

Amendments to the Code of Conduct of the Bar of England and Wales

August 2001

A report by the Director General of Fair Trading
to the Lord Chancellor on the likely competition effects of
amendments to the Code of Conduct of the Bar of
England and Wales

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1 GENERAL SUMMARY

- 1.1 The advice below concerns alterations proposed by the General Council of the Bar to the 7th edition of the Code of Conduct of the Bar of England and Wales ('the Code of Conduct') and annexes. The advice is given on the basis of information supplied to the Director General of Fair Trading ('the Director General') by the Lord Chancellor's Department in May, July and August 2001 and by the Bar Council in July 2001.
- 1.2 Under section 29 and Schedule 4 to the Courts and Legal Services Act (as amended) ('the Act'), if a body authorised to grant rights of audience or rights to conduct litigation makes an alteration to its qualification regulations or rules of conduct, the alteration shall not have effect unless approved by the Lord Chancellor. The Lord Chancellor may seek the advice of the Director General who shall consider whether the proposed alterations would have, or be likely to have, any significant effect on competition.
- 1.3 I am authorised by the Director General, under paragraph 7 of Schedule 1 to the Fair Trading Act 1973, to carry out a competition scrutiny of the proposed alterations as required by the provisions of the Act described above.
- 1.4 Together, the Code of Conduct and the Consolidated Regulations of the Inns of Court ('the Consolidated Regulations') form the qualification regulations and rules of conduct for practice at the Bar of England and Wales. The proposed amendments to the Code of Conduct and Consolidated Regulations concern rules relating to the administration of barristers' practice and arrangements that chambers must make for pupillage.
- 1.5 For the reasons discussed in the following paragraphs, I believe that, while they tend to reinforce existing restrictions on competition, the amendments concerning the administration of barristers' practice are unlikely to have any significant additional effect on competition. In addition, I take the view that the amendments relating to pupillage – to the extent that they increase the scope for candidates from diverse backgrounds to compete for pupillage places on an equal basis - may have a beneficial effect on competition.

Justin Coombs
Director, Service Industries, Competition Policy Division
Office of Fair Trading, August 2001

2 THE AMENDMENTS AND THEIR LIKELY COMPETITION EFFECTS

Administration of independent practice (paragraph 403(a) Code of Conduct)

- 2.1 The new rule 403(a) of the Code of Conduct provides that a barrister in independent practice may share an office, or the administration of their practice, only with another independent barrister. The previous rule stated that an independent barrister could only share chambers with another barrister, but it did not specify that it had to be another independent barrister. The change is intended to prevent independent barristers from sharing administration or offices with professionals who may refer work to them.
- 2.2 It is not clear that the fact that an independent barrister shared an office with an employed barrister would reduce the former's independence. It is arguable that wherever a barrister receives a substantial amount of work from a source, be it a solicitor, employed barrister or other, there may be a temptation to protect the source at the expense of lay clients' interests. It seems unlikely, therefore, that the sharing of an office by employed and independent barristers would significantly increase the threat to independence. The majority of independent barristers are likely to receive only a relatively small proportion of their work from employed barristers, so sharing offices is unlikely to create an increased threat.
- 2.3 In these circumstances, we take the view that this change is an unnecessary further restriction on the freedom of employed and independent barristers to administer their practice as they see fit. It is likely to reinforce the effect of the rule that barristers may not be in partnership with other barristers (or other professionals). However, given that this did not appear to be a widespread practice, we do not think the change is likely to have a significant additional effect on competition.

Funding of pupillage and duties of Heads of Chambers (paragraphs 404.2(c) and 404.3 Code of Conduct)

- 2.4 Rules regarding the advertisement of and funding for pupillage have been changed. First, paragraph 404.2(c)(i) now imposes on those responsible for chambers' administration a specific duty to ensure that all pupillage

vacancies are advertised as prescribed by the Bar Council. Second, paragraph 404.2(c)(ii) now requires those responsible for chambers' administration to ensure that pupils are given at least the minimum level of funding prescribed by the Bar Council from time to time.

- 2.5 With regard to the advertisement of pupillage, there is currently the perception – and arguably the reality - that for a significant number of pupillages, the availability of vacancies is not made widely known. There is also a perception that pupillages are awarded on a non-objective and non-transparent basis. The proposed changes to the advertisement of pupillage places should in theory increase transparency in the availability of pupillages and so allow more people to compete for pupillage places. While there is a risk that the cost of complying with the new rule may reduce the number of places that chambers are willing to offer, this should be minimised by the proposal that basic advertisements will be free of charge. As a final point, however, we note in passing that the rule's effect in practice may be limited by the absence of a requirement that chambers also follow Bar Council guidance on the **selection** of pupils.
- 2.6 The proposals for funding impose a general¹ requirement that, from 31 December 2002, chambers give pupils a minimum of £5000 for a six-month pupillage. This requirement may be waived in exceptional circumstances. The Bar Council has not set out rules to govern the grant of waivers, rather, it is proposed that a waivers committee will be empowered to grant waivers upon such terms and conditions as it sees fit.²
- 2.7 Applications for waivers will be decided in accordance with a number of principles that underpin pupillage. In essence, these embody the idea that the opportunity to take pupillage should be open to all on merit and ability rather than on willingness to fund oneself during pupillage. They also recognise that there is a need to secure an adequate supply of new practising barristers in particular areas of practice and in particular geographical locations.

¹ It is proposed that the following six categories of pupil will not attract compulsory funding: solicitors transferring to the Bar; Scottish advocates; other qualified legal practitioners; legal academics; those taking third six pupillages and pupils who are sponsored by employers and who will return to employment on completion of pupillage.

² See the Interim Report to the Bar Council of the Bar Council's Education and Training Committee (Funding of Pupillage - Consultation on Waivers). Chambers will also be able to apply for waivers to advertise unfunded pupillages as well as to award a particular individual an unfunded pupillage.

- 2.8 As is the case with other situations where a minimum wage applies, it is difficult to assess whether these funding proposals will, overall, have a beneficial effect. On the one hand, a minimum level of funding may ensure that persons can apply for training based on merit rather than the ability to survive financial hardship. It may also sharpen chambers' selection procedures so that the best candidates are chosen without regard to inappropriate factors.
- 2.9 On the other hand, imposing a mandatory minimum level of funding may cause some providers to supply fewer training opportunities because of the financial burden in doing so. Thus, there is a risk that the imposition of mandatory funding for pupillage will actually reduce the number of places offered and reduce competition.
- 2.10 For these reasons, it is difficult to assess whether mandatory funding will be pro-competitive overall. It may increase competition for pupillage places but decrease the number of places offered and so decrease competition in the final market for fully qualified barristers.
- 2.11 Nevertheless, we take the view that – depending on whether the Bar Council has set an appropriate level of funding and the way in which waivers are granted - some minimum level of funding could have a positive effect on competition overall. It should increase competition for pupillage places and, if the level of funding has been set appropriately, there is unlikely to be a significant reduction in the number of places that chambers offer. In this context, we note that the Bar Council intends to review these proposals in two years' time. This should enable the Bar Council to assess the effects of the proposals over time and revise them as appropriate.
- 2.12 Should it become apparent that the level of funding required was causing a significant reduction in the number of pupillages available, the Director General might wish to investigate whether this was affecting competition between barristers and, if necessary, take action to address such a problem.
- 2.13 The Bar Council has also proposed a change to the Consolidated Regulations in order to facilitate the enforcement of the new pupillage rules. Consolidated Regulation 42 now contains a provision that enables the Bar Council to refuse to register a pupillage where prescribed arrangements set out in the Code of Conduct have not been complied

with. We note that the Bar Council must give reasons for a decision not to register a pupillage. This is an important safeguard for those who may be adversely affected by such a decision.

- 2.14 The rule appears to be a proportionate means of ensuring that the Bar Council can enforce relevant rules concerning the conduct of pupillage. We do not think that it is likely to have a significant effect on competition.

Regulation of practice

- 2.15 The current rule 202(f) of the Code of Conduct provides that barristers in independent practice may not also practise as employed barristers. The rule is intended to ensure that barristers offer legal services for reward only as set out in the Code of Conduct. However, there is a lacuna in that the rule does not prevent an independent barrister from supplying legal services under a title other than employed barrister. For example, an independent barrister could in theory practise as a 'legal adviser' and avoid regulation by the Bar.
- 2.16 The new rule seeks to close this gap by permitting both independent and employed barristers to provide legal services for reward only in the course of their practise as a barrister.
- 2.17 Notwithstanding that it will address the current situation whereby barristers may avoid regulation by practising under another title, the proposed rules are likely to have the undesirable effect of reinforcing existing restrictions that limit the ways in which barristers can choose to deliver their services. Nevertheless, we take the view that, for two reasons, the change is unlikely to impose any significant additional restrictions on competition. First, it appears that the current rule envisaged that barristers should not be able to practise without being regulated by the Bar Council. The amendments merely give that aim effect.
- 2.18 Second, we have no evidence that the lacuna in the present rule was to any great extent used to circumvent regulation by the Bar Council. The change is therefore unlikely to reduce significantly the existing level of competition.

3 CONCLUSIONS

- 3.1 In summary, to the extent that the proposed changes to the advertising and funding of pupillage promote diversity in the range of applicants for pupillage, they may enhance competition. However, this is likely to depend on whether the minimum funding requirement has been set at an appropriate level.
- 3.2 Other proposed changes reinforce existing restrictions on competition, but for the reasons discussed above are unlikely to impose a significant additional restriction on competition.
- 3.3 The Office issued a report of the findings of its recent review of restrictions on competition in the professions - including the legal profession - in March of this year. The above advice sets out our conclusions on the **changes to** existing rules on which the Director General has been asked to advise. It is given without prejudice to any conclusions the Director General might reach, or action he might take, regarding the existing rules of the Bar.

**Service Industries Branch, Competition Policy Division
Office of Fair Trading, August 2001**