

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

January 2002

A report by the Director General of Fair Trading
to the Lord Chancellor on the likely competition effects of
amendment 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 an alteration to the 7th edition of the Code of Conduct of the Bar of England and Wales (the Code of Conduct) proposed by the General Council of the Bar. The alteration was supplied to the Director General of Fair Trading by the Lord Chancellor's Department on 14 November 2001.
- 1.2 Under section 29 and Schedule 4 to the Courts and Legal Services Act (as amended), 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 would 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 Courts and Legal Services Act 1990 set out above.
- 1.4 The Code of Conduct provides the requirements for practice as a barrister and the rules and standards of conduct applicable to barristers, which are appropriate in the interests of justice. The proposed amendment to the Code would enable the Bar Council to prohibit discrimination in pupillage and tenancy selection on the grounds of age except in the limited circumstances when it may be objectively justified.
- 1.5 For the reasons set out in the following paragraphs, I believe that the proposed amendment would not have, nor would be likely to have any significant effect on competition.

2 AMENDMENT TO THE CODE OF CONDUCT AND ITS LIKELY COMPETITION EFFECTS

Background

- 2.1 The Equal Opportunities Committee of the Bar Council recommended that age discrimination be prohibited in the Bar's Code of Conduct following the findings of a working party, which looked at the problems experienced by mature students in obtaining pupillage and tenancy.
- 2.2 Analysis of the pupillage clearing house data confirmed that the effect of age is significant for all age groups with a general decrease in the chances of being offered a pupillage occurring with an increase in age.
- 2.3 The Bar Council is of the opinion that it not in the Bar's interest to limit its membership to those who will be working at the Bar all their working lives.
- 2.4 Accordingly, at its meeting on 29 September, the Bar Council approved an amendment to its existing rules to reflect the development.
- 2.5 The Equal Opportunities Committee also produced detailed guidelines for chambers on how an age ban would operate in practice. This guidance will be circulated to all sets of chambers and incorporated into the Equality Code for the Bar, which sets out in detail recommendations for fair selection including the avoidance of age discrimination. Under Paragraph 403(d) of the Code of Conduct, chambers are required to have regard to this guidance.
- 2.6 In the present application, the Bar Council seeks approval for an amendment to rule 305 of its Code of Conduct to prohibit discrimination on the grounds of age except in the limited circumstances when it may be objectively justified. Currently, paragraph 305.1 of the Code of Conduct does not prohibit discrimination on the grounds of age.

The Amendment

- 2.7 The amendment prohibits discrimination on the grounds of age only and does not demand any form of positive discrimination in favour of older applicants or any reduction in the selection criteria chosen for the assessment of applications. Indeed, in the accompanying Guidance for Chambers, the Bar Council proposes that selection criteria should not explicitly or implicitly refer to age but should focus on the skills, abilities and potential of applicants when shortlisting for pupillage or tenancy.
- 2.8 This rule is drafted to take account of EC Directive 2000/78/EC, which establishes a framework for equal treatment in employment, and permits discrimination, which is shown to be objectively and reasonably justified.
- 2.9 Therefore, a decision to refuse a candidate on age grounds can be justified only where the individual circumstances, including the professional experience of the candidate and the likely length of his/her professional life, had been fully considered and the chambers nevertheless concluded for business reasons that the application should be refused on grounds of age.
- 2.10 The amendment applies equally to all chambers. Given that an application from an older candidate who fails to meet the appropriate selection criteria can be refused, it seems unlikely to increase costs. Nor does it appear to raise barriers to entry in markets for the provision of legal services.

Conclusion

- 2.11 In my view, this amendment would not have and nor would it be likely to have any significant effect on competition. This advice deals only with the proposed amendment to paragraph 305 of the Code of Conduct. It is given without prejudice to any other competition assessment of the Code of Conduct.

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