

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

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GENERAL COMMENTS

ACCA welcomes the opportunity to respond to this consultation, which concerns recovery of the costs of both establishing and running OPBAS by way of fees charged to the ‘fee-block’ of professional body supervisors (PBSs). It must surely be the case that the level of costs incurred by OPBAS will change considerably as OPBAS moves from a fact-finding role to one that is more directional of the PBSs. However, this is not acknowledged in the consultation paper, and the FCA has still not disclosed the basis for the estimated costs, despite previously being able to provide a breakdown of the additional costs estimated to be incurred by the PBSs.¹

In addition, the FCA has not published OPBAS’s strategic plan. This makes it even more difficult to comment on the recovery of costs, as the reasonableness of those costs (and therefore the likely level of costs in the future) cannot be assessed.

On 20 July 2017, the government published a draft of the OPBAS Regulations, which are required in order to give powers and responsibilities to OPBAS. The deadline for responding to the consultation was 17 August 2017, and the final OPBAS Regulations (The Oversight of Professional Body Anti-Money Laundering and Counter Terrorist Financing Supervision Regulations 2017) were made on 14 December 2017. It concerns us that the Fees (Office for Professional Body Anti-Money Laundering Supervision) Instrument 2018 is already in draft, and carries the FCA proposals set out within this consultation paper. We request that due regard be paid to the responses of the PBSs to this consultation, and that the Instrument is not finalised in haste.

Much of paragraph 2.3 of the consultation paper might be difficult for stakeholders to engage with unless the reader is already familiar with FCA oversight. It suggests that OPBAS might be unduly constrained by established FCA structures and processes, which might even raise concerns about how successfully the true costs of OPBAS will be ring-fenced (ie without some ‘leakage’ of costs from the wider FCA). What may work for current FCA activities (including the existing fee consultation process, and even the suggestion in paragraph 2.3 that income may be an appropriate basis for the allocation of costs) will not necessarily work well for OPBAS and the PBSs.

We note that the annual funding requirement is to be recovered through periodic fees, based on a metric known as a ‘tariff base’. The tariff base is ‘intended to be an

¹ Office for Professional Body Anti-Money Laundering Supervision: a sourcebook for professional body supervisors GC17/7, pages 8 - 9

objective, transparent and simple measure that can be consistently applied across the fee-block to ensure a fair distribution of cost recovery'.² Of these five criteria (objectivity, transparency, simplicity, consistency and fairness), fairness is paramount. A fundamental question is, therefore, whether fairness requires the tariff base to relate to the costs incurred by OPBAS in respect of each PBS, or to the *benefits* derived by each supervised population from OPBAS oversight.

Representatives of the PBSs have repeatedly asserted that their members will receive *no benefit* from OPBAS oversight, and that any benefit is to the public interest. Therefore, the tariff base must relate to the costs of OPBAS oversight (or a proxy to the actual costs of oversight), and OPBAS has a responsibility not to incur unnecessary costs. If the FCA were to succeed in recovering costs in this way, it would not place a disproportionate burden on the smaller PBSs.

There is no suggestion in the consultation paper that any costs incurred by OPBAS, or by the FCA in respect of OPBAS, may be recovered either directly from the government or from any of the statutory anti-money laundering (AML) supervisors.³ This is despite the fact that the PBSs have had no control over the costs incurred to date, and the scope of OPBAS's oversight (restricted to the professional bodies) has been highly criticised.

The professional bodies have been assured that OPBAS will interact with the default supervisor for the accountancy profession (HMRC) to seek consistent outcomes. However, it appears that the cost of those interactions will not be borne by HMRC. Therefore, the objective of fairness cannot be met in respect of such costs, which do not relate to oversight of the PBSs, and over which the PBSs have no control.

In light of the fairness objective, the outcome of the current consultation process rests on determining the appropriate tariff data. In order to achieve fairness, the tariff data must be relevant and relatively easy to quantify. In addition, it would be helpful (ie not disproportionately burdensome) if the tariff base could be one that allows the fees to be passed on to the supervised population in a logical, straight-forward, fair and transparent manner.

² CP17/35, page 6

³ Set out under regulation 7 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs), the statutory AML supervisors are the FCA, the Gambling Commission and the Commissioners for Her Majesty's Revenue and Customs (HMRC).



We would also expect to see some consistency between the way in which OPBAS's costs are recovered and the way in which the FCA recovers costs in respect of its oversight of the Designated Professional Bodies (DPBs). Many of the PBSs are also DPBs, including the larger bodies such as the Law Society of England & Wales, the Institute of Chartered Accountants in England and Wales, and ACCA. Therefore, given the similarities between the populations supervised by the PBSs and those regulated by the DPBs, if the OPBAS fees borne by these bodies were to be much higher than the fees incurred as DPBs, the FCA should be prepared to clearly explain why.

As already mentioned, the FCA has not set out in any detail the basis for the estimated costs relating to the operation of OPBAS. For example, the consultation paper has not stated the number of staff to be engaged in the different aspects of OPBAS's work. Nevertheless, the consultation paper estimates costs as follows:

- annual running costs from April 2018: £1.7m to £1.9m
- operational costs from November 2017 to March 2018: £200,000
- set-up costs (up to November 2017): £600,000 to £700,000.

As a result of these broad estimates, the FCA's 'working assumption is recovery of £2.5m in 2018/19 – 2019/20 and £2m from 2020/21 onwards'.⁴ This assumption rounds up the annual running costs to £2m, and seeks to recover costs incurred up until March 2018 of £1m. Such generous rounding raises serious concerns about the accuracy of the estimated costs, and also the ability of OPBAS to only incur costs with due regard to proportionality and the resources of the supervised populations.

We should like to highlight our response to question 1, which addresses the recovery of the set-up costs, and compares those costs with the proposed application fee for new PBSs. In light of this comparison, we are strongly opposed to the set-up costs being borne by the existing PBSs.

⁴ CP17/35, page 8



AREAS FOR SPECIFIC COMMENT

In this section, we respond to the six specific questions asked by the FCA in its consultation paper.

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?

We note that the proposals regarding application fees relate only to those professional bodies that will apply to be included in Schedule 1 to the MLRs after OPBAS becomes operational. The existing PBSs will not be charged an application fee. However, the FCA is proposing that, in effect, the set-up costs are to be met by the existing PBSs over the first two years. This aspect of the proposals is fundamentally flawed, as explained below:

It is proposed that the 22 existing PBSs will bear the costs of setting up OPBAS – a proposal that we strongly oppose. Our objection is illustrated by using the simplest of bases for allocating those set-up costs, and estimating the costs up until OPBAS comes into operation in January 2018 as £750,000 (based on the FCA’s estimates set out earlier). Simply dividing £750,000 between the 22 PBSs results in an average fee of £34,000. A professional body would surely prefer to pay an application fee of £5,000, rather than incur £34,000 of set-up costs. The conclusion must be that it is unreasonable and inadvisable to expect the existing PBSs to suffer any costs incurred prior to the formal existence of OPBAS.

From the consultation paper, it appears that the proposed application fee will be at a fixed rate, according to the estimated cost of assessing the average application. However, the proposed fee appears to be a broad estimate, and the consultation paper does not set out the elements that make up the figure of £5,000. We cannot comment on the reasonableness of the proposed application fee without the FCA establishing the amount of work needed to assess a new PBS application, and being transparent with its calculations.⁵ These calculations are very important. If the final application fee gives rise

⁵ Paragraph 2.12 of the consultation paper states:

‘We have not fully determined what will be involved in reviewing each professional body’s application to be listed under the MLRs and making a recommendation to the Treasury.’



to the frequent under-recovery of costs, an unfair burden will be placed on those who will have to make good that deficit. We are unaware of any benefit to be derived from the FCA setting an application fee that does not fully meet the costs of carefully reviewing and processing the application, including making its recommendation to HM Treasury under Part 2 of the OPBAS Regulations.

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?

As already stated, we do not accept that the costs of setting up OPBAS, including all costs incurred before its legal existence in January 2018, should be suffered by the existing PBSs. We also believe that the estimated on-going running costs (£1.7m to £1.9m per annum) may be perceived as excessive. These costs should not be considered without also considering the costs expected to be incurred by all the PBSs, through their interactions with OPBAS and any additional information-sharing requirements. We would expect OPBAS to strive to keep its on-going costs to a minimum.

The means by which the on-going costs of operating OPBAS are shared between the PBSs must be fair, transparent, logical and related to the costs of overseeing each PBS. We are pleased to see that '[the FCA's] objective is to distribute cost recovery between fee-payers on a fair basis'.⁶ With this in mind, we shall comment on each of the options identified in the consultation paper:

Flat fee

This option would divide the annual costs equally between all fee-payers. Initially, 22 PBSs would each be expected to pay the same fee. Although paragraph 2.18 appears to dismiss this option, solely on the basis of the PBSs' ability to pay the fees, dividing a *proportion* of the annual costs equally between the PBSs might, in fact, be fair. This would be true to the extent that the costs of overseeing a PBS include a significant amount of fixed costs. However, we cannot form a precise conclusion in this respect, as the consultation paper does not provide a split between fixed and variable costs.

⁶ CP17/35, page 8



Relevant persons

For some PBSs, the relevant persons supervised by them are firms, and for others they are individuals. This gives rise to variations in the manner in which relevant persons are supervised, and the costs of supervision and OPBAS oversight going forward. This presents a challenge regarding the allocation of OPBAS costs.

In the case of ACCA, relevant persons are firms of accountants. However, many of those firms are sole practitioners who practise without employing any senior staff. Therefore, ACCA itself must supervise both legal and natural persons. Many of the requirements of firms (the reporting of suspicious activity, client due diligence, etc) apply also to individuals who are sole practitioners. Therefore, there is a strong argument for allocating OPBAS fees on the basis of relevant persons supervised.

Alternatively, there may be an assumption that smaller firms are lower risk than larger firms, and the consultation paper may have been written based on that assumption. This may be true in relation to the nature of firms' clients and the work undertaken on behalf of those clients. However, larger firms tend to allocate more resources to AML compliance, such that systems and procedures are kept up-to-date, and the compliance risks of larger firms are likely to be addressed diligently. In short, the risk assessment of a firm does not increase in a linear manner as the number of individuals within the firm increases.

AML supervision places *some* reliance upon a firm's systems and procedures, but a level of testing must also take place. It seems reasonable to assume that the costs of OPBAS oversight will increase approximately in line with a PBS's costs of supervision. Costs will increase as the number of relevant persons (ie firms) increases, but also (to some extent) as the number of supervised individuals within those firms increases.

Supervised individuals

Paragraphs 2.22 to 2.27 discuss in detail the data that is currently provided to HM Treasury in respect of their supervised populations. The FCA must focus on the data that is most relevant, and not that which is easiest to gather (although proportionality is also a relevant consideration).

Paragraph 2.26 of the consultation paper claims to set out how 'individuals supervised by one organisation may be relevant employees of a firm supervised by another organisation. Similarly individuals who are members of a particular body for legal or professional reasons may be supervised for the purposes of the MLRs by a different



body'.⁷ We believe that focus on relevant persons would make these situations unlikely. This is especially true given that effective communication between PBSs will minimise the likelihood of supervisory overlap and supervisory gaps.

However, a tariff base of supervised individuals within relevant persons (ie firms and sole practitioners) supervised by each PBS would appear to be a reasonable approximation for allocating costs between the PBSs. The PBSs will have to gather data on the beneficial owners, officers and managers (BOOMS) within their firms, in order to approve those individuals as BOOMS (in accordance with regulation 26 of the MLRs). Therefore, this option would provide consistency with regulation 26.

The timescale for collecting data in respect of 2018/19 may not be realistic, especially for those PBSs that would be required to collect new data in respect of supervised individuals (BOOMS). In addition, paragraph 2.42 suggests that the definition of the tariff data will be finalised in March 2018. This indicates a hasty conclusion to the current consultation process, which would be neither in the public interest, nor in line with the overriding objective of fairness. (See our earlier comments concerning the haste with which the OPBAS Regulations were finalised.)

Membership

Although it appears that some PBSs have, mistakenly, disclosed their entire membership as relevant persons in the past, it appears that this error has never been addressed by HM Treasury. Nevertheless, entire membership would be an arbitrary basis on which to allocate the costs of OPBAS oversight. PBSs with fewer members would pay lower fees. Although this would 'scale their fees in proportion to their relative size',⁸ this basis of allocation would pay no regard to the paramount objective of fairness, which must relate the fees payable by the PBSs to the costs of OPBAS oversight. Those costs should, in turn, bear a relationship to the risk profiles of the supervised populations.

Supervisory resources

Recovering costs in proportion to the resources of the PBSs devoted to their members' AML compliance would *appear* to be a proxy to the costs of PBS oversight. However, this belief is founded on several assumptions, which we believe are unreasonable. In practice, it might be those PBSs with immature AML compliance structures in place

⁷ CP17/35, page 10

⁸ Ibid



(and therefore with less resource) that require more attention from OPBAS. In addition, this basis of allocation might drive adverse behaviours, including a reluctance to employ adequate resources, if to do so would attract a higher proportion of OPBAS fees.

A further assumption is that the information necessary to allocate costs in this way will be readily available to PBSs. Measuring the number of full-time equivalent staff occupied with AML compliance activities would be likely to involve a number of significant estimates, such that we believe that this option is not realistic.

Income of the PBSs

As noted in the consultation paper, this is a basis for fee recovery in other areas of FCA regulation. But the consultation paper goes on to acknowledge that some PBSs receive income from many sources, and the PBSs do not analyse income on the basis of AML activity. 'Therefore estimating the share of the revenue arising from members subject to AML supervision could add a further layer of complexity and potential inaccuracy',⁹ and so we assume that this option is not being pursued by the FCA as a possible basis for recovering OPBAS costs.

Other possible measures to consider

We believe that the consultation paper considers a comprehensive range of tariff bases. ACCA strongly believes that, whatever recovery model is used, it must represent a realistic approximation to the actual costs incurred by OPBAS as a result of overseeing each PBS (based on assessed risk). Without an indication from the FCA of how it has estimated the on-going costs of OPBAS (including the fixed and variable costs of overseeing each PBS), we cannot be completely clear about the fairest and most transparent way of recovering costs.

However, a realistic minimum annual fee (to recover the fixed costs of oversight) plus an allocation of variable costs (to reflect the time and resource demanded by each PBS) would be the most equitable way of apportioning fees. Bearing in mind the annual fixed costs of OPBAS oversight, it is unclear why the first year's periodic fee for a new self-regulatory organisation should simply be an apportionment of the full periodic fee on a monthly basis.

Any suggestion that some PBSs should subsidise others should be resisted, as such an arrangement would be insupportable and unsustainable.

⁹ CP17/35, page 11



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’?

For reasons already set out, we believe that the fairest and most transparent basis for allocating variable costs is that of supervised individuals within relevant persons supervised by the PBS in question – whether those relevant persons be individuals or firms. As previously explained, we do not believe that the risks and supervisory costs of supervising firms increase with the size of the firm in a linear manner. Nevertheless, on the assumption that the definition of ‘BOOM’ does not extend far beyond those who are owners and officers within firms, we believe that the allocation of fees on the basis of approved BOOMs strikes the right balance.

The only proviso to this might be the costs of overseeing the supervision of large firms. We suggest that it would be possible for OPBAS to identify such costs, and allocate them precisely to the PBSs responsible for supervision of those large firms.

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?

There are already communication channels in place that reduce the risk of supervisory overlap. Using ‘relevant employees’ as a tariff base would reintroduce the risk of regulatory overlap, ie double-counting. ACCA believes that the use of a tariff base other than supervised individuals (BOOMs) within relevant persons is unrealistic, because most PBSs supervise firms (with the focus on firm-wide procedures), and will be responsible for approving individuals to act as BOOMs within those 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?

We believe that there should be a minimum annual fee, although we believe the consultation paper does not set out a clear rationale for either the basis of the minimum



fee or the amount of £5,000. The minimum fee should be set at a level that recovers the fixed costs of overseeing the supervisory activities of a PBS.

In respect of professional bodies that have members providing exempt regulated activities, the periodic fees for each DPB is based on the number of exempt professional firms in each body. The result is that each DPB pays £10,000 for its first exempt professional firm, plus a variable amount. In light of this, the current proposal of a minimum fee of £5,000 appears to be very low, and we have seen no indication of its basis. In addition, the proposal that the smaller PBSs should pay no more seems both inconsistent and illogical, given the overriding objective of fairness. The FCA must remain alert to the fact that every PBS will seek to pass on the costs of AML supervision (including OPBAS oversight) to its supervised population. The only fair model is one that comprises an amount to cover the fixed costs of oversight of a PBS, plus a variable amount according to the size and risk profile of each PBS's supervised population.

We note the statement in paragraph 2.38: 'We do not want the impact of that fee to cause a barrier to entry for professionals'.¹⁰ This reveals that the FCA has strayed from its guiding principle of fairness in setting out its proposals. We also believe that a fair allocation of costs will not act as a barrier to entry to the accountancy or legal profession.

Although we have fundamental concerns about the fairness of the proposals, we should like to comment on the proposed threshold of 6,000 individuals, as it would present a significant problem that must be highlighted. The proposed threshold would represent a very significant imbalance in terms of total cost. By way of illustration, a body with 5,000 such individuals would incur a cost of £1 per person, whereas one with only 1,000 relevant individuals would be charged £5 per person, and one of the largest 25% of bodies could be charged between £15 and £25 per supervised individual (according to paragraph 2.44), and more if a 'tighter definition of supervised individuals' is used.¹¹

¹⁰ CP17/35, page 12

¹¹ CP17/35, page 13



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

Within the consultation paper, there appears to be no question that the professional bodies should suffer the set-up costs. However, we have set out under question 1 above why this is unreasonable, and might give rise to some undesirable behaviours.

If the government insists on burdening the PBSs with the set-up costs, then some of those costs must be met by newly authorised PBSs. This might be achieved by increasing the proposed application fee, although this alone would not be sufficient. An alternative would be to spread the set-up costs over a sufficiently long period so as to bring the average burden on each existing PBS below £5,000 (rather than the £34,000 estimated under question 1). But spreading the burden over such a long period effectively transfers the burden back to the government (which we assume is currently providing the necessary funding). Therefore, in conclusion, there is no realistic alternative to the government meeting the costs already incurred in setting up OPBAS.

CONCLUSION

We have fundamental concerns regarding the lack of information supporting the estimated costs to be recovered, the planned activities of OPBAS, and the basis on which the proposals have been put forward in the consultation paper. From January 2018, OPBAS must be transparent about its costs, and these must be recovered following an objective analysis of the costs of assessing a new application, and of the annual fixed costs and variable costs associated with the on-going supervision of a PBS.

While we are pleased to see that the FCA's objective is to recover costs on a fair basis, there appears to be inadequate focus on this objective throughout the consultation paper. We believe that a fair basis for the application fee and the periodic fee is the only sustainable mechanism for recovering costs. This will result in smaller fees in respect of the smaller PBSs, although there may be some instances where a professional body may be unable to pass on the direct costs of OPBAS oversight in full to its supervised population. In such a case, it is for the government to determine whether it is in the public interest for it to subsidise that professional body. It is contrary to the principle of fairness for another PBS (and therefore its members) to do so.



We have explained why we are fundamentally opposed to the existing PBSs meeting the set-up costs of OPBAS, including all costs incurred prior to its formal existence in January 2018. We are also opposed to the PBSs meeting the costs incurred as a result of OPBAS's interactions with HMRC, as the PBSs are opposed to the limited scope of OPBAS oversight, which excludes oversight of HMRC.

We have referred to the inconsistency between the basis of recovering fees from the DPBs and the current proposals in respect of the PBSs. The only reason for this appears to be for the larger PBSs to subsidise the smaller ones. The impact of the proposals (according to the consultation paper and the estimates that underlie it) is that the periodic fee per individual could range from 83p to £25 (or more), dependent upon the PBS that supervises them.

We have refrained from commenting on the drafting of the fees Instrument itself, as the principles need to be agreed first. Once the principles have been agreed, the FCA should engage appropriate legal draftsmen to ensure that the principles are reflected in the Instrument.





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