

<b>To:</b>	Legal Services Board	
<b>Date of Meeting:</b>	27 November 2013	<b>Item:</b> Paper (13) 82

<b>Title:</b>	Application from the Intellectual Property Regulation Board (IPReg) on behalf of the Chartered Institute of Patent Attorneys (CIPA) and the Institute of Trade Mark Attorneys (ITMA) for a recommendation for designation as a licensing authority	
<b>Workstream(s):</b>	Statutory Decisions	
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<b>Status:</b>	Protect	

<b>Summary:</b>
<p>This paper provides the Board with the LSB's assessment of the application for CIPA and ITMA to be designated licensing authorities. It covers:</p> <ol style="list-style-type: none"> <li>1. The LSB's assessment of the application</li> <li>2. The recommendation of the LSB on whether to approve the application</li> <li>3. Sets out the timetable for approval by the Lord Chancellor and statutory orders process</li> </ol> <p>The application is not included with this report but is available on the <a href="#">LSB website</a> (where it has been published since [date]). A copy is available to any board members and will be available at the Board meeting.</p>

<b>Recommendation(s):</b>
<p>The Board is invited to :</p> <ol style="list-style-type: none"> <li>4. grant the application for a recommendation to the Lord Chancellor (under paragraph 12(1) of schedule 10 to the Legal Services Act 2007 (the Act) that CIPA and ITMA are designated as licensing authorities;</li> <li>5. To delegate to the Chairman the approval drafting of the recommendation</li> <li>6. To delegate to the Chairman and the Chief Executive approval of the drafting of the final decision notice</li> </ol>

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<b>Risks and mitigations</b>	
<b>Financial:</b>	N/A
<b>Legal:</b>	N/A
<b>Reputational: [FoIA s36(2)(b)]</b>	[REDACTED]
<b>Resource:</b>	There is a Statutory Orders process following a recommendation in favour of designation. This, when taken together with the other applications for designation from the ICAEW and IPS, may require a significant proportion of the resources available for statutory decisions which may impact on other applications

<b>Consultation</b>	<b>Yes</b>	<b>No</b>	<b>Who / why?</b>
<b>Board Members:</b>		√	
<b>Consumer Panel:</b>	√		Statutory requirement to consult (see paragraphs 21 to 30).
<b>Others:</b>	The Lord Chief Justice and the Office of Fair Trading - Statutory requirement to consult (see paragraphs 21 to 29).		

<b>Freedom of Information Act 2000 (Fol)</b>		
<b>Para ref</b>	<b>Fol exemption and summary</b>	<b>Expires</b>
34-37	Section 36(2)(b)(ii) – information likely to inhibit the exchange of views for the purposes of deliberation by the Board	N/A

## LEGAL SERVICES BOARD

<b>To:</b>	Board		
<b>Date of Meeting:</b>	27 November 2013	<b>Item:</b>	Paper (13) 82

### **Application from the Intellectual Property Regulation Board (IPReg) on behalf of the Chartered Institute of Patent Attorneys (CIPA) and the Institute of Trade Mark Attorneys (ITMA) for a recommendation for designation as a licensing authority for its existing reserved legal activities**

#### **Introduction**

1. Under Part 1, Schedule 10 of the Legal Services Act (“the Act”) IPReg submitted an application on 15 May 2013 seeking a recommendation that CIPA and ITMA be designated as licensing authorities. The regulatory functions of CIPA and ITMA are delegated to IPReg. The effect of this application would be to allow IPReg to authorise and regulate entities as alternative business structures (ABS) on behalf of CIPA and ITMA.
2. This report summarises our assessment of the application against the criteria set out in the Act which must be satisfied before making a recommendation to the Lord Chancellor for designation. It confirms our view that the proposed regulatory arrangements have met the criteria set out in the Act.
3. This paper therefore recommends that the applications are granted under paragraph 12(1) of Schedule 10 to the Act. If the Board agrees, the LSB will make a recommendation to the Lord Chancellor under paragraph 14(2) of Schedule 10 that CIPA and ITMA be designated as licensing authorities. The Lord Chancellor will have 90 days in which to make a decision on that recommendation (paragraph 15(4) of Schedule 10).

#### **Background to the application**

4. CIPA and ITMA, which both have a long history of registering and regulating intellectual property firms as well as individual lawyers, have delegated their regulatory functions to the Trade Mark Regulation Board (TMRB ) and Patent Regulation Board (PRB), operating together as IPReg. IPReg commenced its regulatory function formally from January 2010. Since then IPReg has registered 184 firms in its capacity as an approved regulator.
5. In May 2012, CIPA, ITMA and IPReg agreed that CIPA and ITMA would make a joint application to become licensing authorities for ABS for practitioners in intellectual property. If the application is granted, CIPA and ITMA will be designated licensing authorities, delegating the regulatory functions of being a licensing authority, including authorisation and supervision, to IPReg (through the TMRB and PRB).

## **Scope of application**

6. CIPA and ITMA are already approved regulators for the following reserved legal activities undertaken by trade mark and patent attorneys:
  - The exercise of a right of audience
  - The conduct of litigation
  - Reserved instrument activities
  - The administration of oaths.
  - The rights sought in this application do not extend beyond these current rights.
7. The Board will also wish to note that IPReg already has experience of authorising and regulating firms that are ‚ABS like‘. Trade Mark Attorneys and Patent Attorneys have not been prevented from having external management and ownership (although such ownership is limited to 25 per cent of the firm). IPReg has a number of firms that are therefore licensable and IPReg will require all such firms to be authorised under its new authorisation procedures at the end of the transitional period, which essentially allows authorised firms to continue to carry on a reserved legal activity prior to the designation of a licensing body that will authorise ABS (as set out in Schedule 5, paragraph 3 of the Act). In meetings with the IPReg Chief Executive, she has indicated that IPReg had identified and anticipated around 10 ‚ABS like‘ firms that will initially want to apply.
8. The introductory statement to the application further makes clear that IPReg does not seek to go beyond its skill base “as a specialist in the regulation of intellectual property practitioners”. Nor does it expect there to be significant increase in the number of firms seeking authorisation; the majority of bodies expected to apply for a licence are already regulated by IPReg.
9. In summary, IPReg is not seeking to authorise, regulate or to go beyond its current organisational expertise as a regulator of trade mark and patent attorneys. Indeed it intends to build on its existing capability.

## **Process of assessing the applications**

10. The following key process steps have been undertaken by the LSB to ensure a systematic and thorough assessment of the application.
  - A completeness check of the required application information. The LSB ‚Rules for applications to be designated as a Licensing Authority (13 June 2011)‘ set out in its Schedule the administrative information required for the application. We have conducted a full check of the information submitted with the application and confirmed that it meets the administrative requirements set out in our rules.
  - The Rules Team of the LSB conducted a thorough review of the applications and accompanying annexes.
  - Sought a legal opinion from the LSB Legal Team during the assessment phase.
  - Compiled an ‚Issues Log‘ which highlighted specific parts of the application that required further information or clarity from IPReg.

- Additional information was sought and there was a face-to-face discussion between LSB staff and Chief Executive of IPReg. This was a very useful meeting and as a result, the LSB was able to address and resolve key issues in relation to the application and the drafting of IPReg's licensing rules.
- We have sought advice from mandatory consultees as required in the Act in relation to all designation applications (see paragraphs 21 to 29 of this report).

**Assessment of the application against the criteria for approval in the Act and the LSB's Rules**

11. The following table is a summary of the assessment against the criteria for designation as a licensing authority as set out in Schedule 10, Part 1, paragraph 11 of the LSA 2007 and the LSB's Rule for Licensing Authority Designation Applications (LSB Rules).

Criteria for designation as an LA	Summary of the LSB assessment	MET or not MET by the applicant
<p><b>Licensing Rules</b> comply with s.83 of the Act. When considering the application the Board will consider how consistent an applicant's proposed licensing rules are with the LSB's guidance on licensing rules.</p>	<p>We are satisfied that IPReg have drafted appropriate rules in its Registered Bodies Regulations in relation to licensing bodies. We consider that these, together with its Rules of Conduct for Patents Attorneys, Trade Mark Attorneys and Other Regulated Persons and related existing regulations, such as the Patent Regulation Board and Trade Mark regulation Board Disciplinary Procedure Rules, satisfy all the licensing rules requirements in the Act and the LSB Rules.</p>	<p>MET</p>
<p>An <b>appeals body</b> in place to hear and determine appeals against decisions of the applicant</p>	<p>Satisfied there will be an Appeals process in place.</p> <p>IPReg will use the General Regulatory Chamber (GRC) of the First Tier Tribunal to hear appeals against decisions it makes when acting as a licensing authority. An order under Section 80 of the Act will be needed to establish the GRC as the appeals body</p>	<p>MET</p>
<p>Appropriate <b>internal governance</b> arrangements at point of designation; regulatory functions not be prejudiced by its representative functions; as far as reasonably practical, regulatory decisions be taken independently of representative ones</p>	<p>CIPA/ITMA/IPReg have completed four dual self certificates on compliance with the Internal Governance Rules and no issues were raised on the last certificate, submitted in July 2013. The LSB has not identified any issues that would lead us to conclude that they would not continue to comply with having appropriate internal governance arrangements.</p>	<p>MET</p>

Criteria for designation as an LA	Summary of the LSB assessment	MET or not MET by the applicant
<p>Applicant <b>competent</b>, has <b>sufficient resources</b> to perform the role of LA in relation to probate</p>	<p>Satisfied applicants, through IPReg, are competent and have sufficient resources in place. IPReg has already demonstrated experience and competence as an approved regulator in regulating the reserved legal activities of patent and trade mark attorneys, including experience of authorising firms. Moreover there will be no change in the type of firms which IPReg will authorise and regulate.</p> <p>We are also satisfied that IPReg has planned and will introduce increased but proportionate resource provision (both permanent staff and access to external resource) by estimating demand through previous experience, research and information such as annual practising fee returns, to enable it to assess size and number of firms likely to apply for authorisation and require supervision.</p>	MET
<p>Approach to licensing rules are consistent with requirements in <b>s.28 of the Act</b> (RO, BRP etc)</p>	<p>Satisfied that IPReg have framed the application with regard to the Regulatory Objectives and Better Regulation Principles (BRPs). The application states that as a licensing authority, IPReg will seek to:</p> <p>Improve access to justice through the facilitation of new forms of business, protecting and promoting the interest of consumers through its principles based Code of Conduct, with its focus on treatment of clients and promoting competition in the provision of services by building in consideration of competition and competition law into its authorisation process.</p> <p>In terms of the BRP, we are satisfied that IPReg has a set of regulatory arrangements that focus primarily on the risk based essential requirements that address risk or the licensing rules. The rules are not overly detailed but broadly provide a clear regulatory framework for practitioners regulated by IPReg.</p>	MET
<p>In accordance with s.82 of the Act, an applicant must prepare and issue a <b>policy statement</b> as to how, in exercising functions under Part 5 of the Act, it will <b>comply with s.28 of</b></p>	<p>The Executive Summary of the application sets out a statement of policy on how IPReg intends to exercise their authority as an LA in accordance with the requirements set out in section 28 of the LSA 2007. The statement is summarised in the assessment above, and is aimed at demonstrating how IPReg's proposed regulatory arrangements will support the regulatory objectives and professional principles in section 1 of the LSA</p>	MET

Criteria for designation as an LA	Summary of the LSB assessment	MET or not MET by the applicant
the Act	2007.	

12. During the process of the LSB’s assessment of the application we identified the following specific matters which required further detailed analysis.

*Scope of legal activity*

13. IPReg have made clear that its authorisation and supervision regime will be limited to firms whose primary business is intellectual property services; Registered Body Regulation 3.1 specifies the areas of law not covered by authorisation.

14. During the course of the assessment the LSB identified (as did the Lord Chief Justice in responding as a mandatory consultee – see Mandatory Advice section, paragraph 27) that the scope of activities it would not regulate was not as comprehensive as it might be. For example, personal injury did not appear in its list of activities it would not authorise.

15. While it is the case that personal injury is not an activity an intellectual property lawyer would normally undertake, the LSB’s view was that since other activities had been specifically excluded, that for the avoidance of doubt, personal injury should also be on the excluded list. Having considered the views of the LSB and the LCJ, IPReg decided to amend its regulations to include a longer list of activities it will not register a body for, adding personal injury and “administrative law other than that relating to intellectual property rights”. This change has reassured the LSB that the scope of activities the application seeks as a licensing authority is consistent with IPReg’s current regulatory functions and experience as an approved regulator.

*Approach to risk*

16. While IPReg did not provide a substantial amount of information in the application on its approach to risk assessment of firms, other than setting out in broad terms the risk assessment tool it had developed, it did refer us to its regulatory standards self-assessment in 2012, where it gave an account of the work it had done on risk and its strategy. Four key elements are worth drawing out:

17. IPReg already undertakes risk assessment through its own records of conduct complaints and the details of service complaints provided by the Legal Ombudsman. In discussion with the Chief Executive, it was noted that there are relatively low volumes of complaints and so there are some limits as to what information this can produce, a system is in place which overtime will collect more data for analysis.

18. In July 2012 IPReg issued an extensive questionnaire to all registered entities in parallel with its consultation on its licensing application. The responses to the questionnaire informed a new risk-based assessment regime.

19. IPReg's approach to identifying client/consumer type and to the risks associated with each client type is consistent with the Oxera model.
20. The regulatory standards self-assessment added that firms registered with IPReg do not currently hold significant amounts of client monies (except on account of disbursements) and IPReg did not anticipate that this will significantly change by virtue of regulation of ABS.
21. With the evidence gathered from the questionnaire exercise, IPReg has developed a new risk based regime and risk assessment tool which identifies three overarching risk categories: business model risk, governance and operational risk; and competence risk. The LSB's view is that this approach is appropriate for IPReg. The risk model will be reviewed on an annual basis and IPReg has given assurance that it can respond quickly to emerging risks and issues.
22. The LSB in its overall assessment of IPReg's work on risk (published in December 2012 in the Developing Regulatory Standards Report on the small regulators) was that "IPReg is taking appropriate steps to build its evidence base on risk. It will have to ensure that such evidence is put to appropriate use and is able to identify those providers that pose a higher risk to consumers". Nothing has been identified in this application which would lead us to a different conclusion.

### **Mandatory advices**

23. Under Schedule 10, paragraphs 3(1) and 3(2) of the Act the LSB are required to seek advice from the Office of Fair Trading (**OFT**), the Legal Services Consumer Panel (**the Panel**) and the Lord Chief Justice (**LCJ**).
24. The Act also allows the LSB to seek advice from selected consultees when considering a designation application. In this case we did not consider it necessary to seek such additional advice as the application did not raise any specific issues which other stakeholders would have an interest or which could provide useful additional insights or views.
25. The table at **Annex A** provides a summary of the advice received by the LSB and the representations received from IPReg. The key points to note are as follows.
  - The OFT did not raise any objections to the application.
  - While the Panel did not have any major policy concerns with the application, it did make a number of more in-depth points. In particular the Panel expressed concerns about the lack of detail in IPReg's rules on Continuing Professional Development (CPD). Having considered the Panel's view on this, the LCJ also chose to comment and proposed that IPReg put together a detailed programme of continuing education in line with those that exist elsewhere in the profession.
26. IPReg's response in the representations on the advice was that the Consumer Panel had misunderstood IPReg's position on CPD and this in turn had led to a misinformed view expressed by the LCJ. IPReg has got detailed CPD regulations, guidance and procedures for individuals but did not include these in its application, since it did not consider them to be directly relevant to an application to become a licensing authority for licensed bodies. It has since said it will provide its detailed CPD Rules as an additional annex to the application. The LSB is satisfied that IPReg has adequate CPD arrangements in place and is



content with IPReg's overall approach to CPD in the context of the licensing authority application.

27. The LCJ also raised a concern about the whether the scope of legal activities IPReg would not authorise was as comprehensive as it could be. As referred to in paragraph 16 of this report, IPReg have agreed to amend its regulations to include a longer list of activities it will not register a body for, adding personal injury and "administrative law other than relating to intellectual property rights".
28. The LCJ said that the application should not be granted until the CPD and personal injury issues had been remedied by IPReg, at which point the LCJ's successor, Lord Thomas, should review his predecessor's advice. Given that IPReg have acted on both issues we do not consider it necessary to seek a further review from the new LCJ.
29. The LCJ made a wider point (which he had made before in respect of previous designation applications), about the effect of competition on standards of such applications. As with consideration of all applications for rule changes and designation as approved regulators or licensing authorities, this application is not simply about regulatory competition. We consider it to be about the competence and capacity of IPReg in the areas of legal activity they currently regulate. It is also about ensuring that the right protections are in place for consumers and that IPReg's regulatory arrangements meet the requirements and criteria for being a licensing authority as set out in the Act and in our rules.
30. An issue arose in respect of the Panel advice on cooperation with the Legal Ombudsman. The Panel noted that IPReg's Rules of Conduct, Rule 20, refers to cooperation with the ITMA and CIPA regulation boards, but advised that this should be expanded to include cooperation with the Legal Ombudsman, even though it was acknowledged by the Panel that a small number of attorney cases reach the Ombudsman. In addition, as noted in Annex A summary of responses, under section 83(5)(g) of the Act, licensing rules of a licensing authority must contain the provision required by sections 112 and 145 of the Act (requirements in relation to handling of complaints).
31. Section 145 requires that provision must be made by approved regulators and in licensing rules, requiring each relevant authorised person to give ombudsmen all such assistance requested by them. IPReg accept that its regulatory arrangements are currently not compliant with section 145. It has therefore helpfully agreed to amend Rule 12 (Complaints Handling) of its Rules of Conduct so that it explicitly places a requirement on those it regulates to provide assistance to ombudsmen. It has further agreed we will also add guidance to Rule 20 (Co-operation) making it clear that the TRB and PRB designate LeO and other ombudsmen as persons with whom those subject to the Code must co-operate. This is a favourable outcome as it means that IPReg will now be compliant as both an approved regulator and licensing authority (if designated). The Board will receive oral confirmation of IPReg's progress on this at the Board meeting.

### **Statutory process and impact on designation timetable**

32. If designated as a licensing authority, it is important to IPReg that its powers as a approved regulator mirror those it will be granted as a licensing authority. To achieve this requires an order under s69 of the Act. Also an order will be required under s80 establishing the General Regulatory Chamber of the First Tier

Tribunal as the appellate body to hear appeals against decisions by IPReg when acting as a licensing authority. These orders need to be in force before the designation order.

33. The most recent timetable from the MoJ indicates that the process for these orders could be complete before the 2014 summer recess with submissions to the Minister to approve and sign the orders by mid-July (having been laid before both Houses of Parliament between mid-May and mid-July). However, there is some risk that this timetable may not be achieved if the orders cannot be laid as planned and designation may not occur until autumn 2014. We will continue to work with MoJ colleagues to ensure that the timetable remains on track and look for opportunities to accelerate the process.

[REDACTED]

34. [REDACTED]

35. [REDACTED]

36. [REDACTED]

37. [REDACTED]

### Conclusion and Recommendation

38. In conclusion:

- The LSB considers that IPReg’s proposed Licensing Rules comply with the requirements in Act and the LSB’s Guidance on Licensing Rules.

- Our assessment is that IPReg is a competent body to undertake authorisation and regulation of licensed bodies. It has a track record and experience as an approved regulator – including of regulating ABS type firms - and it is not seeking to extend the activities it already regulates.
- The LSB is satisfied that the applicant has properly considered the particular risks associated with authorising and regulating ABS and has systems in place, based on previous experience, to understand and mitigate those risks.
- No significant issues were brought out from the advice that might draw us to a conclusion that a recommendation to designate should not be made. However, the issue about S145 compliance will need to be settled quickly.

38. The Board is invited to :

- grant the application for a recommendation to the Lord Chancellor (under paragraph 12(1) of schedule 10 to the Legal Services Act 2007 (the Act) that CIPA and ITMA are designated as licensing authorities;
- To delegate to the Chairman the approval drafting of the recommendation
- To delegate to the Chairman and the Chief Executive approval of the drafting of the final decision notice

18 November 2013