

Application by the Solicitors Regulation Authority to Amend its Code of Conduct

A report by the Office of Fair Trading to the Ministry of Justice on the likely competition effects of the Solicitors Regulation Authority modifying its Code of Conduct under Section 29/Schedule 4 of the Courts and Legal Services Act 1990.

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1 INTRODUCTION

- 1.1 The advice below concerns an application made by the Solicitors Regulation Authority ('SRA') to make various modifications to its Code of Conduct ('the Code'). This advice is given on the basis of information which the Office of Fair Trading ('OFT') was provided with by the Ministry of Justice ('MoJ') in letters dated 16 September and 12 November 2008 attaching changes to the Code and an email from the SRA dated 27 November responding to OFT queries.
- 1.2 The SRA is the body responsible for regulating the solicitors' profession within England and Wales.
- 1.3 Under the Courts and Legal Services Act 1990 ('CLSA90') Section 29/Schedule 4 (as substituted by Schedule 5 the Access to Justice Act 1999) if the SRA wishes to modify the Code it must make an application to the Secretary of State for Justice.
- 1.4 Under Section 29/Schedule 4 of the CLSA90 if a body authorised to grant rights of audience or rights to conduct litigation makes an alteration to its qualification rules or rules of conduct, the alterations shall not have effect unless approved by the Secretary of State. The Secretary of State for Justice may seek the advice of the OFT who will consider whether the proposed alterations would have or would be likely to have any significant effect on competition within the legal services market.
- 1.5 The main aim of the SRA's amendments to the Code is to ensure that it remains applicable when Legal Disciplinary Practices ('LDPs') are introduced in March 2009. LDP's are business structures which will allow different lawyers and non-lawyers to form partnerships together. The OFT has previously stated that it believes that the introduction of LDPs will increase competition within the legal services market, as such it is the belief of the OFT that any modification to the Code which will help to implement the LDP system will have a positive effect on competition within the legal services market.

- 1.6 I am authorised by the Office of Fair Trading, under paragraph 12 of Schedule 1 to the Enterprise Act 2002, to carry out competition scrutiny of the proposed alterations as required by the provisions of the CLSA (as amended) set out above.
- 1.7 In its letter of 16 September 2008 the MOJ specifically asked for advice regarding the modifications made to rules 5, 7, 8, 9, 12, 13, 14 and 20. As such the OFT has limited its advice to the changes made to these rules.
- 1.8 For reasons discussed in the following paragraphs we believe that allowing the SRA to make the modifications to its Code specified in its application will have a positive effect on competition within the legal services market. However we do have concerns with rules 7, 8 and 16 as identified below in paragraphs 3.1 – 3.6, 4.5, 4.6 and 5.2.
- 1.9 The following rule of the Code has been identified to contain provisions which may restrict members of the Law Society from competing for the business of clients:
- Rule 7- the blanket prohibition on unsolicited visits or telephone calls to members of the public;
- 1.10 However, for the reasons set out in paragraphs 3.1-3.6, the restriction contained in this rule is unlikely to have a significant effect on competition.
- 1.11 By contrast, the following rules of the Code have been identified as containing provisions which may restrict members of the Law Society from competing for the business of clients and which may have a significant effect on competition:
- Rule 8 - the prohibition on fee sharing between lawyers and non-lawyer professionals who are not members of LDPs
 - Rule 16 – the restrictions on fee sharing and referral fees between firms providing legal services within the EU.

1.12 These rules appear to restrict members of the Law Society from fully benefiting from business opportunities with non lawyer professionals both within England and Wales and the EU. It will be important to ensure that the restrictions described above are lifted, except where they are absolutely necessary. It should be noted that we assume the restriction in Rule 8 will be lifted once MDPs and ABSs are capable of formation but would be concerned if this was not the case.

2 RULE 5 – BUSINESS MANAGEMENT IN ENGLAND AND WALES, RULE 14 – RECOGNISED BODIES

- 2.1 Changes in these rules have been made to reflect the new terminology in the Administration of Justice Act 1985 ('AJA1985'), to clarify the meaning of the rules and to make the Code applicable to LDPs. The OFT believes that the introduction of LDPs will increase competition within the legal services market. As such it is the OFT's opinion that these modifications will help to increase competition within the legal services market.

3 RULE 7 – PUBLICITY

3.1 Rule 7.03 states that members of the Law Society must not publicise their practice by making unsolicited visits or telephone calls to a member of the public. Rule 7.03 states that “member of the public” does not include:

- a current or former client
- another lawyer
- an existing or potential professional or business connection
- a commercial organisation or public body.

3.2 However, the blanket prohibition on unsolicited visits or telephone calls to members of the public may unnecessarily restrict Law Society members’ ability to advertise their services. Unsolicited visits or telephone calls can allow members of the Law Society to obtain the business of persons who do not know where to go in order to obtain legal services.

3.3 The main argument advanced for a prohibition on unsolicited visits and telephone calls to members of the public is that such a prohibition ensures that members of the public are not induced into instructing a lawyer under unfavourable terms and conditions, or where they would otherwise not have instructed a lawyer at all. Particularly, because it is difficult for lay persons to assess the quality of the legal service offered and whether it represents value for money.

3.4 At present, the prohibition on unsolicited visits or telephone calls applies to all types of transactions and to all potential non-business clients. This raises the question as to whether this provision is still necessary in relation to work that is a standardised transaction, such as conveyancing transactions and in relation to clients that although not business clients do not fall into a category of client that may be considered vulnerable.

- 3.5 To the extent that rule 7 of the proposed Code of Conduct prohibits unsolicited visits or phone calls to a member of the public in relation to all transactions, including standardised transactions, and in relation to all members of the public, irrespective of vulnerability, this rule has the possibility of restricting competition more than is necessary to achieve the public protection objective. However we acknowledge that it may not always be possible to identify this group of consumers and as such specific provisions regarding standard transactions or vulnerability may not be feasible.
- 3.6 Furthermore, in so far as members of the Law Society are able to use other types of unsolicited advertising, the current prohibition on unsolicited visits or telephone calls is unlikely to have a significant effect on competition. For these reasons we conclude that whilst this rule may imply a nominal restriction of competition, it is unlikely to have a significant impact.

4 RULE 8 – FEE SHARING

Rule 8.01 Fee sharing with lawyers and colleagues, Rule 8.02 Fee sharing with other non-lawyers

- 4.1 The list of persons with whom fees can be shared has been redrafted to include all authorised persons, non-lawyer managers and owners of a recognised body and authorised non-SRA firms in order to reflect the new LDP regime.
- 4.2 The modifications made to rule 8.01 have been made in order to make them applicable to the new LDP system. As such it is the OFT's view that these modifications will increase competition within the legal services market.
- 4.3 The wording 'Except in relation to European cross-border practice' has been deleted from rule 8.02 given that Rule 16 specifies more stringent requirements regarding European cross-border practice.
- 4.4 The SRA states that this modification has been made purely for the sake of clarity since the introduction, which does not form part of the rule, now refers to the fact that rule 16 contains more stringent requirements for European cross-border practice.
- 4.5 The OFT has not been asked to specifically comment on rule 16. However we note that it contains an extensive restriction on fee sharing between lawyers and non lawyers in other EU states and this is likely to have a significant effect on competition. We believe this is likely to inhibit the development of alternative business structures involving lawyers and other non-lawyer professionals and therefore, to restrict competition. It will be important to ensure that these rules on fee sharing are amended to permit fee sharing except where the restriction is absolutely necessary.

4.6 Furthermore Rule 8 still continues to restrict fee sharing between lawyers and non-lawyer professionals who are not members of LDPs and, as currently drafted, would inhibit the development of Multi-Disciplinary Practices ('MDPs') and Alternative Business Structures ('ABSs'.) We therefore assume that this Rule will be amended once MDPs and ABSs are introduced and would be concerned if it were not.

5 RULE 9 – REFERRALS OF BUSINESS

Rule 9.01 General

- 5.1 The Wording 'including businesses carrying on the practice of lawyers' has been added to Rule 9.01(3) for the sake of clarity. We understand that this modification has been made purely for the sake of clarity and as such will not have any significant effect on competition within the legal services market.
- 5.2 However our comments in paragraph 4.5 apply regarding the extensive restriction on referral fees within the EU under Rule 16.

6 RULE 12 – FRAMEWORK OF PRACTICE

- 6.1 Rule 12 governs the type and structure of business in which persons regulated by the SRA may practice in and outside England. This rule has been extensively amended so as to require private firms in England and Wales to be recognised bodies or recognised sole practitioners and to reflect the fact that solicitors, Registered European Lawyers ('RELS') and Registered Foreign Lawyers ('RFLs') will be able to practice in authorised non-SRA firms.

Rules 12.01 Solicitors and 12.02 RELs

- 6.2 The original provisions of Rules 12.01 and 12.02 have been completely replaced. The requirements for England and Wales are radically altered but those for overseas practice remain much the same. We understand that this was done in order to clarify the rules and to reflect the new LDP regime in England and Wales.
- 6.3 Since the new rules 12.01 and 12.02 were included to make the Code applicable to the new LDP system it is the opinion of the OFT that this change would have a positive effect on competition within the legal services market.

Rule 12.03 RFLs

- 6.4 The OFT has been informed by the SRA that there are 2,166 RFLs as compared to 144,784 solicitors, less than 2%. The provisions of Rule 12.03 have been almost completely replaced in order to reflect the fact that the SRA will in future authorise a RFL to do immigration work, and regulate the RFL as an individual, not only as a manager of an SRA-regulated firm but also as an employee and when practising through an authorised non-SRA firm.
- 6.5 The modification to Rule 12.03 also has the effect of prohibiting an RFL from being held out as regulated by the SRA overseas as well as in England and Wales and to specify more clearly the reserved work an RFL is not entitled to undertake.

- 6.6 At first sight, it appears that the revised provision may limit the absolute amount of work RFLs are able to do. However the SRA has informed the OFT that these provisions extend what an RFL can do, relative to the previous position. The SRA has stated that all RFLs' current practising rights are retained under the revised rules 12.03(1) and (4) and 20.01(4), and new practising rights are added enhancing the status of RFLs, their transferability to employment in an SRA-regulated firm, and to 'management' or employment in an authorised non-SRA firm .
- 6.7 Furthermore due to the small numbers of RFLs, this is unlikely to have any significant effect on competition within the legal services market. As such it is the OFT's opinion that these modifications are unlikely to have any significant negative effect on competition within the legal services market.

7 RULE 13 – IN-HOUSE PRACTICE

Rule 13.01 Conditions applying at all times

- 7.1 Rule 13.01 has been redrafted and now requires a solicitor, REL or RFL in an authorised non-SRA firm to comply with Rule 13 as if they were an in-house lawyer when doing work outside the scope of the firm's authorisation, for the firm itself, work colleagues, related bodies or pro bono. This new rule was added so as to enable solicitors and RELs to use their legal services outside the scope of authorisation of their firms for the firm but not for the clients.
- 7.2 The modifications made to rule 13.01 have been made at least in part to make this rule applicable to the new LDP system. If lawyers and non lawyers are doing work which is within the scope of authorisation of a firm regulated by an approved regulator, whether as an LDP, MDP or ABS, then they are not restricted by rule 13.01.
- 7.3 As such it is the OFT's opinion that these modifications would not have or be likely to have any significant negative effect on competition within the legal services market.

8 RULE 20 – RIGHTS AND OBLIGATIONS OF PRACTICE

- 8.1 Rule 20 has been extensively redrafted and contains some completely new provisions

Rule 20.01 Rights and obligations of practice

- 8.2 Rule 20.01 is a new rule which sets out the reserved activities authorised by the SRA and which category person (firm and individual) is authorised to do what.
- 8.3 The SRA has informed the OFT that the restriction on RELs in rule 20.01(3) is not new. It is based on the legal requirement in regulation 11 of the European Communities (Lawyer's Practice) Regulations 2000 (S.I. 2000 No. 1119).
- 8.4 The SRA has informed the OFT that the restrictions on RFLs in rule 20.01(4) are not new. They are based on the legal restrictions in sections 20, 22 and 23 of the Solicitors Act 1974 and sections 27 and 28 of the Courts and Legal Services Act 1990. These restrictions relate to the reserved or immigration work an RFL is authorised by the SRA to do without supervision in his or her capacity as an RFL. The SRA has extended the authorisation of an RFL to do immigration tribunal work and other immigration work unsupervised when an RFL is an employee of a recognised body or recognised sole practitioner, and to an RFL who is a 'manager' or employee of an authorised non-SRA firm.
- 8.5 As such it is the OFT's opinion that these modifications would not have, or be likely to have, any significant negative effect on competition within the legal services market.

9 CONCLUSION

9.1 Most of the changes which have been made by the SRA to the Code of Conduct appear to have been made either to help clarify their meaning or to make them applicable to legal service providers who choose to adopt LDPs.

9.2 As mentioned above the changes which have been made solely to restructure the Code or to clarify the meaning of various pre-existing provisions within the Code are unlikely to have any significant effect on competition.

9.3 The OFT believes that those provisions which have been introduced to help make the Code applicable to LDPs will help recognised bodies to adopt LDP business structures. The OFT believes that the introduction and adoption of LDPs will increase competition within the legal services market and as such the OFT believes those changes will help to significantly increase competition within the legal services market.

9.4 The following rules may nonetheless contain restrictions which can adversely affect members of the Law Society when competing for the business of clients:

- Rule 7- the blanket prohibition on unsolicited visits or telephone calls to members of the public;

9.5 However, for the reasons set out above, the restriction contained in this rule is unlikely to have a significant effect on competition.

9.6 By contrast, the following rules of the Code have been identified as containing provisions which may restrict members of the Law Society from competing for the business of clients and which are likely to have a significant effect on competition:

- Rule 8 - the prohibition on fee sharing between lawyers and non-lawyer professionals who are not members of LDPs

- Rule 16 – the restrictions on fee sharing and referral fees between firms providing legal services within the EU.

9.7 These rules appear to restrict members of the Law Society from fully benefiting from business opportunities with non lawyer professionals both within England and Wales and the EU. It will be important to ensure that the restrictions described above are lifted, except where they are absolutely necessary. However as discussed previously we assume that the restriction in Rule 8 will be lifted once MDPs and ABSs are formed.