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5 August 2016

Dear Sirs,

Legal Services Market Study – Interim Report

The Society of Scrivener Notaries notes the publication of the *Legal Services Market Study – Interim Report* (“the Interim Report”), together with the accompanying annexes.

We welcome the interest taken by the Competition & Markets Authority in legal services regulation and have considered the Interim Report and annexes carefully.

The Interim Report invites responses on certain issues. We have particular concerns about the risks of defamation arising from some of the remedies considered by the CMA. These concerns relate to the inaccuracies and consumer confusion that can arise from “direct comparison tools” and the privacy and defamatory risks of online reviews.

We therefore wish to respond as follows.

1. Observations on the scope of the Market Study to date

1.1 Whilst we accept that notaries are only one sector of the legal services market, we believe that a Study of the market needs to consider evidence from all sectors. We would therefore like to submit the evidence below in order to assist the work of the CMA.

1.2 The Interim Report lists the organisations with whom the CMA has engaged since the market study was launched in January 2016. The list of approved regulators does not include the Master of the Faculties (the regulator for notaries public). The list of representative bodies does not include the Society of Scrivener Notaries nor the Notaries Society.

2. The market for notarial services in England and Wales

Demand

2.1 (For the sake of brevity and relevance, our response is focussed on private consumers and small businesses, to the exclusion of larger companies and corporations).

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2. The market for notarial services in England and Wales

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2.1 (For the sake of brevity and relevance, our response is focussed on private consumers and small businesses, to the exclusion of larger companies and corporations).

2.2 The role of the notary as a public, independent, certifying officer means the majority of a notary's services are rendered to consumers who have personal legal matters in other jurisdictions.

2.3 An analysis of the legal services market therefore needs to take into consideration the interaction between the law of England and Wales (a common law jurisdiction) and the laws of other countries, particularly those with a civil law tradition.

2.4 In most cases therefore, notaries in England and Wales operate in an **export market**. Their services are rendered to consumers based in the United Kingdom, in that their work is intended for use in other jurisdictions rather than a "domestic market".

2.5 There is consumer demand for notaries to have an understanding of foreign languages and law and this affects purchasing decisions.

2.6 There is also consumer demand for notaries who are able to offer other services, such as translation, consular legalisation and advice on foreign law. These activities are not necessarily reserved legal activities.

2.7 Demand for notarial services tends to be strongest in major population centres, particularly in the South East of England.

Consumer need

Consumer inexperience

2.8 Many consumers are infrequent users of notarial services and there can be understandable misunderstandings that can arise. Our experience is that consumers can also have a range of expectations about the service they receive. Some consumers regard the services of notaries as a rubber-stamping exercise, whereas others are looking for advice and/or reassurance about a variety of legal issues, most of which relate to foreign law.

2.9 That inexperience also impacts on a consumer's understanding of cost. For example, the additional expense of legalisation (at the Foreign & Commonwealth Office or consulate) adds to the consumer's total expense. The UK government and foreign government set their own tariffs in such matters and these are often subject to change at short notice.

Foreign law/foreign languages

2.10 It should be noted that many consumers of notarial services are from overseas and have varying levels of proficiency in English. Such consumers are more comfortable dealing with a notary who speaks their language.

2.11 Many consumers interact with advisors based abroad who also have varying levels of English. Many practitioners can report experiences of consumers in a state of uncertainty. Some of the confusion is bureaucracy, some of it linguistic. Most notaries can report examples of clients who variously need to have documents "legalised", "stamped", "certified", "authenticated", "apostilled", "translated" with very little detail as to what this means. All of these terms have meanings but are often used interchangeably and are best understood when taken in the context of the consumer's particular circumstances.

2.12 In some cases, notaries are asked (or volunteer) to contact a third party abroad in order to discuss what the consumer requires.

2.13 In these situations, it is only *after* the consumer makes contact with a notary that they are given initial advice on what is required for their needs. Consumers who "self-diagnose" can be a risk of wasting time and money in the pursuit of options that are either unnecessary or ineffective. For example, it is not uncommon for consumers to report that they need to translate their documents into English before executing them. On closer examination, it transpires that a notary with appropriate linguistic proficiency is in a position to re-draft or certify such documents in the language of the jurisdiction concerned.

The risks of self-diagnosis by consumers

2.14 Many consumers are (understandably) unaware of the formalities of the receiving jurisdiction and it is only after making contact with a notary that specific needs can be identified. For example, many jurisdictions expect the use of a full notarial act (where the notary is responsible for the entire contents of the document). A simple certification of signature is insufficient. The notary will often need to research a point of law or formality in respect of the foreign jurisdiction. There is a time and cost element to such research, which cannot be valued by a reductionist comparison tool.

2.15 Self-diagnosis of need does not therefore always produce the desired result in the receiving jurisdiction. Indeed, most practitioners can recount examples of how some clients make false economies and seek to blame others for failing to prevent them from doing so.

The needs of vulnerable consumers

2.16 The consumer of notarial services is not necessarily the person paying for them. Notaries are often asked to attend on those who are vulnerable, at home or in hospital, or without access to the internet. Such persons are at a disadvantage when it comes to making choices and it is often the case that a decision to instruct the notary will have been taken by someone else.

2.17 The notary has a duty of care towards the individual, and must refuse to act if there is doubt as to the individual's mental capacity or the absence of undue influence. Where this is the case, a third party's perception of the notary is unlikely to be positive.

In such situations, the decision to instruct the notary will not have been taken by the "end consumer", i.e. the person to whom the notary owes the highest duty of care.

Identification of need

2.18 Identification of need is therefore a key area of notarial practice. Failure to understand consumer need can often be a cause of consumer complaints, whether these are in relation to cost or quality of service. A notary is in a far better position to assist a consumer when the consumer provides full and accurate information regarding their personal affairs, and informs the notary if there is any significant change in their personal situation. This exchange of information is two-way. The client needs certainty about the service being provided to them and at what cost. The notary needs certainty as to the client's circumstances and needs.

Purchasing decisions

2.19 Recommendations, referrals, client retention and repeat business are key part of any successful practice.

2.20 We were also surprised by the CMA's apparent lack of confidence in the peers, friends and families of consumers. This is reflected at 1.17, 4.9 and 4.11 of the Interim Report. *"Most consumers rely on previous experience or recommendations from peers, friends or family to assess quality." "This may be a practical approach to ensuring they get adequate quality and value for money given the inherent issues in assessing quality."*

"We consider that [the big percentage of "confident" consumers] largely reflects the fact that they feel able to rely on recommendations on quality rather than that they are able to observe quality themselves".

2.21 We suggest on the contrary that consumers are able to observe quality and to report their experiences faithfully to their friends and peers. We therefore urge the CMA to have more confidence in the consumer's ability to "ask around" before making a choice. As the Report says at 4.11:

"We note that the majority of respondents to our survey (72%) felt able to judge the quality of the provider before choosing".

We should be encouraged by this, whilst accepting that more focus must be given to the 28% who do not.

Supply

Current numbers and regulation of notaries in England and Wales

2.22 There are just under 800 notaries in England and Wales and they are regulated by the Master of the Faculties. The spread of notarial offices largely reflects demand. Most notaries are sole practitioners, with some notaries practising in partnerships or small companies.

A notary's clientele can vary depending on the location of the practice and any other legal activities which may be offered to the public.

Services provided

2.23 The legal services offered by notaries may be "reserved" (within the meaning of the Legal Services Act 2007) or "non-reserved". Reserved legal activities would include notarial activities, probate, conveyancing and the administration of oaths. Non-reserved activities would include translation & interpreting services or consular legalisation.

2.24 Most notaries are familiar with what the Interim Report describes as "unbundling", where a package of legal services is broken down into parts with some undertaken by the consumer or a third party. For example, some consumers choose to arrange consular legalisation themselves; some choose to commission legal translation elsewhere; and some choose to make their own

arrangements for despatch. Consumers of notarial services enjoy a degree of choice, and perhaps more so in comparison with other legal services

Pricing

2.25 At 1.16 of the Interim Report it is claimed that the evidence of “*price dispersion*” (i.e. a difference between prices charged by providers for the same service) is evidence of “*limited price competition*”. We suggest that the opposite conclusion should be drawn. Pricing is affected by a number of factors such as overheads, urgency, availability, experience, skills required, or volume. To us, the evidence is indicative of a competitive market.

2.26 At 4.14 of the Interim Report it is stated that: “*An important feature of price competition in legal services is the structure of fees presented to consumers. Fixed fees are important for competition as they enable consumers to have a greater certainty over potential legal costs and an ability to compare price providers more easily than hourly fees. Survey evidence consistently shows that consumers have a strong preference for fixed pricing rather than hourly billing.*”

2.27 We broadly agree with this statement, with the proviso that the certainty afforded to consumers is completely dependent on certainty as to the consumer's need. Please refer to the analysis of consumer needs at 2.8 above.

The recognition of notarial acts – consumer benefit

2.28 The supply of a competitive quality service to consumers is dependent on the ability of notaries in England and Wales to ensure that their acts are recognised in other jurisdictions.

2.29 The Society of Scrivener Notaries is proud to have been full members of the International Union of Notaries since 1998. It is the first notariat from a common law jurisdiction to have achieved this recognition.

2.30 The CMA should be aware that notaries in civil law jurisdictions (mainland Europe, Latin America) have a particular role within their system of national, internal law. Notaries in common law jurisdictions do not enjoy quite the same status. For reasons which are outside the scope of the Interim Report, there is an unfriendly, minority view within civil law jurisdictions that notaries in England and Wales are not “lawyers”.

2.31 The profession wishes to continue to serve the needs of its clients and is therefore inevitably vigilant in matters that relate to its reputation overseas. This issue is unlikely to recede in the coming years as the relationship between the United Kingdom and the European Union is redefined.

2.32 It is therefore in the consumer interest for the status and activities of notaries in England and Wales to retain recognition and acceptance **in civil law jurisdictions**. If the status of Anglo-Welsh notarial acts abroad is weakened due to inappropriate regulation or regulatory changes, the ability of consumers to resolve their legal issues will be adversely affected. The worst case scenario, in which the recognition of Anglo-Welsh notarial acts becomes sporadic and unpredictable, would mean that consumers in England and Wales are unable to access notarial services at all. The potential detriment to the consumer is obvious and there would be wider economic implications.

3. Consumer protection

3.1 Once a consumer and the notary are in contact with each other, regulation comes into play **prior** to engagement.

Transparency of cost

3.2 At 1.12 of the Interim Report it is claimed that a *“lack of transparency of price and service make it harder for consumers to compare providers and identify value for money”*. At 5.40 – *At the time of engagement, regulated providers must provide the best possible information about the likely cost of a matter...”*

We are of the view that this takes place already.

The law

3.3 The Interim Report considers the implication of the Consumer Rights Act 2015 which implies various terms into consumer contracts in relation to quality of service. We draw your attention to the existing impact on notaries of The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ("the Consumer Contracts Regulations"). The Consumer Contracts Regulations give rights to consumers who enter into contracts with businesses. The rights are robust and are contained in Schedules 1 and 2. For "on premises" contracts, the consumer must be made aware of the main characteristics of the goods or services, the identity of the trader, the total price of the goods or services inclusive of taxes, or the manner in which the price is to be calculated, together with all additional delivery charges or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable.

3.4 For "off premises" contracts, the level of consumer protection is even greater, with the requirement for a "cooling off" period and the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

Professional regulation

3.5 Consumers enjoy similar protection in the professional regulations applicable to notaries.

"A notary may charge a professional fee for all notarial work undertaken by him, and the basis upon which that fee will be calculated or the fee to be charged for the work done, shall be made known in advance to any new client". (Rule 18.1, Notaries Practice Rules 2014)

3.6 Transparency does not just apply to fees, but also to redress.

"When a notary accepts instructions for professional work or changes the terms on which he is acting he must provide the client with a copy of a form of words prescribed by the Master from time to time (the "prescribed form of words") which explains that the client has a right to make a complaint under Part II of the Notaries (Conduct and Discipline) Rules 2011 and how to make such a complaint." (Rule 8.1, Notaries Practice Rules 2014)

Redress mechanisms

3.7 In England and Wales the regulator has always been independent of the notarial profession.

3.8 Consumers of notarial services enjoy the benefits of the protections offered within the regulated sector. The CMA should note that where a non-reserved legal activity is offered by a notary, it is nevertheless contained within the regulatory framework by virtue of the fact that it is offered to the consumer by a notary.

"a notary's practice includes the preparation and performance of notarial acts and any other service undertaken as a notary whether or not such service may only be undertaken by a notary." (Rule 2.2.1, Notaries Practice Rules 2014)

3.9 The clients of notaries can therefore make use of the "first-tier" complaints procedures and are subject to the jurisdiction of the Legal Ombudman.

4. Responses to proposed CMA remedies

Improving price and service transparency – information provision before engagement

4.1 Our evidence to you is that the focus should be on encouraging consumers to engage with lawyers at an earlier stage on a "no obligation" basis. Transparency of price can be ensured if there is transparency as to the service required.

4.2 The correct regulatory balance has already been struck at the time of engagement and we cannot see how further improvements can be made, other than to ensure enforcement. Once a consumer has engaged with a notary it is an offence under the general law and *prima facie* professional misconduct for a consumer to be misled.

Addressing barriers to comparison and search - the dangers of reductionism

4.3 As explained above, the needs of consumers are often complex and require contact with a notary before they can be identified.

4.4 We have no objection to consumer research online, indeed we welcome it as part of the "buying process". Most notaries operate websites. This Society welcomes publication of "negative information", i.e. adverse findings against a notary by the Legal Ombudsman or Court of Faculties. Such information is of public interest and consumers are right to take it into consideration.

4.5 However, we have concerns about the CMA's interest in direct comparison tools (DCT) and an over-reliance on online reviews.

4.6 The rationale for DCTs is that they enable consumers to compare prices. The only useful tool for a consumer is one that provides them with an "end figure". We doubt that it is possible to construct a tool that enables the consumer to price any and all types of notarial services for all jurisdictions worldwide (inclusive of a firm's out-of-pocket expenses, such as consular fees).

4.7 We also anticipate that attempting to frame the complexities of consumer needs into a website could lead to confusion and misunderstanding.

4.8 We have concerns that a DCT would lead to abuse by the unscrupulous. It will encourage the use of "premium listings" and "loss leader" services that disguise price "mark-ups" elsewhere, particularly if there were a proposal to make publication of "average pricing" mandatory.

4.9 Our preference is that the consumer should have the confidence and resources available to "shop around".

4.10 We also have reservations about what the Interim Report calls "reputation mechanisms". At 4.28, having been rather dismissive of the consumer's personal experiences, the Interim Report goes into detail. *"These can include published consumer feedback, such as online reviews, and the development of recognisable brands with a reputation for quality"*.

4.11 We are surprised that the CMA should attribute more weight to online reviews rather than the consumer's personal experience. Online reviews (such as those which are published on well-known comparison website) are open to abuse and have low levels of reliability. There is a tendency towards the extreme views. The service was either 5-star and outstanding, or 0-star and appalling. Those who were satisfied and wanted nothing more are rarely enthusiastic about completing a survey.

4.12 There is little or no quality control of online reviews. Indeed we believe that there is the potential for manipulation with "reviews" being written (or intimated) with the intention of promoting or diminishing the lawyer concerned. The risks of defamation to a firm or individual are high. As a profession where most notaries work individually or in very small practices, there are few who have the resources to engage in "online reputation management". The damage done by "Twitter trolling" and online bullying in other areas of public and professional life is a salutary warning.

4.13 Consumers who ask their friends are much less at risk of being misled. Our view is that online research is only a prelude to direct enquiries of the notary concerned. This conclusion is supported by your analysis at 4.13 of the Interim Report.

"Small businesses perceived it to be necessary to have telephone or face-to-face conversations about their specific legal need in order to make price and quality comparisons."

4.14 It is hardly surprising that the legal needs of consumers are specific, and the market responds to demand accordingly. We therefore encourage the CMA and other regulatory bodies to avoid a reductionist analysis of consumer demand. General online research is useful and a feature of the market, but it is only one part of prudent decision to purchase. Consumer needs must be balanced with the need to protect the privacy of the individual under Article 8 of the European Convention on Human Rights.

Improving consumer information and awareness

4.15 We agree with your suggestion that the Legal Choices website be further promoted as a tool for consumer research.

4.16 We also draw your attention to other independent websites. The Faculty Office (as regulator for notaries) operates a website that identifies language proficiency. The Foreign & Commonwealth Office website is an example of clarity in explaining to consumers the process of document legalisation. The two Societies which represent notaries in England and Wales also have informative websites.

Consumer protection and redress – client care – regulatory title – Legal Ombudsman – ADR arrangements

4.17 These matters are important but given the scope of the Interim Report and the timescale available to us we will make no further observations for the time being other than to draw your attention to our evidence above.

4.18 We would not be surprised if the Legal Ombudsman were to become the *de facto* ADR entity of choice even though that body decided not to proceed with its application for official status.

Changes to regulation and the regulatory framework

4.19 Our evidence shows that the consumer interest in England and Wales will be met if the acts of notaries in England and Wales continue to receive recognition abroad. This is more likely to occur if the independence of the notarial profession is maintained. We therefore welcome your observation at 6.38:

"the 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".

The CMA's observation complements the comments made by the Chairman of the Legal Services Board that complete regulatory independence is the benchmark.

4.20 A longer-term review of legal services regulation is outside of the scope of the Interim Report but we feel that the market would benefit from a period of stability in the medium term. The disruption caused by a regular stream of initiatives usually outweighs the potential benefits.

5. Conclusion

We are grateful to the Competition & Markets Authority for the opportunity for comment, and look forward to contributing to raising consumer awareness of the benefits from well-regulated legal services.

Yours sincerely,

Jonathan Coutts

Honorary Secretary