

Application to amend the Bar Council's international practice rules of its 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 Annex A of its International practice rules and rule 1001 of its code of conduct

Crown copyright

© Crown copyright 2003

This material may be freely reproduced except for sale or advertising purposes.

CONTENTS

<i>Chapter</i>		<i>Page</i>
1	General summary	1
2	The amendment to the code of conduct and its likely competitive effect	2
3	Conclusions	5

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 amendments to Annex A of its International Practice Rules and Rule 1001 of its Code of Conduct are designed to add suitably qualified foreign lawyers to the list of persons who may supervise barristers who have not fulfilled the requirements of the three year rule (Paragraph 203.1 of the Code of Conduct).
- 1.5 For the reasons discussed in the following paragraphs, I believe that the proposed amendments may enhance competition in the provision of advocacy services by reducing an existing restriction. However, the substantive requirements of paragraph 203.1, and the manner in which it is applied and enforced, are likely to limit the pro-competitive benefits of the proposed amendment.

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

Background

- 2.1 In light of the provisions of the EU Establishment Directive ('the Directive') the Bar Council was asked to consider the position of barristers working in the EU who had completed pupillage but had not fulfilled the requirements of the three year rule.
- 2.2 The Bar Council considered that in order to comply with the Directive their rules should be amended to allow foreign lawyers to act as suitably qualified people for the purposes of the three year rule. To act in this capacity, foreign lawyers must be designated in advance, or on a case by case basis by the Bar Council. The proposed amendment seeks to allow for this whilst ensuring a level of supervision similar to that in England and Wales.
- 2.3 All applications for designating a 'qualified person' go before the Transitional Arrangements Sub-Committee and are considered individually on their merits. The Bar Council envisages that the system for designating a foreign lawyer as a 'qualified person' will work in much the same way.

Likely competitive effects

- 2.4 While the proposed amendment is to be welcomed and will benefit barristers who wish to practice in Member States of the European Union, the pro-competitive benefits of the change are limited by restrictions both in the substantive requirements of paragraph 203(1) and in the manner in which this rule is applied and enforced by the Bar Council.
- 2.5 There are two aspects of the rule at paragraph 203(1)(b) that give rise to concern. Both relate to the effects of the rule in the context of practice at the employed Bar. The first is the requirement that a barrister's place of practice must, for the duration of the qualifying period be the same as that of a person who is qualified to supervise. The second relates to the operation by the Bar Council of a discretionary power of waiver in relation to this requirement.
- 2.6 The requirement in paragraph 203(1)(b) that a barrister's principal place of practice must, for a period of three years be the same as that of a suitably qualified supervisor governs both independent practice and employed practice. Its effects in these two contexts are however very different. In independent

practice, the requirement will almost inevitably be met by practice in chambers, and irrespective of whether there is, in reality, regular contact for the purposes of supervision between the qualified person and the person supervised. By contrast, in employment, the rule acts to severely restrict the freedom of a newly qualified barrister to accept an employment contract and to restrict also the freedom of potential employers to employ newly qualified barristers. This will only be possible where the would-be employer already employs a relatively senior lawyer who meets the exacting terms of rule 203(3). In our view, the restriction inherent in this rule might be considerably relaxed and the level of supervision maintained or even improved, if the rule were expressed in terms of regular contact with a supervisor rather than in terms of a principal place of practice. This would allow a barrister in employment whether in the UK or elsewhere in the European Union, to be supervised by a suitably qualified person (such as a former pupil master) whether that person shared his place of employment, was employed elsewhere or was at the independent Bar. This would greatly enhance the opportunities for barristers in employment generally, and in particular, would allow barristers entering employment elsewhere than in the UK a considerably increased range of employment opportunities.

- 2.7 The Bar Council has a general discretion to waive the requirements of rule 203(1)(b) on application. Applications are considered by the Transitional Arrangements Sub-Committee. Our concern is that the operation of a waiver system in this context creates a very high degree of uncertainty for barristers who wish to practice at the employed Bar and to acquire standing to meet the three year rule. Given that the numbers of barristers qualifying greatly exceeds the number of openings at the independent Bar, it is likely that this uncertainty affects the majority of the recently-qualified Bar. Taking into consideration the discretionary nature of the waiver system, the absence of clear published criteria, and that barristers seeking an exemption are unlikely to be in a position to make an application for waiver until they have entered employment, the hurdles that face those who wish to practice in employment both in the UK and elsewhere in the EU are considerable.
- 2.8 In summary, the current rules and the way they are applied operate to prevent a barrister from knowing in advance whether a period of practice in employment will qualify him/her to the same degree as a period at the independent Bar. The criteria for meeting rule 203(1)(b) should be clarified and simplified to allow a barrister who wishes to enter employment to know in advance whether the period in employment will meet the requirements. In order to widen the range of employment that will meet the requirements, we also recommend that the Bar Council consider amending rule 203(1)(b) to allow appropriate supervision to be undertaken by any suitably qualified person who is willing to undertake it.

3 CONCLUSIONS

- 3.1 In summary, to the extent that the proposed changes increase the number of persons able to act as 'qualified persons' for the purpose of supervising newly qualified barristers, they should in principle enhance competition. However, the requirements of the three year rule are unduly restrictive and therefore the competitive benefit is much reduced.

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