

SRA BOARD
18 January 2017

CLASSIFICATION – PUBLIC



**Competition and Markets Authority
Legal Services Market Study: Final Report**

Purpose

- 1 This paper outlines the key points raised in the Competition and Markets Authority (CMA)'s final report on its legal services market study.

Recommendations

- 2 The Board is asked to:
 - (a) note the contents of the CMA's final report on its market study into legal services
 - (b) note the CMA's recommendations on solicitors working in unregulated firms (paras 6-16 of this paper)
 - (c) note the CMA's recommendations on transparency (paras 17-24 of this paper)
 - (d) note the CMA's recommendations on regulatory architecture and independence (paras 25-30 of this paper)

If you have any questions about this paper please contact: Crispin Passmore, Executive Director, Policy. crispin.passmore@sra.org.uk or 0121 329 6687

SRA BOARD
18 January 2017



CLASSIFICATION – PUBLIC

Competition and Markets Authority Legal Services Market Study: Final Report

Background

- 3 The Competition and Markets Authority (CMA) launched its [market study](#)¹ into the supply of legal services in England and Wales in January 2016. We [responded](#)² to its [interim report](#)³ in August 2016. This paper summarises the CMA's [final report](#)⁴, which was published on 15 December 2016. All references are to the final report.
- 4 The scope of the study was the provision of civil law legal services to individuals and small businesses in England and Wales. There were three main themes to the study:
 - the ability of consumers to drive effective competition through making informed purchasing decisions
 - whether information failures expose consumers to harm that is not being adequately addressed through existing regulation or redress mechanisms
 - the impact of regulation and the regulatory framework on competition.
- 5 Below we highlight the areas of particular interest to the SRA's current and future work programme.

Solicitors working outside SRA regulated firms

- 6 Paragraph 51 of the CMA's final report states that:

"current regulatory rules that limit unauthorised providers' ability to employ solicitors to deliver unreserved legal activities may unnecessarily reduce the availability of lower cost options in the sector."
- 7 It has found that, given the reliance consumers place on regulated titles such as 'solicitor' as an important indicator of quality, the restrictions on the ability of unauthorised firms to employ solicitors to deliver unreserved legal activities may reduce the ability of unauthorised firms to compete.

¹ <https://www.gov.uk/cma-cases/legal-services-market-study>

² <https://assets.publishing.service.gov.uk/media/57d192aaed915d6cfa000034/solicitors-regulation-authority-response-to-interim-report.pdf>

³ <https://assets.publishing.service.gov.uk/media/577f76daed915d622c0000ef/legal-services-market-study-interim-report.pdf>

⁴ <https://assets.publishing.service.gov.uk/media/58518dc1ed915d0aeb0000a4/legal-services-market-study-final-report.pdf>

CLASSIFICATION – PUBLIC

8 This finding fits within a wider context of the functioning of the legal services market and the existence of unmet legal need. The CMA found a number of barriers to engagement with legal services providers, including the low likelihood of consumers categorising their problems as legal. Individual consumers are often more likely to put their issues down to bad luck and in the case of small businesses to characterise the problem as a business issue⁵. This in turn makes it less likely that they will seek legal advice and will continue to have unmet legal needs as they struggle to navigate the market. The tendency for consumers to turn to recommendations or previous experience to find a provider makes it less likely that they will consider or be aware of new or innovative providers. The CMA suggests this will limit the impact that these new providers can have on competition.

9 The CMA states that our proposals would help to address these competition concerns:

"We consider that access to regulated titles would improve the ability of unauthorised providers to compete in two ways:

- Through the impact that these titles have on consumer decision-making and trust. This means that consumers may be more willing to use unauthorised providers which employ practising solicitors, in situations where they might benefit from using them; and
- Through the ability of unauthorised firms to harness the expertise of solicitors in innovative and lower cost business models.

This is likely to have a positive impact on consumers by generating greater competitive pressure on price, and creating new routes and choice for consumers to access advice from qualified solicitors."⁶

10 The report also considers the potential risks to consumers of using businesses which offer less regulatory protection than the consumer expects (for example, those that use a solicitor employed by an unregulated firm, expecting the firm to offer the same protection as an SRA regulated firm). The CMA suggests the issue should be looked at in the context of whether a consumer would have gone to a regulated provider in the first instance (with the full range of protections) or whether they would have gone to an unauthorised provider (which did not employ a solicitor). Many consumers of services from unauthorised providers would not have sought legal advice at all.

11 The CMA highlights that the only consumers who would have less protection are those that would otherwise have gone to a regulated provider. Those consumers who would have gone to an unauthorised provider in any event

⁵ Paragraph 3.59

⁶ Paragraph 5.106-7

CLASSIFICATION – PUBLIC

would benefit from additional protection. Further, we note that as a result of our proposed changes, these consumers would have access to LeO and their solicitor would be required to follow the standards set out in our Code of Conduct for Solicitors.

Possible risks and mitigation

- 12 The CMA has found that additional regulatory protections (eg professional indemnity insurance and access to the Compensation Fund) can be important, but are often limited to certain situations. For example, they note that many unauthorised providers already elect to have PII without a regulatory requirement to do so. Access to the Compensation Fund is relevant when an SRA regulated provider owes money to a consumer in certain circumstances, such as if the provider has misappropriated funds or did not have PII. They note that this leaves the potential for consumers to be exposed to greater risks when using solicitors in unauthorised firms, particularly where client money is involved.⁷
- 13 The CMA has also noted the potential significance of the absence of legal professional privilege for certain consumers in certain situations.
- 14 For these reasons the CMA believes it is important for consumers to be advised of differences in regulatory protection *immediately prior* to purchasing services from an individual solicitor within an unauthorised firm. The report therefore supports the inclusion in the draft Code of a requirement to inform clients of the differences in regulatory protection.

Conclusion on solicitors working in unauthorised businesses

- 15 The CMA finds that on the basis of evidence and provided that the proposals we have put in place to mitigate the consumer protection risks are effective, and “the benefits to competition of removing the restriction [on solicitors working in unregulated firms] would likely outweigh the consumer protection concerns identified.”⁸
- 16 A specific recommendation is made to us “to remove regulatory restrictions to allow solicitors to practise in unauthorised firms”.⁹

Recommendation: the Board is asked to note the CMA's recommendations on solicitors working in unregulated firms.

Transparency

- 17 As mentioned above at paragraph 8, the CMA found a number of barriers to engagement with legal services providers including limited knowledge and

⁷ Paragraph 5.113

⁸ Paragraph 5.116

⁹ Page 274

CLASSIFICATION – PUBLIC

awareness of their need for legal services. Further, on top of the unmet legal needs this can create among consumers, these barriers "may help to perpetuate current market outcomes by entrenching certain patterns of behaviour that disincentivise competition."¹⁰ The CMA argues that there is "a clear need to increase transparency of price, service and quality to improve consumer engagement and to enable consumers to get a better deal."¹¹

- 18 Based on the Office of Fair Trading's [Access, Assess, Act](#)¹² Framework, the CMA states:

"First and foremost, consumers should be able to access key information to be able to make effective purchasing decisions. Where information can be accessed, it should be presented in a way that consumers can assess in order for it to be taken into account to make an informed purchasing decision."¹³

- 19 The CMA goes on to explain that for information to be accessible to consumers it must be readily available and easy to find (for example, websites should be easy to navigate). It must also be timely, enabling consumers to have an understanding of price, service and quality before approaching providers to make comparisons. Once information is accessible, it must also be accurate and communicated by different providers in a way that is comparable (such as a standardised format being used).

- 20 The first significant hurdle for consumers is that providers "generally do not make their price information accessible, for example by displaying it on their websites." This is compounded by the fact that where price information is provided it may not be clearly set out or easy to compare against other providers. In addition, while providing information on quality can be more challenging than information on price, there is still room for improvement. For example, the CMA found that consumers would like access to customer reviews and feedback.¹⁴

- 21 The CMA concludes that:

"Competition in the legal services sector for consumers and small businesses is not working well. Our findings suggest that the problems in the sector arise from information issues that weaken the ability of consumers and small businesses to drive competition through making informed purchasing decisions.... The lack of assessment of value for money softens competition and incentives for innovation, both within

¹⁰ Paragraph 3.62

¹¹ Paragraph 7.7

¹² http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/economic_research/oft1224.pdf

¹³ Paragraph 3.67

¹⁴ Paragraph 3.131-2

CLASSIFICATION – PUBLIC

and between types of provider.... these information issues contribute to unmet legal need.

In addition to the adverse impacts on demand and price, consumers and small businesses are also losing out in the long term. Innovation in the sector is limited.... This is despite making the regulatory regime more flexible in terms of the types of businesses which can operate in this sector through the introduction of the ABS regime and despite the presence of some innovative unauthorised providers."¹⁵

22 The CMA has made recommendations on changing supplier behaviour on transparency:

- "Act to improve the quality, utility and prominence of disclosures on providers' websites in relation to price, service, redress and regulatory status.
- Develop and consult on an enhanced regulatory minimum level of transparency for legal services providers, supported with guidance on implementation.
- Introduce guidance or regulatory requirements as necessary to improve information provided on engagement such as through the client care letter.
- Promote the use of quality signals by providers and issue guidance for providers on engaging with online reviews."¹⁶

Comparison websites

23 Our submission is quoted at paragraph 3.153, when we suggest that "increased coverage of the legal services market by comparison websites would be the single best way to enable consumers to compare legal services." The CMA has outlined remedies relating to transparency that may encourage the development of more of these types of services.

24 The following recommendations on facilitating comparison are made:

- "Identify and publish relevant information on entities and professionals which can be made available to customers, [digital comparison tools] DCTs and other third party intermediaries under an 'open data' licence.
- Publish relevant regulatory data in a standard format across all regulators and with consistent frequency.

¹⁵ Paragraph 3.238-43

¹⁶ Page 224

CLASSIFICATION – PUBLIC

- Assess the feasibility a single digital register across authorised professionals combining relevant regulatory and customer focused information."¹⁷

Recommendation: the Board is asked to note the CMA's recommendations on transparency.

Impact of the regulatory structure on competition

25 The CMA has identified a number of potential issues arising from the existing regulatory structure. They state:

"[W]e consider that independence of a regulator from the providers that it regulates is a key principle that should be taken into account in any review of a regulatory framework."¹⁸

[Consequently... a review of regulatory independence is a priority."¹⁹

26 It reiterates its view on independence later in their report:

"The regulatory framework needs to be independent both from the government and the profession. While it is important that representative bodies can provide input to regulatory decision-making, a lack of full independence may compromise the ability of regulation to meet its objective."²⁰

27 The CMA did not find evidence that the multiplicity of frontline regulators is currently having a significant impact on the market, but highlight that this may change in the future "if regulation were to focus on risk to a greater extent".²¹

28 It also considered the relationship between the Legal Services Board (LSB) and the frontline regulators, and found that this "may result in lengthy and inefficient decision-making in certain cases". Further:

"In the present context of legal services regulation, in particular relating to the lack of full independence, the LSB plays an important role to ensure that regulation serves the regulatory objectives and benefits consumers. However, we believe that there may be scope to ensure independence without the need for a separation between frontline and oversight regulators."²²

¹⁷ Page 264

¹⁸ Paragraph 5.145

¹⁹ Paragraph 5.152

²⁰ Paragraph 6.17

²¹ Paragraph 5.153

²² Paragraph 5.154

SRA BOARD
18 January 2017



CLASSIFICATION – PUBLIC

- 29 The CMA makes the following short term recommendations in relation to the regulatory framework:
- "The Ministry of Justice (MoJ) to undertake the review of independence of regulators
 - Regulators to take steps to reduce regulatory burden in areas where not justified by consumer protection risk or public interest
 - The SRA to remove regulatory restrictions to allow solicitors to practise in unauthorised firms."
- 30 It also recommends that in the long term the MoJ should review the current regulatory framework for legal services.²³

Recommendation: the Board is asked to note the CMA's recommendations on regulatory architecture and independence.

Other issues

Professional titles

- 31 The CMA highlighted our submission on the reliance of professional titles as follows:
- "The SRA submitted that many consumers rely on professional titles (eg 'solicitor') to help them choose a legal services provider. Qualitative research commissioned by the SRA in 2010 indicated that many individual consumers who purchase from solicitors do so because they believe that the 'solicitor brand' is a proxy for high quality and trustworthiness. We consider that consumers' reliance on certain professional titles to select a legal services provider is not a cause for concern provided that they understand what they are getting for the solicitor brand, and the title is an accurate proxy for high-quality advice and service delivery and the availability of redress."²⁴
- 32 It also stated "we believe it is important for regulation to continue to focus on title in the short to medium term given the high market shares of solicitors currently".²⁵

Professional indemnity insurance (PII)

- 33 The CMA addressed the levels of PII regulated providers are required to hold:

²³ Page 274

²⁴ Paragraph 4.18

²⁵ Paragraph 5.101

SRA BOARD
18 January 2017



CLASSIFICATION – PUBLIC

"As a key regulatory cost on firms which may be passed onto consumers, we believe that fuller consideration should be given to whether it is appropriate to reduce the minimum level of mandatory PII cover to reduce costs on providers and allow these firms more scope to assess the risks involved in providing their legal services and take out the appropriate level of PII."²⁶

34 It then continues to consider our work in this area:

"The SRA's intention was to reduce minimum PII requirements and its associated costs (which are likely to be passed on to consumers) to reflect the fact that risks are generally concentrated in few specific areas of law (for instance, conveyancing). An implication of the reform would have been that, in principle, a customer's claim might be lower than providers' insurance. The SRA, on balance, considered that the benefits of reducing the cost of PII across the sector were greater than the increased level of risk that might have occurred in certain areas of law and only in limited circumstances. The LSB, in rejecting the application [for this rule change], pointed to concerns around the robustness of the SRA's evidence for supporting this lowering in the PII minimum requirements. The LSB's assessment, in line with the requirements of the Legal Services Act 2007, hence focused on the potential risks of such reform for the achievement of the regulatory objectives (specifically in this case, consumer protection).

We are not best placed to comment on whether the LSB's decision was appropriate in this specific case on the basis of the evidence produced by the SRA. However, we consider that this situation illustrates how, in the current framework, the burden of proof is on regulators applying for a regulatory change to show that there is evidence that a rule should be removed, rather than imposing a requirement to justify the retention of a rule by demonstrating evidence of a risk that continues to deserve regulatory intervention. In other words, we believe that the current regime imposes a high bar for reducing regulation, which may lead to a bias toward keeping the status quo."²⁷

Legal Choices

35 The CMA makes a number of specific recommendations relating to the Legal Choices website, which we run with the other frontline regulators:

- "Review and further develop the content of the Legal Choices website to:

²⁶ Paragraph 5.52

²⁷ Paragraphs 6.48 - 6.49

CLASSIFICATION – PUBLIC

- present a comprehensive whole of market overview of different types of provider including those not regulated by frontline regulators;
 - provide information and practical guides on comparing and choosing a legal services provider; and
 - provide guidance on what information consumers and small businesses should reasonably expect from legal services providers on engagement and during the course of ongoing cases.
- Identify how best to support the vulnerable and those who are either unable or do not have confidence to access the Legal Choices website.
 - Actively consult the LeO, the LSCP, the LSB, relevant consumer and small business groups such as Which?, Citizens Advice, and the FSB, ICAEW and self-regulatory bodies on content and focus. Furthermore, the frontline regulators should consider how to meet ongoing consumer and business needs in future changes to editorial content.
 - Engage with government including the MoJ, BEIS and the Government Digital Service to improve signposting to Legal Choices and consistency of content between Legal Choices and GOV.UK.
 - Engage with relevant bodies in Northern Ireland and Scotland to consider how to ensure individual consumers and small businesses across the UK can be signposted to appropriate information.
 - Actively promote Legal Choices from their websites and on published materials.
 - Encourage legal services providers to make consumers aware of Legal Choices.
 - Explore other channels to promote awareness of the Legal Choices website including paid search.

We recommend to the MoJ that it coordinates changes to content on GOV.UK and introduces signposting to the Legal Choices website across its content."²⁸

Implementation

36 The CMA recommends that the LSB should oversee regulators' implementation of this report, and the effect subsequent changes are having on the market. There are some set dates for implementation:

- By 31 January 2017: frontline regulators to establish a programme board to facilitate a joined-up approach from the regulatory community and for that board to have met.

²⁸ Page 251

SRA BOARD
18 January 2017



CLASSIFICATION – PUBLIC

- By 30 June 2017: frontline regulators to publish a collective response to the report's recommendations, and each frontline regulator to publish an action plan of how it will take the report's recommendations forward.
- By 30 September 2017: frontline regulators to commence a consultation on any proposed regulatory change to drive increased transparency.

- 37 In three years the CMA will conduct its own assessment of the extent to which recommendations have been taken forward and the impact of these changes on competition. If unsatisfied it will consider the need for further action on its part.
- 38 We already have a number of consultations planned that relate to areas highlighted in the CMA's report. Each of phase two of Looking to the Future; our work on regulatory data and consumer choice; and our work on PII and the compensation fund are scheduled to go out to consultation during 2017. Beyond these specific examples, our programme of regulatory reform supports the broad direction of travel of the CMA's report. For example, we are currently consulting on a new approach to waivers that would support innovation.

Recommendation: the Board is asked to note the contents of the CMA's final report on its market study into legal services.

Next steps

- 39 We will draft an action plan to implement the CMA's recommendations, which will go to the Policy Committee for approval. Paul Phillip will write to the CMA accepting their recommendations and outlining how they fit with our existing plans and upcoming consultations.
- 40 We will ensure the recommendations feed into our ongoing reform programme. We have reconsidered the timetable for our reforms to ensure the recommendations can be incorporated.
- 41 The Board will be kept up to date with progress through the Chief Executive's reports.

SRA BOARD
18 January 2017



CLASSIFICATION – PUBLIC

Supporting information

Links to the Strategic Plan and / or Business Plan

42 The recommendations made by the CMA fit with our [aim](#)²⁹ to:

reform our regulation to enable growth and innovation in the market and to strike the right balance between reducing regulatory burdens and ensuring consumer protection.

How the issues support the regulatory objectives and best regulatory practice

43 The CMA has made recommendations that relate to our work on solicitors practising in unregulated firms, transparency and regulatory independence. Between them, these areas support the following regulatory objectives in particular:

- protecting and promoting the public interest
- improving access to justice
- protecting and promoting the interests of consumers
- promoting competition
- encouraging an independent, strong, diverse and effective legal profession

44 The CMA's recommendations will also help to achieve more proportionate regulation and transparency for consumers.

Public/Consumer impact

45 The recommendations will create greater choice for consumers, by enabling them to access solicitors through a wider range of businesses. They will also empower consumers to make more informed choices through improved information on quality and price.

Author Crispin Passmore

Contact Details crispin.passmore@sra.org.uk, 0121 329 6687

Date 10 January 2017

²⁹ <http://www.sra.org.uk/sra/strategy.page>