

19th August 2016

Dear Ms Rican-Sevitz,

MARKET STUDY INTO THE SUPPLY OF LEGAL SERVICES IN ENGLAND AND WALES

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the above named consultation.

The FSB is the UK's leading business organisation. It exists to protect and promote the interests of the self-employed and all those who run their own business. The FSB is non-party political, not for-profit organisation and is the largest organisation representing small and medium sized businesses in the UK.

Small businesses make up 99.3% of all businesses in the UK, and make a huge contribution to the UK economy. They contribute 51 per cent of the GDP and employ 58% of the private sector workforce.

We trust that you will find our comments helpful and that they will be taken into consideration.

Yours sincerely,

Richard Parlour

Chairman of the Home Affairs Committee
Federation of Small Businesses

FSB response to CMA market study into the supply of legal services in England and Wales: remedies

August 2016

INTRODUCTION

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to this consultation document on behalf of its members across the UK.

The law and the legal services which service it are vital ingredients in a well-functioning market economy. The law provides the framework which enables commercial activity. Therefore, an effective commercial legal services sector which facilitates the use of the law by small businesses is crucial to a thriving small business sector and a competitive UK economy.

The legal services sector has not served the small business community as well as it might. A report in 2013 by Pleasence and Balmer identified £100bn worth of unsatisfied legal need among the UK's small business population.¹ This is a considerable failure of the legal services market to meet the needs of small businesses.

Consequently, we supported a thorough look at the functioning of the commercial legal services sector by the Competition and Markets Authority (CMA) and argued that the review should cover:

- Transactional services;
- Litigation services; and
- Dispute resolution services.

While the focus of the study has been narrower than FSB had hoped, nonetheless we welcome the interim findings as a providing an important overview of the effectiveness of key parts of the legal sector in meeting the needs of small businesses and elucidating some of the ways in which it currently fails.

In the comments below FSB outlines:

- Why the remedies discussed in the interim report are likely to be helpful but that there are a range of issues which additionally need to be dealt with holistically, rather than in a piecemeal fashion, if there is to be a step-change in the functioning of the small business legal services market and a significant reduction in the quantum of unmet legal need; and
- A number of reforms which, in FSB's view, are needed to genuinely ensure the most useful information is made available to inform the market.

REMEDIES

The thrust of the interim report

The interim report focusses on transparency i.e. information solutions to ensure potential and actual small business users of legal services are able to better access and utilise more effectively information about different provider options in order to improve their purchasing choices.

¹ Pleasence, P and Blamer, N J (2013). 'In Need of Advice: Findings of a Small Business Legal Needs Benchmarking Survey', can be accessed at: <https://research.legalservicesboard.org.uk/wp-content/media/In-Need-of-Advice-report.pdf>

Better upfront information about the price and quality of offerings available in the market are key elements of a well-functioning market. Where the service is particularly complex, as is often the case for legal services, and proxies for value-for-money play less of a role than in other markets, clear and useable information is more important than ever.

Scope for a wider investigation

Additionally, the interim report sets out some sensible points about the importance of the right regulatory framework but notes that aspects of these are being looked at already, both by the legal services regulators themselves and the Ministry of Justice (MoJ). While we agree that the CMA should avoid cutting across this work, there is a wider risk that much of what is currently underway or is in the pipeline is disjointed with different bodies and organisations looking at particular aspects of the overall system rather than a holistic approach which can identify how many of the different parts interact to create the whole. FSB would like to see a co-ordinated and coherent reform agenda for the legal services sector, which flows from some clear evidence-based objectives.

As a result of the current approach, a number of important aspects of the legal services sector for smaller businesses have not been examined in sufficient detail by any organisation in FSB's view. The failings in these other aspects of the legal services market are equally important and are closely linked to each other and those identified in the interim report. These include:

- The lack of awareness among small businesses of what business problems are legal and in particular the capability of small business owners and managers to identify issues/problems that are wholly or partially legal and consequently amenable to legal resolution. While difficulties in accessing and using information about different legal service providers are part of the demand-side problem (and indeed are prior to the problems associated with searching the market and choice of provider) they are not the whole story. A considerable proportion of small businesses do not get as far as trying to navigate the market. This knowledge 'gap' needs to be better addressed;
- The role of free legal advice from organisations such as Citizens Advice in helping small businesses better deal with legal problems. FSB notes that the report highlights how 'un-regulated' providers are often a starting point for many of those with legal problems, including some small businesses;
- The management of the potential cost risks associated with purchasing legal services or pursuing legal solutions to problems and the access to and utilisation of products or practices which might help mitigate some of those risks for small businesses;
- The role of redress for small businesses e.g. through widening the scope of the Legal Ombudsman Service to cover more small business – legal services provider disputes; and
- The functioning of the commercial ADR sector for smaller businesses, which appears to suffer from some of the demand-side problems that the transactional and litigation services parts of the legal services market. Measures which helped improve transparency and consequently the ability to search the market might facilitate greater use of ADR by small businesses.

FSB consider that without thoroughly looking into these other aspects of the whole legal services picture the market will never improve sufficiently to make a significant dent in the large quantity of unfulfilled legal need that exists among small businesses. Consequently concentrating on transparency and information remedies for those who are already trying to

engage with the market without addressing the awareness gaps, the relative cost issues and redress will bring improvements but not far reaching ones.

Perhaps the most serious of the problems outlined above is that of the knowledge gap. FSB would like to see measures on transparency (see comments below) complemented by awareness raising/ educational measures among the small business community about:

- What is a legal issue;
- The best means of resolution;
- Where they can find out relevant information about appropriate legal remedies;
- How best to utilise advice and information in their own interests.

Transparency and information

As the interim report suggests, there is scope for considerable improvement in the transparency of the information available to small business consumers of legal services. FSB supports more remedies which increase the transparency in the legal services sector to help address current information asymmetries between buyers and sellers.

Price transparency

The most effective way to increase transparency is to make useful information available upfront, which can then in-turn helpfully inform the decisions of market actors. In other words, use-able information has to be available to potential buyers at the pre-purchase or market search stage. Therefore, FSB would like to see much more use of pre-purchase advertising of accurate prices, which are easily accessible to potential clients. For example, any planned improvement to the clarity and transparency of the post-engagement client care letter should also be information brought into the pre-purchase time period. In addition, FSB would like to see more diversity in the types of legal services offered so there is not just one common form for pricing but numerous ones, which small businesses can then choose from as being the most appropriate. This should include greater use of fixed fees. FSB recognises that not all services are likely to be amenable to fixed fees. Robust steps may be needed to ensure this change occurs. While in the first instance the market should be encouraged to provide upfront pricing it may, if necessary, have to be compelled. This approach should include the pre-purchase publishing of hourly rates (currently in the post engagement client care letter) and even the publishing of potential ranges of fees for litigation. Regulators should have a role in helping to guide consistency of the parameters for pricing information published (e.g. requiring the clear listing or aggregating of disbursements and VAT in addition to fees), but should avoid dictating one common form for pricing.

Customer feedback

Measures are also needed to improve the information available in the market on quality and outcomes. More transparent pricing information is only part of the greater transparency needed in the legal services sector. Information on quality and outcomes is best provided by previous users of the services. Therefore, in addition to pricing data it is also critical that small business clients are encouraged to provide post-purchase information about their experiences to help inform other future users who are searching the market. These should include user ratings and other evaluative information. The lack of this sort of data is one of the reasons why there has been slow take-off in the role of third party intermediaries in the

legal services sector, as was noted the interim report, where it was pointed out that digital comparison tools are not currently widely used in legal services.

Specific proposals

Whilst regulators might themselves implement solutions for publishing prices and consumer feedback; their regulatory priorities will rightly come first and their ability to effectively execute digital distribution of such information with reducing budgets should be acknowledged upfront. A critical element to enable scale and accessibility of trusted information as widely as possible to all current and potential clients is to ensure that all available information is also available through third party intermediaries such as legal comparison websites that will facilitate 'shopping around' through user-friendly comparisons. To help the choice process measures which acted to signal to smaller businesses which information sources can be trusted would also be useful. This, for example, might mean kite marking of the data on comparison sites for the quality and trustworthiness of the information provided by regulators or other independent authorities.

To deliver the price transparency and the user-experience feedback, the CMA should consider two specific remedies:

- Legal services regulators should have the power to require providers of legal services to provide upfront transparent pricing to potential customers. Since such information is in client care letters already it should not be onerous for lawyers to provide to potential clients upfront. Alternatively the regulators should, as a backstop power, and at minimal additional cost and effort, be compelled to obtain from all lawyers their hourly billing rate with their annual regulatory return and require firms to provide similar information about services and related pricing. Through regulators having an obligation to make public such pricing information and a concomitant duty to encourage upfront transparency the incentives will be created that will ensure the whole of the legal services sector begin to offer upfront pricing of services in a way familiar to consumers of goods and services in other sectors; and
- Regulators should also be given a power to require legal services providers to seek and collect client feedback and to provide this to the regulator, who should in-turn be compelled to make such information publicly available in some form. This measure might be considered somewhat more intrusive and burdensome to regulated legal services providers in the short run, however many very cheap, secure and effective services for obtaining client feedback already exist. The few pence per client feedback requested that it can cost to collect such feedback data is an insignificant cost relative to the much higher average cost per transaction to clients. Collecting feedback should be good practice for any legal service provider (whether regulated or not) in any case. For regulated professionals it would also present an important source of information for the regulator better enabling them to monitor the performance of those they regulate. Despite the initial additional costs, with this sort of data made public the long-term gains for clients, the legal services providers themselves and the market more generally should be significant.

The Regulatory framework

As the interim report itself acknowledges, regulation of legal services providers drive up their operating costs. FSB is a strong supporter of risk-based and proportionate regulation. We believe that these principles have to apply across all sectors including the legal services

sector. Consequently, we support ongoing attempts by the SRA to reduce the regulatory burden by reducing the size and simplifying the Solicitor's Code and other regulators attempting similar rationalisations, while not removing essential consumer protection. We also support the suggestion in the interim report of a systematic review of regulation across the sector to ensure it is risk-based. However, as outlined earlier, this should come as part of a comprehensive review of and coherent plan to reform (where necessary) and improve the commercial legal services sector for small businesses not as a further piecemeal change un-co-ordinated with other initiatives.

The multiplicity of the titles of qualified providers of legal services can cause confusion among some clients who then default to solicitors because the latter are the most widely known. The range of professions offering legal services may therefore act as a barrier to small business clients using other non-regulated providers in circumstances when the latter may be the adequate and more cost effective provider. To what extent the professional organisation of the legal sector could be rationalised is a long-term question that is only likely to be addressed as part of a comprehensive review. Such a question would need to be asked in conjunction with questions about whether the sector requires a single regulator or whether the multiple regulator model can continue to deliver for small business clients. The latter is planned by MoJ, but an opportunity is being missed by not looking at these issues in one whole rather than in parts. Whatever the conclusion of such reviews the FSB supports independent regulation that is risk-based and proportionate and holds 'regulated providers' to robust standards of conduct and openness where appropriate.

One middle way between extensive sector specific *ex ante* regulation which inevitably involves complexity and costs, would be to make the provision of all legal services provided to certain vulnerable categories of customer (such as small businesses) subject to the jurisdiction of the Legal Ombudsman. This would help provide a check on some poor service and provide an opportunity for feedback on the state of the market to other users and regulators. This approach could help highlight areas of the small business legal services market where there is persistent detriment, while helping minimise costly regulatory frameworks. While not a panacea for significant market transformation, such a change would help bring some incremental improvements over time.

For further information

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