

Application by the Association of Law Costs Draftsmen to Amend its Bye-Laws, Code of Conduct, Discipline and Complaints, Student Training Regulations and Publicity and Advertising Code

A report by the Office of Fair Trading to the Ministry of Justice on the likely competition effects of the Association of Law Costs Draftsmen modifying its Bye-Laws, Code of Conduct, Discipline and Complaints Procedure, Student Training Regulations and Publicity and Advertising under Section 29 and Schedule 4 of the Courts and Legal Services Act 1990

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1 INTRODUCTION

1.1 The advice below concerns the application made by the Association of Law Costs Draftsmen ('ALCD') to amend its Bye-Laws, Code of Conduct, Discipline and Complaints Procedure, Student Training Regulations and its accompanying annex A-L and Publicity and Advertising Code. This advice is given on the basis of the following:

- Information provided by the Ministry of Justice ('MoJ') to the Office of Fair Trading ('OFT') in a letter dated 6 March 2009
- A copy of the Bye-Laws
- A copy of the Code of Conduct
- A copy of the Discipline and Complaints Procedure
- A copy of the Advertising Code
- A copy of the Training Regulations and its accompanying annex A-L
- A Table which sets out the ALCD's responses to initial questions of the MOJ which sought clarification about its application
- A Table which sets out the ALCD's responses to the OFT questions dated 8 May 2009, and
- A Table which sets out the ALCD's responses to the OFT questions dated 20 May 2009.

1.2 The ALCD is a membership organisation that is responsible for the regulation, representation and ongoing education and development of individuals practicing specifically in the area of legal costs.

1.3 Under the Courts and Legal Services Act 1990 ('CLSA90') Section 29 and Schedule 4 (as substituted by Schedule 5 of the Access to Justice

Act 1999) if the ALCD wishes to modify its regulatory framework it must make an application to the Secretary of State for Justice.

- 1.4 Under section 29 and Schedule 4 of the CLSA90 if a body authorised to grant rights of audience or rights to conduct litigation makes an alteration to its qualification rules or rules of conduct, the alteration shall not have effect unless approved by the Secretary of State. The Secretary of State may seek the advice of the OFT who shall consider whether the proposed alterations would have, or be likely to have, any significant effect on competition.
- 1.5 As stated in the application of the ALCD, the main aim of the ALCD's amendments to its Bye-Laws, Code of Conduct, Discipline and Complaints Procedure, Student Training Regulations and Publicity and Advertising Code is to introduce a new category of members known as Costs Lawyers.
- 1.6 I am authorised by the OFT, under paragraph 12 of Schedule 1 of the Enterprise Act 2002, to carry out competition scrutiny of the proposed alterations as required by the provisions of the CLSA (as amended) set out above.
- 1.7 In its letter of 6 March 2009 the MOJ specifically asks for advice regarding the modifications made to Bye-Laws, Code of Conduct, Discipline and Complaints Procedure, Student Training Regulations and its accompanying annex A-L and Publicity and Advertising Code. As such the OFT has limited its advice to the changes made to the regulatory framework of the ALCD.
- 1.8 For reasons discussed in the following paragraphs we believe that allowing the ALCD to make these modifications will not have a significant effect on competition within the market for services provided by Law Costs Draftsmen.

2 BACKGROUND

2.1 The three main areas in which Law Costs Draftsmen provide their services are for dealing with¹:

- Solicitor and Client Costs
- Public Funded (legal aid) Costs
- Costs Payable Between Parties (Interpartes).

2.2 **Solicitor and Client Costs:** A client who is unhappy with the solicitor's bill has remedies available if she wishes to challenge it. A law costs draftsman may be instructed to prepare a detailed bill of costs for assessment, to advise on law and procedure and, subsequently, if instructed by a solicitor or a litigant, to argue in support or to oppose the bill.

2.3 **Public Funded (legal aid) Costs:** Where a solicitor is representing by a publicly-funded client, a detailed bill is usually required to be assessed either by the court or the Legal Services Commission ('LSC') before payment can be made. A law costs draftsman may be instructed to prepare written submissions in respect of any amounts disallowed by the LSC.

2.4 **Costs Payable Between Parties (Interpartes):** The unsuccessful litigant is usually ordered to pay the successful litigant's costs and, if those costs cannot be agreed, a detailed bill is prepared and served. The paying party then has to serve a schedule of points of those items in the bill she wishes to dispute before the bill is lodged at court and a detailed assessment hearing takes place at which the points are argued and a decision made by the court. A Law Costs Draftsman can be involved in all the necessary procedural steps for either party and can also be involved in preparing case budgets.

¹ Response from ALCD to OFT questions 8 May 2009.

- 2.5 The requirement to attend court to oppose or support a bill of costs may arise in any of the above three categories. Members of the ALCD who are qualified as Costs Lawyers have Right to Conduct Litigation and Rights of Audience and are therefore entitled to prepare for and appear in proceedings relating to costs disputes.
- 2.6 Dealing with Legal Costs is not reserved to members of ALCD. The ALCD estimates that ALCD members services form at most 50% of the market for general advice relating to legal costs and 50% of the market for services performed by Costs Lawyers.
- 2.7 Even if the market share of the ALCD is quite high, we believe that solicitors, barristers and litigants in person can exercise the Rights of Audience and the Right to Conduct Costs Litigation, thus the barriers to entry in the market for services performed by Costs Lawyers are low. This would suggest that the ALCD is unlikely to have any significant market power.

3 BYE-LAWS

- 3.1 The current Bye-Laws of the ALCD identify seven categories of members: Fellows, Associates, Diploma, Certificated, Students, Affiliates and Honorary. In the proposed Bye-Laws the categories of Costs Lawyers, Corporate Associates and Partnership Associates have been introduced and the Diploma and Certificated class of members have been withdrawn.
- 3.2 According to the ALCD,² the introduction of Corporate and Partnership Associates is considered necessary to anticipate the introduction of Multi Disciplinary Partnerships. As such the OFT believes that the introduction of Corporate and Partnership Associates will not have or be likely to have any significant effect on competition within the market for services provided by Law Costs Draftsmen.
- 3.3 According to the ALCD,³ The Diploma and Certified classes membership have been withdrawn since less than 1% of the member took advantage of the basic training which these Memberships provide. The OFT believes that the withdrawal of these classes of membership will not have or be likely to have any significant effect on competition within the market for services provided by Law Costs Draftsmen.
- 3.4 Costs Lawyers are defined at Paragraph 27 of the ALCD Bye-Laws as Fellows who, upon application, have received from the ALCD the Rights of Audience or the Right to Conduct Costs Litigation in accordance with Section 27 and 28 of the Courts and Legal Services Act 1990. According to the responses from ALCD to the OFT questions,⁴ Fellows who wish to gain Rights of Audience or the Right to Conduct Costs Litigation are required to undertake a two day course

² Response from ALCD to MOJ questions.

³ Response from ALCD to MOJ questions.

⁴ Response from ALCD to OFT questions 8 May 2009.

in order to qualify as Costs Lawyers and to be issued with a practising certificate to show the additional status.

3.5 The OFT recommends that in order to encourage applications and minimise uncertainty, the details and content of the two day course to obtain the status of Costs Lawyer should be well-publicised to members.

3.6 The OFT has been informed that the number of places available on the course is sufficient to satisfy the total number of applicants.⁵ The OFT therefore considers that the introduction of the new category of Costs Lawyers will not have or is not likely to have significant effect on competition.

⁵ Response from ALCD to OFT questions 20 May 2009.

4 CODE OF CONDUCT

- 4.1 Changes in these rules have been made to reflect the introduction of the new category of Costs Lawyers in the Bye-Laws. As such the OFT believes that the modifications of the Code of Conduct will not have or be likely to have any significant effect on competition within the market for services provided by Law Costs Draftsmen.

5 DISCIPLINE AND COMPLAINTS PROCEDURE

- 5.1 Changes in these rules have been made in order to clarify the discipline and complaints procedure. The OFT believes that certain and clear rules for the discipline and complaints procedure enhance transparency and objectivity and therefore increase competition. It is the OFT's opinion that these modifications will help to increase competition within the market for services provided by Law Costs Draftsmen.

6 STUDENT TRAINING REGULATIONS

- 6.1 Sections A and B of the Student Training Regulations have been redrafted and Sections C, D, E, F, G, H, I, J, K and L are new.
- 6.2 Section A paragraph 1 explains the aim and the objectives of the ALCD Modular Training Course. In the responses from ALCD to the MOJ it is argued that the introduction of the Modular format makes the course conducive with the type of work the individual Law Cost Draftsmen perform. The OFT believes that the introduction of a modular course will not affect competition. As such it is the OFT's opinion that this modification will not have or be likely to have significant effects on competition within the market for services provided by Law Costs Draftsmen.
- 6.3 Section A paragraph 3 lists the new categories of individuals that are to be exempted from the training course to become an ALCD member. These are individuals that have obtained, within the previous seven years, the following qualifications:
- A Law Degree, or
 - ILEX qualifications, or
 - Certificate of completion of the Law Society Legal Practice Course, or
 - The Bar Vocational Course.

These are to supersede the current categories of exemptions which cover individuals who:

- Have qualified as solicitors, barristers, Fellows of Members of the Institute of Legal Executives, or
- Can demonstrate a minimum of 5 years continuous service as a fee earner in the office of a solicitor

- Have a law degree
- Have been granted exemption from the training course, at the discretion of the Council, if exception circumstances apply.

6.4 The OFT recognises the importance of ensuring that the level of education and training to become a Law Costs Draftsman is sufficiently high in order to adequately protect consumers . In order to ensure that consumers of legal services and efficient service providers are not unnecessarily denied the benefits of competition, the right balance must be struck between requiring levels of training which are sufficient to ensure competence and imposing unnecessarily stringent requirements which have the effect of restricting entry to the profession.

6.5 The OFT's position on entry requirements is summarised in our 2001 Report on Competition in Professions (the 2001 Report).

'The openness of markets to new entrants is important to effective competition. This does not mean that requirements to pass a test or pay a subscription are never permissible under competition law. A requirement to have demonstrated basic competence is clearly justified where consumers are not well placed to assess the quality of service, as is usually the case in markets for professional services. Provided that necessary qualification thresholds are not manipulated to limit supply and force up price, there will not be a significant adverse effect on competition. This proviso cannot lightly be assumed to be met, however. There is a straightforward pecuniary incentive for incumbent producers, who largely control the professional bodies, to constrain entry below the level that would most benefit the public generally.'⁶

⁶ Competition in Professions, Office of Fair Trading, March 2001. paragraph 27
http://www.offt.gov.uk/shared_offt/reports/professional_bodies/oft328.pdf

- 6.6 The new Training Regulations has widened the criteria for exemption from the Training Course by exempting individuals with vocational qualifications as opposed to fully qualified professionals. On the other hand it does not grant exemption to individuals that can demonstrate a minimum of 5 years continuous service as a fee earner in a solicitor's office.
- 6.7 The OFT believes that these changes in criteria are unlikely to lead to a significant variation in the number of those obtaining exemptions. For this reason the OFT believes that these variations are unlikely to have significant effect on competition. However we would encourage ALCD to consider retaining the five year continuous service exemption as it is unclear why this rule has been revised.
- 6.8 Changes in rules B, C, D, E, F, G, H, I, J, K and L have been made in order to clarify the students training regulations. The OFT believes that clarifying the rules of the student training regulations enhances transparency and objectivity and therefore increases competition. As such it is the OFT's opinion that these modifications will help to increase competition within the market for services offered by Law Costs Draftsmen.

7 PUBLICITY AND ADVERTISING CODE

- 7.1 Changes in this Code have been made in order to clarify the rules pertaining the Publicity and Advertising Code. It is the OFT's opinion that these modifications will not have or be likely to have any significant effect on competition within the market for services provided by Law Costs Draftsmen.

8 CONCLUSION

- 8.1 The majority of the changes which have been made by the ALCD to the Bye-Laws, Code of Conduct, Discipline and Complaints Procedure, Student Training Regulations and its accompanying annex A-L and Publicity and Advertising Code appear to have been made either to help clarify their meaning or to make them consistent with the introduction of the new category of member known as Costs Lawyers and, as such, are unlikely to have any significant effect on competition.
- 8.2 The OFT believes that those provisions which have been introduced to clarify and minimise the exercise of discretion will enhance transparency and objectivity are likely to increase competition.
- 8.3 The introduction of a new category of member defined as Costs Lawyers and the new class of exemptions from training are unlikely to have a significantly effect on competition within the market for services provided by Law Costs Draftsmen.