

The OFT's approach to dealing with approved regulator, licensing authority and rule change applications

1.1 This document describes the OFT's approach to dealing with applications for rule changes, approved regulator and licensing authority applications received under the Legal Services Act 2007 (LSA07). This document is not intended to be formal guidance but rather a broad description of the OFT's approach and engagement with the Legal Services Board (LSB) in carrying out its role under LSA07. This document will be kept under review.

Background

1.2 The OFT's general objective is to target actions by firms or features of the market, which lead to the market not working well for consumers. In the legal services market the key outcome sought is increasing the quality of, and access to, legal services available to consumers in most cases through greater competition.

1.3 The OFT seeks to achieve this outcome through a combination of advocacy, targeted interventions and statutory remit under LSA07. This document describes the OFT's statutory remit and subsidiary duties. The OFT's statutory duties are primarily confined to commenting on the competition impact of changes, leaving any balancing assessment of competing objectives to the LSB.

1.4 Under LSA07 the LSB has the oversight regulator role of legal services in England and Wales. Part of the LSB's role includes providing approval for:

- new bodies who wish to become an approved regulator for the first time
- approved regulators looking to alter any of their regulatory arrangements

- approved regulators that wish to extend their range of reserved legal activities¹
- approved regulators looking to become a licensing authority.²

The OFT's role

- 1.5 The OFT, either due to a statutory remit or informal agreement reached with the LSB, review the applications made to the LSB for competition concerns. Specifically, the LSB is under a statutory duty to consult with the OFT and others before deciding whether to grant an application to become either an approved regulator of a reserved legal activity, a licensing authority, or when existing approved regulators wish to extend the range of reserved legal activities they cover.
- 1.6 For applications by an approved regulator who wishes to change its rules, the LSB is not under the same statutory duty to consult the OFT. However it can seek the formal advice from the OFT after issuing a Warning Notice in relation to an application (see paragraph 1.26 for more detail). The LSB and OFT have also agreed that applications for rule changes that have the potential to raise competition concerns should also be referred to the OFT for consideration and informal advice. Applicants may also liaise with the OFT prior to submitting an application to the LSB (see paragraph 1.11 and 1.21).

The OFT's competition assessment

- 1.7 When considering any application, the test the OFT will adopt is whether the proposals prevent, restrict or distort competition within the market for reserved legal services to any significant extent, or are likely

¹ Reserved legal activity is defined by section 12(1) LSA07 as: the exercise of a right of audience; the conduct of litigation; reserved instrument activities; probate activities; notarial activities; and the administration of oaths.

² Part 5 and Schedule 10 LSA07

to do so.³ The OFT assessment may include an assessment of whether the applications:

- restrict entry into a profession
- decrease competition or the incentives for firms to compete
- unnecessarily increase the regulatory burden on firms.⁴

1.8 These factors can, among other things, result in increased prices (for both consumers and suppliers), lower take up or restricted access for consumers, a reduction in quality and possibly result in reputable suppliers exiting the market. Furthermore, when evaluating whether there is likely to be a significant effect on competition, the OFT will consider both the direct legal market and any related markets and any possible future consequences of the applications.

1.9 While the OFT's statutory focus under the LSA07 is on whether the regulatory arrangements of an approved regulator prevent, restrict or distort competition, as a combined consumer and competition body the OFT may also comment on any consumer protection implications of rule changes or approved regulator applications.

Approved regulator and licensing authority applications

1.10 The LSB is under a statutory duty to consult with the OFT when it receives an application from an organisation to become an approved regulator⁵ or licensing authority.⁶ The OFT is also under a duty to give the LSB such advice as the OFT thinks fit regarding whether the application should be granted.⁷

³ Schedule 4 Part 2 paragraph 6(2) LSA07

⁴ This approach is more broadly set out in the OFT's report on Competition in the Professions March 2001 – OFT328

⁵ Schedule 4 Part 2 paragraph 5(2).

⁶ Schedule 10 Part 1 paragraph 3(2) LSA07

⁷ Schedule 4 Part 2 paragraph 6(1).

Before an application to become an approved regulator or licensing authority is submitted

- 1.11 Where a body applying to become an approved regulator or licensing authority, believe an application may raise competition concerns, the OFT would welcome receiving early sight of the draft application, or other relevant documentation setting out the potential competition concerns, before it is formally submitted to the LSB. Similarly, where an applicant is unsure of the OFT's possible concerns, we may welcome an informal discussion, but this will be at the OFT's discretion. Details of who to contact can be found on the OFT website.⁸
- 1.12 In both these situations, the OFT requests that the body provides a clear indication of the relevant issues and sections of the application or documentation that the OFT should consider. If the application appears to raise a competition concern the OFT may write to the body outlining its concern and send a copy to the LSB for reference.

Approved regulator applications

- 1.13 Once an application is received by the LSB, they have 12 months within which to decide whether to grant or reject the application. This decision period can be extended to 16 months.⁹ Once all the relevant information pertaining to the application has been received, the LSB will send the application to the OFT who will endeavour to respond within three months of receiving the application.
- 1.14 To facilitate its assessment, the OFT would appreciate a short synopsis of the application. Where the LSB anticipates any competition issues it may, if minded, include details of such concerns in its correspondence to the OFT.

⁸ www.offt.gov.uk/OFTwork/financial-and-professional/professional-services/

⁹ Schedule 4 Part 2 paragraph 15(4).

- 1.15 The OFT will provide an initial, informal, view within one month of receiving the application. This view may be subject to change once the OFT has carried out its full analysis of the application.
- 1.16 The OFT has the power under the LSA07 to request further information from the applicant.¹⁰ Where the OFT requires further information, the OFT will write to the applicant directly, setting a time frame within which it should provide the necessary information. A copy of any information requests and the subsequent responses will be provided to the LSB as a matter of transparency. If the applicant does not provide the necessary information, or does not provide it within the required time frame, the OFT may not be able to rule out prima facie concerns about the possible impact on competition.
- 1.17 The OFT will provide its final advice to the LSB in writing and will also publish it on the OFT web site as a matter of transparency.

Licensing authority applications

- 1.18 The OFT's duties and procedures under licensing authority applications is comparable to those under the approved regulator applications. Namely, the LSB is under a statutory duty to consult with the OFT when an organisation applies to become a licensing authority. The OFT, in turn, is under a duty to give the LSB such advice as it thinks fit regarding whether the application should be granted.¹¹
- 1.19 The OFT will again endeavour to provide an initial view within one month after receiving the application and a full response within three months.

Rule change applications

- 1.20 For rule change applications, the LSB has the option to seek formal advice from the OFT on competition concerns only on applications

¹⁰ Schedule 4 Part 2 paragraph 10 LSA07

¹¹ Schedule 10 Part 1 paragraph 4(1) LSA07

where it is minded to issue a warning notice. However, the LSB and OFT have agreed that any applications for rule changes that may raise competition concerns can be referred to the OFT for consideration and informal advice. In certain circumstances it may also be appropriate for the approved regulator (and/or the LSB) to involve the OFT before the formal submission of an application.

Before the regulator submits application to LSB

- 1.21 Where the LSB and/or an approved regulator believe an application may raise competition concerns, the OFT would welcome receiving early sight of the draft rule change application before it is formally submitted to the LSB. Similarly, where an applicant is unsure of the OFT's possible concerns, we may welcome an informal discussion, but this will be at the OFT's discretion. Details of who to contact can be found on the OFT website.¹²
- 1.22 In both these situations, the OFT requests that the approved regulator provides a clear indication of the relevant issues and sections of their application that the OFT should consider. If the application appears to raise a competition concern OFT may write to the regulator outlining its concern and send a copy to the LSB for reference.

Regulator submits application to the LSB

- 1.23 The LSB has an initial statutory time limit of 28 days within which to consider a rule change application.¹³ In order to facilitate responding within this timeframe, the OFT requests that where informal advice is required the LSB send a copy of the application to the OFT as soon as practicable. The OFT will then endeavour to provide the LSB with an initial opinion within five working days of receiving the application (normally taken at caseworker level) and, if appropriate, a more developed opinion five working days prior to expiry of the 28-day limit (a formal letter).

¹² www.of.gov.uk/OFTwork/financial-and-professional/professional-services/

¹³ Schedule 4 Part 3 paragraph 21(4) LSA07

- 1.24 If the application raises competition concerns, these will ideally be discussed with the LSB, and potentially the regulatory body, during the 28-day period. The OFT will also send a copy of its opinion to the applicant and, if appropriate, publish a copy of the letter on the OFT web site in the interests of transparency.
- 1.25 The LSB can extend the time limit within which to consider a rule change application beyond the 28 days. In a case where the OFT's informal advice has been sought, it would be helpful if any extension of time is communicated to the OFT as soon as practicable.¹⁴

Where the LSB issues a warning notice

- 1.26 Where the LSB is considering whether to refuse a rule change application it may issue a warning notice to the approved regulator making the application.¹⁵ When the LSB issues a warning notice, it may invite such persons as it considers appropriate to give the LSB advice.¹⁶
- 1.27 Where the OFT is asked to provide such advice, it may request further information from the applicant if necessary.¹⁷ In these circumstances the OFT will provide the LSB with a copy of the information request.
- 1.28 The OFT's objective is to respond to the warning notice within three months of receiving the request for advice, though the OFT will endeavour to respond sooner where possible.

¹⁴ Schedule 4 Part 3 paragraph 21(7) LSA07 sets out that the LSB may extend the time limit for considering the application to a 90 day period beginning with the date on which the application was made

¹⁵ Schedule 4 Part 3 paragraph 21(1)(b) LSA07.

¹⁶ Schedule 4 Part 3 paragraph 22(1) LSA07 sets out that the LSB may invite such persons as it considers appropriate to provide advice to the LSB regarding whether the application should be granted.

¹⁷ Schedule 4 Part 3 paragraph 22(2) LSA07.