



Bar Council response to Recovering the costs of the Office for Professional Body Anti-Money Laundering Supervision (OPBAS): fees proposals

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the FCA's consultation on its fee proposals for the Office for Professional Body Anti-Money Laundering Supervision ("OPBAS")¹.
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend.
4. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board ("the BSB").

Overview

5. The low-risk profile of the Bar must be taken into account when a determination is made as to what is the appropriate level of fee to levy upon it for its share of the costs of the operation of a supervisor's supervisor for which, from the perspective of the Bar, there is little justification.
6. The "risk-based approach" is central to both the Fourth Money Laundering Directive and the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* (the Regulations). The current scheme of

¹ Available here: <https://www.fca.org.uk/publications/consultation-papers/cp17-35-recovering-OPBAS-costs-fees-proposals>

anti-money laundering awareness and supervision of compliance with AML/CTF requirements as put in place by Parliament is predicated upon a fact-sensitive assessment of how and where the risk of money laundering or terrorist financing might arise. OPBAS must, in its objectives and operation, reflect that requirement. It must focus its efforts and resources upon the areas of greatest risk. It must be able to justify its resources by reference to those risks and the measures required to address them. It must not take a blanket approach to those bodies under its supervision. By the same token it must seek to draw its funding proportionately to the existence of those risks. It would be unjustifiable for professional persons acting in areas of low AML/CTF risk to pay for a supervisor that is required due to the risks of unrelated persons. There is no reason why a barrister who does not undertake work within the regulated sector should pay a levy to fund a body that is required because of threats posed by the activities of estate agents or accountants. Why should, for example, a criminal barrister whose entire practice is spent in the conduct of litigation be required to fund a body that will not touch upon the conduct of his/her practice but be concerned with the supervision of high-end property dealers? To fail to account for the existence and degree of engagement with the AML/CTF risk by the supervised population would be to ignore the risk-based requirement of the Regulations and to operate in defiance of the spirit of the law. It is vital that any consideration of the appropriate and fair fee to be imposed upon a supervisor takes into account the exposure of the supervised profession to the risk of carrying out money laundering or terrorist financing.

7. Accordingly, the position of the Bar in relation to AML/CTF is set out below.
8. Following the recommendations of the Clementi Report, and by virtue of the *Legal Services Act 2007*, the regulatory and supervisory functions of the Bar Council have been delegated to the independent Bar Standards Board (“the BSB”). The BSB discharges this function according to its Enforcement Strategy which it applies in conjunction with a Supervision Strategy, both of which are underpinned by detailed provisions in Part 5 of the BSB Handbook. As a result, the Bar is independently supervised in respect of its compliance with its anti-money laundering and counter-terrorist financing (AML/CTF) obligations.
9. Additionally, the Bar Council publishes guidance for barristers to explain their obligations and illustrate best practice for AML/CTF compliance. That guidance contains practical assistance and examples that give further help to barristers in applying their AML/CTF obligations in practice.
10. That independent supervision and professional guidance aside, it remains the fact that the majority of self-employed barristers do not undertake work that falls within the scope of the Regulations.

11. The work of the substantial majority barristers generally consists of advising on and conducting contentious litigation: work that falls outside the AML 'regulated sector'. Barristers are not permitted to receive, control or handle client funds, and do not, and are not entitled to, administer client accounts. With regard to receiving client funds, barristers are only entitled to be paid for their services. As barristers are prohibited from handling client funds or managing their client's affairs, they are unable to conduct transactions on behalf of their lay, or professional, clients.

12. A few barristers in some specialist fields are involved in non-litigation work that might fall within the scope of the Regulations, for example tax barristers and chancery barristers involved in assisting in property transactions) but they are generally instructed by other professionals (usually solicitors) who will deal with the lay client, handle any financial aspects of the matter and also conduct their own customer due diligence prior to instructing the barrister.

13. The above framework within which the Bar operates leads to barristers having a particularly low-risk AML/CTF profile. The BSB's 2017 AML/CTF Risk Assessment found that:

- a) The overall inherent risk profile of the Bar was judged to be low.
- b) The extent to which barristers engage in activity relevant to the Regulations is limited.
- c) Due to the professional restrictions referred to above there is little opportunity for criminals to use barristers directly to launder money.
- d) The most likely areas in which the Regulations apply to the work of the Bar relate to advisory work relating to property/company formation/structures of the set-up of trusts.
- e) Only eight chambers were identified as specialising in tax advisory work.
- f) There was no evidence of under-compliance with the Regulations, rather the BSB expressed its concern that there were some areas of *over-compliance*.

14. The assessment of the level of risk within the legal sector in HM Treasury's 2017 National Risk Assessment² (the NRA) identifies the areas of highest risk as being work that the Bar does not undertake, for example, the creation of trusts and

² Available here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/655198/National_risk_assessment_of_money_laundering_and_terrorist_financing_2017_pdf_web.pdf

companies, conveyancing and the operation of client accounts. It is of note that the NRA departed from its thematic approach to risk assessment in order to state that barristers are exposed to lower AML/CTF risks. The NRA further noted that barristers *“are prohibited from executing transactions, conducting conveyancing and offering client account services”* and that those factors *“are also judged to mitigate the risks involved”*.

15. The risk profile of the Bar as a whole must therefore be considered to be very low indeed.

16. The Bar Council’s view that the barristers’ profession poses a very low ML/TF risk – and that in fact there is no risk at all arising out of the practices of the vast majority of barristers – is further supported by the fact that there are no historic examples in the public domain of barristers engaging in money laundering or terrorist financing activities on behalf of their clients.

17. The BSB already provides effective and proportionate AML/CTF regulation of barristers. We have not been alerted to any deficiency in the regulatory regime concerning the Bar that OPBAS is designed to remedy.

18. The imposition of OPBAS upon the supervision of a profession of such inherent low-risk, led the Bar Council to issue a joint letter with the Bar of Northern Ireland and the Faculty of Advocates to express its strongly felt concerns.

19. The Bar Council urges the FCA not to add to the erroneous step of imposing the existence of OPBAS upon a profession that does not require additional oversight by way of imposing fees that are not proportionate to the risk inherent in the practice at the Bar.

20. It is against that general background that the specific questions posed by the current consultation fall to be addressed.

Q1: 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?

21. The Bar Council observes that the proposed fees are in general excessive and, at present, unjustified. The projected annual running costs are £1.7-1.9m per annum, with additional set up costs of £200,000 in the first year. No justification has been given for those figures and no breakdown has been provided. Given their size, a detailed cost breakdown must be made available so that those bodies who are being asked to foot the bill can analyse it and provide input into the necessity of the resources that they are being charged for. There can be no objection to such figures being provided. No public body is entitled to levy a fee upon persons given no option but to pay it without providing proper transparency in respect of that fee.

The Bar Council requests that such a breakdown is provided as soon as possible and in any event before the FCA makes any binding resource decisions or commitments.

22. In addition to the above observation, the Bar Council questions the correctness of the application of a blanket fee for all applicants and does not consider such an approach to be appropriate. Instead, it is suggested that the application fee should be proportionate to, or at the very least factor in, the level of risk presented by the supervised population of the applicant supervisor. The Bar Council repeats its comments in relation to the importance of OPBAS taking a risk-based approach to its obligations. In order to properly reflect that requirement and to ensure that operational costs are fairly and proportionately distributed the level of an application fee charged should factor in the inherent ML/TF risk presented by the supervised body.

23. The levying of a fee that is related to the risk profile of the applicant's supervised population would serve to incentivise supervisors, and in turn their supervised population, to address the risks within their professional body. In contrast to this, a flat rate fee would permit a degree of displacement of the cost of compliance from higher-risk professional bodies to lower risk professional bodies already subject to OPBAS oversight. Permitting such cost shifting would not incentivise higher-risk bodies to address their risk levels and would unfairly penalise the lower-risk bodies required to accept the higher costs associated with the supervision of a successful high-risk applicant.

Q2: 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?

24. The FCA has rejected the idea of fee calculation by total membership. The Bar Council notes the FCA's recognition cost recovery should not be apportioned according to the total membership of the relevant professional body supervisor as such a measure would not take account of the supervisor's responsibilities under the Regulations – instead merely scaling the fees in proportion to the member body's relative size. The Bar Council concurs with the FCA's assessment and agrees with its position of rejecting membership numbers as a basis for fee recovery.

25. In support of that position the Bar Council makes the following further observations. Whilst there may, in some professions, be the supposed "*rough equivalence*" between the total number of individuals within a profession and the extent of AML/CTF-related supervision carried out, there is, in fact, no evidence cited to support this supposition. In the case of the Bar, where the substantial majority of the profession never engages the Regulations, the evidence in fact tends to show that this is not the case. Even though the estimated number of barristers

who engage with the Regulations are already low, as an overall percentage of the profession, the BSB considers there to be an issue of over-compliance i.e. the level of *actual*, rather than perceived, engagement with the Regulations may in fact be lower than the profession believes to be the case. Moreover, measurement by way of supposed engagement does not factor in the level of risk inherent within the work that does in fact engage the Regulations. It is axiomatic that the higher the level of risk, the greater will need to be the level of supervisory oversight; and *vice versa*. In the case of the Bar, the work of the small number of professionals who do engage the Regulations is assessed to be low-risk, and may more accurately be described as *very* low risk. The attendant level of supervision is, or at least should be, commensurately measured in scope and application. It is a supervisory position that is not related to the overall size of the profession. A profession, such as the Bar, that has a substantial number of members, of whom only a small number undertake work within the Regulations and do so on a low-risk basis (by reason, for example, of not handling client funds or conducting transactions) should not be expected to be levied a fee that bears no relationship to the risk-profile of the limited number of members who do fall within the Regulation's scope.

26. The Bar Council also observes that by addressing the number of persons who are supervised persons who are individuals, the FCA at least begins to approach the collection of fees on a basis that has some relationship with the ML/TF risk presented by the persons within the supervised body. By way of contrast, fee calculation by membership numbers alone does not reflect any level of risk as it fails to distinguish between those persons whose work engages the Regulations and those whose does not. The rejection of levying the fee by reference to membership should be maintained.

Q3: Can you suggest any improvements to the definition of our preferred measure for OPBAS fees of 'supervised persons (under the MLRs) who are individuals'?

27. Whilst the Bar Council agrees with the FCA that the correct measure for the basis of the fees to be levied is the number of supervised persons who are individuals, the Bar Council is concerned that the proposed method of calculation suffers from insufficient precision. The Bar Council submits that the reference to paragraphs 1 and 2 of Schedule 4 to the Regulations within the definition of the cohort of persons that are to form the basis of the calculation serves to defeat the object of the fee instrument. A particular problem lies in the reference to paragraph 1 of Schedule 4, which, in relation to self-regulatory organisations, refers back to "*the number of members*": an already rejected concept for the basis of fee calculation.

28. The Bar Council suggests that the reference to paragraphs 1 and 2 of Schedule 4 should be removed from the basis of the calculation, as they confuse

rather than help to define the required cohort of levied persons, i.e. the supervised persons who are individuals.

29. The proposed fee instrument has also introduced a term not found within the Regulations, i.e. “supervised individuals”. “Supervised individuals” are a different category from, or perhaps a hybrid of, the two concepts used in paragraphs 1 and 2 of Schedule 4, i.e. “supervised persons” and “supervised persons who are individuals”. It is not immediately obvious to the Bar Council how the introduction of an additional, non-statutory, category of persons assists the process, particularly given the reference, in paragraph 1 to calculation by way of “*the number of members*”, and the already expressed intention to avoid calculation upon that basis.

30. The Bar Council understands the intention of the FCA to be the identification of the number of individuals who are undertaking professional activity within the scope of the Regulations and thus engaging supervision. It is submitted that the definition of such a group of individuals can be determined by reference to how those persons fall within the scope of the Regulations. It is submitted that this would be preferable to a definition that refers to the provision of information requirements upon the supervisors.

31. The Bar Council proposes that reference to paragraphs 1 and 2 of Schedule 4 is removed. It is further proposed that the term “Supervised Individuals” is otiose and the fee instrument need only refer to the statutory term “The number of supervised persons who are individuals”. The latter term is slightly longer, but is more accurate and would appear to better reflect that which the FCA are trying to achieve. If latter term is used and reference to the provisions of Schedule 4 are removed, then a definition of the desired cohort of individuals can be given at Part 1 of Annex 2 to Appendix 2 of the fee instrument in precise terms by way of reference to the Regulations.

32. The Bar Council suggests the following wording:

33. “The number of supervised persons who are individuals is defined as:

a) The number of a Professional Body Supervisor’s members, or the number of those regulated by it, who are both:

(a) individuals, and

(b) a “relevant person” (as defined in Regulation 3 of the Regulations),

plus

b) the number of “relevant employees” (as defined in Regulation 21(2)(b) of the Regulations) appointed by a relevant person who falls within the definition of paragraph (1) above.”

34. “Supervised persons who are individuals” should then be used elsewhere in the fee instrument, for example at Part 3 of Annex 2 to Appendix 2, as the basis of the calculation of the appropriate fee.

35. The Bar Council also submits that the provision of information on that basis, under the requirement at Part 2 of Annex 2 to Appendix 2, would be of greater assistance to the FCA than the supervisory information required to be provided by self-regulatory organisations under paragraph 1 to Schedule 4. Removal of the reference to paragraphs 1 and 2 of Schedule 4 would also have the benefit of simplifying the definition, thus making its application more readily apparent.

36. If, contrary to the Bar Council’s submission, the FCA wishes to maintain the term “supervised individuals” and reference to paragraphs 1 and 2 of Schedule 4, the definition should make clear that “supervised individuals” is limited to only those members of a supervised body who are individuals and who are engaging with the Regulations. At present the current terminology does not achieve that objective.

37. The Bar Council would suggest that the current wording is amended in the following way.

a) *“For the purposes of this instrument, the number of supervised persons who are individuals as set out in paragraphs 1 and 2 of Schedule 4 to the MLR” consists of, and is limited to:*

i. “the number of “relevant persons” (as defined in Regulation 3 of the MLR) who are:

- 1) members of it, or regulated or supervised by it; and
- 2) are individuals;
- 3) PLUS

ii. the number of “relevant employees” (as defined in Regulation 21(2)(b) of the MLR) appointed by a relevant person.”

38. However, the Bar Council maintains its primary submission that reference to paragraphs 1 and 2 of Schedule 4 of the Regulations does not assist the objective of the fee instrument, tends to introduce uncertainty and should be removed.

Q4: 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?

39. The Bar Council refers to its answer to question 3 and its re-drafting of the Part 1 of Annex 2 to Appendix 2 of the draft fee instrument.

Q5: 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?

40. The Bar Council agrees that there should be a minimum fee payable by each supervisor and does not object to the particular sum proposed. However, the Bar Council refers the FCA to its comments re the size of fees generally in response to Question 1.

Q6: Do you believe we should spread recovery of the set-up costs and accumulated costs of OPBAS over two years?

41. The Bar Council submits that two years is too short a time over which to recover the set-up fees. Given the substantial sums involved, the lack of consent that the supervised bodies have been asked to provide to the process and the relatively short time frame that the process is to be implemented over, a longer period of recovery should be permitted. The Bar Council suggests that, bearing those factors in mind, a period of 5 years would be reasonable. In addition, the Bar Council repeats its comments in response to Question 1 in relation to the size of fees generally.

**Bar Council
January 2018**