

EXPLANATORY MEMORANDUM TO
THE LEGAL SERVICES ACT 2007 (FUNCTIONS OF AN APPROVED
REGULATOR) ORDER 2009

2009 No. 3339

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Order amends an inadvertent drafting error in the Legal Services Act 2007 (LSA 2007) which, if left uncorrected, would, on commencement of the relevant provisions (expected on 1 January 2010), result in the Institute of Trade Mark Attorneys (ITMA) being unable to regulate trade mark attorney work undertaken outside the UK. Correcting the error will also ensure that the scope of regulation applying to trade mark attorneys mirrors the scope of regulation applying to patent attorneys.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The required amendment is being made under the provisions of the LSA 2007 which establishes a new regulatory framework for the provision of legal services in England and Wales. The amendment is being made under section 69(1) which provides for the Lord Chancellor, by order, to modify, or make other provision relating to, the functions of an approved regulator or any other body. Section 69(2) stipulates that such an order may only be made on the recommendation of the Legal Services Board (LSB), as described in that subsection. The LSB has made such a recommendation in relation to the required amendment.

5. Territorial Extent and Application

5.1 This instrument applies to work carried out by trade mark attorneys registered in England and Wales.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State, Bridget Prentice, has made the following statement regarding Human Rights:

“In my view the provisions of the Legal Services Act 2007 (Functions of an Approved Regulator) Order 2009 are compatible with the Convention rights.”

7. Policy background

- *What is being done and why*

7.1 At present, there is a drafting discrepancy between the two Statutory Instruments which govern the registration of patent attorneys (SI1457/1990) and the registration of trade mark attorneys (SI1458/1990). The discrepancy is that the definition of trade mark attorney work in the SI1458/1990 does not include the words “or elsewhere” after “the UK” in describing the geographical scope of such work, unlike the equivalent definition in SI1457/1990. Both SIs will be repealed as a result of the commencement of relevant provisions of the LSA 2007, expected in January 2010.

7.2 However, the omission has been inadvertently replicated in new section 83A to be inserted in the Trade Marks Act 1994 upon commencement of section 184 of the LSA 2007 (also expected in January 2010). There is no policy intention behind the omission which is solely a drafting error. However, the omission creates a significant practical problem. New section 83A makes provision for the person keeping the register of Trade Mark Attorneys to make rules which regulate the carrying on of “trade mark agency work” by registered persons. It is the related definition of “trade mark agency work” in which the omission occurs and the effect is to limit the geographical scope of regulation to the UK only. However, a significant amount of trade mark agency work is, in practice, undertaken outside the UK particularly in relation to applications, on behalf of UK clients, for the registration of Community Trade Marks at the Office for Harmonisation in the Internal Market in Spain.

7.3 The policy intention behind new section 83A was never to limit the regulation of trade mark attorney work in this way and, on the contrary, its objective was to maintain parity between the regulatory frameworks of ITMA and CIPA in respect of the regulation of work undertaken outside the UK.

7.4 The LSB made its recommendation to amend section 83A(7) with a view to ITMA, as an approved regulator, being able to carry out its role more effectively or efficiently, in satisfaction of the test in section 69(3)(c). Aspects of the work connected with applying for or obtaining trade marks outside the UK involve reserved legal activities in England and Wales.

- *Consolidation*

7.5 As the amendment makes a relatively minor change to the functions of a regulator under the LSA 2007, no issues of consolidation arise.

8. Consultation outcome

8.1 The LSB is obliged to consult wherever it recommends a statutory instrument to the Lord Chancellor under section 69(2) of the LSA 2007. Accordingly, a consultation paper, together with a draft Order and draft Impact Assessment, was circulated to consumer organisations, regulatory bodies, other professional representative bodies and other key stakeholders. Six responses were received which either provided no comment on or approved the proposed amendment.

9. Guidance

9.1 As the purpose of the amendment is self-evident and self-contained, no guidance has been issued.

10. Impact

10.1 As a matter of good practice, an Impact Assessment is attached to this memorandum setting out the key issues which have been considered and consulted upon.

11. Regulating small business

11.1 The legislation applies to small business.

12. Monitoring & review

12.1 Following implementation of the new regulatory framework, expected in January 2010, responsibility for the monitoring and review of this policy will lie with the LSB. This policy may be reviewed once it has been used in practice.

13. Contact

Heather Atkinson at the Ministry of Justice Tel: 020 3334 4204 or email: heather.atkinson@justice.gsi.gov.uk can answer any queries regarding the instrument.

Summary: Intervention & Options

Department /Agency: Ministry of Justice	Title: Impact Assessment of Amendment to the Legal Services Act 2007
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Stage: Final Proposal	Version: Final version	Date: 07/10/2009
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Related Publications:
Legal Services Board Consultation relating to an Order to be made under section 69(1) of the Legal Services Act 2007 on the scope of regulation by the Institute of Trade Mark Attorneys – discussion paper, responses to consultation and letter to the Lord Chancellor; available at:
(http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm)

Available to view or download at:

<http://www.opsi.gov.uk> and <http://www.justice.gov.uk/publications/legalservicesbill.htm>

Contact for enquiries: Heather Atkinson

Telephone: 020 3334 4204

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

The Order amends an inadvertent drafting error in the Legal Services Act 2007 which, if left uncorrected, would, on commencement of the relevant provisions, result in the Institute of Trade Mark Attorneys (ITMA) being unable to regulate trade mark agency work undertaken outside the UK. In practice, such work represents about 60% of work undertaken. Not making an amendment would also create an uneven playing field with the regulation of patent attorneys.

What are the policy objectives and the intended effects?

The policy objectives are to allow the continuing regulation of trade mark agency work undertaken outside the UK and to ensure that the scope of regulation applying to trade mark attorneys mirrors that applying to patent attorneys.

What policy options have been considered? Please justify any preferred option.

Excluding the do nothing baseline, the only option considered is to correct the drafting error. This would rectify the problems identified above. It would also maintain the current legislative position which allows ITMA to regulate trade mark agency work outside the UK.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

This policy may be reviewed once it has been used in practice.

Ministerial Sign-off For Final Proposal Impact Assessments:

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:

Date:

Summary: Analysis & Evidence

Policy Option: 0 (do nothing baseline)	Description: Under the 'do nothing' option, the ITMA would be unable to regulate trade mark agency work undertaken outside the UK.
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups'		
	One-off (Transition) Yrs			
	£			
	Average Annual Cost (excluding one-off)			
	£	Total Cost (PV)	£	
Other key non-monetised costs by 'main affected groups' Non-UK trade mark agency work would no longer be regulated. This would subject UK firms and consumers to greater risk when purchasing offshore trade mark agency work.				

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups'		
	One-off Yrs			
	£			
	Average Annual Benefit (excluding one-off)			
	£	Total Benefit (PV)	£	
Other key non-monetised benefits by 'main affected groups' Registered patent attorneys would benefit from no longer having to bear a regulatory burden, and any associated cost, in terms of their work abroad.				

Key Assumptions/Sensitivities/Risks It is assumed that the lack of regulatory oversight would have no significant impact on the demand or supply of registered offshore trade mark agency work.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?	England and Wales				
On what date will the policy be implemented?					
Which organisation(s) will enforce the policy?	ITMA/IPReg/LSB				
What is the total annual cost of enforcement for these organisations?	£				
Does enforcement comply with Hampton principles?	Yes				
Will implementation go beyond minimum EU requirements?	Yes				
What is the value of the proposed offsetting measure per year?	£ Nil				
What is the value of changes in greenhouse gas emissions?	£ Nil				
Will the proposal have a significant impact on competition?	No				
Annual cost (£-£) per organisation (excluding one-off)	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">Micro</td> <td style="width: 25%; text-align: center;">Small</td> <td style="width: 25%; text-align: center;">Medium</td> <td style="width: 25%; text-align: center;">Large</td> </tr> </table>	Micro	Small	Medium	Large
Micro	Small	Medium	Large		
Are any of these organisations exempt?	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> </tr> </table>	No	No	N/A	N/A
No	No	N/A	N/A		

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)
Increase of £ nil	Decrease of £ nil	Net Impact £ nil

Key: Annual costs and benefits: (Net) Present

Policy Option:
1

Description: Under option 1 the Legal Services Act 2007 drafting error would be corrected, returning the offshore trade

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups'
	One-off (Transition)	Yrs	
	£		
	Average Annual Cost (excluding one-off)		
£		Total Cost (PV)	£
Other key non-monetised costs by 'main affected groups' Making the amendment would prevent the benefits associated with the 'do nothing' base case materialising.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'
	One-off	Yrs	
	£		
	Average Annual Benefit (excluding one-off)		
£		Total Benefit (PV)	£
Other key non-monetised benefits by 'main affected groups' Making the amendment would prevent the additional risk associated with the 'do nothing' base case materialising.			

Key Assumptions/Sensitivities/Risks

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?	England and Wales			
On what date will the policy be implemented?	01/01/2010			
Which organisation(s) will enforce the policy?	ITMA/IPReg/LSB			
What is the total annual cost of enforcement for these organisations?	£			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	Yes			
What is the value of the proposed offsetting measure per year?	£ Nil			
What is the value of changes in greenhouse gas emissions?	£ Nil			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)		
Increase of	£ nil	Decrease of	£ nil	Net Impact	£ nil

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

1. Introduction

Scope of the proposals

This Impact Assessment assesses the costs and benefits of amending an inadvertent drafting error in the Legal Services Act 2007 which, if left uncorrected, would, on commencement of the relevant provisions, result in the Institute of Trade Mark Attorneys (ITMA) being unable to regulate trade mark agency work undertaken outside the UK which, in practice, represents about 60% of work undertaken. It would also create an uneven playing field with the regulation of patent attorneys.

If the error is rectified in advance of the commencement of the relevant provisions of the Legal Services Act 2007 on 1 January 2010, ITMA will be able to assume comprehensive regulatory powers over the full range of trade mark agency work on that date.

Organisations in the scope of the legislation

The legislation will primarily impact the ITMA. There should be little or no impact on other approved regulators. The exception is the Chartered Institute of Patent Attorneys (CIPA), for which the amendment will re-create a level playing field in respect of the regulation of IP work abroad. This is relevant because about 350 practitioners are dually qualified as both registered patent attorneys and registered trade mark attorneys.

2. Rationale for Proposals

The policy objectives are to enable the continued regulation of trade mark agency work undertaken outside the UK and to ensure that the scope of regulation applying to trade mark attorneys mirrors that applying to patent attorneys.

Economic Rationale

The conventional economic approach to Government intervention is based on efficiency or equity arguments. Government intervenes if there is a perceived failure in the way a market operates ("market failures") or if it would like to correct existing institutional distortions ("government failures"). Government also intervenes for equity (fairness) reasons. Intervention in this case would be made to correct an existing distortion, which will come into effect on 01/01/2010.

3. Cost Benefit Analysis

The Impact Assessment and HM Treasury Green Book Guidance require that all options are assessed relative to a common 'base case' over the appropriate appraisal period of the relevant 'do-something' options. In this case, the base case would be to allow offshore trade mark

attorney work to become unregulated. The 'do something' option is to fix the drafting error, returning the market to its current regulated position.

Option 0: do nothing

Description

Under the do nothing base case, offshore trade mark attorney work would become unregulated from 01/01/2010.

Costs

There is no legal requirement to be a registered member of ITMA in order to provide the services of a trade mark attorney. Indeed, many clients choose to be represented by non registered attorneys. However, many attorneys do register, incurring the costs of registration and ongoing regulation. It is assumed that they do so as the costs of registration are outweighed by the benefits that registration brings, for example registration may be seen as a necessary requirement by some clients. Such requirements are not considered likely to change in the base case. This IA therefore assumes that there would be no change in the demand or supply of registered trade mark attorneys working offshore in the do nothing option.

There would, however be costs for UK clients. The value of ITMA membership to UK clients is twofold: (1) It acts as a signal of quality, given membership requires a registration process to be completed; and (2) it reduces risk when hiring a registered attorney, given they will be subject to regulatory oversight by ITMA. Lack of oversight in the base case would increase the risks faced by UK clients. There could be an additional risk that currently registered attorneys could opt out of regulatory oversight in respect of work undertaken within the UK, but this additional risk is considered minimal, given there is currently no legal requirement to be registered.

Benefits

It is assumed that lack of regulatory oversight would have no significant impact on the demand for work to be undertaken offshore by registered attorneys, given registered attorneys will still have passed the tests required in order to become registered. Therefore, there may be some benefits accrued by trade mark attorneys given they will no longer have to bear a regulatory burden, and any associated cost, in terms of their work abroad.

Net Impact

Neither the costs or the benefits in the base case have been quantified, but it is expected that the costs to UK clients would outweigh any benefits that would accrue to attorneys, making the net impact negative.

Option 1: Amend the Legal Services Act 2007

Description

Under Option 1, the drafting error in the Legal Services Act 2007 would be corrected, returning the market for offshore trade mark attorney work to its current regulated position.

Costs

Compared to the base case, attorneys would be required to bear the costs associated with their offshore work being regulated.

Benefits

Making the amendment would prevent the costs outlined in the base case from occurring.

Net Impact

Option 1 reverses the impacts established in the 'do nothing' base case, returning the offshore market to its current regulated position. The benefits of doing so are considered to outweigh the costs of doing nothing.

4. Impact Tests

Small Firms Impact Test – the proposed amendment is not expected to have a disproportionate effect on small firms.

Competition – the proposed amendment is not expected to have a negative effect on competition. However, if the amendment is not made, trade mark attorneys will, under the new regulatory arrangements, have no option but for their work abroad to be unregulated. This could have an adverse impact in that, in order to ensure that they will benefit from the protection of regulation, clients could opt, where possible, to have their work undertaken by IP practitioners other than trade mark attorneys. It could therefore create an uneven playing field in terms of competition. In practice, however, this is not considered likely: clients are assumed to prefer to maintain established professional relationships with trade mark practitioners.

Legal Aid – the proposed amendment is not anticipated to place any significant burden on legal aid as public funding is not generally available for IP work.

Race/Disability/Gender Equalities – the impact of the proposed amendment is expected to be negligible as it essentially preserves the position under the current regulatory arrangements for trade mark agency work undertaken outside the UK. The resulting maintenance of ITMA's and IPReg's regulatory scope and function will encourage a strong, effective, diverse and independent profession.

The proposed amendment is not considered to have any significant environmental, health or rural impacts. There are no anticipated human rights implications.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

Annexes

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