



LORD CHIEF JUSTICE OF
ENGLAND AND WALES

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON

Callum Armstrong
Regulatory Associate
Legal Services Board
One Kemble Street
London
WC2B 4AN

5 February 2018

Dear Mr Armstrong,

**Application from the Chartered Institute of Legal Executives
for a recommendation for designation as a licensing authority**

I write further to your letter dated 18 December 2017 concerning the recent designation application made by the Chartered Institute of Legal Executives (CILEx). In reality, the application concerns CILEx's regulatory arm, CILEx Regulation Limited (CRL). For ease, I will refer to CILEx throughout.

The nature of the application

CILEx (formerly ILEx) is an approved regulator under the Legal Services Act 2007 (LSA), which has delegated its regulatory functions to CRL. CILEx is an approved regulator in respect of the following reserved legal activities: i) rights of audience, ii) conduct of litigation, iii) reserved instrument activities, iv) probate activities and v) the administration of oaths. CILEx now applies for designation as a licensing authority (for reserved legal activities i)-iv) and the regulated legal activity of immigration advice and services) under Schedule 10 to the LSA to enable it to authorise and regulate "alternative business structures" (ABS); it has been able to authorise and regulate non-ABS entities since 2015.

My statutory functions

As required by that Schedule, I am required to provide such advice as I think fit and, in particular, have regard to the likely impact on the courts of England and Wales. In so advising, I also bear in mind the regulatory objectives, namely: protecting and promoting the public interest; supporting the constitutional principle of the rule of law; improving access to justice; encouraging an independent, strong, diverse and effective legal profession; and, promoting and maintaining adherence to the professional principles.

Documents received

In addition to CILEx's application, I have received the statutory advice from the Competition & Markets Authority (CMA) and the Legal Services Consumer Panel (LSCP).

I note that the CMA starts from a position of support-in-principle and, further, finds no evidence to suggest the grant of the application would distort the market. In addition, I note that the CMA observes that the regime proposed largely mirrors the CILEx regime applicable to non-ABS entities, but with additional safeguards and restrictions as deemed necessary in relation to ABS.

I also note the LSCP is supportive of the application.

My advice

This advice is, of course, premised on the present regulatory arrangements remaining the same. The Ministry of Justice has recently confirmed that there are no current plans for reform. It also seems to me that I must, however, bear in mind that regulatory alterations may be required as a consequence of the UK's withdrawal from the European Union.

Otherwise, I begin by echoing the concerns of my predecessors in terms of the basis upon which the LSA proceeds: that regulatory competition will improve regulatory standards and, therefore, further the public and consumer interest. Whilst the scheme of the LSA must, of course, be followed, care and caution are still required. As Lord Thomas observed in his most recent report to Parliament, "[t]here is a nascent concern that the public interest too often gives way to the consumer interest, which is itself too narrowly defined." The LSB should bear this in mind when assessing the application. It follows that "regulatory arbitrage" or "shopping around" must be avoided.

In addition, it should not be forgotten that the legal profession is one of the twin pillars of our justice system, together with the judiciary. It is of critical importance – for consumers individual and corporate, at home and abroad – that those undertaking reserved legal activities conduct themselves with the highest standards of professional conduct and ethics. This is, of course, particularly the case in relation to rights of audience and the conduct of litigation, which directly impact the courts and tribunals. Therefore, when changes are made to regulatory matters, careful thought needs to be given and strong safeguards need to be put in place to protect and promote such high standards.

Having prefaced my advice with those general observations, I turn to the instant application.

It is apparent from the application, and the supporting business plan, that a key factor underpinning the application is to improve diversity in the legal market in a meaningful way. This is both in terms of the diversity of CILEx authorised individuals (who may go on to establish an ABS) and by adopting a licensing process that is attractive to small and medium enterprises. This approach is clearly a positive thing. I also note that CILEx's research demonstrated that there is often a "natural choice" of regulator, in terms of entities choosing to be licensed by the regulator connected to the profession of the authorised individuals they employ. Given my general concern about "shopping around", I also consider this to be a positive thing and not something that regulatory arrangements should strive to change.

It is, therefore, reassuring that the application to license ABS entities is based on an extension of the current non-ABS entity regulatory regime. Further, it is also reassuring that CILEx does not intend to license multi-disciplinary practices (MDP) in the first instance, and, instead, prefers to focus on developing its capability. Were CILEx to seek to license MDP in future by way of a rule change application to the LSB, I would expect the judiciary to be consulted.

In addition, it is apparent that CILEx's Strategic Risk Committee is alive to the need to understand fully ownership and management structures (including making 'fit-and-proper' judgements) and to guard against undue or improper influence by non-legal owners. However, I question whether the present arrangements are sufficiently robust to guarantee this. In particular, I bear in mind the recent designation application made by the Bar Standards Board and the advice of my predecessor, Lord Thomas.

First, the Head of Legal Practice (HoLP) merits consideration. This position, mandated by the LSA, is an important safeguard in terms of the proper operations of ABS entities. I am not persuaded that requiring the HoLP only to be an employee of the ABS is adequate. I therefore advise the LSB to consider carefully this proposal and ensure there is appropriate parity with other licensing authorities.

Secondly, only one manager is required to be an authorised person for a license to be granted. I *strongly* recommend that this is revisited. It seems to me that there is too great a scope for improper influence by non-authorised owners and managers. The public interest rationale behind this concern, and an indicative approach to licensing that guards against it, are well articulated by the BSB in its designation application at paragraphs 3.2.4-3.2.7. Indeed, this measured approach was, quite rightly, commended by my predecessor at the time. It is a sentiment that I echo and I adopt his advice in this regard.

Overall, therefore, I am broadly content with CILEx's application as a sensible, incremental extension to its existing regulatory arrangements. However, I feel unable to support it fully until my concerns about sufficiently safeguarding the public interest in the proper administration of justice (and, to some extent, the consumer interest) by more robust arrangements in terms of ownership and management are addressed.

Yrs. Sincerely,
Ian Burnett

Lord Burnett of Maldon