



Bar Council response to the European Commission's consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the European Commission's consultation paper entitled regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy.¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The legal services market in England and Wales is as a matter of law only partially regulated. Anyone is permitted to provide legal services on a commercial basis, with the exception of specified "reserved legal activities"² which may only be provided by regulated legal professionals. Until recently, few unregulated businesses have operated in the legal sector. This is now changing with the advent of online platforms.
5. Online platforms operating in the legal sector are not regulated at all. Currently they are able to assist mainly with less complex legal matters, however this is likely to change going forward. The power of computational technology for communication, modeling and

¹ <https://ec.europa.eu/eusurvey/runner/Platforms/>

² "Reserved legal activities" are defined at section 12 and Schedule 2 of the Legal Services Act 2007 as follows: a) the exercise of a right of audience; b) the *conduct of litigation*; c) reserved instrument activities; d) *probate activities*; e) *notarial activities*; and f) the administration of oaths.

execution will permit and prompt a potentially radical redesign of the legal services sector. Through these technological advances online platforms will be able to offer more sophisticated services and acquire greater market share. Many observers believe that these platforms have the potential to change the legal market place considerably, over time becoming key portals through which legal services are procured³. The Bar Council understands that the French Bar Associations are already discussing whether to set up their own online platforms to respond to the perceived competitive threat from the unregulated platforms.

6. Given the absence in the legal market of any significant numbers of non-regulated providers it would seem that most consumers/clients are presently aware that they are well advised to seek the services of a regulated lawyer who provides the guarantees of a) high standards of academic and professional training, b) professional indemnity insurance and c) behavioural standards of a code of conduct enforced by independent regulators, the arrival of online platforms may reduce that awareness unless the regulated sector is able to respond by innovating in similar ways and competing effectively with the existing platforms.

7. The Bar Council has noted the rapid advance – backed by significant injections of venture capital - of online platforms such as “RocketLawyer” and “LegalZoom”, to name some leading companies in this market. Although the Bar Council has not yet carried out in-depth research on the impact of these platforms, the Bar Council appreciate that online platforms may offer easily accessible services at affordable rates to consumers who may otherwise find it difficult or more expensive to procure legal services. Provided they meet appropriate quality standards, they may – at their current stage of development - also add value as a “first port of call” for consumers confronted with a legal problem as well as for those who wonder whether they do in fact have a legal problem.

8. There is, however, widespread concern among bar associations in many jurisdictions, as to the impact the arrival of these new players in the legal market may have on the quality of the services provided to consumers/clients. In particular, questions arise as to:

8.1. the extent to which such platforms in the future may seek to provide more sophisticated legal services which are currently the preserve of regulated lawyers

8.2. whether such services will be delivered at a standard of quality and probity comparable to that currently guaranteed by traditional regulated providers, and

8.3. the relationship between services offered by entirely unregulated intermediaries or service providers and the legal services market in which legal professionals are strictly regulated in the public interest.

It is vital that consumers/clients accessing legal services from unregulated providers know when, how and from whom to seek redress if anything should go wrong – and that such effective redress is indeed available.

³ See for example: <http://www.lawgazette.co.uk/analysis/comment-and-opinion/online-platforms-lawyers-act-now/5051248.fullarticle>

9. The remainder of this paper focuses on responding to those parts of the Commission's questionnaire that pertain directly to the issues set out above. The Bar Council's comments are thus concerned exclusively with "online platforms" which offer the direct or indirect supplying of legal services.

The definition of 'online platforms'

10. The Bar Council considers that the present definition of online platforms provided in the Commission's questionnaire is so broad as to not be useful for the current conversation as it relates to the legal sector.

The Bar Council's experience with online platforms offering legal services, either based in the UK or to which we have access

11. We take this opportunity to discuss our own online legal services platform the "Direct Access Portal", as well as non-lawyer owned commercial platforms such as "RocketLawyer" and "LegalZoom", to name just the two most prominent providers known to us. There are a range of online platforms active in the England and Wales legal market, of which these are just three examples.

a) Nature of the legal services offered (e.g. legal advice, automated document assembly, online dispute resolution, find-a-lawyer, lawyer review/rating etc.)

12. The Bar Council offers the Direct Access Portal⁴, through which the public can locate a qualified direct access barrister for the purpose of instructing him or her to provide legal services.

13. Companies such as RocketLawyer and LegalZoom assist with document creation, legal advice, legal guidance documents and find-a-lawyer services.

14. RocketLawyer states that it does not itself provide legal advice – this is offered by the lawyers accessible through the platform. LegalZoom advertises as providing legal advice, but in its Terms of Use disclaims this, stating that it is not itself providing legal advice.

b) Application of professional rules to these services

15. The Direct Access Portal is a service managed by the Bar Council and therefore compliant with the Bar Standards Board Handbook (the code of professional conduct for barristers of England and Wales). The only legal service providers which the public can instruct through the Direct Access Portal are barristers of England and Wales, all of whom are lawyers regulated by the Bar Standards Board.

⁴ The name "Direct Access Portal" has been chosen because barristers have traditionally provided legal services to lay clients almost exclusively via solicitors and other professional lawyers. However, regulatory change over the last three decades has meant that barristers now increasingly seek instructions directly from lay clients rather than on a referral basis, although the latter remains the predominant way of instructing.

16. Lawyers which can be found on or via commercial platforms such as RocketLawyer or LegalZoom may or may not be regulated by their independent regulator. RocketLawyer states that it has made “reasonable efforts”⁵ to ensure that such lawyers are regulated by the Solicitors Regulation Authority. This would appear to be a somewhat more vague assurance to the consumer than would be available through the Bar Council’s Portal or by instructing a regulated lawyer in the traditional way.

c) The extent of regulation of these services by the competent authorities in England and Wales

17. Every barrister providing legal services under his professional title is regulated by the Bar Standards Board.

18. Any person in England and Wales may provide legal services (so long as they do not provide reserved legal activities, see footnote 2 above) – however, the Bar Council considers that online platforms without sufficient measures of transparency could be misleading to the public as to whether they, or the providers providing services through them, are regulated. Hence it might be appropriate to consider whether regulatory requirements need to be put in place to ensure consumers are more prominently and reliably informed in this respect.

19. In any event, the Bar Council is not aware of any cases of action taken by the competent authorities against such platforms or those providing services through them.

Social and economic role of online platforms

The key advantages of using online platforms

20. The Bar Council considers the following advantages as selected from the list provided by the Commission, to hold particular value for the legal services market:

- make information more accessible;
- make communication and interaction easier;
- create more transparent prices and the possibility to compare offers;
- lower the cost of reaching customers for suppliers; and
- help with matching supply and demand.

Problems faced by consumers or suppliers vis-à-vis online platforms

21. Whilst the Bar Council is not presently aware of any significant problems we foresee the following issues arising from the operation of online platforms in the legal services market:

Clarity for consumers/clients

22. The client/consumer who procures legal service must be aware of whether or not the

⁵ <https://www.rocketlawyer.co.uk/on-call-terms.rl>

service provided via an online platform is provided by a legal professional, regulated in the client's jurisdiction, and covered by suitable insurance against negligence claims. The Bar Council also notes that online platforms introduce the possibility of the provision of legal services across jurisdictions, and clarity must be maintained as to who regulates the suppliers, and in which jurisdictions they are entitled to provide legal services or reserved legal activities.

23. Similarly, consumers/clients must be aware of whom they may apply to for redress should they have been affected by the provision of inadequate legal services or misconduct. Where a provider of legal services is unregulated and there is no means of redress, the consumer/client should be aware of this before procuring such services from the provider. We strongly believe that clients should not be left with the only option to seek redress in the courts. This would distort competition with regulated providers and leave consumers inadequately protected.

The rule of law

24. The Bar Council is particularly concerned about the considerable risk of consumer/client awareness in relation to the desirability of consulting a regulated highly trained lawyer diminishing over time. This could lead to a considerable reduction of such professionals being available in the market. It is particularly important to recognise in this respect that independently regulated lawyers do not just provide commercial legal services. They also have a crucial function as an important pillar of the legal infrastructure in a democratic society, owing duties to the court and to the administration of justice, which underpins the rule of law. It also underpins true access to justice because without legal services of sufficient quality, there is a risk of clients not achieving the justice to which their situation entitles them. In the UK this is even more pronounced since our senior judiciary is exclusively recruited from among the regulated legal professions, notably the barristers' profession. Online platforms however, given that by definition they must only be concerned with the maximisation of profit, will be inclined to minimise the use of regulated lawyers going forward (as they tend to be a more costly human resource than non-lawyers, e.g. paralegals). There may, therefore, be grave consequences for the rule of law and the public interest should online platforms become more dominant in the legal market, if this also has the result that the number of highly trained regulated lawyers considerably diminishes; in this situation, not only will there be a grave risk to the role of the profession in underpinning the rule of law and access to justice, but there may no longer be a sufficiently large pool of talent available to ensure the judicial bench performs to the standard required for a proper functioning of the legal system of a sophisticated democratic society. If the quality and ethical standards of both the legal profession and the judiciary are threatened, then so are the rule of law and effective access to justice themselves. The question of the public perception of the difference between regulated and unregulated service providers is therefore very important. We consider the transparency aspect of this below from paragraph 31.

Concerns around a level playing field

25. Competition issues may arise between regulated and unregulated providers seeking to access the same markets. EU competition law is engaged only where a restriction or distortion of competition, or abusive behaviour, affects either the whole, or a "substantial

part” of the EU internal market. Legal services markets have historically been organised largely along national lines. A question therefore arises as to the extent to which Member States’ competition laws are adequate to address local or regional, but nonetheless significant, anti-competitive effects in this market.

The quality and behaviour of online platforms

26. The way in which online platforms operate must ensure complete respect for the rules of professional conduct which must be observed by the legal service providers they contract with.

27. There may be a need to guard against online platforms offering or leading to poor quality legal services for consumers/clients, leading to adverse outcomes and potentially without adequate methods for seeking redress (e.g. through professional indemnity insurance or through disciplinary proceedings). As an example, the BSB Handbook provides certain situations in which barristers should not accept instructions, including if they are not competent or experienced enough to handle the particular matter, do not have enough time, may not be able to maintain their independence or where there is a conflict of interest. Where there are no such duties imposed on unregulated providers, there is no similar protection for the consumer/client’s interests.

Implications for attorney-client privilege

28. As soon as client-lawyer communication is conducted via an online platform which belongs to a third party, implications for confidentiality and privilege inevitably arise. Access and ownership of such information must be made clear to all parties and regulation needs to ensure that confidentiality and privilege are adequately protected.

Data protection implications

29. Similarly, the storage of information received in the course of any client-lawyer communication must be made clear. The Data Protection Act 1998 contains restrictions on the transfer of personal data to countries outside the European Economic Area, which do not provide an adequate level of security. Where platforms are based elsewhere, they may be subject to different data protection obligations, and this should be made clear to all parties concerned. Data should be stored in a jurisdiction where the law provides sufficient safeguards in relation to data protection, and the platform’s terms and conditions should provide sufficient assurances in relation to data security. The Bar Council is also aware of potential conflicts of laws in these situations. United States legislation, notably, allows certain US authorities to access data stored on facilities provided by US persons or companies without the knowledge or consent of the customer of that facility, which may conflict with the United Kingdom’s data protection legislation.

How could these problems be best addressed?

- **Market dynamics?**
- **Regulatory measures?**
- **self-regulatory measures?**
- **combination of the above?**

30. The Bar Council would be reluctant at this point to call for specific regulatory measures to be imposed on online platforms. When supplying legal services through an online platform, each regulated legal service provider remains the responsibility of their independent regulator, and imposing further regulatory measures is likely to cause difficulty and confusion in a number of areas. Ideally, the issues identified above would be solved through market dynamics and existing competition rules. However, the Bar Council will monitor developments and contact the competent authorities as and when it becomes apparent that the existing legal framework has become unable to deal adequately with the risks arising.

Transparency of online platforms

31. The Bar Council has not conducted research into whether the business practices of the online platforms operating in the legal sector are sufficiently transparent. We are of the opinion that such platforms should comply with the same transparency and client care requirements which apply to service providers within the regulated sector.

Information that should be provided

32. It is essential that online platforms be required to inform their customers in a prominent fashion, whether or not they are providing legal services themselves or whether they are acting only as intermediaries. In any case they should be required to make sufficiently clear to the consumer that they are not themselves subject to legal professional regulation or indemnity insurance requirements unless they are providing services through regulated lawyers. If the provider is not subject to indemnity insurance, it must be transparent to the consumer/client whether, and if so what kind of insurance the provider holds in relation to their services.

33. Similarly, online platforms should be required to inform their clients whether the legal services will be provided by independently regulated legal professionals, and therefore providing the protections of indemnity insurance and codes of conduct. RocketLawyer, for example, provides on its website merely a promise that it has made “reasonable efforts”⁶ to ensure that such lawyers are regulated by the Solicitors Regulation Authority. In contrast to the majority of EU Member States, the current regulatory model in England and Wales (and indeed the rest of the UK) protects the professional title or ‘badge’ of the legal profession rather than reserve all provision of legal services to the regulated legal profession. Such transparency requirements are, therefore, even more essential to ensure sufficient consumer protection in the UK.

34. Again, it must be clear to consumers/clients whether, and if so from whom, they may seek redress should anything be unsatisfactory in relation to the legal services they receive.

35. Online platforms should also be transparent about how legal service providers are selected and introductions made to consumers; for example, to what extent they apply criteria relating to cost, quality and expertise. Similarly, they should be transparent about any limits

⁶ <https://www.rocketlawyer.co.uk/on-call-terms.rl>

placed on those who may be selected; for example, whether they require providers to pay to be on any 'approved list', whether they are selecting from the whole market, whether they are imposing limitations on the services provided or whether they seek to influence in any way the discretion of the legal services provider in advising or representing the client. This would be even more important if, and to the extent that they are legally entitled to demand referral fees (payments to intermediaries in return for choosing a particular provider). Referral fees and commission arrangements have been proven in too many situations to have led to inappropriate incentives, operating against the best interests of consumers/clients. Barristers in England and Wales are prohibited from paying or accepting referral fees.

36. As explained above, data protection terms should be clearly accessible to consumers.

Collaborative economy

Effect on our members' revenues of competition from collaborative platforms?

44. We are not aware of any reductions in our members' revenue as a result of such competition, but this is a distinct prospect in the future as these platforms become more sophisticated and more widely used.

Use by members of the Bar of collaborative platforms to offer services

45. The Direct Access Portal is used by members of the Bar as well as the general public. We are not aware to what extent barristers supply legal services through other online platforms, but it is fair to assume that there will be an increase in barristers supplying legal services through online platforms in the future.

Is the collaborative economy raising specific regulatory and enforcement issues?

47. The Bar Council notes the challenge of balancing the need of the "under-served" in the legal market (lower income groups, small businesses) with the need for well-regulated and high quality legal services that are available to all consumer/client groups; a balance which ensures that in future high quality legal professionals are still being educated and trained, and that professionals who will be able to acquire sufficient skills and experience are able to progress to the judiciary and to maintain its current high quality.

48. The Bar Council also anticipates a degree of tension between price competition on the one hand and service quality, ethical standards and duties to the public interest on the other. The tension will arise to different degrees in different situations, depending in part on the degree of expertise and experience required to address a particular legal problem. As well as this, however, even the most straightforward problem requires a basic level of competence and expertise, and clients/consumers should be entitled to expect high ethical standards from those providing them with legal services.

49. Various objectives will need to be balanced, as recognised in the principles underlying the existing legal professional regulation, particularly the 'regulatory objectives' in section 1 of the Legal Services Act 2007. These flow from the nature of legal services

themselves: even where legal problems or disputes may appear relatively mundane, they often hold significant and even profound implications on those involved. Those procuring legal services often do so not out of choice but out of necessity. While these objectives will sometimes be complementary and sometimes in conflict, it is perhaps unlikely that an unregulated market would achieve the right balance on its own. The Bar Council notes that the risks may be greater if one part of the market is largely unregulated, and thus given an unfair and inappropriate competitive advantage.

Is self-regulation, including voluntary standards, sufficient in the context of the collaborative economy?

50. Existing regulation in the legal sector, and the circumstances in which legal services may be required, make this a complex question. At paragraph 49 above, we refer to various objectives which need to be balanced, including objectives which are not present in other fields (e.g. access to justice, the rule of law, and professional standards). We believe the situation requires ongoing monitoring, as more evidence is required to formulate a satisfactory answer.

The use of reputation/rating systems in facilitating transactions on collaborative economy platforms

55. The Bar Council would consider this to be a promising mechanism for ensuring transparency and quality in the legal services market.

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