

The fine print

The massive fines mooted for ABSs are off the scale in the legal services world, says **Stuart Bushell** as he continues his countdown to the profession's big bang

Just before Christmas the Legal Services Board displayed its 'bah humbug' tendency by proposing that alternative business structures (ABSs) should be subject to a maximum fine of £150m for compliance offences and individual offenders a fine of up to £50m. The fines in question will not be levied by the LSB but by the individual licensing authorities under the aegis of the LSB, such as the SRA.

It could have been worse, as the LSB originally wanted unlimited penalties, and indeed the Solicitors' Disciplinary Tribunal now has power to impose such penalties – the previous £5,000 limit having been abolished by the Legal Services Act. However, the Ministry of Justice helpfully pointed out that the Act didn't actually provide for such a power.

The LSB's own powers to fine poorly performing regulators are calculated on a percentage basis, as five per cent of the turnover of the body in question. However, the LSB opted for defined financial limits for ABSs on the basis that this would permit more flexibility to the regulators' freedom of movement and that it would be difficult to apply a percentage fine to individuals. In doing so it has fallen in line with the Financial Services Authority, which is named as an influence in the evidence base which accompanies the consultation paper.

Got the power

It is interesting therefore to see how the FSA has used its own fining powers in the ten years or so since it received them. The largest single fine imposed on a company to date is £33,320,000, which was levied on JP Morgan Securities for failing properly to segregate client money. The next highest was £17,500,000, levied on Goldman Sachs International.

In 2010 the FSA imposed fines of more than £1m on 13 occasions, the highest for an

individual coming in at £750,000 for mis-marking trading positions. However, the total value of fines imposed by the FSA in 2010 was only £89,121,281, and, given the considerably greater size of the financial services market and its potentially higher risk profile, the idea of a single ABS transgressor being fined £150m seems excessive – though

well as that of the potential new ABSs mooted by companies such as Tesco, Lloyds and Aviva, which command revenues of £42bn, £23bn and £14bn respectively.

Close link

The FSA revised its penalties policy in March 2010, so that, although fines could be unlimited in theory, in practice they have been linked closely to the income or revenue of the offenders.

For instance, a firm might be fined up to 20 per cent of the revenue derived over a particular period from the product or business area to which the breach relates. Similarly, an individual might be fined 40 per cent of their salary and benefits.

The FSA states its policy aims as being "the improvement of standards" and "credible deterrence" and in time the SRA and the other legal regulators will draw up their own policies. However, as with speeding fines, there are likely always to be lurking suspicions that decisions may be influenced by revenue-raising considerations.

The SRA has made clear that, wherever possible, it wants the regulation of ABSs

to be exactly the same as for mainstream solicitors. Traditional law firms will be hoping, however, that the full weight of the new fining powers will be reserved for the new entrants to the legal market, where the potential dilution of the professional ethic might arguably have more serious consequences.

It is far from clear how the LSB arrived at its £150m/£50m limit. The board says that fines need to be set at that level "so as to ensure that the largest firms were not given disproportionately low penalties compared to the small firms in the market".

We are also told that Clifford Chance's total income last year was £1.2bn, so that a £150m fine would equate to approximately 12.5 per cent of their turnover. The board says that it has had regard to the financial clout of current participants in the legal market as

