

Title: Section 80 order: Modification of the Chartered Institute of Patent Attorneys (CIPA) and the Institute of Trade Mark Attorneys (ITMA) Appeals from Licensing Authority Decisions IA No: MoJ010/14 Lead department or agency: Ministry of Justice Other departments or agencies: Legal Services Board	Impact Assessment (IA)		
	Date: 29/05/2014		
	Stage: Final		
	Source of intervention: Domestic		
	Type of measure: Secondary legislation		
Contact for enquiries: Dawn Reid dawn.reid@legalservicesboard.org.uk			
Summary: Intervention and Options			RPC Opinion: Awaiting Scrutiny

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
N/A	N/A	N/A	No
			Zero Net Cost

What is the problem under consideration? Why is government intervention necessary?

CIPA and ITMA are approved regulators under the Legal Services Act 2007 (LSA) and their regulatory functions are delegated to the Intellectual Property Regulation Board (IPReg). CIPA and ITMA have applied to be designated as licensing authorities for alternative business structures (ABSs). The Legal Services Act 2007 (LSA 2007) states that a licensing authority must make provision in its licensing rules for appeals in relation to decisions it makes as a licensing authority with respect to ABS. LSB intervention is required as an appeals process for IPReg licensing decisions can only be established by an order under section 80 of the LSA 2007.

What are the policy objectives and the intended effects?

It is a necessary prerequisite for CIPA/ITMA to be designated as LAs that they have in place an appeals mechanism for the decisions that they make as licensing authorities through IPReg. The policy objective of the LSB is to put in place an appeal mechanism through the use of the General Regulatory Chamber (GRC) of the First-tier Tribunal (FTT) to hear appeals against decisions made by licensing authorities, including those made by IPReg under delegation from CIPA and ITMA.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0: Do nothing.

Option 1: Propose a section 80 order which addresses the objectives outlined above in respect of hearing appeals against decisions made by IPReg (under delegation) as a licensing authority.

Option 1 is the preferred option, as the expertise of the FTT is considered appropriate for the issues that ABS licensing appeals may involve. The FTT already acts as the appeals body for ABS licensing appeals of the Council for Licensed Conveyancers. It is also consistent with the LSB's overall policy aim that the FTT's jurisdiction be expanded in the longer term to create a single appeals mechanism for all approved regulators and licensing authorities in respect of non-ABS and ABS decisions.

Will the policy be reviewed? It will not be reviewed. If applicable, set review date: N/A					
Does implementation go beyond minimum EU requirements?				N/A	
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		Micro Yes	< 20 Yes	Small Yes	Medium Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)				Traded:	
				Non-traded:	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister: _____ Shailesh Vara _____ Date: 29 May 2014

Summary: Analysis & Evidence

Policy Option 1

Description: First tier Tribunal as the appellate body for appeals against IPReg decisions as a licencing authority

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	N/A	N/A
High	N/A	N/A	N/A
Best Estimate			

Description and scale of key monetised costs by 'main affected groups'

The key monetised costs by main affected groups is likely to mostly impact on IPReg who will bear the costs of the FTT in hearing appeals. Estimate of total costs in first year of £38,000 with unit running costs per case of £3,500. Appeals are likely to be in range of 0-10 per year, with the range of 0-3 appeals per year most likely, so the overall monetised cost to IPReg is not likely to be significant. There might be some monetised costs to individual ABS who appeal (e.g. legal and representative costs) but this is difficult to quantify.

Other key non-monetised costs by 'main affected groups'

There are some non-monetised costs to FTT in terms of using internal resources (e.g. legal, judges, staffing, training etc). However, FTT has already allocated resources for its tribunal functions and will invoice IPReg for actual monetised costs. IPReg could incur non-monetised human and IT resource costs for dealing with appeals cases. But this is not likely to be significant given the low number of appeals expected. There may be small regulatory costs to consumers as the IPReg passes on hearing costs to ABS businesses in the form of higher fees which may ultimately be passed onto consumers.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	SN/A	N/A	N/A
High	N/A	N/A	N/A
Best Estimate			

Description and scale of key monetised benefits by 'main affected groups'

Difficult to quantify specific monetised benefits for main affected groups. FTT will invoice IPReg for costs in dealing with appeals but this will not be to achieve a profit, so the monetised benefit to FTT will be neutral. An effective and fair appeals mechanism may increase confidence in the intellectual property ABS market which could in turn reap unquantifiable monetised benefits for ABS firms regulated by IPReg.

Other key non-monetised benefits by 'main affected groups'

The main non-monetised benefit will be that ABS and ABS applicants will have access to an independent and transparent tribunal process. This strengthens the perception of fairness and therefore confidence in regulatory decisions made by IPReg, encouraging entry into the market. Consumers of legal services may also benefit from increased consumer protection as a result of consistent arrangements for dealing with appeals in relation to licensing authority decisions.

Key assumptions/sensitivities/risks	Discount rate (%)	N/A
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Key assumption is that the number of appeals will be in the lower quartile of the 0-10 spectrum of cases for which the HMCTS has costed. The assumption of a low number of cases is also based on the estimate of around 40 firms that IPReg regulates that are thought to be licensable and the fact that there have been no appeals to IPReg's existing independent adjudicator since IPReg was established. Consequently there is an extremely low risk of cases exceeding the assumption of 0-10.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: Low risk	Benefits:	Net:	No	IN

Evidence Base (for summary sheets)

References

No.	Legislation or publication
1	Legal Services Act (2007)
2	LSB Consultation Paper Approaches to Licensing
3	LSB Response to Consultation on Approaches to Licensing
4	IPReg Consultation on Licensing Authority Application June 2012
5	Draft section 80 order

Evidence Base (for summary sheets)

1. Introduction

Background

- 1.1 The Legal Services Board (LSB) was created by the Legal Services Act 2007 (LSA 2007) and is charged with the responsibility of overseeing the regulators of legal services and ensuring that their activities reflect the regulatory objectives set out in the LSA 2007. The LSB's mandate is to ensure that regulation in the legal services industry is carried out in a manner that is consistent with the public interest and that the interest of consumers is central in policy making. The LSA 2007 gives the LSB and approved regulators (the regulators of traditional legal services providers) the same regulatory objectives. In full these objectives are:
- Protecting and promoting the public interest;
 - Supporting the constitutional principle of the rule of law;
 - Improving the access to justice;
 - Protecting and promoting the interests of consumers;
 - Promoting competition in the provision of legal services;
 - Encouraging an independent, strong, diverse and effective legal services profession;
 - Increasing public understanding of the citizen's legal rights and duties; and
 - Promoting and maintaining adherence to the professional principles.
- 1.2 The LSA 2007 enables the operation of Alternative Business Structures (ABS) by permitting the ownership of legal firms by non-lawyers. The LSA 2007 also details the process of establishing a licensing authority and the statutory basis upon which the licensing authority licenses and regulates ABS.
- 1.3 Section 80 (1)(a) and 3 of LSA 2007 provides the Lord Chancellor with an order-making power (to be exercised only on the recommendation of the LSB) to establish a new body to hear and determine appeals, or make provision about an existing body for the purpose of enabling it to hear and determine the appeals.
- 1.4 Patent and trade mark attorneys provide intellectual property legal services. The Chartered Institute of Patent Attorneys (CIPA) and the Institute of Trade Mark Attorneys (ITMA) are approved regulators of patent and trade mark attorneys respectively. CIPA and ITMA have, since January 2010, delegated their regulatory functions to the Intellectual Property Regulation Board (IPReg). All references to "IPReg" and actions thereof in this Impact Assessment mean IPReg acting under the authority delegated to it by CIPA and ITMA. By an agreement dated 23 May 2012, CIPA, ITMA and IPReg agreed that IPReg would jointly make an application for CIPA and ITMA to become licensing authorities for ABSs intending to practise in the intellectual property field.

- 1.4 A mechanism is required to hear appeals by ABS businesses against decisions of IPReg, should it be designated as a licensing authority under Part 5 of the LSA 2007. An order under section 80 is required for appeals to be heard by the First-tier Tribunal (FTT) which is part of the unified tribunal structure established under the Tribunals, Courts and Enforcement Act 2007 and administered by HM Courts and Tribunal Service (HMCTS).
- 1.5 The FTT combines a number of previously separate administrative tribunals into one unified structure, which has its own infrastructure and administrative support function. The FTT is made up of a variety of jurisdictions which are grouped into Chambers, including the General Regulatory Chamber (GRC) which consists of a number of jurisdictions concerned with hearing appeals against the decisions of regulatory bodies.
- 1.6 There are some explicit appeal rights under the LSA 2007 (section 96 and Schedule 13), concerning decisions to impose a financial penalty or to impose restrictions on the ownership of a licensed body. Licensing rules made by IPReg will also set out the rights of appeal. The LSB issued [guidance in December 2010](#) specifying those decisions which, as a minimum, the LSB considers ought to be appealable. We expect the following decisions of licensing authorities to be appealable (with the relevant sections or schedules of the LSA 2007 shown in brackets):
- Refusal of application for a licence (s.84)
 - Imposition of conditions on a licence (s.85)
 - Modification of a licence (s.86)
 - Disqualification from some or all roles within a licensed body (s.99)
 - Suspension and revocation of licence (s.101)
 - Power to modify application of licensing rules etc to special bodies (s.106 and s.107)
 - Refusal to designate as Head of a Legal Practice, or withdrawal of approval (Schedule 11, paragraph 12)
 - Refusal to designate as Head of Finance and Administration, or withdrawal of approval (Schedule 11, paragraph 14).
- 1.7 The LSB anticipates that if the Lord Chancellor agrees to the LSB recommendation for CIPA/ITMA to be licensing authorities, with IPReg acting as the licensing authority under delegation from CIPA/ITMA, it will take effect from early 2015, subject to the statutory order timetable.

Problem under consideration

- 1.8 If no provision is made in an order under section 80 of the LSA 2007 for appeals, it will not be possible for CIPA and ITMA (IPReg) to become a licensing authority. If they are not licensing authorities it will not be possible for trade mark and patent attorney ABS firms to be licensed by IPReg. As a consequence, the net benefits associated with the introduction of ABS for services provided by those firms regulated by IPReg will not be realised, unless they seek a licence from another licensing authority. It is necessary, under the LSA2007, that in order for a body to act as a licensing authority it must have in place an appeals mechanism for the decisions it makes as a licensing authority. Government intervention is required as an appellate body needs to be established in respect of decisions made by a particular licensing authority by an order under section 80 of the LSA 2007. In addition, if the s.80 Order is not made, and therefore IPReg cannot license ABS, the ABS like entities already regulated by IPReg under the transitional arrangements would have to bear the costs and inconvenience of seeking authorisation by another approved regulator once the transitional provisions cease to have effect.

Economic rationale

- 1.9 In terms of wider context, the conventional economic approach to government intervention to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate (e.g. monopolies overcharging consumers) or if there are strong enough failures in existing government interventions (e.g. waste generated by misdirected rules). In both cases the proposed new intervention itself should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and redistributive reasons (e.g. to reallocate goods and services to the more needy groups in society).
- 1.10 In this case, the intervention is required on legislative, efficiency and equity grounds. As referred to, under the LSA 2007, a body acting as a licensing authority for ABS, must have an appellate body to hear appeals from the decisions it makes as a licensing authority. More generally, setting up an appropriate appeals mechanism through the FTT would benefit ABS businesses directly, as it may result in increased consumer confidence in the overall regulatory framework for intellectual property legal services. Providing trade mark and patent attorney ABS firms with a right of appeal may also be seen as fairer from society's perspective as it signals an important fair market entry process for firms who want to become ABS. The proposal may therefore generate further economic gains for society, through providing greater confidence to consumers and market providers.

Policy objective

1.11 The policy objective is to put in place an appeal mechanism to hear appeals against decisions made by IPReg acting under delegation as a licensing authority for CIPA and ITMA. The costs and processes for the appeal mechanism are intended to be transparent, efficient, fair and public. The body hearing the appeals should have sufficient resources and expertise to deal with the potentially complex issues that ABS appeals may relate to and the FTT is considered to be the appropriate independent appellate body to fulfil that role. It is already the appellate body for the Council for Licensed Conveyancers (CLC) licensing authority decisions. Moreover, there has been a trend following the Review of Tribunals by Sir Andrew Leggatt to consolidate tribunal jurisdictions. The FTT now operates the unified tribunal service organised into Chambers, including the GRC. It is the stated policy position of the LSB that the FTT should hear appeals against decisions by all approved regulators and licensing authorities of legal services regardless of the type of legal service being provided and whether it is ABS or non-ABS. This will lead to greater consistency in decision making, enable a body of expertise to develop, and enable economies of scale to be achieved in relation to administrative and appellate functions.

Affected stakeholders

1.12 The following individuals, organisations and sectors are affected:

- IPReg – the body whose decisions will be appealed.
- CIPA and ITMA, if designated as licensing authorities, who have delegated their authorisation and regulatory functions to IPReg. Consequently CIPA and ITMA have a central interest in the appeals arrangements for the licensing decisions IPReg makes.
- HM Courts and Tribunal Service which contains the First-tier Tribunal as the body to which appeals will be made.
- Patent and trade mark attorney ABS firms (and applicants for an ABS licence) – who will be the subject of the decisions that are appealable.
- Consumers – who may ultimately benefit and bear the costs of the appeals arrangements.
- Legal Services Providers - suppliers of legal advice and representation services.

2. Costs and Benefits

2.1 This Impact Assessment identifies impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing the two options. The costs and benefits of Option 1 are compared to the do nothing option (Option 0). Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, there are important aspects of the proposal

that cannot sensibly be monetised. These might include how the proposal impacts differently on particular groups of society or changes in equity and fairness, either positive or negative.

Option 0: Base case (do nothing)

- 2.2 Doing nothing is not considered a feasible option, as without intervention in the form of an order under section 80 of the LSA 2007, there is no body with the power to hear and determine appeals against the decisions of IPReg when acting as a licensing authority. CIPA and ITMA could not therefore be designated as licensing authorities. The do nothing option is presented as a hypothetical base case only.
- 2.3 Because the do nothing option is compared against itself, its costs and benefits are necessarily zero, as is its Net Present Value (NPV being the difference between the money inflows and outflows from an option).

Option 1: The First-tier Tribunal acts as the appeals body for appeals against decisions of IPReg

Description

- 2.4 Under this option, an order would be made under section 80 of the LSA 2007 making provision for the FTT, through the GRC, to hear appeals against the decisions of IPReg when acting as a licensing authority.

Costs

HM Courts and Tribunals Service

- 2.5 HM Courts and Tribunals Service (HMCTS) would face additional costs associated with a potential increase in the volume of cases heard at the Tribunal. However, set up and operating costs (e.g. tribunal member sitting fees) will be recovered from IPReg by HMCTS, meaning there should be no net financial impact on HMCTS as a result of the proposal (see costs to IPReg/CIPA/ITMA outlined below).

IPReg/CIPA and ITMA

- 2.6 HMCTS has provided costs (which, as mentioned in 2.5, will be recovered from IPReg) for considering and hearing appeals as follows:
- Start up costs - £3,000
 - First year's running costs - £35,000
 - The unit running cost - £3,500
- 2.7 Start up costs cover update of the website, guidance, forms, staff and judicial training, senior judicial input into implementation, implementation time and expenses incurred by HMCTS. The running cost covers judicial cost for salaried and fee paid judges, administration for those appeals and use of HMCTS estate for both hearing and administration. If panel members were used they would be factored in to the cost per case.

2.8. The running costs aim to capture as much of the expenditure of bringing in a new appeal right as possible, even if that appeal right is expected to have no appeals in practice. However, it cannot be fully cost reflective - particularly on smaller appeals - as a lot of the preparatory work will be in-house and involvement by divisions within HMCTS. Legal, policy, judicial, communications and IT colleagues will be required and travel expenses, for instance, might be incurred. The same amount of work would need to be carried out if HMCTS were to receive 0 or 10 appeals. To that end, HMCTS policy is to charge for a minimum of ten appeals in the first year. This would be invoiced as soon as the main work to implement starts. Any appeals over that number, and in subsequent years, will be charged, on a quarterly invoice basis to IPReg, based on cost per case heard by the tribunals system. Therefore if IPReg did not have any appeals, it would not be required to make any payment after the initial payment - even if new judges require training in the future.

2.9 The number of cases referred to FTT in respect of IPReg licensing decisions is likely to be within the lower range of the 0-10 spectrum. Of the current firms IPReg regulates, approximately 40 firms are licensable, of which 9 are large or medium-sized, which provides some indication of the number of ABSs in the first year, if IPReg (CIPA and ITMA) is designated as a licensing authority. Therefore, the potential for appeals is from a very limited number of firms. It is also worth noting for comparison that to date no appeals to the FTT have been made from the pool of over 30 ABS firms licensed by the CLC. Moreover, since ITMA and CIPA delegated their regulatory functions to IPReg in January 2010, there have been no appeals to IPReg's Independent Adjudicator for decisions and sanctions of IPReg's Disciplinary Board. While these do not signal that no appeals will be made to the FTT from IPReg's licensing decisions, they do give some indication that the assumption of 0-10 cases per year is realistic. The table below illustrates the range of potential costs minimum and maximum range.

Number of cases	Potential range of case HMCTS costs for IPReg based on HMCTS estimate of £3,500 per case unit and after payment of start-up and first year running costs.
0-3 (Most likely)	£0-£10,500
4-6 (Less likely)	£14,000-£21,000
7-10 (Least likely)	£24,300-£35,000

2.11 Any additional IT and telephony costs for IPReg are expected to be negligible.

2.12 IPReg could incur costs associated with defending appeals, which may include the cost of legal advice and representation. The GRC has limited power to award costs against parties, so it is assumed that IPReg would normally be expected to bear its own legal costs. Given the probable low number of cases it is unlikely that costs will be significant in the context of IPReg's overall budget (£592,000 for 2014).

ABS businesses

2.13 It is assumed that the ABS subject to the decision concerned would be legally represented at an appeal. The expense of legal representation would be an additional cost to ABS businesses. Due to the low number of appeals, a very small number of individual ABS businesses would incur costs associated with preparing for appeals.

2.14 Any IPReg costs in relation to the appeal arrangements are likely to be negligible. Therefore costs passed on to trade mark and patent attorney ABS, through annual license fees, are also likely to be negligible.

Consumers of intellectual properties legal services

2.15 All regulatory costs may ultimately be passed on to consumers of legal services in the form of higher prices. This includes any additional costs associated with appeals in relation to IPReg decisions. However, as set out above, it is envisaged that these costs will be negligible.

Benefits

HM Courts and Tribunals Service

2.18 HMCTS would benefit from additional income if cases were referred to it. However, this income would be intended to cover set up and operating costs (e.g. tribunal member sitting fees), meaning there should be a neutral financial impact on HMCTS as a result of this option.

ABS

2.17 ABS patent and trade mark attorney firms would benefit under the proposal as they would have the right to appeal against the decisions of IPReg acting as a licensing authority. The right of appeal would apply in relation to the range of decisions listed in paragraph 1.6 of this Impact Assessment. Compared to the base case, ABS firms/those holding, or seeking to hold, roles within ABS would benefit directly from the ability to appeal a decision.

Society

2.19 The proposal may lead to increased consumer confidence in the intellectual property legal services regulated by IPReg because there will be an experienced and competent body in the form of the FTT to hear and make appeal decisions, which may provide economic welfare gains for society. Furthermore, giving ABS firms/those holding, or seeking to hold, specific roles within ABS the right to appeal decisions may be seen as fairer from society's perspective.

2.20 The recourse to an independent appeals mechanism will support the perception of fairness in the process and therefore encourage greater confidence in the regulatory decisions of IPReg as a licensing authority. This in turn signals fair entry to the market and an encouragement for new business models and entrants to ABS, which should enhance competition and consequently help to improve the efficiency of ABS and their provision of intellectual property services in the market.

Legal services providers

2.16 It is assumed that both IPReg and ABS businesses would be legally represented in an appeal. Any additional appeals that take place as a result of the proposal would therefore represent an increase in the demand for legal advice and representation services. Legal service providers would benefit from undertaking additional work.

3. Enforcement and Implementation

3.1 The assumption for the proposal is that IPReg will enforce licensing compliance and that the FTT will implement and operate the appeals system. It is anticipated that, subject to the statutory order timetable, it will be implemented from early 2015.

4. Specific Impact Tests

Equality Impact Assessment

4.1 After carrying out an initial impact assessment screening, we do not believe that the proposals will affect any sector of society more than another and we do not believe there are any significant age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation issues involved in this proposal. Therefore, after carrying out an initial screening we concluded that a full Equality Impact Assessment was not needed.

Competition Assessment

4.2 The Office of Fair Trading Report in January 2013 identified that ABS had removed a key barrier to market entry to the legal services market in general. Therefore, putting in place an appeals mechanism would allow the implementation of ABS, and hence enable the associated competition benefits in relation to services regulated by IPReg. This in turn will help with the government's overall objective of increasing competition and growth in the economy.

Small firms impact assessment

4.3 No monetised impact, but in research commissioned by the LSB into small business legal needs published in April 2013, help from legal services was highly associated with problems concerning intellectual property (27% compared to 11% for other categories of problems). The market for services provided by intellectual property legal firms is therefore an important one for small business. An independent appeals mechanism provided by the FTT should help encourage general confidence among small businesses, in the way which intellectual property legal services are provided.

Environmental Impacts

4.4 The proposal is not expected to have any environmental impacts of note.

Health Impact Assessment

4.5 No significant impacts on human health or the demand for health and social care services in the UK are anticipated as a result of the proposed option.

Human Rights

4.6 Article 6(1) of the European Convention on Human Rights, states that: *“...in the determination of civil rights and obligations..., everyone is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal established by law”*. Therefore human rights are likely to be enhanced by the right of an ABS to appeal a decision to a recognised independent tribunal such as the FTT.

Justice Impact test

4.7 As the proposed option is not expected to increase significantly the volume of cases that will go through the tribunal system, it is not expected that the proposal will have a significant justice impact. Nonetheless, there may be limited justice impacts.

Rural proofing

4.8 No rural impacts have been identified.

Sustainable Development

4.9 No sustainable development impacts have been identified.