

Guidance and the Regulatory Space for Solicitors

By Dr Steven Vaughan

Birmingham Law School

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For more information on this Working Paper Series, please contact:

Dr Steven Vaughan, CEPLER Director of Education: s.vaughan@bham.ac.uk

or Lesley Griffiths, CEPLER Senior Administrator - l.griffiths.1@bham.ac.uk



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Steven Vaughan, University of Birmingham

Despite most of my current research being on lawyers, my PhD was in European chemicals regulation (obviously). I was (and am) interested in how one of the EU's largest and most complex pieces of legislation, REACH, was underpinned by more than one million words of guidance produced by the European Chemicals Agency.¹ Since my PhD, my interest in the use of guidance by agencies has only grown. I've since looked at how every single one of the EU's 33 agencies uses guidance,² and have this month turned my attention to the SRA.

I wasn't planning on writing anything yet about my current SRA research, but an exchange of tweets this morning with the regulator has prompted me to put something down on paper. I said:

"Spending this month and next month reading every piece of guidance published by [@sra_solicitors](#) - so far, so differentiated and ad hoc."³

The SRA came back with:

"SRA guidance addresses that which resists codification; responding to the contextual and the contingent, it bears their traces."⁴

And then with:

"In other words: You say "differentiated & ad hoc"; we say "targeted, proportionate, responsive"."⁵

The second Tweet by the SRA makes me wonder if the author has actually read much of the SRA's own guidance. The below is what I have found so far.

The Use of Guidance by the SRA

When I say "guidance" I am using the term as shorthand for 'guidance' to encompass those post-legislative instruments that are called 'guidance' and those which are called something else – guidelines, guides, formats, common approaches, position papers, advices, nutshells, handbooks, technical guides, standards, FAQs etc – but which fulfill the same functions. In other research,⁶ I have suggested that the functions of guidance can be fourfold:

- (i) guidance can amplify or expand on the underlying hard law;
- (ii) guidance can standardise the actions of those subject to the law;
- (iii) guidance can translate the law (i.e. where guidance implicitly contests and goes against the drafting of the underlying law, 'translating' the relevant provisions into something else); and/or

¹ Should you be on the look out for Christmas presents, my book on EU chemicals regulation is here: <http://www.e-elgar.com/shop/eu-chemicals-regulation>

² Vaughan, S. 'Differentiation and Dysfunction: An Exploration of Post-Legislative Guidance Practices in 14 EU Agencies' (2015) *Cambridge Yearbook of European Legal Studies*

³ <https://twitter.com/lawvvaughan/status/663660018768695296>

⁴ https://twitter.com/sra_solicitors/status/664358413472825344

⁵ https://twitter.com/sra_solicitors/status/664362317753294848

⁶ The book referred to at footnote 1 above

(iv) post legislative guidance can extrapolate from the law (i.e. guidance can fill in the gaps where the legislative text is silent on a given matter).

Guidance is everywhere on the SRA website. It is attached to the Handbook, is seen in Case Studies given to COLPs, in how the SRA professes to make decisions, in 'Resources' given to solicitors, via FAQs addressed to consumers, in competency based toolkits designed for firms, in technical guides for my SRA and in many, many other places.

So far, I have read the 36 documents on the SRA website which are housed under: Home > Solicitors > Resources > Guidance. My plan is to read everything else over the next two months. Watch this (regulatory) space.

An Hierarchy of Norms?

The 'guidance' in the SRA's 'guidance' section is actually called a variety of things. Table 1 below sets out the titles and the numbers of documents with those titles.

Table 1 - Titles of SRA 'Guidance' Documents

Title	Number
Guidance	6
Warning Notice	12
Note	4
Guidance Note	1
Guide	1
Document	1
Starter Pack	1
Unknown ⁷	9

What I am curious about is whether these titles imply some sort of hierarchy? So, for example, does a Warning Notice have more normative force than a Guidance document, which itself has more force than a Guidance Note? Elsewhere, I have argued:

"There are perhaps two replies to these questions. The first is that what counts is substance, not form, and so it is irrelevant what any given document is titled... The second, alternative, reply is that questions as to form and substance only really become engaged in specific contexts – that is, when those documents are adjudicated – and that, for the overwhelming majority of guidance documents, the likelihood of adjudication is very small indeed. As such, there are really no satisfactory or meaningful answers to these questions and thus those to whom they are addressed would need, in the real world, to muddle through them as best as they are able."⁸

Phase II of my research into the SRA's use of guidance will be empirical, and I am going to ask solicitors as to their views on how they use and experience the guidance tools the SRA issues.

⁷ These documents sit on the 'Guidance' page, but only have descriptive titles – e.g. "Chapter 12 of the SRA Code of Conduct 2011 – the Separate Business Rule" – and do not specifically state what type or form of 'guidance' they are.

⁸ See footnote 2 above

At the EU level, guidance documents by regulators can run to hundreds of pages. This is, as yet, not the approach taken by the SRA. Most of its guidance is relatively short, as Table 2 below shows.

Table 2 – Length of SRA ‘Guidance’

Length	Number
0 - 1,000 words	9
1,000 – 2,000 words	16
2,000 – 5,000 words	6
5,000 – 10,000 words	4

Is Guidance Binding?

9 of the SRA’s 36 ‘guidance’ documents make no reference, at all, to their status. The other 26 do, but in a variety of ways (some have helpful ‘Status’ headings; others don’t have those headings, but do include statements about status). Half of those 26 say the following (or equivalent wording):

“This advice does not form part of the SRA Handbook but the SRA may have regard to it when exercising its regulatory functions.”

A further 10 of the 26 say this (or equivalent wording):

“This advice does not form part of the SRA Handbook **and is not mandatory**, but the SRA may have regard to it when exercising its regulatory functions.” [own emphasis]

So, does that mean that the first 13 are mandatory? There is, as far as I can see, no apparent rhyme or reason as to when or where the SRA will, or will not, say that its guidance is not mandatory. Consistency is not a common characteristic of the SRA’s guidance. There is a debate to be had about the normative force of guidance, and the instances in which addressees may be obliged to follow guidance. I’ll be writing about that debate in the months to come.

One of the documents – on ‘employed solicitors publicity and information provided to third parties’ – says,

“This warning notice does not form part of the Solicitors Regulation Authority (SRA) Handbook. However, the SRA **will have** regard to it when exercising its regulatory functions.” [own emphasis]

In using this language in this specific document, the SRA has bound itself by its own guidance (i.e. it must acknowledge and follow this guidance when exercising its regulatory functions). This may, or may not, be of real world concern, but the fact that this is an isolated use of this language suggests (again) a lack of consistency.

Some, but by no means all, of the 36 ‘guidance’ documents have headings which say “Who is this guidance relevant to?” These are, I would suggest, rather helpful. This is because what we see from these 36 documents is that the audiences for the SRA’s norms are both legion and context specific. On occasions, the guidance is for the entire profession; in other instances, only a small group are targeted (e.g. those with an interest in an ABS).

The Language of Guidance

The language the SRA uses in its guidance documents varies significantly. At times, there is detailed prescription. In other instances, the language is vague. Both approaches may well be intentional, but the approach to drafting sometimes discloses a tension between the regulator wanting to tell the regulated community what to do, and the regulator operating in an outcomes-focused world where clear directed action is not of the moment. Take two examples:

(i) guidance on the Separate Business Rule⁹

- In one para (25) the document says, “It is not possible to give an exhaustive definition of a ‘matter’.” But then the following para (26) goes on to say, “However, in our view, the following will always be part of the same matter for these purposes...” and then goes on to list four specific examples; and

(ii) guidance on diversity data collection¹⁰

- The language here is both directed and unequivocal - e.g. “Every individual needs to be categorised according to the role categories set out below” – but at times also persuasive/suggestive – e.g. “A much richer picture of your firm will be provided if you publish more detail, for example about your new trainee or partner appointments”.

What is clear that is the SRA likes to use examples/case studies and lists of factors/characteristics in its guidance documents. Sometimes these lists are offered up with no additional comment – “Factors...include the following:”¹¹ – but in other instances the SRA states clear that the lists are non-exhaustive and/or only indicative.¹²

In some, but not all, of the guidance documents, specific reference is made to the Legal Services Act 2007 and/or the SRA Handbook rules and/or the Principles at the front end of the Handbook. Why this does not happen for every single piece of guidance is unclear. Surely there must be some basis on which the guidance is issued, or some rule or Principle to which it relates?

On occasion, the guidance also details rulings from the Solicitors Disciplinary Tribunal: whether such is a drafting tick of a specific guidance author, and/or whether such is done to offer up the real world consequences of solicitors failing to comply with their obligations; and/or whether this is about the SRA using SDT rulings to add normative force to its guidance views is also unclear.

⁹ [https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Chapter-12-of-the-SRA-Code-of-Conduct-2011-%E2%80%93-the-separate-business-rule-\(SBR\).page](https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Chapter-12-of-the-SRA-Code-of-Conduct-2011-%E2%80%93-the-separate-business-rule-(SBR).page)

¹⁰ <https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/diversity-data-collection.page>

¹¹ <https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Offering-inducements-to-potential-clients-or-clients.page>

¹² Seen, for example, in: <https://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notice/High-yield-investment-fraud--Warning-notice.page>

Consultation and Review

Not one of the 36 'guidance' documents says anything about consultation: about who was engaged in the process of making the guidance, who fed in to the prior drafts etc. This is striking. Is this because no one outside the SRA was part of any guidance making? A number of other regulators have guidance consultation procedures, as part of their governance mechanisms, which details who is to be consulted on what guidance and when and how. I would suggest that such a procedure would be useful for the SRA.

While the 'Guidance' webpage details that 9 of the 36 'guidance' documents have been updated since their creation,¹³ only 2 of those documents say anything, at all, about review. The latest guidance, from 22 October 2015, says "We will keep this guidance under review and update it as necessary";¹⁴ and the sole practitioners 'Starter Pack' says, "The contents of the pack will be reviewed at key stages depending on the feedback we receive on the key compliance issues effecting small firms and sole practitioners."¹⁵ One would assume (or hope) that the other 34 guidance documents would also be kept under review. Indeed, the fact that 9 of them have been updated suggests this is, in fact, the case (sometimes). But that only 2 of the 36 speak directly about review goes to wider issues, already discussed above, of consistency and approach. To use the language of the SRA, an approach to guidance which is "targeted, proportionate, [and] responsive" can also be equally consistent, clear and well thought through. I am not convinced that, at the moment, it is.

¹³ <https://www.sra.org.uk/solicitors/code-of-conduct/guidance.page>

¹⁴ <https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Accountant-s-report-and-guidance-for-firms-and-accountants.page>

¹⁵ <https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Sole-practitioners-and-small-firms-regulatory-starter-pack.page>