

Application by the Bar Council to amend Paragraph 702 of its Code of Conduct relating to the rights of Registered European Lawyers

December 2003

**A report by the OFT to the Department for Constitutional
Affairs on the application by the Bar Council to amend Rule
702 of the Code of Conduct of the Bar of England and Wales**

OFT690

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 Office of Fair Trading by the Department for Constitutional Affairs on 21 October 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 Office of Fair Trading 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 Office of Fair Trading, under paragraph 12 of Schedule 1 to the Enterprise Act 2002, 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 702 of its Code of Conduct seeks to enable a Registered European Lawyer (REL) to seek advice from another lawyer without being in breach of its rules concerning confidentiality.
- 1.5 For the reasons discussed in the following paragraphs, I believe that the proposed amendments should in principle enhance competition in the provision of advocacy service.

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

Background

- 2.1 Paragraph 5(3) of the Registered European Lawyers Rules (Annexe B to the Code of Conduct) requires that an REL exercising rights of audience in courts where such rights are restricted must act in conjunction with a solicitor or barrister with rights of audience in the relevant court.
- 2.2 For European lawyers registered with the Bar Council, the activities concerned are appearances in the magistrates court and above. All other activities can be undertaken independently.
- 2.3 The Bar Council has considered the meaning of 'acting in conjunction' in this context in light of the decision of the European Court of Justice in case 427/85 *Commission v Germany* [1988]ECR 1123.
- 2.4 The Bar Council has taken the view that the aim of Paragraph 5(3) is to ensure that the lawyer providing restricted services in the host jurisdiction has the support necessary to enable them to act within a judicial system different from that with which they are familiar and to assure the court that this is the case.
- 2.5 The Bar Council therefore believes that when an REL is appearing in courts where only barristers and solicitors have rights of audience they must have in place arrangements with a barrister or suitably qualified solicitor to provide the appropriate degree of support and guidance to ensure full compliance with the applicable procedural and ethical rules.
- 2.6 The Bar Council has taken the view that it would be inappropriate to ask the lay client to instruct two barristers and that it could be appropriate for the REL to approach the barrister directly rather than have the lay client instruct two lawyers, particularly where direct access is permitted.
- 2.7 The Bar Council considers that difficulties could arise over confidentiality and considers that it is appropriate to amend paragraph 702 of the Code of Conduct to enable an REL to seek advice from such another lawyer without being in breach of the Bar's confidentiality rules.

Likely competitive effects

- 2.8 The proposed amendment is to be welcomed as it enhances competition by enabling RELs to exercise rights in English courts.
- 2.9 Although in some cases, particularly where direct access is permitted, the proposed amendment would enable a REL to seek advice from a barrister directly rather than the client having to instruct two lawyers, the Bar's continued prohibition on independent barristers conducting litigation means that the client will also need to instruct a solicitor where litigation

is required. The OFT believes that the continued necessity for clients to also instruct a solicitor will limit the pro-competitive effect of this proposal.

- 2.10 As stated in our report *Competition in professions* published in March 2001 the OFT believes that this prohibition prevents potential efficiencies, restricts freedom of choice and limits the number of lawyers available to conduct litigation. Rules that permitted barristers in independent practice to conduct litigation would be likely to lead to increased competition in the market for legal services.

3 CONCLUSION

- 3.1 By allowing RELs to seek advice from another lawyer in accordance with Paragraph 5(3) of the Registered European Lawyers Rules (Annexe B to the Code of Conduct) without being in breach of the Bar's rules on confidentiality the proposed amendment may enhance competition by increasing the number of lawyers able to exercise rights in English courts.
- 3.2 However, the continued necessity for clients to instruct a solicitor because of the Bar's prohibition on independent barristers conducting litigation, limits the pro-competitive effect of this proposal.
- 3.3 To the extent that the continued restriction on barristers in independent practice conducting litigation infringes UK competition law, it will be for the OFT to pursue this matter directly with the Bar.
- 3.4 This restriction does not however lead us to alter our conclusion that granting the present application will tend to increase competition by enabling more lawyers to exercise rights in English courts.
- 3.5 The views expressed in this document relate solely to the likely competitive effects of this proposal and do not constitute advice on the compatibility of the proposal with European Competition law or with European law on the free movement of lawyers.

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OFT, December 2003