

Comparing the market

Despite the push towards transparency in pricing, **John Gould** explains why comparing legal services like-for-like isn't so simple

IN BRIEF

- ▶ The Solicitors Regulation Authority Transparency Rules aim to assist consumers by providing more information on pricing for legal services, but miss the point that even the most basic lawyers' services are complex, customised and therefore not easily comparable.
- ▶ Transparency to show how a firm is better value than the next firm is good for business; nonetheless, mandatory detailed price information doesn't tell you much about value.
- ▶ The main market effect of mandatory information may be to give an advantage to those providers prepared to start with a price and then fit the service they actually offer to the price they have chosen.

Back in December 2016, after a year-long study, the government announced that the Competition and Markets Authority (CMA) had concluded that competition in legal services for individual consumers and small businesses was 'not working well'. In particular, the CMA thought that there was not enough information available to consumers on price, quality and service to help people choose their best lawyerly option. In the CMA's view, not only was it challenging for consumers to face wide variations in the cost of similar services, but it was even a struggle for them to find enough information to help them identify their legal need in the first place.

A purely cosmetic effect?

As a result, we now have the Solicitors Regulation Authority (SRA) Transparency Rules 2018. A sceptic, however, might say that an emphasis on transparency is missing the fundamental point. Value is hard to compare because even the most basic lawyers' services are complex and customised, not because specific prices aren't published on websites. Who would use an expensive lawyer to provide a simple product? Unless it is possible to describe the quality and content of the services of two providers in simple and comparable terms, price comparison means little. The more accurate the generalised description, the longer and less accessible the information to the would-be purchaser. The more accessible or standardised the description, the greater the

scope for purchasers to be misled by headline prices. The danger is that the Rules substantially increase the burden of regulation and produce nothing more than a cosmetic effect. This could mean that better ways to improve competition are overlooked or, worse, the Rules produce unforeseen effects in limiting choice to unrealistically basic products with an infinite variety of add-ons. It is, of course, also at least possible that online price comparison for packaged lawyers' services is the future.

The CMA didn't particularly have in mind individuals who phoned lawyers to enquire about their services. Nor did they have much to say about the information already required to be provided to clients at the time of engagement. The CMA focus was on 'potential customers' and particularly on the information about price, service, redress and regulatory status available online.

Sky scanning

Traditionalists may not have been impressed by the description of clients as 'customers'. The unspoken assumption underlying the CMA's report was that legal services are really no different from other goods or services which can be offered online. Indeed, the tempting, but probably unfair, suspicion is that the report owed rather too much to a precedent template derived from a report into some other market. Perhaps someone had a report relating to air travel and in a very lawyer-like way thought the precedent too good to waste.

I'm sure that is not how it happened, but is it possible, by chance, that the information provided by airlines provides the standard of transparency that the CMA considered lacking in legal services?

You might think, naively, that one flight was much like another for price and service comparison purposes, but you would be wrong. Suppose, without studying information provided by an airline on reasons to go there, I have successfully identified my need to fly to Berlin. Without assistance, I have narrowed the choice of departure airport to London and am prepared to go to any Berlin airport without regard to their relative merits. With unusual decisiveness, I have decided to go for

two days from a specific date.

My online search produces around 300 flight options fitting my requirements. Boredom sets in after a dozen or so with prices ranging from £41 return to £2,030 and flight times ranging from one hour and forty minutes to eight hours and forty-five minutes (I don't like Munich that much). I assume that with time and the inclination I could explore the price effects of changing departure times, different classes, seat allocation, baggage allowances, speedy boarding or catering. Even if I did, I may well find that during the time necessary for my researches some of the prices had changed. Even then I may fail to see the extra charges in the small print. I would still know nothing of my chosen airline's relative performance on safety, delays, cancellations or whether its cabin crew were all former guards at Folsom Prison.

The point is that even superficially simple services are very difficult to compare. The comparison of legal service offerings, on the basis of online price information, may end up offering no more than the chance that would-be customers/clients will in some cases be better able to choose a few lawyers with whom to enter two-way communication refining both the service required and the pricing. Some would say they already have that.

In fact, the main market effect of mandatory information may be to give an advantage to those providers prepared to start with a price and then fit the service they actually offer to the price they have chosen. The more certainty required in terms of price, the greater the need to be able to constrain the service to a pre-costed package. This 'Poundland' approach moves a compound choice featuring price, service and value towards a choice based on unascertainable service quality for which no transparent information is likely to be available.

Thus the effect may be to change the way legal services are offered, so that the need for a fixed (and therefore transparent) price causes a move away from providing a service



adapted to the client's best interests and towards very well defined legal products in which many elements required in the interests of clients become the extra baggage priced like a budget airline.

Fixed fee fears

The SRA, in its response to the CMA, identified two main barriers to price transparency, both of which suggest a rather unflattering view of the lawyers it regulates. First, lawyers are too risk-averse to embrace fixed fees, fearing they will have to perform unexpected and unpaid additional work. The SRA seemed bemused that lawyers didn't seem to appreciate that fixed fees meant that sometimes they may do less work than expected and come out ahead. Second, that lawyers can 'get away with' charging different prices to different consumers because there is very limited shopping around. This conjures a rather Dickensian image of dim, lazy and gullible clients wandering into the arms of narrow-minded cautious lawyers who are terrified that they might not be paid for some of their work. The point is, however, that offering fixed fees in two-way communications is not the same as publishing allegedly fixed fees for ill-defined products. Residential conveyancing, for example, is overwhelmingly provided at a fee fixed upon engagement. Fixed fees, where they are possible, are a good thing.

The upshot of all of this is that we now have the SRA Transparency Rules made under s 31 of the Solicitors Act 1974 (and other legislation relating to incorporated practices and alternative business structures). The rule-making powers are wide and allow regulation in any matter of professional practice. The requirement to publish costs information on a firm's website applies to specified services both to individuals and businesses. The services seem to be selected as those which might be hoped to be describable with at least some degree of standardisation.

For individuals, the specified services are in summary:

- ▶ residential conveyancing;
- ▶ non-contentious work in relation to the administration of a deceased's estate;
- ▶ immigration applications and tribunals other than in relation to asylum;
- ▶ single hearing road traffic offences in the Magistrates Court; and
- ▶ representation and advice to employees in relation to claims for wrongful or unfair dismissal claims.

A summary of the specified services for businesses is:

- ▶ acting for employers in tribunal employment claims for unfair or wrongful dismissal;
- ▶ debt recovery up to a value of £100,000; and

- ▶ licensing applications for business premises.

It may be observed that these areas are the ones in which the market has already created widely available fixed prices. I would imagine that most residential conveyancing is conducted on a fixed fee basis. Some services are already very cheap—an online search for fixed price debt recovery would reveal an offer to draft and send a debt collection letter for a fixed fee of £3. The point is not that a fixed price cannot be obtained, but rather that a researching 'customer' can't presently easily establish what the fixed price will be for his particular need without some dialogue with possible service providers. To change this in a widespread and significant way is a high aspiration indeed.

Having identified the types of service to which they apply, the Rules go on to set out what the costs information must include. In summary, the mandatory requirement includes:

- ▶ the total cost of the service (or an average cost or range of costs if that is not practicable);
- ▶ the basis of charging;
- ▶ the experience and qualifications of the fee earner and supervisor;
- ▶ information on disbursements;
- ▶ details of the services included and not included in the price;
- ▶ key stages;
- ▶ timescales; and
- ▶ client liabilities in conditional fee agreements.

The SRA Guidance accompanying the Rules suggests that the publication requirement will help avoid confusion and complaints further down the line, but this seems to ignore the necessary intervening stage during which a researching customer becomes a client and receives specific and mandatory costs information.

The Guidance illustrates another difficulty in that, perfectly understandably, the template information to be provided for residential conveyancing alone runs to some 1500 words. It might be expected that marketers would wish to embellish that basic information a little and add some seductive words of their own. One wonders how many conveyancing firms a researching customer is expected to consider out of the thousands potentially available. A keen and price-sensitive person might make ten telephone calls and on the basis of brief particulars expect to receive electronically ten specific sets of information each with a fixed price. There may be people prepared to read 15 or 20,000 words and apply them themselves to their own circumstances, but I wouldn't like to be trapped in a lift with one.

The Poundland approach

The irony is that an organisation with the word 'competition' in its name should apparently have little confidence in competition. The number of providers offering these services is huge. There is no widespread collusion preventing attempts to attract clients by attractive web offerings. The amount of information available online about law firms has never been greater. As the CMA's report rather disparagingly acknowledges, many people rely on trusted recommendations to choose lawyers anyway.

In order to prevent information being misleading it must necessarily include detail, and that detail is likely to reflect the complexity of legal services which are mostly more complicated than flying to Berlin. That means length, and length means inaccessibility or irrelevance.

Where good innovations exist, they tend to quickly come into use and so, for example, rules are unlikely to have been required to ensure the growing use of online conveyancing calculators. If they give a competitive advantage, why wouldn't they be used? If they don't, perhaps potential clients don't value them. Transparency to show how a firm is better value than the next firm is good for business, but mandatory detailed price information doesn't tell you much about value. Personally, I can't tell whether a pound more or less for a cup of coffee indicates better or worse value. It rather depends on your sense of taste.

Perhaps there is a competitive consequence of these changes which is not related to clients' choice at all. Who knows, it may have been intended all along. The main audience for price transparency may not be prospective customers, for whom their mobile phone can give them all they need, but actually competitors. Presumably lawyers will be among the first to research what other lawyers say they are charging. Will this lead to price cutting or a levelling upwards? Presumably the CMA expect the former.

However unlikely it seems, if some clients come to believe that all products labelled in the same way are in substance the same, then for them the price on the packet will be the beginning and end of the competitive story. For many people the contents of the packet will become lower quality and more like the contents of any other packet. We will then be in the age of Poundland law—and what, I hear you say, is wrong with that?

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