

EXECUTIVE NOTE

THE LICENSED LEGAL SERVICES (INTERESTS IN LICENSED PROVIDERS) (SCOTLAND) REGULATIONS 2012

SSI 2012/154

The above instrument was made in exercise of the powers conferred by sections 67(2)(a) and (4)(c) and (d) and 146(2)(a) of the Legal Services (Scotland) Act 2010 (“the 2010 Act”). The instrument is subject to the negative procedure.

Background

The 2010 Act allows solicitors who offer legal services in Scotland to operate using certain business models which were previously prohibited. It removes restrictions on solicitors entering into business relationships with non-solicitors, allowing investment by non-solicitors and external ownership, and creates a regulatory framework in which the new types of business will operate. The new types of business are called licensed legal services providers (“licensed providers”) and will be licensed and regulated by approved regulators which in turn will be approved, authorised, and regulated by the Scottish Ministers.

The 2010 Act makes various provisions regarding the ownership and control of licensed providers as well as other entities or bodies. In particular:

- section 49(1) provides that, in order for an entity to be eligible to be a licensed provider, the qualifying investors in it must have at least a 51% stake in the total ownership or control of the entity;
- section 62(1) provides that, before issuing a licence to a licensed provider, or renewing it, an approved regulator must be satisfied that the non-solicitor investors in the body are fit to have such an interest (and must continue to monitor the fitness of such investors as appropriate);
- section 63(4) provides that an investor who has less than a 10% stake in the total ownership or control of a licensed provider is an exemptible investor¹;
- section 64(4) provides that, where a non-solicitor investor in a licensed provider is a body rather than an individual, the fitness of the persons having ownership or control of the body or any other material interest in it is relevant for the determination of whether the body itself is fit to have an interest in a licensed provider; and
- section 67(6) defines an “investor” in a licensed provider as any person who has ownership or control of the licensed provider or a material interest in it.

Given the importance of clearly identifying the persons affected by the provisions mentioned above, it is considered necessary to clarify exactly what is meant by these terms.

¹ Under section 63(2), approved regulators need not apply the fitness for involvement test (required under 62(1)) to exemptible investors. However, the approved regulator’s licensing rules must set out the circumstances in which this provision will be used, and may also specify a threshold lower than 10%.

Policy objectives

The policy objective is to set out who is to be regarded as having an interest in a licensed provider in various circumstances, for the following purposes:

- to clarify when qualifying investors are to be regarded as having a majority share in the ownership or control of a licensed provider, for the purposes of section 49 (which requires that at least a 51% stake in licensed providers lie with solicitors or other regulated professionals);
- to enable the clear identification of investors (as defined in section 67(6) of the 2010 Act) who are subject to the fitness for involvement test set out in section 62 of the 2010 Act;
- to clarify the extent to which approved regulators can examine the fitness of those with an interest in non-solicitor investors which are bodies, when assessing the fitness of those bodies (under section 64(4) of the 2010 Act); and
- to ensure that the exemptible investor provisions in section 63 of the 2010 Act cannot be used to avoid the fitness for involvement test through the spreading of a significant interest over several associated persons.

In relation to the majority ownership requirements in section 49, regulation 2 sets out the circumstances in which qualifying investors are to be regarded as having a 51% share in a licensed provider. In particular, the 51% majority ownership is satisfied when the qualifying investors have or control at least 51% of the voting rights, and would be entitled to at least 51% of the income and at least 51% of the assets.

For the purposes of the general definition of “investor” (which determines, among other things, who is to be subject to the fitness for involvement test), regulation 3 sets out that a person has ownership or control or a material interest in a licensed provider if they have or control any voting rights, or if they are entitled to any share of the income or the assets.

Regulation 4 clarifies the extent to which regulators can consider the fitness of those who control corporate investors by setting out what is to be regarded as an interest in a body that is a non-solicitor investor in a licensed provider. It sets out that a person may be regarded as having such an interest if they have or control any voting rights of the body in question, or if they are entitled to any share of its income or assets. This can also be applied to those with such an interest in bodies which have an interest in licensed providers (and so on). However, in order to allow approved regulators to exercise their discretion and apply the fitness test in a proportionate manner, there is no requirement that a person *must* be regarded as having an interest under regulation 4.

Regulation 5 relates to the exemptible investor provisions in section 63, which allow approved regulators to disapply the fitness for involvement test in relation to those with a small stake in a licensed provider. In order to prevent persons seeking to avoid the fitness test by spreading a significant interest between several individuals or companies, regulation 5 sets out that a person is only to be considered as having less than a 10% (or other figure as specified) stake if they and their associates, taken together, meet the criteria specified (which are similar to those in regulations 1-4).

Finally, the definition of “associate” is provided in regulation 6 (which includes, for example, a spouse or civil partner of an investor).

Consultation

There is a general requirement under section 5 of the 2010 Act for the Scottish Ministers to consult, where considered appropriate, such persons and bodies as appear to have a significant interest in the subject matter in question. In accordance with that section, consultation has taken place with the Lord President, the Law Society of Scotland and the Institute of Chartered Accountants of Scotland. Any comments received were taken into account when the regulations were developed.

Impact Assessments

An Equality Impact Assessment was prepared for the Legal Services (Scotland) Bill, and which found no evidence of differential impact in respect of disability, gender, sexual orientation, race/ethnicity, or religion/belief. A further assessment was considered, but as these regulations do not introduce new policy but provide for the administration of the policy introduced by the 2010 Act, it was considered that this was unnecessary.

The Scottish Government also considered whether an environmental impact assessment was required. However, as it considers that the instrument has no environmental impact, no assessment was considered necessary.

A Regulatory Impact Assessment was carried out for the Legal Services (Scotland) Bill.² A Business and Regulatory Impact Assessment is not considered necessary for this instrument, as it does not introduce substantive new policy and has no further significant impact on the Scottish Government, local government or on business.

Financial Effects

This instrument does not have any new financial effects that were not anticipated when the enabling legislation was enacted. A Financial Memorandum was produced which set out the financial implications of the Bill.³

Scottish Government

Justice Directorate

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² The regulatory impact assessment for the Legal Services (Scotland) Bill can be viewed at www.scotland.gov.uk/Resource/Doc/980/0087717.pdf

³ See [http://www.scottish.parliament.uk/S3/Bills/Legal%20Services%20\(Scotland\)%20Bill/b30s3-intro-en.pdf](http://www.scottish.parliament.uk/S3/Bills/Legal%20Services%20(Scotland)%20Bill/b30s3-intro-en.pdf), pages 34ff