

From: The Chief Executive

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Dear Craig,

Regulatory Independence

Thank you for meeting Michael Heap and myself last month and giving us the opportunity to let you have IPReg's initial views on the LSB's proposals on this subject. I am now able to let you have our substantive comments.

We welcome the document overall. It reflects, in our view, a considered and thoughtful approach and the draft rules follow the LSB's undertaking to have a "principle" based approach to rule making. However, there are a number of areas where the IPReg Board has concerns, for example, Lay majorities may devalue the contributions of Professionals; the management of shared services and proposals for dealing with monitoring and supervision in order to satisfy an independent regime could add to costs. Proportionality will be key in order, from our standpoint, that flexible and cost effective arrangements can be put in place which ensure that the independence of IPReg is not compromised. Set out below are our detailed comments.

Ring fencing, Board Appointments

The proposals and draft rules, which tackle the anomalous position of Approved Regulators having to set up an independent regulatory regime, appear to be workable, provided there is goodwill on both sides and that the LSB do adopt a proportionate approach when reviewing the arrangements in place.

Ring fencing

In order to ring fence it from the two Institutes, IPReg has been set up as a company limited by guarantee with the two Institutes as shareholders. It is therefore a legal entity in its own right. There is in place a Memorandum of Understanding between the three parties (IPReg and the two Institutes) and there is an intention to have a Delegation

Document, which will spell out the respective responsibilities and the consequences for any breach. The current draft, which delegates the two Institutes' powers and responsibilities as Approved Regulators to IPReg, is on hold pending the final determination of the LSB's rules on Regulatory Independence – it will need to be amended substantially to reflect the LSB's proposals. Overall, however, in relation to the ring fencing proposals we believe that the arrangements that are in place and which will be supplemented by the Delegation Document in due course would comply with what the LSB have in mind, therefore IPReg would have no difficulty with the ring fencing proposals.

Appointments to the Board

Under the MoU between IPReg and the Institutes each Institute can “appoint” three professional members. Each Institute uses different selection methods. There are drawbacks, however. There is a lack of clarity about the role of professional members. Are they representing the interests of the Institutes or the respective professions? Indeed one of the Institutes has recently suggested that its Council might wish to review the performance of its professionals on the IPReg Board. With the ambiguity of role in mind IPReg would welcome the LSB's proposals on appointments.

IPReg could undertake the process, working to the “Nolan” principles, of recruitment of lay and professional Board members, involving the two Institutes as appropriate – we have to maintain the confidence of stakeholders in IPReg as a regulator. We used the Appointments Commission to recruit lay members and would wish to use them again in order to underpin the independent selection process for both Lay and professional members.

We already have a requirement for a lay Chairman which in our case means someone who is not regulated by the IPReg ie is not a Patent or Trade Mark Attorney. In our view it goes too far to suggest the exclusion as Chairman anyone who might fall into a profession regulated under the Act. That removes a significant number of potential candidates for very little reason and would be disproportionate to the problem of a Chairman who has some distance between his professional activities and those of the profession his/her Board is regulating. Simply requiring the exclusion from appointment as Chairman anyone from the profession regulated by the Board would be sufficient.

Each of the Patent Attorney Regulation Board and the Trade Mark Attorney Regulation Board – which together constitute IPReg under the MoU and the draft Delegation Document, will have a professional majority - the three respective professionals and two of the three lay members under the lay Chairman of IPReg. However, a lay majority could be achieved on each Board by including the third lay Member. But it is not clear what problem is being solved? In cases where the regulator's interface with the general public is not significant, and the professions are specialised, the citizen's perception is likely to be relatively unimportant. Therefore, in relation to the two professions we are to regulate, such a rule would not be proportionate and may be perceived as devaluing the role of the

professionals and lead to a reluctance on their part to seek selection for IPReg or any other professional Board.

If the LSB rules did require IPReg to change the structure of its Board or put in place different selection methods for Professional members, we would not wish the disruption or distraction of having to do so other than in the existing timescale, 3 years, for the re-appointment of existing members. There would be little advantage, but a great deal of distraction, time and effort involved in doing so.

Management of Resources, Shared Services

We welcome the LSB's approach to the issue of resources for the regulatory arms. Independence here, we agree, is particularly important in order to manage perception among a variety of stakeholders. And we agree that there should be in place a dispute resolution arrangement – we have a mediation arrangement in the draft Delegation document – and provision for the involvement of the LSB if necessary.

Shared services and delegation back to the Institutes– delegation of the management of the registers from IPReg to the two Institutes - are likely to be a feature of our life. The principle based approach is therefore to be welcomed. But the guidelines too must be proportionate and flexible. For example IT services (along with accommodation) is provided by CIPA .but it would not be practical for IPReg staff, for a variety of reasons - there will only be two, it would be expensive to employ individuals with the management/technical skills necessary - to be involved in the management of those providing these services. At times therefore it might be difficult to ensure the transparent independence the proposals seem to seek. The main vehicles in relation to the provision of services by the Institutes will be Service Level Agreements (SLAs). On the face of it, the SLA will not fully serve the purpose of transparent independence the LSB seem to be seeking. We would therefore ask that the rules/guidelines set down by the LSB be satisfied (particularly in relation to our professions) if IPReg itself were content that the spirit of independence and the public interest were being safeguarded. This could be a responsibility of the IPReg the Governance Committee and the subject of the Annual Report IPReg will be making to the Institutes and the LSB.

Monitoring and Supervisory arrangements

IPReg itself would have no problems with the suggested arrangements set out by the LSB of an independent body with responsibility for management/supervision of the regulator, provided the overall arrangements for interface between the regulator, CIPA and ITMA, did not become burdensome or complex – and therefore expensive in terms of use of resources. There are already a number of layers to the relationship with the Institutes – Officials Meeting, Liaison Group, an IPReg Committee within ITMA and something similar likely with CIPA. Another external body is therefore likely to add to the complexity (and expense) of monitoring and supervision. If such an external body to undertake the supervision of IPReg becomes mandatory and the other layers remain in place then additional costs to registrants is the likely result. From our standpoint that

would be disproportionate. The rules and the guidelines should reflect that there is no “one size fits all arrangement” and that provided there are structures in place to monitor and supervise without compromise to the independence principles the LSB should be able to give such arrangements a seal of approval. For example, could the dual self certification arrangements include statements that each side is content/satisfied that the monitoring arrangements have worked satisfactorily, with details of any issues which might have arisen and how they were resolved. That could then be one of the topics for discussion with the LSB each year involving the Approved Regulators (CIPA and ITMA in our case) and the regulator IPReg. Such an arrangement is in our view likely to be as effective in terms of monitoring/supervision as having the task undertaken by an independent body, and far less costly.

Compliance with the rules

The idea of dual self certification is one which we would support. We already have in place a “Governance Committee” which would be responsible for ensuring compliance with the LSB Rules. As indicated above, this could work with the appropriate Committees of the Institutes to reinforce the monitoring arrangements throughout the year as well as being the subject of an annual “Compliance” meeting with the LSB with perhaps a more detailed Review being held by the LSB every three years. Such a compliance meeting and Review might be broadened to cover not just compliance with the rules but also “performance objectives” which the LSB might set down.

Practicing fees

The proposals are generally acceptable. The only area of concern to us (and our stakeholders) would be the way in which the LSB viewed “permitted purposes”. We ourselves would not wish to have a general power to raise money through practice fees to apply funds to measures which those regulated might question. Therefore, any guidelines should make it clear that the LSB will look carefully at any request to raise practice fees for expenditure on “permitted purposes” and that the monitoring and supervisory arrangements should be deployed in order to ensure that objectives for which the monies were raised were measured and met. For example, given the specialised nature of the services provided by Patent and Trade Mark Attorneys and their limited contact with citizens at large, we are most unlikely to want (or need) to spend money on “increasing public understanding of the citizen’s legal rights and duties”

The proposal for a MoU to provide the administrative arrangements for the submission of application for practice fees may be something which can be determined at a later date. Initially it might be better to have a flexible approach and then let best practice emerge which might then be condensed into a MoU. The one rider to this is possibly an agreed timetable for the process. In our case – if the requirement for agreement of the IPReg budget with the two Institutes remains – then the process for setting the practice fees will start as soon as we know what the LSB Levy is to be (when the LSB Business Plan is published). If therefore an agreed timetable is not met by one or other of the parties then there will need to be some consequences. For example, if one or other of the Institutes

does not approve the budget by a certain date – assuming there is a reasonable timeframe for discussion etc- then it should be deemed that approval is given.


From our stand point, we would prefer that the IPReg budget should not be the subject of approval by the two Institutes. That is likely to be time consuming and non productive, given the opportunities the representative arm will have for comment and influence. Currently, IPReg has to have its budget agreed by CIPA and ITMA, two separate processes. The resulting fees have to be the subject – this year for the last time – to the agreement of the IPO. The proposed fees for entities – which we will have for the first time – will have to be agreed with LSB. Such an arrangement is not proportionate, particularly where, by and large, fees are not going to vary significantly from year to year. But moreover, where it would provide the opportunity for the representative side to unduly influence the activities of the regulator.

Consultation should of course take place take place between the Approved Regulator and the regulatory arm. But, as in relation to other areas, no additional substantive arrangement need be set up, bearing in mind the levels on which interchange already takes place. We would want to be able to use or adapt one of the existing arrangements on a proportionate basis to discuss and consult on the IPReg budget, but within a framework where approval of the Approved Regulator was not necessary

Transparency

The proposals set out in the document are acceptable, in our view.

Please let me know if you require any further information or have any questions on the above.

Yours sincerely


Mike Knight