22 November 2021

Approval of 2022 Practising Certificate Fee (PCF) application made by the Intellectual Property Regulation Board (IPReg) to the Legal Services Board (LSB) under section 51 of the Legal Services Act 2007 (the Act)

1. The LSB has approved an application made by IPReg to the LSB under section 51 of the Act. Section 51 of the Act relates to the control of PCF charged by approved regulators.

2. A PCF is a fee payable by a person under an approved regulator's regulatory arrangements, in circumstances where the payment of the fee is a condition which must be satisfied for that person to be authorised by the approved regulator to carry on one or more activities which are reserved legal activities. An approved regulator may only apply amounts raised by the PCF for one or more of the permitted purposes which are set out in section 51(4) of the Act and the Practising Fee Rules 2021 (Rules)[1].

3. A PCF is payable under the regulatory arrangements of an approved regulator only if the LSB has approved the level of the fee required by section 51 of the Act. The Chartered Institute of Trademark Attorneys (CITMA) and Chartered Institute of Patent Attorneys (CIPA) are approved regulators, and IPReg is the regulatory body to which CITMA and CIPA have delegated their regulatory functions.

4. In making an application, an approved regulator must comply with the provisions of the Rules. The Rules provide a framework for the practising fee application and approval process. The Rules specify the permitted purposes that the practising fee may be applied to, the criteria and material the LSB will consider before deciding to grant an approved regulator's application in whole or part, the information approved regulators are required to submit, and the application process and procedure. An approved regulator must also have regard to the LSB's Guidance on the Practising Fee Rules 2021 (Guidance)[2], which gives guidance on each of the Rules.

5. This notice sets out the decision taken, including an assessment of the PCF application.

Summary and overview of PCF application and decision

6. The application submitted by IPReg provides that the PCF bands which determine the level of PCF to be charged to individuals and firms will remain the same as in 2021, as set out in the table below.

[1] https://legalservicesboard.org.uk/wp-content/uploads/2021/02/PCF-Final-Rules-2021-Accessible.pdf
[2] https://legalservicesboard.org.uk/wp-content/uploads/2021/01/PCF-Final-Guidance-for-publication-accessible.pdf

Attorneys/Individuals	Proposed 2022 Fees	
	Single register	Both registers
Attorney solely undertaking corporate work	£177	£283
Attorney in private practice	£215	£353
Attorney not in active practice	£161	£258
Sole trader attorney not employing other attorneys or professionals	£353	£504
Sole trader attorney:	£353	£504
employing other attorneys - add fee per attorney	£71	£71
employing other professionals - add fee per professional	£283	£283

Registered Bodies *(this includes ABS and non-ABS firms)*	Proposed 2022 Fees
	Single or both registers
Registered Body through which a single attorney and no other attorneys or other professionals provide services	£138
Any other registered body	
Base Fee	£353
add fee per attorney	£71
add fee per other professional practising via the registered body	£283

7. IPReg's projected total PCF income for 2022 is £1,013,213 (an increase from the 2021 budget PCF figure of £906,936). IPReg's annual report 2020[3] sets out in paragraph 3.3 on page 7 that as of 31 December 2020 there were 3,165 registered attorneys, of which: 248 were registered as both a patent and a trade mark attorney, 2157 registered as patent attorneys, and 760 registered as trade mark attorneys.

8. The LSB's decision is to approve in full the levels of the PCF for 2022 to be charged to individuals and firms, as set out in the application. In making this decision, we identified some shortcomings in relation to the transparency and accountability of IPReg's application. We have therefore set out some important expectations for IPReg to meet in its application next year, so as to be able to demonstrate that it fully meets the overarching criteria set out in the Rules and provides transparency and accountability to its regulated community and the public, that it is using its resources efficiently in pursuit of the regulatory objectives.

LSB assessment

<u>Overarching criteria (Rule 14)</u>

Accountability

[3] IPReg Annual Report 2020 FINAL.pdf

9. The Rules and Guidance set out an expectation that regulatory bodies provide accountability in their PCF applications on their work in relation to areas of concern raised by the LSB. In particular, paragraph 42 of the Guidance explains that we may take into account whether any commitments that regulators have made in relation to unmet regulatory performance outcomes are reflected in regulators' activities for the year ahead. This is important because the performance framework sets out the minimum standards we expect of a well performing regulator; being able to demonstrate how the PCF and associated programme of activity will enable a regulatory body to meet these minimum standards is an important part of demonstrating that the proposal is sufficient to allow the body to discharge its regulatory functions effectively.

10. IPReg was assessed as not meeting three outcomes (RA2, RA3 and E2) under our regulatory performance framework in November 2020.[4] Over the last year, IPReg has committed to a number of actions aimed at addressing these unmet outcomes. However, the application was not clear how these commitments would be funded through the proposed PCF and there was very little detail on what would be done to make progress on these in the application, business plan and wider material provided. We therefore sought further information from IPReg on this point. As part of this, we asked IPReg how its proposed activity took account of the fact that in a performance update provided to the LSB in July 2021, IPReg itself noted that 'a significant amount of research and data gathering will be needed over the next 6-12 months to develop a full risk model'. This was identified by IPReg in relation to its work to develop its own compensation fund.

11. In response, IPReg confirmed that it has reserves set aside for work related to the unmet outcome RA3, including £15k for research to develop its evidence base and £20k for diversity initiatives. It noted that, subject to advice from the Board's Data Group, it anticipates that it will gather information from different sources including registrants, its CRM and the Intellectual Property Office. We note that the research reserve has been reduced from £50k due to the diversion of funds for IPReg's compensation fund.

12. We are concerned that the overall budget allowed will not match the need that IPReg itself has identified, for significant research and data gathering. Our concerns about the level of funding are compounded by the lack of detail provided by IPReg in either the application or its business plan, or in response to our further questions, on the scope of this planned research and how it will contribute to its overall work programme.

Transparency

13. In relation to transparency, the Rules provide that regulators should be clear how they apply their practising fees to a programme of activity, and how the benefits of those activities which are regulatory functions will be assessed.

14. Annex 6 of the application sets out IPReg's Business Plan for 2022/2023 and this business plan sets out IPReg's programme of activity. Paragraph 7, bullet 5 of the application, sets out that due to its small size, staff work across several different areas, which means that IPReg is unable to provide a detailed breakdown of PCF spend per regulatory activity. The table under paragraph 7 of the application sets out that the majority (61%) of its PCF income will fund staff costs. IPReg has also set out

[4] https://legalservicesboard.org.uk/wp-content/uploads/2020/12/LSB-Regulatory-performance-report-21-December-2020-FINAL-FOR-PUBLICATION.pdf

the level of funding required to deliver its programme of activity. We consider that there is scope for IPReg to provide a greater degree of transparency around how its resources are allocated across its different regulatory activities. We expect IPReg to give further consideration to how it might provide an indication or estimate of how resources are allocated, to improve transparency and accountability.

15. Rule 14a of the Rules sets out that the PCF application should be clear on how the benefits of regulatory activities will be assessed. As this information was not included in the application, we asked IPReg to provide information about how it will assess the benefits of regulatory activities funded by the PCF, including those of its review of regulatory arrangements and its diversity and inclusion work. IPReg responded that it is currently developing plans for how to evaluate diversity initiatives and for assessing the changes to regulatory arrangements. There is therefore very little detail on commitments about how it will approach evaluation and assessment of the benefits of its regulatory activity.

Conclusion

16. Based on our published assessments, IPReg needs to improve its performance in a number of areas under our regulatory performance framework. As set out above, the budget and programme of activity provided fall short on transparency and accountability, including on demonstrating how IPReg will approach and fund the work required to achieve the required performance improvement. This in turn makes it difficult to conclude with confidence that the amounts raised by the practising fees to be applied to regulatory functions are sufficient to effectively discharge its functions, in line with Rule 29(d).

17. On this occasion, we are not refusing the application on the basis of these concerns. Instead, we will continue to monitor IPReg's progress in delivering improvements in its performance and provide IPReg with the opportunity to demonstrate that it can meet the performance outcomes through its proposed budget and programme of activity.

18. The decision to approve the application this year has also been informed by the fact that this is the first year of operation of the new Rules. In this context, we consider that the application, plus the additional information provided through our assessment, can be seen as meeting the minimum requirements. For the avoidance of doubt, for future applications we will require a greater degree of accountability and transparency, so that applications are fully in line with the overarching criteria set out in the Rules and Guidance, including in relation to any commitments that are relevant to delivering improvements in performance under our regulatory performance framework. We will also expect IPReg to set out how it has assessed the actual benefits of the regulatory activities undertaken in the previous year and how it will assess the benefits of regulatory activities for the coming year.

Allocation of PCF to permitted purposes

19. We are satisfied that IPReg has complied with the guiding principles in setting the PCF for its regulatory functions, in particular that the PCF must be allocated solely for the permitted purposes set out in section 51 of the Act and the Rules.

Budget for 2022 and reserves

20. IPReg intends to distribute the cost of the level of funding required amongst its regulated community using a proposed fee structure consistent with previous

years.The annual report 2020 sets out on page 4 that fee income from regulated bodies was £256,698 and individual attorney fees were £702,608.

21. IPReg has provided its draft budget for 2022 and the income and expenditure for the previous year (inclusive of VAT). Paragraph 10 of the application notes that the 2022 budget takes the following into consideration:
    - IPReg does not expect any material change in income and expenditure and so has not provided any forecasts for 2023 and 2024.
    - The budget is prepared using the accruals basis and all figures are inclusive of VAT.
    - The budget only shows PCF income and no other sources of income.
    - All expenditure is on permitted purpose activities.

22. We asked IPReg for further information on why it uses a range of pots of reserves for costs that would be typically considered to be operating expenditure. Annex 9 to its application includes thirteen separate ring-fenced reserve lines. IPReg explained that one of the reasons for this is that some of the reserve offsets have been set aside as a result of unspent budget lines from previous years, when activities were deferred as a result of the pandemic. IPReg believes that this approach aids transparency. It also explained that it retains the flexibility to transfer money between different reserve pots. Whilst we do not consider that this approach raises grounds to refuse the application, we are concerned that rather than aiding transparency, this approach could be seen as making the overall position harder to understand and therefore less accessible and transparent. We would also expect that the number of unspent budget lines that result in future offsets would reduce in the future, as a result of prudent planning and notwithstanding future external events such as the COVID-19 pandemic.

23. As set out in paragraph 7, bullet 4 of the application, the proposed PCF does not meet the funding required to deliver IPReg's programme of regulatory activity and IPReg will draw on reserves to meet this funding gap. Annex 5 of the application (proposed budget 2022) sets out how reserves will meet this funding gap and further detail on reserves was provided in Annex 9. From the information provided in the application, it was unclear what impact the proposed draw on reserves would have on the target level of uncommitted reserves, as provided for in IPReg's reserves policy, and therefore the overall financial resilience of IPReg. We therefore sought further information and assurance from IPReg.

24. In response, IPReg confirmed that its General Contingency Reserve is what is intended to cover three months of operational expenditure in line with its reserves policy. It explained that a full three months of operational expenditure would be £236k but that it would be able to delay some payments to bring this down to £210k. The impact of the draw on reserves would leave the General Contingency Reserve at £200k, so slightly under the target set out in the policy. IPReg also noted that it has significant additional reserves in other pots that could be reallocated to increase the General Contingency Reserve to above £500K if necessary. As a result, it was satisfied that the allocation was appropriate.

25. This response provided assurance on the substance of IPReg's position. However, as stated above, this position was not clear from the initial information provided in the application. For future applications and engagement with the regulated community on its PCF, we expect IPReg to consider how it could improve transparency by presenting its proposals in a way that provides clarity on the projected impact on its overall financial position and resilience.

Decision not to increase fees

26. As set out in paragraph 7 of the application, IPReg determined that it would be inappropriate to increase PCF fees for 2022. We asked IPReg to provide evidence to support the assertion in paragraph 7 and share the different considerations the IPReg Board took into account and how it balanced these to reach the decision it was not appropriate to increase the PCF.

27. IPReg responded that it took into account several factors to make this decision, including:

    - A moderate estimate of net admissions to the registers in 2022 and the fact that the number of people joining the registers is greater than the number leaving.
    - Over the next 2-3 years, several policy work areas may require additional resources such as elements of the Review of Regulatory Arrangements.
    - The Education Working Group programme plan.
    - The anticipated number of LSB consultations and other activities.
    - The need to alter the allocation of its reserves as a result of establishing a compensation fund and approach to financing an operating deficit from reserves.
    - Its approach to financing its operating deficit from reserves.
    - The fact that the LSB has previously commented on the size of IPReg's reserves.
    - The fact that the impact of the pandemic and the end of furlough are still being felt and the longer-term implications are unclear.

28. IPReg also explained that every year the IPReg Board considers whether it would be possible to reduce the cost of regulation by reducing fees and that these considerations are balanced by the need to ensure that IPReg has sufficient resources to meet its regulatory obligations, plan and complete activities, and manage unforeseen events. We were satisfied with this additional assurance provided.

<u>Consultation and engagement</u>

29. IPReg consulted on this application between 6 September 2021 and 4 October 2021. It sought comments on the following areas:
    - Its plan not to increase practising fees in 2022.
    - Plan to extend by 12 months (until 31 December 2022) the ability for IPReg to waive practising fees for attorneys who are facing hardship as a result of the Covid-19 pandemic.
    - Business Plan for 2022/23.
    - Budget for 2022.

30. We note that IPReg's consultation[5] on the PCF included information about the need to create a compensation fund reserve and fund part of its operating expenditure from reserves rather than PCF. The consultation also included an equality impact assessment and sought comments on this area. Paragraph 25 of the application provides a comprehensive review of the responses to the consultation and paragraph 26 sets out IPReg's response to the issues raised by consultees.

[5] IPReg consultation on 2022 Business Plan, Budget and Practising Fees

31. As set out under paragraph 5 of the application, last year's PCF decision notice set out an expectation for IPReg to take additional steps to improve its consultation response rate in the future. Under paragraph 5, the application explains that IPReg engaged directly with CIPA and CITMA before the consultation opened and sent them both advance copies of the consultation. The application also sets out that all registrants and regulated firms were emailed the consultation directly and so were the Legal Services Consumer Panel and IP Inclusive. Paragraph 24 of the application sets out that IPReg received six responses to the consultation, which is less than the 10 responses it received last year.

32. We asked IPReg a follow-up question to explain what steps it took to improve the consultation rate. IPReg responded that it considers that its approach to communications and messaging does lead to good levels of responses and engagement.

33. We do not accept that the six responses to IPReg's public consultation was a good level of response. As set out in this decision notice, the application was lacking transparency and clarity in a number of regards which makes it harder for IPReg to be accountable to the public and fee payers. Improving the transparency of what is being proposed will be important to encourage higher levels of engagement in the future. Given the low response rates to public consultation, we expect IPReg to demonstrate consideration and implementation of alternative methods of engagement, in addition to public consultation, to ensure that its proposals benefit from effective engagement in the future. We recognise IPReg's efforts to engage widely on its review of regulatory arrangements and encourage IPReg to consider any learning from this which it could apply, when seeking better engagement for future PCF applications.

<u>Impact assessments</u>

Equality Impact assessment

34. Annex 4 of the application includes a summary of IPReg's initial Equality Impact Assessment (EIA) on the impact of the level of the proposed PCF on legal services carried out by authorised persons, in particular those with protected characteristics. We note that following its diversity survey of registrants this year, IPReg is now in possession of up-to-date diversity data to support this EIA and IPReg's other regulatory activities.

35. Under the initial EIA IPReg had not identified any potential adverse impact on protected characteristics from the proposed PCF. Annex 11 of the application includes IPReg's EIA as amended following consultation feedback. This EIA amended text around IPReg's approach to the PCF for attorneys on parental or adoption leave.

36. Paragraph 3 of the application sets out that in recognition of individual hardship, IPReg operates a PCF waiver process. Following consultation, IPReg has widened its PCF waiver policy (set out in annex 12) but not changed its PCF levels.

37. Question 3 of the PCF consultation asked for feedback on IPReg's decision not to conduct a diversity survey in 2022. Paragraph 25, question 3, bullets 3 and 4 of the application set out that two stakeholders urged IPReg to run a diversity survey in 2022, with IP Inclusive recommending it be run annually. We asked IPReg a follow-up question to understand how it had taken account of the views of these stakeholders in deciding not to re-run the diversity survey. IPReg confirmed that it had but considers that there would be more value in running another survey in 2023 after what it hopes

to be a more normal year post-pandemic. IPReg is discussing with stakeholders how any survey would best be conducted in 2023.

38. Overall, we consider that the application provides adequate consideration of equality issues, which are particularly relevant to the regulatory objective of encouraging an independent, strong, diverse, and effective profession.

Decision

39. The LSB has approved the PCF application submitted by the IPReg for 2022 under section 51 of the Act.

Summary of expectations for next application

- A greater degree of accountability and transparency, in line with the overarching criteria set out in the Rules and Guidance, including in relation to any commitments on delivering improvements in performance under the regulatory performance framework.
- IPReg to demonstrate consideration to how it could provide an indication or estimate of how resources are allocated across activities, to improve transparency and accountability.
- IPReg to set out how it has assessed the actual benefits of the regulatory activities undertaken in the previous year and how it will assess the benefits of regulatory activities for the coming year, in line with the expectations in the Rules and Guidance.
- IPReg to consider how it could improve transparency by presenting its proposals in a way that provides clarity on the impact of its proposals on its overall financial position and financial resilience.
- IPReg to demonstrate consideration and implementation of alternative methods of engagement, in addition to public consultation, to ensure that its proposals benefit from effective engagement in the future.

Matthew Hill, Chief Executive
Acting under delegated authority granted by the Board of the Legal Services Board
22 November 2021