FCA Consultation – 'Recovering the costs of the Office for Professional Body Anti-Money Laundering Supervision (OPBAS): fees proposals

A response by
The Chartered Institute of Legal Executives

08 January 2018

1. Introduction

1.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers.

1.2. CILEx is the Supervisory Authority listed in the Money Laundering Regulations 2017 for Chartered Legal Executives in England and Wales. CILEx has delegated the responsibility of the application of money laundering-related rules to its independent regulator CILEx Regulation Ltd.

1.3. This is because CILEx is also a designated Approved Regulator under the Legal Services Act 2007. A requirement under the Legal Services Act 2007 is to ensure that representation and regulatory matters are separated so that regulation can be carried out independently. CILEx Regulation is the independent regulator of members of CILEx, those who are not members, but who are authorised to undertake reserved legal activities, and who do so in their own entities.

1.4. It is important to set this out at the outset because CILEx continues to be concerned that the practical consequences of this arrangement which applies to us, and other Supervisory Authorities in the legal sector, through the Legal Services Act, as well as the regulatory approach and its prevailing direction in the sector, have not been completely appreciated in the context of its influence on current AML regulation and impact on the proposal for the creation of OPBAS as part of this consultation. The Professional Body Supervisors (PBs) vary in structure, size of regulated community and modus operandi. Given the lack of clarity around many of the proposed elements of the OPBAS set-up and ongoing work, care will have to be taken that PBs contribute a fair proportion of their processes and resources to OPBAS, as reflects their relative size and lower level of regulatory risk, and do not carry disproportionately large burdens.

2. General points

2.1. As with previous related consultation responses[1], CILEx understands the government's rationale for creating OPBAS and appreciates what it is

[1] HM Treasury's 'Anti-money laundering supervisory regime: response to the consultation and call for further information', April 2017: https://www.cilex.org.uk/~/media/pdf_documents/main_cilex/policy_and_governance/consultation_responses/cilex_submission_-_anti-money_laundering_supervisory_regime_call_for_further_evidence.pdf?la=en

intended to bring to AML supervision: proper focus on dealing with the corrosive effect of increasing amounts of money laundering affecting the country, its economy and its international standing must be welcomed.

2.2. However, the FCA's proposals in this consultation paper could be clearer. There is a real lack of clarity around how the running costs of OPBAS have been estimated and, without that, it is difficult to make any assessment of the likely levels of fees the PBs will actually be charged.

2.3. As previously stated[2], CILEx continues to have reservations that the outcomes intended by the creation of OPBAS will not actually come to fruition, nor has any evidence been offered to support the supposition that any anticipated benefits will be achieved. The draft FCA Sourcebook did not provide sufficient detail or clarity to give real assurance that the role of OPBAS will truly add value to the arrangements that are already in place through the various current supervisors. There remains a lack of detail too in relation to how the effectiveness and value added by OPBAS will be measured: perhaps there is, or there is intended to be, a residual role for HM Treasury to develop and apply those measures as they are likely to have capacity to do so (see 2.7 below).

2.4. Nor is there any further clarity in relation to what it is envisaged OPBAS will doing and therefore the numbers of staff and other resources it needs; consequently, the funding level required does not seem to be on any firm foundation. There are references within the consultation paper itself[3] that there is this uncertainty. Although discussions[4] have been useful in some ways, they have not helped with adding much further clarity: in discussions it was suggested that the OPBAS staff complement might, for example, comprise 10 associates, 3 (shared) policy officers and 1 manager, with an uplift added for caution, though it was at the same time admitted that that team does not yet know what its work will involve.

2.5. CILEx assumes that in order to develop the OPBAS proposals the FCA would in the first place have made an assessment of priorities and the volume of work, and the staffing, salaries, premises, and shared services etc, needed to deliver them. It does not seem acceptable, as was confirmed at the 01

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and 'Anti-money laundering supervisory review', August 2017: https://www.cilex.org.uk/~/media/pdf_documents/main_cilex/policy_and_governance/consultation_responses/cilex_submission_-_aml_supervisory_review_consultation_response.pdf?la=en

[2] CILEx response to FCA Consultation – 'Office for Professional Body Anti-Money Laundering Supervision: a sourcebook for professional body supervisors', 23rd October 2017: https://www.cilex.org.uk/~/media/pdf_documents/main_cilex/policy_and_governance/consultation_responses/cilex_submission_-_fca_opbas_sourcebook_for_pbss_final.pdf?la=en

[3] For example, at para 2.13

[4] Such as the roundtable at the FCA on 01 December 2017.

December 2017 roundtable, that the figures are a working assumption only, rounded up to the nearest £1/2m; nor that year 1 objectives are hard to define as the initial key objective is to understand the work the PBs currently do. Without a realistic estimate of the type and volume of work OPBAS will be undertaking, neither the FCA nor any stakeholders can have confidence in the service, the funding required, or the costs to PBs.

2.6. CILEx believes that either that business case development work should have been conducted in advance of floating these proposals or, if that work has been done, it should be shared with all PBs. The legal sector PBs in particular[5] have experience and an expectation of an oversight regulator operating with this level of transparency through their relationships with the Legal Services Board (LSB). Such inclusion and engagement build the confidence and collaborative working that seems to be lacking in the OPBAS scenario. That the details of the OPBAS budget will not be available until the publication of the FCA's Business Plan in May/June 2018 (as was also said at the 1st December roundtable) is at best far from that level of transparency, and at worst indicative of a willingness to let the PBs bare all exploratory developmental costs.

2.7. It is clear that the new OPBAS arrangements, being funded in this way, will deliver savings to HM Treasury, who have been completely open about the link between the development of the OPBAS arrangements and government efficiency targets.[6] : In that context, it is demonstrably reasonable that government should, as an absolute minimum, cover the exploratory development costs which will be redeemed through subsequent savings.

2.8. In the interests of transparency we expect HM Treasury to detail how any savings achieved through the OPBAS scheme will be spent, and for this to include any ongoing costs involving the quality assessment of OPBAS's effectiveness and value (see 2.3 above).

3. Responses to specific questions

Question 1: Do you have any comments on our proposed application fee of £5,000 for professional bodies that wish to be added to the list of self-regulatory organisations in Schedule 1 to the MLRs?

3.1. CILEx finds it difficult to envisage scenarios in which professional bodies, not already listed as AML Supervisors under Schedule 1 of the MLRs, would apply to be so. That said, given, as the consultation paper itself

[5] As distinct from the accountancy PBs.
[6] As confirmed at 01 December 2017 roundtable.

acknowledges[7], that the FCA has '*not fully determined what will be involved in reviewing each professional body's application'* and that it is not clear what '*a moderately complex application under FSMA[8]'* entails, it is difficult to see how the charge of £5,000 has been reached. However, CILEx agrees that, given these circumstances, it is right that the level of the charge should be reviewed based on experience of handling actual applications when they happen i.e. that the principle to charge an application fee is fair but flexibility as to the level of that charge should be retained; this is to ensure that, should the £5,000 prove to be too low, the costs of new-joiner PBs should not unfairly be passed to existing PBs to bear.

Question 2: Do you have any comments on the different measures we have considered for the tariff base for OPBAS fee-payers? Are you aware of any other measures we should consider?

3.2. CILEx agrees with the FCA's preferred measure of '*supervised persons who are individuals'* as set out in the consultation paper[9]*.* However, CILEx acknowledges that this will have to be applied consistently by all PBs to ensure all are calculating on the same basis. On that basis, there is an emerging consensus amongst PBs that puts some necessary detail on that definition by relating it to '*beneficial owners, officers and managers*'. This has the advantage of making the definition more specific, promoting consistency of application by all PBs and being anchored on the MLRs[10].

3.3. The other measures discussed are not appropriate:

3.3.1. CILEx agrees that the '**flat fee**' measure would disproportionately affect smaller fee payers.

3.3.2. CILEx agrees that the '**relevant persons** (as defined in regulations 3 and 8 of the MLRs)' measure is not sensitive enough to differentiate between large corporations as opposed to small firms or individuals and therefore would neither accurately map to the regulatory risk represented by supervised members/firms nor allow for some PBs only supervising individuals and no firms.

3.3.3. CILEx also agrees that the '**membership**' measure is similarly not sensitive enough to arrive at a fair charge for all PBs. For the reasons set out in the consultation paper[11], this does not properly get to those individuals who are supervised for the purposes of the obligations in the MLRs and could be better defined[12].

[7] At para 2.12
[8] Ibid, para 2.13
[9] Ibid, para 2.41
[10] S26 'Prohibitions & Approvals
[11] At paras 2.23 – 2.25
[12] See 3.2 above

3.3.4. CILEx agrees that the '**supervisory resources**' measure is also inappropriate as it would penalise those PBs that had to use the most resources to fulfil that role.

3.3.5. CILEx also agrees that an '**income**' measure would not work as the PBs vary greatly, with income from a variety of sources and membership fee-setting policies that do not explicitly relate to AML-related activity specifically.

3.4. In relation to the supply of data relating to the preferred measure on which the tariff will be calculated, CILEx agrees that the timing set out in the consultation paper[13] should be appropriate and that, rather than a few PBs delaying the rest if they are unable to obtain the data, they should use the most recent figure supplied to the Treasury[14].

Question 3: Can you suggest any improvements to the definition of our preferred measure for OPBAS fees of 'supervised persons (under the MLRs) who are individuals'?

and

Question 4: Can you suggest ways of consistently identifying those individuals who are supervised by professional body supervisors as relevant employees of relevant persons? Are there risks of double-counting? If so, how can we avoid them?

3.5. As stated above[15], the definition, or the guidance around it, of supervised persons should have greater clarity by relating it more explicitly to individuals supervised for the purposes of compliance with the MLRs.

3.6. As the consultation paper itself acknowledges[16], Schedule 4 has been interpreted by some PBs as requiring information about their total membership. This is understandable given the drafting. However, it would in CILEx's view be disproportionate and cannot be right or what is intended: not every member will be undertaking activities that engage AML provisions; some members may be employed by firms regulated by other PBs and, yet others may be employed in unregulated entities. It would be particularly disproportionate to expect legal PBs' regulatory reach to extend to members working in firms not regulated by it, or any other legal PB, and not undertaking reserved legal activities[17]. CILEx therefore supports the emerging consensus among PBs for relating the definition to '*beneficial owners, officers and*

[13] Ibid, para 2.42
[14] Ibid, para 2.43
[15] 3.3.3
[16] At paras 2.23 – 2.25
[17] Ss 12-13 Legal Services Act 2007 - for which regulatory authorisation to practise is required.

managers'.

3.7. As such, the present suggested drafting in Appendix 2[18] simply replicates the potential confusion, around what is intended by the definition of relevant or supervised persons, by reference to the relevant legislation, and is therefore not sufficiently clear. It should be amended to include reference to '*beneficial owners, officers and managers*' and could also more usefully, at least in any accompanying guidance, set out in plain language how the legislative definitions should be interpreted for the purposes of OPBAS and its tariff setting.

3.8. A starting point for achieving that clarity might also be to focus on firms regulated by each PB, individuals employed by those firms, and thereafter self-employed sole traders/TCSP practitioners who may hold client money and engage the MLRs. Maintaining the focus on the firm first and its employees thereafter would minimise the genuine risk of double-counting.

3.8.1. For example, CILEx's regulatory oversight includes those running their own firms, but also those employed in SRA-regulated firms. This approach would mean that for members in those firms, compliance with the MLRs would be driven by the SRA's regulation of those firms. We understand that CILEx Regulation's starting point would, similarly, be the firms regulated by it and their employees (and self-employed sole traders/TCSP practitioners); it would therefore not wish to duplicate the regulatory burden on individuals working in SRA-regulated firms who have legitimate reason to be members of another PB.

3.9. This approach is also consistent with one of the principles of the Legal Services Act, which sets the current regulatory framework for legal services, in which regulation of the firm takes priority over regulation of the individual in that firm[19]. The same principle might be applied by other PBs in a similar position[20] and thus avoiding double-counting. This approach would also have the benefit of largely mapping where the greatest regulatory/compliance risk might be as FCA has previously acknowledged that the largest risks are likely to be present in the largest firms.

Question 5: Do you think we should set a minimum fee for the OPBAS levy? If so, is £5,000 a reasonable contribution from those professional body supervisors paying minimum fees only?

[18] Referred to in para 2.27 of the consultation paper.

[19] S52 Legal Services Act 2007 – designed to prevent regulatory conflict between a regulator of a firm and a regulator of individuals within the firm where that regulator is different.

[20] For example, members of the Chartered Institute of Taxation working for ICAEW-regulated firms might be regulated by ICAEW whereas CIOT self-employed/TCSP practitioners would be covered by CIOT.

3.10. CILEx agrees that there is some sense to the concept of a minimum fee but believes the most proportionate solution would to have a tariff sensitive enough to link directly to the number of supervised persons regulated by a PB. However, as referenced in the General Points above, this view is tempered by a lack of any real indication of what OPBAS will actually be doing and what the trues costs will be. Whilst we therefore can see the logic of the application of a Minimum Fee as a principle from FCA's perspective, this is done cautiously, and we reserve our position on the actual level of the fee until the greater anticipated clarity emerges. Linking the fee to the number of those supervised would however in particular ensure that the smallest PBs are not paying a disproportionately high level of fee.

3.11. In considering the level of the Minimum Fee, the expectation that PBs will contribute to the costs of FIN-NET or SIS will also have to be factored in which could amount to approximately a further £5,000 cost. From the limited exposure to the details of those arrangements that CILEx has had, however, there seems to be little demonstrable added value to participating in that arrangement. In addition to that, the FCA has previously estimated that an extra £39,800 can be added in to reflect additional operational costs likely to be incurred by each of the PBs through the OPBAS arrangements.[21]

Question 6: Do you believe we should spread recovery of the set-up costs and accumulated costs of OPBAS over two years?

3.12. CILEx believes that the period over which the recovery of the set-up and accumulated costs of OPBAS should be greater than 2 years.

3.13. As stated above, it is not yet clear what OPBAS will actually be doing, nor the resources that it will require to do it. Therefore, it seems to CILEx to be sensible and reasonable to allow enough time for greater certainty to crystallise in relation to the real costs of OPBAS. In this way HM Treasury, FCA, PBs and others can be more confident of what the actual set-up and ongoing costs are.

3.14. In addition, this allows enough time to identify any savings accruing to government (HM Treasury) which might contribute to OPBAS set-up costs, as referred to above.[22]

[21] Para 3.5 of FCA Consultation – 'Office for Professional Body Anti-Money Laundering Supervision: a sourcebook for professional body supervisors', 30th October 2017
[22] Para 2.7

4. Conclusion

4.1. As CILEx has previously stated in other OPBAS-related consultation responses, there is an obvious need for there to be enhanced co-ordination in the face of the increasing challenges of tackling money laundering. The OPBAS approach has the potential to add value to achieving a more coordinated and consistent response to the challenges of anti-money laundering. However, there needs to be a greater level of detail and clarity in the proposals to understand what OPBAS will actually do, what the costs of its activities will be, what resources it therefore requires, how it will add that value, and how that effectiveness and performance will be measured.

4.2. While there remains uncertainty to as to the likely cost of the new arrangements, it makes it all the harder for supervisors to comment and plan on practical arrangements and their potential associated costs.

4.3. CILEx's view of the OPBAS model therefore remains a qualified one until that greater clarity emerges.

Please contact the individual below for further contributions that may be required from the answers provided.

For further details

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