copies of the relevant underlying documents to the OFT to enable us to carry out our analysis. We note that such a requirement is included in the rules regarding designation of Approved Regulators.