

Application to amend the Bar Council's code of conduct

February 2003

A report by the Director General of Fair Trading
to the Lord Chancellor on the application by the Bar Council to
amend Rule 603(e) of its code of conduct

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1 GENERAL SUMMARY

- 1.1 The advice below concerns alterations by the General Council of the Bar to the Code of Conduct of the Bar of England and Wales ('the Code of Conduct') supplied to the Director General by the Lord Chancellor's Department on 3 January 2003.
- 1.2 Under section 29 and Schedule 4 to the Courts and Legal Services Act 1990 ('the CLSA') (as amended), if a body authorised to grant rights of audience or rights to conduct litigation makes an alteration to its qualification rules 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 competition scrutiny of the proposed alterations as required by the provisions of the CLSA (as amended) set out above.
- 1.4 Together, the Code of Conduct and the Consolidated Regulations of the Inns of Court form the qualification regulations and the rules of conduct for practice at the Bar of England and Wales. The Bar Council's proposed amendment to Paragraph 603 (e) of their Code of Conduct concerning conflicts of interests is aimed at removing ambiguity.
- 1.5 For the reasons discussed in the following paragraphs, I believe that the proposed amendment to the Code of Conduct is not likely to have a significant effect on competition.

2 THE AMENDMENT TO THE CODE OF CONDUCT AND ITS LIKELY COMPETITIVE EFFECT

- 2.1 Paragraph 603(e) of the Bar Council's Code of Conduct currently restricts barristers from accepting instructions if there is, or appears to be, a conflict or risk of conflict of interests, rather than requiring that the existence of such a conflict is established.
- 2.2 Following a complaint concerning a potential conflict of interests under paragraph 603(e) of the Code, the Bar's Professional Conduct and Complaints Committee advised the Bar Council to consult counsel. The Committee expressed concern that the present wording of Paragraph 603(e) gives rival litigants an unfair opportunity to seek to 'conflict out' the opposition's counsel, particularly in areas of law where there are only a few specialist practitioners. Counsel considered that Paragraph 603(e) should be amended to remove any ambiguity.
- 2.3 The Bar Council proposes that the wording of Paragraph 603(e) of the Code be amended to remove the words 'or appears to be' so that it would require the existence, rather than simply the appearance, of a conflict or risk of conflict of interests. The revised wording would read as follows:
- (e). if there is ~~or appears to be~~ a conflict or risk of conflict either between the interests of the barrister and some other person or between the interests of any one or more clients (unless all relevant persons consent to the barrister accepting the instructions);
- 2.4 The amendment reduces ambiguity whilst maintaining protection for the consumer and also increases consistency between the rules of the Bar Council, Law Society and the Council of the Bars and Law Societies of the European Union (CCBE).
- 2.5 The proposed change may assist barristers in determining whether or not to accept a case on the grounds of conflict of interest. It may also have the effect of preventing opponents in litigation from unfairly restricting a client's choice of counsel and therefore increase the number of barristers available, giving clients a greater choice of representation. The proposed amendment is unlikely to have appreciable effect on competition.

2.6 The Legal Services Consultative Panel, whose advice on the proposed amendment we have had the benefit of seeing, recommended the insertion of the word 'significant' before 'risk'. The Panel's insertion may increase clarity and consistency. It is not likely to have a significant effect on competition.

3 CONCLUSIONS

- 3.1 In summary, the proposed amendment to the Bar Council's Code of Conduct is not likely to have a significant effect on competition in the market for the supply of legal services.

Margaret Bloom
Director of Competition Enforcement
Office of Fair Trading, February 2003