

FACULTY OFFICE

CMA review of the implementation and impact of the recommendations of its 2016 market study into legal services in England and Wales

Call for inputs (CFI) - Supplementary questions for regulators

Introduction

The Competition and Markets Authority (CMA) launched a Call for Inputs to aid its review of the implementation and impact of the recommendations of its 2016 market study into legal services in England & Wales from, inter alia, Approved Regulators. The CMA also asked some supplementary questions for regulators in addition to the CFI. The Master of the Faculties (MoF) is the Approved Regulator for Notaries Public in England & Wales. The day to day regulatory functions of the MoF are carried out through the Faculty Office of the Archbishop of Canterbury (FO) of which the Master is the senior officer. There are approximately 750 Notaries Public practising in England and Wales and the MoF is, therefore, one of the smaller Approved Regulators with a commensurately small staff team at the FO. This response is focussed on the supplementary questions.

Transparency: questions supplementing Q1-Q3 of the CFI

1) How satisfactory has progress on transparency been to date?

The FO, following consultation with the notarial profession, introduced a Rules based approach as opposed to a Guidance based approach to enhanced transparency. Following a further consultation, the FO introduced amendments to the Notaries Practice Rules in September 2019 and which came into force on 2 December 2019 to give practitioners three months to bring themselves into compliance with the new requirements. Compliance was assessed through a random spot check of websites compared in August 2019 and March 2020, before and after the Rules came into effect.

The spot check showed a significant improvement in transparency after the Rules came into effect. However, additional work was required to follow-up on some of the notaries whose websites were not wholly compliant. This was achieved by inviting voluntary amendment to the websites and no disciplinary action was needed. This work was outlined in the Website spot check report published on the FO website: <https://www.facultyoffice.org.uk/notaries/news/website-spot-check-price-information/>

The inspections regime is another way that the Faculty Office monitors compliance with the Practice Rules 2019. The inspections for 2020 were delayed by Covid-19 and reports were expected early in the new year. The inspections regime helps the FO to get a clearer picture of compliance with the Rules.

2) What are the challenges faced in setting and enforcing transparency rules or guidance? a) What are the key learnings from the initial implementation and monitoring of transparency rules or guidance?

From the result of our consultations, it was clear that there are challenges in requiring notaries to publish fixed fees for their services due to the number of significant variables in the way that even what at first sight might appear a straightforward matter might involve. The overwhelming majority of notarial work is intended for use in overseas jurisdictions and the varying requirements of those jurisdictions as regard execution or certification of documents, authentication and identification of

the appearor and the affixing of an Apostille by the FCO and/or Consular Legalisation all need to be factored in to both the fee charged and the likely level of disbursements as well as establishing the nature and number of documents involved and the nature and the number of parties.

Of the other transparency requirements (service information, redress information, complaint information and regulatory information), most are relatively easier to standardise, although the stages of a notarial instruction (service information) can also vary depending upon the requirements of the receiving jurisdiction. The Notaries Practice Rules 2019 were drafted to require notaries to explain how they calculate their fees and then to provide a proper fixed quote once the work involved in a potential instruction has been ascertained.

3) What more could frontline regulators do to drive increased transparency? a) What further work is being planned? b) Are there any plans to review or change the rules or guidance in place?

The FO believes that the requirements set out in our Rules is clear and sets out our expectations of notaries as regard transparency. We cannot expect every Notary to have a website as these can be both expensive and time consuming to maintain. The majority of Notaries are sole practitioners and some 47% of the profession have annual turnover in respect of their notarial practice of less than £15,000. But where a Notary does have a website, we intend to continue carrying out spot checks to ensure that the information provided complies with the requirements and, where deficiencies are identified, to require amendments to be made. Similarly, where the inspection regime identifies issues, these will also be followed up.

The FO now publishes information about any disciplinary action taken against a notary alongside their business information on "find a notary" this enables the public to make an informed decision when selecting a notary.

Where transparency rules have been put in place:

4) Is there sufficient enforcement of the transparency rules by frontline regulators? a) What levels of compliance have been observed? What do you consider to be the main drivers for non-compliance to date? b) What steps are taken to enforce compliance with transparency rules? c) What key factors have driven the enforcement strategy to date? Are changes planned for future enforcement?

See answer to 1) above.

Where guidance has been provided in place of transparency rules:

5) Are frontline regulators sufficiently incentivising compliance with the guidance? a) What levels of compliance have been observed? What do you consider to be the main drivers for non-compliance to date? b) What steps are taken to encourage compliance with the guidance? c) What steps have been taken to evaluate the effectiveness of the guidance approach? Are changes planned in future, eg a move from guidance to rules?

The FO introduced Rules rather than Guidance.

6) If possible, to illustrate your responses to the questions in the CFI on transparency please provide examples of good and bad implementation of transparency of price/service/quality/redress/regulatory status by providers.

CF: <https://www.facultyoffice.org.uk/notaries/news/website-spot-check-price-information/>

Legal Choices: question supplementing Q4 of the CFI

7) What are your views on the future of the Legal Choices website? a) What key challenges has this faced to date? b) What funding and governance arrangements are most appropriate going forwards?

The Registrar of the FO, ██████████ is about to take over as chair the Legal Choices Governance Board.

The FO has been involved in the Legal Choices project since its inception and wish to record our thanks to the SRA who have undertaken the overwhelming majority of the development work. Legal Choices is (was) an excellent example of all the Legal Regulators working together and it is unfortunate that the BSB have withdrawn. The aims and reach of Legal Choices has extended far beyond what was originally envisaged for the site and we feel that the website provides consumers with useful information on the range of legal service providers and the services they can provide. This goes some way to meeting aspects of the LSB access to justice agenda by providing more legal education to the public in one place.

However, these developments come at significant cost. The FO, as one of the smaller Regulators has seen its contribution to the development and running costs increase from £400.00 to £5,000.00 at a time when pressure to reduce regulatory costs is also significant. Whether it represents value for money was difficult to judge as the project becomes more and more expensive but we are committed to remaining part of the project for the foreseeable future. There remains a question mark over whether it is reasonable and suitable for Legal Choices to continue to be solely funded by the Regulators given the expectations that the unregulated sector also be included in its reach.

Quality indicators: question supplementing Q5 of the CFI

8) What further analysis would be most helpful to develop an understanding of what type of quality indicators consumers find useful? What are the main barriers to the successful implementation of quality indicators?

Notaries generally provide services which are prescriptive based upon what the receiving jurisdiction requires and, although there are wide variations in those requirements between jurisdictions, there is very little scope for wide divergence in the quality of notarial services. One of the main quality indicators would be customer service/satisfaction. The FO generally receives very few service complaints about the profession, on average less than 10 per year. In terms of more serious disciplinary matters, the FO deals with fewer than one disciplinary case a year on average. Whilst we acknowledge that the lack of complaints is not always an indication of service quality, in practice, if a notary has not performed their task properly, it is likely that the document would be rejected by the receiving jurisdiction and if this were happening regularly it is our view that this would generate complaints as the transaction upon which the document is dependent would be delayed or jeopardised.

Most users of notarial services do so because they are required to in order to facilitate a transaction overseas and the use of a Notary is mandated by the receiving jurisdiction and avoids the need for the appearor to travel overseas themselves to execute the documents in the presence of the local lawyer or organisation. They are therefore directed to seek out a local notary rather than independently seeking the services of a notary. This is somewhat different to most other legal service providers in England & Wales. As there are only 750 notaries in the England & Wales the majority of consumers choose a notary based upon geographic location first and then via price.

Because the majority of individual consumers of notarial services, and even many SME's, will only require to use such services once in a lifetime, consumer feedback has been very difficult to gauge. The FO had a consumer feedback survey open for 18 months, during which time we received fewer than 10 responses.

DCTs: questions supplementing Q6 of the CFI

9) Is there more that regulators could do to encourage the development of DCTs?

If there is a market for Digital Comparison Tools in the legal sector, the FO believes that these should be wholly independent of the Regulators. Where our regulated community consent to their data being made available, we provide in a downloadable format, contact details for notaries which would enable DCT's to use the information to set up their own database. However, there is always a risk that the data may become out of date and it would be most unhelpful to consumers if they were being directed to an individual who, for whatever reason, was no longer authorised to provide regulated services (Reserved Legal Activities). Realtime harvesting of information on Regulators websites is complex and expensive to set up and this is unlikely to be cost effective for the DCT in relation to notarial services. Some other discreet legal service provision may be more appropriate for such activities, such as residential conveyancing or will writing.

10) To what extent are providers engaging with DCTs? a) Has this improved since the market study and if not, why not?

So far as we are aware, there is one organisation which is seeking to fulfil a role similar to that of a DCT serving the notarial profession and to which notaries are essentially required to make a membership payment. It is, therefore, perhaps more of a marketing tool rather than strictly a DCT. Our rules do not, and cannot of course, make it compulsory for our regulated community to engage with such organisations and, as a Regulator, we do not believe it is our place to actively promote a particular platform.

Whilst we can see that there might be a role for DCTs, it must be the case that providers are left to decide for themselves as to whether it is appropriate for them. In the Insurance industry there are, of course, one or two high profile providers whose marketing strategy is that 'you will not find us on comparison websites', so they are clearly not for everyone.

The regulatory framework: questions supplementing Q11-Q13 of the CFI

11) What are the main options for short-term regulatory reform that requires no, or limited, legislative amendment? a) What are the key advantages and disadvantages of each? b) What issues would remain without longer term reform?

The FO believes that a revision of the definition of reserved legal activities should be pursued. In particular, the narrow definition of 'Probate Activities' needs addressing. The preparation of papers to make an application for a Grant of Probate/Representation does not, in our view, focus on the principal risk. It is the administration of the Estate, including the collection of (sometimes) significant sums of money and the distribution thereof which poses the greater risk. Similarly, the writing of the Will upon which the Grant of Probate is based also represents a risk. The LSB recognised this risk and it is unfortunate that the then Lord Chancellor rejected its application to include Will Writing as a reserved legal activity which we very much supported.

12) What are your views on the options for extending redress to customers of unauthorised providers, such as extending access to LeO, or industry run 'kite schemes' requiring that providers direct consumers to ADR schemes?

The FO agrees that unregulated consumers should have access to redress, possibly through the Legal Ombudsman, but we do question how this could be achieved practically as it is currently the Regulators (and, therefore, the Regulated Community/Sector) that fund LeO through the OLC Levy at present. It is clear that, given its current resources, LeO does not have the capacity to take on significant extra work given the already lengthy delays in cases being dealt with. We would support some form of Alternative Dispute Resolution alongside or as an alternative to LeO subject to funding. We do believe in the concept of 'polluter pays' and if LeO or ADR are to be opened up, or indeed made compulsory for the unregulated sector, there must be provision for that sector to pay towards the costs.

The development of a register of all unregulated service providers was a feasible solution though we do have concerns over the practicalities of such a register. Whilst there is clearly a distinction between 'unregulated' and 'unregistered', given the unregulated nature of the sector, the advantages of registration would need to outweigh the 'benefits' to the providers of being unregulated otherwise the benefits to consumers of dealing with either a Regulated Lawyer or a registered legal services provider, principally access to redress, would not be achieved. At our meeting with CMA representatives we were asked whether there had been an increase in need for consumer protection and our view is that there was now a greater expectation from consumers of the availability of redress rather than an increased need.

13) What are the key emerging regulatory challenges, for example with respect to lawtech? a) To what extent can these be addressed under the existing regulatory framework?

For the FO and its regulated community the principal emerging regulatory challenges stem from unregulated providers seeking to provide services when not being authorised to do so and the lack of any clear prosecuting jurisdiction in the Legal Services Act. Reports to the Police of unlawful provision of notarial services contrary to Section 14 of the Act have usually gone un-investigated, unacknowledged and in one case, rejected with a suggestion of referral to the LSB to investigate and prosecute breaches.

Lawtech will provide additional jurisdictional challenges for regulators, particularly where providers are based outwith the jurisdiction but seek to provide services in England & Wales.

14) What evidence is available on the experiences of consumers of unauthorised providers?

We are aware of a number of instances where consumers have had issues with overseas property transactions where documentation has been 'executed' either fraudulently by persons purporting to be notaries but who are not, or where authorised persons from other legal professions have not appreciated that documents have required notarial attestation or, in some cases, not appreciated that they are not empowered to notarise a document, assuming that it is simply certification that is required. This then results in delays in the transaction being completed which can be costly.

Question supplementing Q14 of the CFI

15) Is there any more work that can be done within the existing regulatory framework to strengthen regulatory independence?

The FO has never had any representative function and the issue of regulatory independence does not apply. Given this, we do seem to have an easier relationship with the two representative bodies than some Approved Regulators. However, we are seeking to increase lay membership on the Master's Advisory Board to enable a greater input of the consumer's voice.

Question supplementing Q15 of the CFI

16) Are there remaining areas where there is scope to significantly reduce regulatory costs? a) If so, what plans are in place to tackle these?

The most effective way of reducing regulatory costs is to endeavour to reduce the regulatory burden. As a smaller regulator, the FO is acutely aware of the increased obligations on Approved Regulators from oversight bodies, much of which we support but which comes at a cost which can only be recovered from the profession which in turn is passed on to the consumer through fees charged by professionals. This was a particular concern for the FO where 47% of the profession generate a turnover of less than £15,000.

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Registrar

The Faculty Office of the Archbishop of Canterbury