I FOUGHT THE LAW (SOCIETY) AND THE LAW WON

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In November 2016, the Competition Appeals Tribunal (CAT) heard the first competition law litigation case to be brought under the new Fast Track Procedure (FTP), as introduced under the Consumer Rights Act 2015. The case was brought by Socrates Training Limited – a provider of training courses to solicitors – who alleged that The Law Society, by "tying" its Conveyancing Accreditation Scheme (CQS) to its own training courses, was abusing a dominant position. In May this year, the CAT handed down judgment, ruling in Socrates' favour and finding the Law Society had breached both Chapter I and Chapter II prohibitions of the Competition Act. Economic Insight were the economists on behalf of Socrates - and in this Insight we provide a brief overview of the case, the key issues, and the wider implications for future hearings under the FTP.

1. Background

In 2010 the Law Society launched the CQS, an accreditation scheme for solicitors engaged in residential conveyancing in England and Wales. For a number of years since then, the CQS also incorporated a requirement that solicitors must acquire certain mandatory training from the Law Society itself – primarily relating to mortgage fraud and anti-money laundering (AML).

Socrates is an independent provider of training to solicitor firms, which includes AML training. Socrates was concerned that its business was being harmed by the Law Society's requirement that solicitors purchase its training in order to acquire accreditation. Importantly, over time, various mortgage lenders made CQS accreditation a mandatory requirement for being on their panels of approved conveyancing suppliers – meaning that solicitor firms wishing to undertake conveyancing work for those lenders had to join the CQS.

The specific allegations brought by Socrates were that:

- The mandatory requirement to obtaining the training exclusively from the Law Society constituted a "tying" or "bundling" of the training alongside accreditation – and thus was contrary to the Chapter II prohibition.
- Or alternatively, that the terms of membership of the CQS, by imposing mandatory training requirements on solicitors constituted an anti-competitive agreement, contrary to the Chapter I prohibition.

The case was heard by the CAT at the High Court in November 2016 – with judgment subsequently being handed down in May 2017.

2. Two sides to every story

The economics evidence at the hearing was limited to the issues of 'market definition' and 'dominance', with evidence heard from Sam Williams (Director of Economic Insight, on behalf of Socrates) and Dr Adrian Majumdar (Partner at RBB, on behalf of the Law Society).

In relation to market definition, there were two key elements to consider: (i) the upstream, which refers to the question of what market *the CQS itself* resides in; and (ii) the downstream, which refers to the question of what markets *the relevant training services* reside in.

In relation to the upstream market, the Law Society's position was that the CQS acted as a 'platform' that brought lenders, and solicitors engaged in conveyancing, together. As such, it was a 'two-sided market' which: (i) provided quality assurance to mortgage lenders with regards to solicitors undertaking conveyancing on one side; and (ii) on the other side, facilitated access to mortgage lender panels for solicitors. In contrast, Socrates' case was that the CQS resided in the market for accreditation services – for which there was no alternative supplier, but the Law Society.

The question of whether a service resides in a two-sided market turns on the extent of demand feedback effects across both sides of the market. In this case, solicitors paid for CQS accreditation, but mortgage lenders *were not charged* for using it as a criterion for their mortgage panel membership. Consequently, any demand feedback effect from the lender side to the solicitor side must be limited - and could relate only to the 'quality' of the CQS (as lenders would be agnostic as regards the price charged to solicitors, or indeed to any mandatory training requirements placed on solicitors by the Law Society). Consistent with this, the CAT agreed with Socrates' position, ruling that the upstream market consisted of the supply of accreditation to solicitors providing residential conveyancing in England and Wales.

In relation to the downstream, the CAT found that the market was the supply of training courses in AML, mortgage fraud and financial crime (most likely for the UK).

3. When is "must-have" really "must-have"?

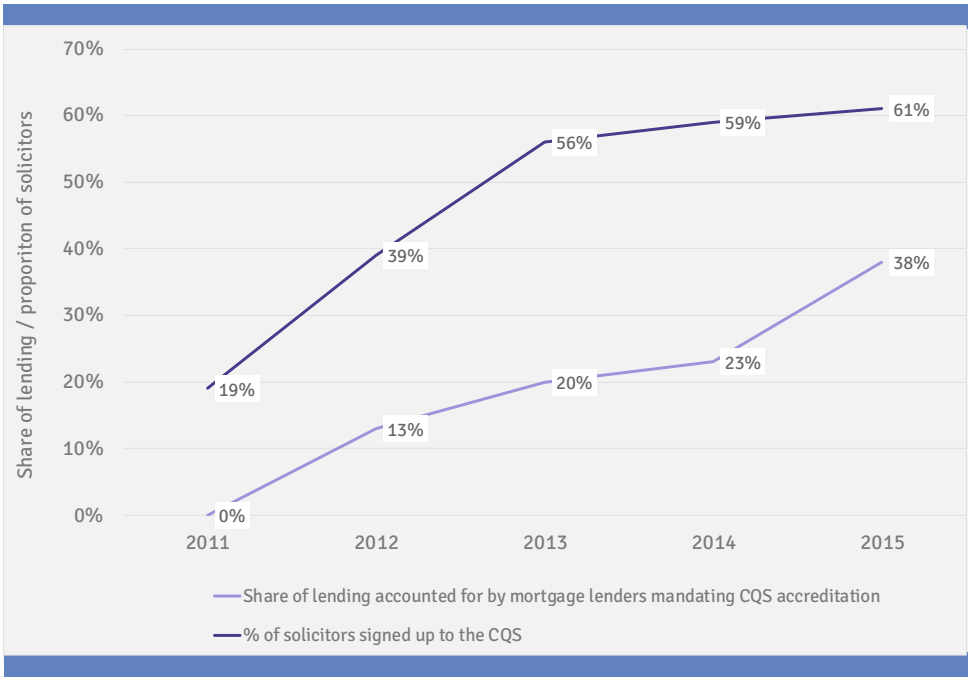
On the question of whether, and when, the Law Society became dominant – a range of evidence was considered. In relation to market shares, given that the CAT agreed with Socrates' proposed upstream market definition, the Law Society possessed a 100% market share of the provision of accreditation services for the duration of the operation of the CQS. Accordingly, the market share evidence was consistent with the Law Society being *presumed* dominant from the time of the CQS's inception in 2010 through to the present day.[1]

It is, however, established that market share evidence does not, on its own, necessarily determine dominance. Other relevant factors include potential future competition and the countervailing power of buyers of the services. Relating to the latter point, the CAT took the view that the question of dominance mainly turned on when the CQS became *"must have"* for solicitors.

[1] *In case law and guidelines, dominance may be presumed at a market share above 50% - see EC Case C62/86, AKZO Chemie BV v Commission [1993] 5 CMLR 215.*

To inform this, key evidence included trends in both: (i) the *share of lending* accounted for by mortgage lenders that mandated CQS accreditation to solicitors wishing to be on their panels for undertaking conveyancing work; and (ii) the *proportion of solicitors that had signed* up the CQS. The relevant data is shown in the following chart. Drawing on this, the CAT ultimately took the view that the CQS became "must have" for solicitors (and ergo the Law Society was dominant) from 2015. Here the CAT noted that: (a) there was a large increase in proportion of lending accounted for by lenders mandating the CQS in 2015 (see the jump from 23% to 38% in the chart); and (b) by this point, 61% of solicitors were on board.

Figure 1: Trends in "share of lending" and "proportion of solicitors signed up"



Source: CAT

'When we ask the question "must have", do we also need to consider "for whom" more carefully?

There is, however, a knotty issue left hanging by this element of the judgment – namely: **when we ask the question "must have", do we also need to consider "for whom" more carefully?** Put simply, in analysing the trends in the above manner, the CAT was (in effect) considering solicitor firms as a single, homogenous, group. However, an alternative perspective would be to consider whether there are segments of solicitors providing conveyancing services. For example, one meaningful segmentation might be one based on the 'amount' of conveyancing work undertaken. This matters because the importance of CQS accreditation would clearly vary across firms segmented by the quantity of conveyancing work (i.e. for firms undertaking little conveyancing work, arguably the CQS would never be "must have", whereas for firms substantially reliant on conveyancing income, it might be "must have" relatively soon after its inception).

Referring back to the chart, we see that the proportion of <u>all</u> solicitors subscribing to the CQS increases very rapidly up until 2013 (56%) but then actually increases *very little* after this. This is arguably somewhat at odds with the CAT's finding that 2015 represented a tipping point, at which the CQS became "must have" for solicitors. One intuitive explanation for this is that the CQS is most relevant *only to those solicitor firms for whom conveyancing represents a material amount of their income.* Consequently, if this specific segment of solicitors could be identified, one might find

that the 56% of all firms subscribed to the CQS by 2013 actually represented close to 100% of solicitor firms materially engaged in conveyancing. This, then, would explain why there were no further significant increases in the number of solicitor firms subscribing to the CQS after 2013, despite the subsequent increase in the number of lenders mandating CQS accreditation. Or, put simply, all the firms for whom the CQS was "must have", had already signed up by then. Hence, this logic would imply that the Law Society would have had dominance over this specific segment of solicitor firms from 2013 onwards, two years prior to the date proposed in the CAT's determination.

Alternatively, say there were solicitor firms for whom a material amount of their conveyancing work was on behalf of HSBC. For such firms, the CQS would be "must have" from the point at which HSBC made CQS accreditation mandatory for inclusion on its panel (which would imply that the Law Society was dominant from 2010).

The above is a somewhat complex issue and, in this case, the fact that it was not explored during proceedings can be partly explained by the absence of any data necessary to track the behaviour of segments of solicitor firms over time.

4. Fast tracking to the future – prioritising in the face of proportionality

The above goes to an important wider point regarding the new FTP: *proportionality.* As competition law practitioners will know, there are aspects of every case that are not fully resolved, and yet could be important. The point is that, for FTP cases, the time and budget constraints might make the trade-offs more acute.

Looking ahead, therefore, our view is that successful outcomes will depend on the skills of the relevant legal and economics teams in focusing in on the issues that matter most – and being ruthless in ensuring that the arguments in those areas are as strong as possible. Setting the legal and economics issue to one side, this case serves as a landmark, given it represents the first ever FTP case to be heard at the CAT. The hope is that this emboldens smaller firms to make greater use of competition law, in circumstances where they have been harmed. Whilst it is still too early to say how successful or not the FTP will be – this case is a step in the right direction.

Socrates a step in the right direction: a legal perspective from Stephen Tupper, competition lawyer on behalf of Socrates.

"Procedurally Socrates is something of a curate's egg. Many industry observers will be stunned that a Chapter II case took less than 12 months to resolve. For those of us involved, however, we believe that the CAT might have done even better. Whichever way you look at it, however, there can be no doubt that FTP is going to make a significant and positive difference to access to competition law justice from now on."

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