

Regulatory Independence Certificate initial assessment summary - Institute of Trade Mark Attorneys (ITMA) / Intellectual Property Regulation Board (IPReg)

Introduction

1. The Legal Services Board's (LSB's) Internal Governance Rules came into effect on 1 January 2010 and applicable approved regulators (AARs) were required to self-assess their compliance with the rules by the end of April 2010. In areas where it had not proved possible to achieve compliance by that date AARs were asked to provide an action plan that would deliver compliance by no later than 31 October 2010.
2. We have now completed an initial analysis of your arrangements against the substance of the IGRs and the implementation timetable. This is the summary report of our initial analysis. The assessment highlights areas of concern and areas where we do not feel that we have sufficient information to assess compliance. It also sets out the actions that are now required. Where we have asked for further submissions these should be returned by Friday 27 August. This will allow the LSB Board to make final decisions at its end of September meeting and respond to you in October.
3. We may ask for any combination of the following:
 - an action plan for reaching compliance
 - confirmation of whether risks that we have highlighted are recognised and the extent of the risks (and details of how the risks will be mitigated)
 - provision of further information.
4. In areas where we have not highlighted concerns our review of the information provided has concluded that your structures are likely to be compliant with the IGRs but of course on-going compliance with the principles, rules and the spirit of independent regulation will be required in practice.

Documents provided

5. The certificates and documents submitted by ITMA and the Chartered Institute of Patent Attorneys (CIPA) are identical.
6. The ITMA/CIPA submission consists of:
 - A completed Certificate
 - Delegation Agreement between IPReg and ITMA and CIPA dated 2 December 2009.

Overview of Regulatory Delegations

7. ITMA and CIPA have delegated their regulatory functions to the Patent Regulation Board (PRB) and Trade Mark Regulation Board (TRB) both have three professional members

and three lay members and a chairman who must be neither a patent attorney nor a trademark attorney. The same three lay members and the chairman are shared between both Boards. The chairman may vote only in cases of deadlock. TRB and PRB have sponsored the creation of the Intellectual Property Regulation Board (IPReg) to “facilitate and co-ordinate the functioning of PRB and TRB”. IPReg may also have functions delegated to it by ITMA and CIPA from time to time. The IPReg Board is made up of all the members of TRB and PRB with the same Chair.

Overall conclusion

8. ITMA has made significant progress in establishing a separate regulatory board and the information provided indicates that the internal governance arrangements put in place appear fit for purpose and able to deliver compliance with the IGRs.
9. However, we are concerned about on-going non-compliance with the requirement for a lay majority on regulatory boards, the definition of lay within the delegated agreement and uncertainty over regulatory functions that may have been delegated to IPReg - an entity comprising the six professional members of TRB/PRB, the three lay members of TRB/PRB, and the shared chair. We are also concerned about the role of regulatory committees which could be seen as being dominated by the provider interest and the level that board members have previously been responsible for representative functions.
10. We have some concerns about board reappointment arrangements and we require further information about arrangements for board discipline and also ITMA/IPReg understanding of the LSB's role within this. We also require more information about arrangements for setting board remuneration levels.
11. We also have some concerns about the arrangements around shared services, budgets and the dispute resolution mechanism. In particular whether a model of negotiation followed by potentially lengthy and costly independent dispute resolution provides sufficient safeguards given the potential inequality of bargaining power between the regulator and its parent professional body. This is particularly so because there are no service level agreements in place to govern shared services. Further information about oversight arrangements is also requested.

Issues and areas of concern

Principle 1, Governance, IGR C: a majority of the regulatory board are lay

12. The two regulatory boards, TRB and PRB, each comprise a Chairman, three lay members and three attorney members. The lay members of both the TRB and PRB are the same individuals. The IPReg Board comprises a chairman, the three lay members and six attorney members from both the TRB and PRB.
13. TRB and PRB are designed to operate with equal numbers of professional and lay members with a lay chair having a casting vote in case of deadlock. Whilst the chair is neither a patent nor trade mark attorney he is nonetheless a non-practising barrister (who has never practised) and is not lay under the definitions of the Legal Services Act 2007 (the Act) and the IGRs.

14. It is proposed in the certificate that the Chair continues until the end of his term (date not stated but believed to be 2013 at the earliest). It is then intended that a chair be appointed that meets the IGR definition of lay. In response to LSB guidance to Principle 2 (Appointments etc) about the desirability of securing a diverse board it is reported that it is to be considered whether a lay consumer expert might be co-opted to the Board at least for defined projects. A cost feasibility assessment of a permanent fourth voting lay member will then be undertaken as part of the 2011 budget setting process. This would deliver compliance with the lay majority requirement.
15. Some assessment of the level of risk that this on-going non-compliance poses and some arguments as to the reasonableness of not complying sooner have been provided. This includes:
- a) The Chair was appointed in June 2008 prior to IGRs establishing the definition of lay that IGRs would adopt (although the delegation agreement officially creating the regulatory boards came into effect at a later date)
 - b) The Chair is qualified as a barrister but has never practised and has no prior involvement at all with the intellectual property professions – no risk of conflict.
 - c) The Chair will continue to have voting rights in the case of deadlock, which he has never had to exercise in practice.
 - d) Chairman was appointed in June 2008 and therefore has considerable “corporate knowledge” and experience
 - e) Chairman was selected for his experience in management of complex public organisations which has proved invaluable
 - f) Chairman is now “public face” of IPReg and has respect of professional community.
 - g) There is no budget for replacement of the Chairman and it would not be proportionate to do so.
16. As things stand, the proposed arrangements of the IPReg Board are such that there will be just three lay members but six attorneys plus a non-lay chair. We will therefore require further detail around any regulatory function delegated to IPReg as if acting as a single entity, since the balance of membership in favour of attorneys makes it non-compliant as a regulatory board in terms of lay representation.
17. The delegation agreement continues to define lay as not being a patent or trade mark attorney rather than following the definition within the Legal Services Act and IGRs.
18. IPReg runs three formal regulatory committees on behalf of TRB and PRB, all of which have a professional majority. The IGR requiring lay majorities for regulatory boards may not explicitly extend to these groups but there is an appreciable risk that the spirit and perception of independence will be compromised if a significant proportion of the advice provided to the regulatory boards comes from groups seen to be dominated by the provider interest (to the relative exclusion of the consumer voice).

LSB ASSESSMENT

Compliance: **Non-compliant**

Response: ITMA / IPReg to provide an action plan that will deliver compliance by no later than 31 October 2010 or if this is not possible a full justification of it might be reasonable to move to a lay majority at a later date). In any event ITMA/ IPReg to provide further detail around any regulatory functions delegated to IPReg as a single entity, further details and timings around the proposal to co-opt a lay consumer expert to the Board (either in full or for specified projects) and of the framework and timings for the cost and feasibility study of an additional permanent lay expert. ITMA / IPReg to provide the date that current chairman's appointment will expire. ITMA/IPReg to provide details of the activities undertaken by regulatory committees and groups, the role that they play in regulation, their delegations and decision making authorities, reporting lines and the composition and appointment process followed.

Principle 2, Appointments, IGR C: Decisions in respect of the remuneration, appraisal, reappointment and discipline of persons appointed to regulatory boards must respect the principle of independence...

19. Reappointment of the Chairman is to be determined by the Presidents of ITMA and CIPA in consultation with the lay members. The reappointment of any other members of the Boards is subject to the agreement of ITMA and CIPA and the Chairman of IPReg. The decision is to be guided by objective appraisal. No details of the appraisal framework or its operation have been provided. No information is provided as to the processes and authorities for the discipline of board members.
20. The delegation agreement states that remuneration levels will be determined by IPReg in association with ITMA and CIPA but no details of how this relationship and process will operate have been provided.

LSB ASSESSMENT

Compliance: **Appreciable risk**

Risk: The Chairs of the professional body appear to be wholly in control of the re-appointment of the Regulatory Board's chair with only consultation of lay members required. There is no reference to objective appraisal being undertaken. The LSB is concerned that this presents a threat to the principle of independence and is not aligned to IGR guidance. The LSB believes that there is some risk attached to the reappointment of other board members as agreement of ITMA and CIPA is required. Although reference to objective appraisal is made no detail is provided.

Response: ITMA / IPReg to confirm whether they recognise these risks, the extent of the risks and provide information about how they will be mitigated and managed. In any event ITMA /IPReg to provide further information about the appraisal process and how it operates in practice and also whether it applies when the Chair is re-appointed as well as other members. ITMA /IPReg to provide further information about processes and authorities for the discipline of board members and about processes and authorities for setting remuneration levels for board members.

Principle 2, Appointments, IGR D: no person appointed to a regulatory board must be dismissed except with the concurrence of the Board (or in exceptional circumstances). IGR guidance, ...where exceptional reasons justify immediate dismissal without concurrence...it would expect a full explanation. Where ...discipline is short of dismissal the Board should be consulted privately in advance.

21. In assessing against Principle 2 (D) ITMA / IPReg report that it is the Board is entitled to dismiss the Board in consultation with CIPA and ITMA. It further reports that the guidance in relation to explaining to the LSB any instance when a board member is dismissed without concurrence and the guidance in relation to consulting with the LSB about any other disciplinary undertaking is “not applicable”. It is possible that the reference to “Board” in the rule and guidance is misunderstood to mean the regulatory board rather than the LSB.

LSB ASSESSMENT

Compliance: **Further information required to assess compliance**

Response: *ITMA / IPReg to confirm that they recognise that no board member may be dismissed without the concurrence of the LSB (save exceptional circumstances), that if such circumstances arise a full explanation will be provided to the LSB and the LSB will be consulted in advance of disciplinary actions that fall short of dismissal. ITMA/ IPReg to confirm that the regulatory board and those involved in exercising regulatory functions have the freedom to approach the LSB at any time. ITMA/ IPReg confirm whether these provisions are codified in any arrangements or authorities.*

Principle 2, Appointments, guidance in relation to IGR E: regulatory board members should not have been responsible for representative functions immediately prior to appointment and the longer the gap the better

22. There is compliance in that no person serving on a regulatory board can also be responsible for any representative function. However, the recent representative history of some of the members is of concern to the LSB and appears to be at odds with guidance. Two of the three TRB professional members were members of the ITMA Council immediately prior to appointment and the remaining one was a member of an ITMA committee. (One of the three PRB members was a CIPA Council member until 2006; one was a member of a CIPA committee immediately prior to appointment with the third having had no representative role in the past).

23. This requirement forms part of guidance and we have not been specific about the appropriate length of gap. However, the LSB is concerned that there is a significant proportion of regulatory board members that have been undertaking representative functions immediately prior to appointment. There is a requirement to take guidance into account when seeking to comply with the principles and rules.

LSB ASSESSMENT

Compliance: **Appreciable risk**

Risk: As suggested in LSB guidance a regulatory board with members who have recently had representative responsibilities may threaten the principle and perception of regulatory independence. This is more so if this responsibility was immediately prior to appointment to the regulatory boards and / or if a large proportion of the regulatory board have recently had representative responsibility.

Response: ITMA / IPReg to confirm whether they recognise this risk, the extent of the risk and provide information on how it will be mitigated now and when it comes to future appointments.

Principle 3, Strategy and Resources, C and D: Budget approval and dispute resolution mechanisms

24. Under the delegation agreement IPReg must submit its budget for consideration and agreement. The Chairman of IPReg must be informed if ITMA or CIPA do not agree the proposed budget, which may be because of one of the following reasons:

- a) it does not support the objectives of the Board
- b) it will not provide value for money
- c) it indicates any form of non-compliance.

25. In approving the budget, ITMA and CIPA are required to have regards to their duties to ensure resources are made available to IPReg. Any further disputes would be referred to a mediator and then potentially an arbitrator.

26. There are some shared services, including the regulatory boards outsourcing (for a fee) the administration connected to some regulatory functions e.g. maintaining the physical registers of practitioners to ITMA and CIPA. The submission states that there will be SLAs put in place for shared services but no details of these are provided.

27. The delegation agreement sets out a dispute resolution mechanism where the relevant CEOs and Chairs will discuss any dispute, and if the dispute is not resolved an external mediator will be appointed and if this is not successful an arbitrator will be appointed. There are concerns that mediation (and arbitration) can be time consuming and costly and may form a disincentive to raising disputes and to settle short of securing the resources it believes are required to set and implement its preferred regulatory strategy.

LSB ASSESSMENT

Compliance: **Appreciable risk**

Risk: Arrangements for budget approval and access to resources are built on principles of discussion and negotiation followed by formal dispute resolution. There is an appreciable risk that this may not provide sufficient safeguards in practice given the potential inequality of bargaining power between IPReg and its parent professional bodies and the potential length and cost of independent mediation (and arbitration).

Response: ITMA / IPReg to confirm whether they recognise this risks and if so the extent of the risk and the actions that may be undertaken in mitigation. The certificate reports that

service level agreements will be put in place with more explicit dispute mechanisms - please provide further details about the development of these arrangements. ITMA / IPReg to provide details of the metrics currently or prospectively collected to monitor whether arrangements do operate successfully in practice and deliver the necessary degree of independence.

Principle 4: Oversight: monitoring by the AAR

28. The delegation agreement provides that observers from ITMA and CIPA may attend meetings of the regulatory board. The certificate reports that experience has shown that the presence of observers may inhibit free discussion by the board members. Whilst the delegation agreement continues to permit ITMA and CIPA to send observers to regulatory board meetings it has been agreed that this will stop as a routine practice and there will instead be a liaison meeting between ITMA, CIPA and the Chairman and CEO of IPReg prior to each formal board meeting.

29. It is not proposed that the delegation agreement is amended to reflect this change of approach as it is felt that this authority must remain for reasons of oversight.

LSB ASSESSMENT

Compliance: **Further information required to assess compliance**

Response: *ITMA / IPReg to confirm whether any criteria exists for when ITMA and CIPA may attend meetings of regulatory board in its oversight role and arrangements for doing so (in light of the issues of fettering free discussion experienced in practice and on-going authority to attend).*

12 July 2010