



JUDICIARY OF
ENGLAND AND WALES

THE RIGHT HONOURABLE THE LORD THOMAS OF CWMGIEDD

Paul Greening
Legal Services Board
One Kemble Street
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WC2B 4AN

1 February 2017

Dear Mr Greening

**Applications by the Institute of Chartered Accountants in England and Wales
to become an approved regulator and licensing authority
in relation to further reserved legal activities**

I write further to your letter dated 26 October 2016 concerning the above applications by the Institute of Chartered Accountants in England and Wales (ICAEW).

The applications

The ICAEW is, by Order, an approved regulator and licensing authority for probate activities. It has applied for a recommendation to be designated as an approved regulator (pursuant to Part 2 of Schedule 4 to the Legal Services Act 2007 (LSA)) and as a licensing authority (pursuant to Part 1 of Schedule 10 to the LSA) in relation to the other five reserved legal activities. I note that the applications were originally made on the basis that they were "restricted to services relating to taxation" in relation to rights of audience, conduct of litigation and reserved instrument activities. Further, in relation to notarial activities, the applications were originally made on the basis that only non-ICAEW-qualified notaries would undertake notarial work. There were no limitations as to the administration of oaths.

On 20 December 2016, the ICAEW applied to the Legal Services Board (LSB) to amend its application. Acceptance of this application was confirmed on 10 January 2017. Through the amendments, the limitation in respect of notarial activities has been extended such that the conduct of litigation and the exercise of rights of audience will only be carried out by non-ICAEW-qualified individuals. Such a limitation will apply until such a time as the ICAEW is able to design and provide adequate legal qualifications that their registrants will be required to possess before being authorised to undertake those reserved legal activities. This will also be subject to changes to the ICAEW's Legal Services Regulations being approved by the Legal Service Board.

My statutory functions

In accordance with Schedules 4 and 10 to the LSA, I am pleased to provide the LSB with such advice as I see fit, with particular regard to the likely impact on the courts in England and Wales if the applications were to be granted.

In addition, I bear in mind the regulatory objectives set out in section 1 of the LSA, particularly (a) the public interest, (b) the rule of law and (c) access to justice, as well as (f) and (h) concerning the legal professions, which touch directly upon the administration of the courts and the conduct of litigation.

Documents received

I have received the ICAEW's consolidated application and annexes (as amended), together with a further report from the ICAEW in support of its application for which I was grateful and have carefully reviewed.

In addition, I have received the statutory advice from the Competition & Markets Authority (CMA) and from the Legal Services Consumer Panel (LSCP). In addition, I have received joint representations from The Notaries Society and The Society of Scrivener Notaries, also enclosing representations from the International Union of Notaries (The Notaries).

By way of comment on these other documents received:

CMA

I note the CMA considers there would be no adverse consequences on competition and the proposed regulatory framework provides sufficient consumer protections. The CMA further suggests that there may be increased competition that puts pressure on prices and broadens access to justice. Whilst, of course, access to justice is a universal concept, given the proposed limitation of "services relating to taxation", I would question whether any material increase in access to justice would result, particularly for the average – rather than the well-off – consumer of legal services. Finally, the CMA notes possible confusion about the scope of taxation services offered (I agree) and professional indemnity matters, but notes these are issues for the LSB to consider.

LSCP

The LSCP welcomes the attempt to stimulate competition in the legal services market. However, it indicates some concerns over how the limitation to taxation will be managed in practice, particularly in relation to consumer understanding. In addition, the LSCP has raised concerns about effective regulatory independence and the holding of client money. I would echo such concerns.

The Notaries

These representations concern the ICAEW's application so far as it relates to notarial activities and the administration of oaths. The "export nature" of notarial work is described, and how, largely, it concerns the interrelationship between the law and legal system of England and Wales and those of foreign jurisdictions. The profession prefers a single, independent regulator – The Master of the Faculties – and raises various public interest concerns relating to the international standing of England and Wales notaries.

The Notaries assert the importance of effective regulatory independence and question the need for a second regulator in the field of notarial activities in light of the general trajectory of legal services regulation. They also raise concerns about the effect on the competitiveness of notaries in England and Wales when contrasted with those in civil law jurisdictions where the role of Notary Public is enhanced. It is suggested that were notarial acts in England and Wales to lose their international standing as a matter of course, consumers would be unable to access effective notarial services in England and Wales at all. The consequences of this on international trade are also alluded to. I understand that such representations have been made directly to the LSB and clearly merit full consideration.

My advice

This advice, of course, is subject to the present regulatory framework remaining the same. It seems to me that, when advising, I must also take into account the fact that regulatory changes may need to be made as a consequence of *Brexit*.

First, I repeat concerns that my predecessor and I have expressed previously about the premise upon which the LSA proceeds. Namely, that regulatory competition will improve regulatory standards and, in so doing, further the public and consumer interest. As I have said before, the risks of “regulatory arbitrage” and “shopping around” for the least restrictive regulatory regime must be avoided.

Secondly, again as I have expressed before, one concern that underpins all of the Regulatory Objectives is the maintenance of the highest professional standards of conduct and ethics required in litigation, which necessarily impacts the courts and tribunals of England and Wales. This factor is of great importance to legal services at the current time, in light of strong worldwide competition; this is likely to be intensified by *Brexit*. The ethical standards, integrity and independence of those providing legal representation in litigation, and those practising law more widely, is one of the twin foundations of the pre-eminence of London as an international centre for dispute resolution. We simply cannot afford to imperil this at the present time or take any action without very careful thought and strong safeguards.

I therefore have serious concerns about the ICAEW’s application (particularly in light of the recent amendments) in relation to the conduct of litigation, rights of audience and, by association, notarial activities. It seems to me to be entirely premature to seek designation as an approved regulator in relation to these reserved legal activities when the ICAEW has no immediate intention or ability to offer qualifications and, subsequently, individual authorisations in respect of them. As the ICAEW acknowledges, “the demand for the qualifications...will still remain very uncertain” even if its application is approved.

As the application currently stands, so far as the ICAEW would be an approved regulator, it could only seek to authorise and regulate non-ICAEW-qualified individuals. As a result of this, the ICAEW would not be able to authorise (as opposed to license) entities, given their expectation that mainly accountancy-led practices will seek “accreditation”. It is also unclear to me whether the application and regulations envisage that a qualified lawyer (of whatever description) working within an ICAEW-licensed entity will: i) continue to be authorised and regulated by the regulator connected to their profession; ii) be authorised and regulated by the ICAEW; iii) be required to hold dual authorisation; or, iv) be authorised by the ICAEW, but with conduct matters being left to the professional regulator.

If i): the application and rules need to be much clearer. If ii): this engages my primary concerns about “regulatory arbitrage” and “shopping around”. The regulations will require far more detail as to professional obligations; I would have expected to see the enhanced Code of Ethics as part of the application. This would also represent a move away from the current regulation-by-profession approach. If iii): this would seem to be unnecessary and contrary to good regulatory practice. If iv): a separation of authorisation and professional conduct matters should, in my view, be avoided.

Regardless of the intended approach to non-ICAEW-qualified individuals, as the substance of the ICAEW qualification regime will be determined at some future point, I do not see how I can properly advise as to the likely impact on the courts and tribunals of England and Wales. I appreciate that designation as an approved regulator is a statutory pre-requisite to designation as a licensing authority; however, for the above reasons and due to the complexity and confusion that could result, I must strongly oppose the application.

Finally, these concerns do not arise in relation to reserved instrument activities “restricted to services relating to taxation” and the administration of oaths. These designations seem a far more appropriate next step for the ICAEW to take as it builds capacity as an approved regulator and licensing authority in respect of reserved legal activities.

Yours
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