

Response to Scottish Government: Licensed Providers Regulatory Scheme

This paper responds to a Scottish Government letter of 3 March 2016 which seeks the views of the Competition and Markets Authority (CMA) on the proposed regulatory scheme for 'licensed providers' – a form of alternative business structures (ABS) – as submitted by the Law Society of Scotland (the Society).

The CMA is the UK's primary competition and consumer authority. It is an independent non-ministerial government department with responsibility for carrying out investigations into mergers, markets and the regulated industries and enforcing competition and consumer law. In 2014 the CMA took over many of the functions of the Office of Fair Trading (OFT).

The CMA works closely with sector regulators, including those who regulate professional services, such as legal services. One of our strategic goals is to extend competition frontiers through using our powers to conduct market studies to improve the way competition works. We are currently engaged on a market study into legal services in England and Wales.¹ Previously, as the OFT, we examined the legal services market in Scotland in response to a Which? super-complaint in 2007. In responding to that super-complaint, the OFT advocated that restrictions on ABSs should be removed so as to benefit consumers in Scotland and recommended that the Scottish Executive should outline its views on how this could be done. We therefore have an interest in the development of the first Scottish ABS regulatory scheme and this is reflected in parts of the Legal Services (Scotland) Act 2010 where the CMA is required to provide advice.

We welcome progress with implementing the legislation and were glad to participate in the recent consultation event on 23 March. In the absence of current evidence to suggest that the scheme would (or would be likely to) prevent, restrict or distort competition in the legal services market, we recommend that Scottish Ministers approve the Society's proposed scheme on the basis that this will provide an opportunity for those firms or individuals wishing to take advantage of an ABS

¹ This market study is examining three key issues: (i) whether customers can drive effective competition by making informed purchasing decisions; (ii) whether customers are adequately protected from potential harm or can obtain satisfactory redress if legal services go wrong; and (iii) how regulation and the regulatory framework impact on competition for the supply of legal services.

business model to become licensed to do so. However, we have a number of comments that the Scottish Government may wish to consider:

1. Since receipt of earlier drafts of the scheme in 2014, we note the strengthening of certain consumer-facing provisions in the scheme and welcome the focus on complaints handling. We look forward to the Society providing further guidance to licensed providers in promoting best practice, for example requirements on transparency as to what fees will cover; notification of redress options on website; timely communication.
2. We recommend that the scheme is reviewed once it has been operating for two to three years and that a full (and open) consultation on its success and possible improvements conducted.² While we note that the Society has declared its desire to maintain a level playing field between licensed providers and their traditional counterparts, we understand that differences in the relevant primary legislation pertaining to licensed providers and traditional solicitor firms will result in certain differences in the regulatory requirements being imposed between these business models. A future review would be useful in assessing the impact of these regulatory differences on the take-up of the scheme or on licensed providers' ability to compete in the Scottish legal sector.

The CMA believes that any such review of the scheme should include:

- (a) An evaluation of the take-up of licensed providers and the length of time/cost to process applications by the Society.
- (b) A review of potential barriers to entry created by the regulatory scheme – whether underpinned by provisions stipulated by the 2010 Act or not – and undertaken with a particular focus on assessing the impact of differences between the regulatory scheme for licensed providers and regulations for traditional law firms. This might include looking at the impact of the requirement that Scottish ABSs must be 51% owned by solicitors or other regulated professionals.
- (c) An assessment of whether the Society should be able to waive certain aspects of the regulatory scheme.
- (d) At a later stage following the scheme's implementation, an evaluation of how consumers may have benefited from the introduction of ABSs.

² In recommending this, we note that the Solicitors Regulation Authority and Legal Services Board in England and Wales have conducted a number of reviews aimed at assessing the functioning of the licensing process and potential impacts on consumers.

Any such review may facilitate an assessment of whether the current legislative framework for ABSs goes far enough to deliver the benefits originally intended for improved consumer choice and value. We note that one significant way in which the Scottish framework differs from that in England and Wales is the requirement for 51% ownership by solicitors or other regulated professionals. A review could assess whether this potentially constrains innovation and the potential efficiencies in legal services provision that the OFT assessment in 2007 envisaged. The CMA would be happy to assist the Scottish Government in considering the consumer benefits of this and other aspects of the current framework, based on our experience both relating to our earlier work in Scotland and the current market study into legal services in England and Wales.

3. Finally, we note that the 2010 Act requires the Society to put in place provisions to consult the CMA in relation to licence applications that may, as a result of being granted, have an adverse effect on competition. As the regulatory scheme is essentially pro-competitive in seeking to open the sector up to new forms of entry (following the OFT's earlier recommendations for regulatory reform), we would envisage very few circumstances when the grant of a licence would lead to a prevention, restriction or distortion of competition. In this context, we note that the Society's accompanying explanatory note on the regulatory scheme currently refers to a firm's dominance, and potential abuse of such dominance, as a potential indicator of an adverse effect on competition. The CMA believes that a more suitable test for assessing the potential adverse effect on competition arising through the grant of a license would be to consult the CMA's competition checklist found in its Competition Impact Assessment guidelines.³ If approval is given, we will engage with the Society on how this guidance could be used by the Society and we are happy to offer similar engagement to Scottish Government officials, should this be helpful.

6 May 2016

³ CMA (September 2015), [Competition impact assessment \(CMA50\)](#).