

To:	Legal Services Board	
Date of Meeting:	26 October 2016	Item: Paper (16) 59

Title:	Update on CMA market study
Work stream(s):	CMA market study
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Status:	Official

Summary:

The paper provides an update on developments relating to the CMA market study to assist with briefing for the Board's session with the CMA senior team.

It also facilitates a Board discussion (to follow once the CMA team has left the board meeting) on a series of issues relating to the current situation and future steps once the CMA's final report is published, as follows:

- Endeavouring to align as much as possible policy positions between the LSB and CMA, in particular relating to transparency proposals
- Coordination issues where there are different potential roles for LSB relating to recommendations from the CMA that require a joined-up effort among the legal regulators
- Timing and resource implications, in particular the impact on the 2017/18 business plan

Recommendation(s):

The Board is invited to:

- Note the paper; and
- Discuss the issues relating to the current situation and future steps.

Risks and mitigations	
Financial:	N/A
Legal:	[REDACTED]
Reputational:	[REDACTED]
Resource:	[REDACTED]

Consultation	Yes	No	Who / why?
Board Members:	X		The Board received an oral update at its meeting on 14 July and then regular updates via the CEO's reports. The Chairman met with Lord Currie before the CMA published its interim report and is due to meet him again at the beginning of November. The CMA is attending today's board meeting and

			participating as a panellist in our forthcoming Manchester event.
Consumer Panel:	X		The LSCP is an active participant in the CMA's work and has published position papers. The LSB has commissioned advice on information remedies from the LSCP which will inform future work on transparency following publication of the CMA's final report.
Others:			The CMA's market study has been discussed collectively by the CEOs of the regulators and in bilateral meetings. The CEOs are due to discuss the CMA's final report collectively at their next meeting in January. The Chairs will briefly discuss the CMA study at their meeting in November.

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
Risks and mitigations box	Section 36(2)(b)(ii): information likely to inhibit the exchange of views for purposes of deliberation	N/A
Para's 11 and 19-20, Annexes A and B	Section 36(2)(b)(ii): information likely to inhibit the exchange of views for purposes of deliberation	N/A
Annex C	Section 44: restricted information under s167 LSA which was obtained by the Board in the exercise of its functions and therefore must not be disclosed	N/A

LEGAL SERVICES BOARD

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Update on CMA market study

RECOMMENDATION

1. There will be two parts to this item: a session with the Competition and Markets Authority (CMA) team focused on remedies; and a discussion without the CMA present on the issues highlighted in paragraphs 10 to 24 of this paper.
2. The Board is invited to:
 - (i) Note the paper; and
 - (ii) Discuss the issues relating to the current situation and future steps.

Background

3. On 13 January the CMA launched a market study into legal services to see if they are working well for consumers and small businesses. The scope of the market study encompasses legal services in a broad sense by considering services that are reserved, regulated or unregulated across a broad range of different legal areas. However, criminal legal services are excluded from scope. The CMA is also not focusing on the experiences of medium-sized and large businesses acting as consumers of legal services.
4. On 8 July the CMA published an interim report setting out its initial findings and emerging views on possible remedies. In addition, it published reports of two consumer surveys it commissioned to understand the experiences of individual and small business consumers. At this point the CMA also gave notice of its decision not to make a market investigation reference. This means that the CMA's work will not extend beyond the statutory deadline of 12 January 2017 for completion of the market study. It also means that the CMA cannot impose remedies on the LSB or other organisations, but instead can only make recommendations.
5. In August, consistent with the steer provided by the Board at its meeting in July, the LSB submitted a high-level response to the CMA's interim report. This was largely supportive of the CMA's diagnosis, but emphasised the need for transparency and regulatory reform to proceed in parallel. We have also made a supplementary submission on the reserved activities in response to a follow-up questionnaire by the CMA. The CMA has published 30 stakeholder submissions it received in response to its interim report – a high-level summary is provided at **Annex A**.

6. We have attended two CMA stakeholder workshops, on transparency and regulation respectively. Seen together with the responses to the interim report, there is clearly a wide divergence of views across regulators, representative bodies and consumer organisations on most of the key issues. Notably, there has been quite strong push back on proposed remedies relating to the mandatory disclosure by providers of price and quality information.
7. There has been ongoing and good engagement between the CMA and LSB in the run up to and throughout the market study. This has included providing LSB research as one of the main CMA sources of 'hard' evidence. In addition we have exchanged information, responded to queries and held bilateral meetings at technical, senior and board levels. We have also provided two 'teach-in' sessions: an overview of the market and regulatory framework at the beginning of the market study; and a more detailed session in September on the LSB's functions, duties and powers.
8. We invited the CMA's senior team to attend the October board meeting. This provides an opportunity for the Board to meet the key members of the CMA team and to build a relationship which might continue after the CMA publishes its final report. It is also a chance to try to influence the CMA team on policy matters (see paragraphs 11 to 18). The CMA are also participating as a panellist at the event in Manchester following the November board meeting.
9. The CMA has provided a deck of slides summarising its current thinking intended as pre-reading (sent as a separate paper in the Board pack **Annex C**). The CMA does not plan to run through these on the day, but instead will make some high-level remarks to stimulate discussion. **Annex B** provides some suggested questions for the Board to ask CMA team. While the remaining sections of this paper provide useful context for the session with the CMA team, there will be an opportunity to discuss the issues once the CMA team has left the board meeting.

Key issues for LSB

10. There are a series of issues for the Board to consider, both in relation to the current situation and following publication of the CMA's final report. We do not need to determine our final approach on the latter now, which will in any case depend on the contents of the final report. However, it is important to highlight these issues now so that the Board can start to think about them.

Policy alignment

11. [REDACTED]

Transparency

12. The Board has previously questioned some of the transparency remedies proposed by the CMA. We are confident that transparency can be improved and consumers can become more empowered to drive competition. However, we think there are inherent features¹ of legal services which make it challenging to rely on consumers alone to actively shape the market. The CMA has set out its current thinking in slides 11-13 in its pre-reading, as follows:
- The CMA will outline a minimum level of disclosure it would like to see in relation to price, quality and redress, supported by best practice guidance. The frontline regulators would be invited to form a working group to develop specific proposals, which may vary depending on the legal activity or type of provider. In addition, a quality mark could be developed to encourage enhanced disclosure by providers beyond the minimum level
 - Further development and promotion of the Legal Choices website, including provision of balanced information about unregulated providers
 - Collection and publication of more regulatory information about providers, in a format that could be easily used by third party intermediaries, such as comparison websites. Ideally, the CMA would like a single digital register combining information from regulators, the Legal Ombudsman and others.
13. The CMA is due to share more detailed proposals on transparency with the executive team in advance of the board meeting. We would wish to consider the detailed proposals against the challenges we identified in our response to the CMA's Interim Findings Report (see footnote 1). There may be issues about the feasibility of more ambitious options and we might wish to encourage the CMA to give further consideration to issues around governance, funding and resources for implementation.

Legislative reform

14. The CMA has indicated that they are likely to make a specific recommendation to the Ministry of Justice to undertake a review of full regulatory independence. Further, they are minded to recommend that the Ministry of Justice undertake a review of the existing legislative framework. The CMA plans to outline a set of principles which it thinks should inform such a review. While there inevitably will be differences with the LSB's vision, the CMA has assured us these should not be substantive. This represents a considerable change of position by the CMA since the Interim Findings Report. This is encouraging, although it would still be helpful for the Board to underline the importance of reform in its discussions with the CMA.
15. The new Lord Chancellor told the Justice Select Committee that as yet she had not formed a view on the need for full regulatory independence, but confirmed it

¹ Our submission on the CMA's Interim Findings Report identified the following issues: ensuring remedies are capable of practical implementation given the diverse provider base, complexity and range of services, and variation in pricing models; delivering savings for consumers that outweigh implementation and increased compliance costs for providers; not having unintended consequences, such as reduced variety of services or increased prices; ensuring remedies are effective given insights from behavioural economics; and ensuring any requirements on providers are enforceable.

is something she will be looking at. We are due to discuss our proposals with Lord Keen (the Minister responsible for legal services regulation) at our forthcoming meeting. Ministers are likely to wait for the CMA's report before making any further public announcements.


Legal Ombudsman's jurisdiction

- 16. The CMA has indicated that it is likely to recommend to Government that it find a mechanism to allow the Legal Ombudsman to accept complaints from certain unregulated providers, such as will-writing businesses. Section 164 of the Act makes provision for a voluntary scheme, but the Legal Ombudsman's response to the CMA's Interim Findings Report suggested that developing a voluntary scheme 'would be an improper use of our levy'.
- 17. The Interim Findings Report also discussed widening the Legal Ombudsman's jurisdiction to cover larger small businesses and some third party complaints. We do not yet know the CMA's latest thinking on these matters.
- 18. We would need to establish further details before being in a position to consider the benefits and risks of such changes.

Co-ordination issues

19. [REDACTED]

20. [REDACTED]


Timetable and resourcing

21. The CMA expects to publish its final report in December. Unlike in market investigations, in market studies there are no statutory timetables in relation to consideration and implementation of recommendations. Even so, the CMA may seek to set expectations to ensure a speedy response by the LSB and others. This is likely to require some intensive work during January-March 2017.
22. The CMA's current thinking is to produce a preferred implementation timetable or 'roadmap'. As indicated in paragraph 19 above, the LSB's role could be to report on progress against this timetable. We assess that this could be manageable within our existing resource. Implementation of any recommendations which the Board supports in principle in policy terms would need to be balanced relative to the resource needed to deliver other priorities in the 2017/18 Business Plan. We would also wish to devote some resource to engaging with recommendations directed at others, even if only to develop internal thinking on policy, for example in relation to the Legal Ombudsman's jurisdiction.
23. Should the LSB be asked to play a more extensive role, such as coordinating collaborative working or brokering solutions in intractable areas, this would have greater resource implications. The CMA is aware that the LSB is a small organisation with relatively little discretionary policy resource. We would argue that the CMA has a responsibility to only make recommendations for us to take action which we have the capacity and capability to deliver. This could be an area to explore further with the CMA team.
24. Finally, the CMA has also indicated a new approach where it maintains some form of involvement following the publication of its final report. This is the first market study the CMA has conducted since it was established (as opposed to a full market investigation) so processes are still taking shape and their plans will become clearer in the coming months.

Next steps

25. We will bring a paper to the January meeting to allow the Board to have an initial discussion of the CMA's final report.
26. The CEOs of the regulators will discuss the CMA's final report in January.

October 2016