

Application by the Bar Council to amend Rule 1001 of its Code of Conduct

January 2004

**A report by the OFT to the Department for Constitutional Affairs on
the application by the Bar Council to amend Rule 1001 of 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 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 of its Code of Conduct seeks to amend the definition of 'professional client' contained in Rule 1001 to include Scottish and Northern Irish solicitors so that they may instruct barristers in England and Wales.
- 1.5 For the reasons discussed in the following paragraphs, I believe that the proposed amendments may increase competition in the provision of advocacy services by reducing existing restrictions.

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

Background

- 2.1 At present the Bar's Code of Conduct prevents Scottish and Northern Irish solicitors from instructing barrister at the bar in England and Wales to appear in an English or Welsh Tribunal or Court.
- 2.2 The current definition of 'professional client' in the Bar's Code of Conduct, includes a foreign lawyer but does not permit that lawyer to instruct a barrister to act as an advocate and the definition of 'advocacy services' prohibits foreign lawyers from instructing barristers to appear in Tribunals and higher courts.
- 2.3 The Bar Council believes that there is no good reason to prevent Scottish and Northern Irish solicitors from instructing counsel to appear in courts generally, especially as the present rules place them in a worse position than European Lawyers practising in England and Wales by virtue of the Establishment Directive.
- 2.4 The Bar Council has therefore proposed an amendment to the definition of 'professional client' to include Scottish and Northern Irish solicitors. This will allow them to instruct barristers in England and Wales generally.

Likely competitive effects

- 2.5 The proposed amendment is to be welcomed as it may enhance competition by increasing the number of 'professional clients' able to instruct barristers in England and Wales.
- 2.4 However, the Bar's continued prohibition on independent barristers conducting litigation means that the client must instruct a solicitor where litigation is required rather than being able to approach a barrister directly.
- 2.5 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 To the extent that the proposed amendment increases the number of persons able to instruct barristers in England and Wales competition may be increased. However, we believe that the continuing restrictions on direct access and the conduct of litigation by barristers in independent practice restrict the ability of barristers to compete freely and effectively in the provision of legal services and inhibit the freedom of prospective clients to choose the service provider that best corresponds to their needs.
- 3.2 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.

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