

**LAW SOCIETY OF IRELAND**

**Supplementary submission to the Competition Authority in  
respect of its Study into Competition in the Professions  
of Architect, Barrister, Dentist, Engineer, Medical  
Practitioner, Optometrist, Solicitor & Veterinary Surgeon,  
pursuant to Section 11 of the Competition Act, 1991 (as  
amended)**

**August 2004**

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## TABLE OF CONTENTS

<b>1</b>	<b>INTRODUCTION.....</b>	<b>1</b>
<b>2</b>	<b>A COMPETITIVE MARKET .....</b>	<b>2</b>
	The issue.....	2
	The structure of the market.....	2
	The effect of regulations and rules .....	4
	Actual market behaviour .....	4
	Performance of firms.....	5
	Conclusion.....	5
<b>3</b>	<b>ENTRY TO THE PROFESSION .....</b>	<b>6</b>
	The issue.....	6
	Entry requirements.....	6
	No numerical restrictions on entry .....	7
	The Law Society’s training “monopoly”.....	8
	Conclusion.....	9
<b>4</b>	<b>ADVERTISING.....</b>	<b>11</b>
	The issue.....	11
	The restrictions .....	11
	Minimal effect on competition.....	12
	Indecon’s evidence.....	12
	The case for the restrictions .....	13
	The matter of comparative advertising.....	13
	Conclusion.....	14
<b>5</b>	<b>CONVEYANCING .....</b>	<b>15</b>
	The issue.....	15
	Effects of the restriction on competition.....	17
	No evidence that the market is not competitive.....	18
	Alternative providers of conveyancing services .....	19
	Conclusion.....	21
<b>6</b>	<b>MULTI-DISCIPLINARY PARTNERSHIPS (PRACTICES).....</b>	<b>22</b>
	The issue.....	22
	The threat to core values .....	22
	Effects on competition .....	24
	Regulation issues .....	25
	Conclusion.....	25
<b>7</b>	<b>REGULATION OF SOLICITORS .....</b>	<b>26</b>
	The issue.....	26
	The functions of regulation and representation.....	26
	Advantages of regulation by professionals.....	28
	Co-regulation, not self-regulation .....	29

Likening the regulation of solicitors to the operation of a cartel is completely without foundation.....	31
Alternatives to the present system of self- or co-regulation .....	32
Conclusion.....	33
<b>8 FUSION .....</b>	<b>34</b>
The issue.....	34
What are the alternatives to separation?.....	34
Issues to be addressed.....	34
Conclusion.....	37

# 1 INTRODUCTION

- 1.1 The Law Society has repeatedly welcomed the Competition Authority's decision to study the provision of certain professional services. It is undoubtedly in the public interest that the provision of such services be reviewed from time to time to ensure that any inherent restrictions on competition result in consumer benefits and are proportionate to such benefits.
- 1.2 The Society is confident that any open-minded study will conclude that restrictions on competition in relation to solicitors in Ireland are very few, are imposed largely by law, are proportional and are justified, in the words of the European Court of Justice, as "necessary for the proper practice of the legal profession".
- 1.3 The purpose of this Supplementary Submission is to put before the Competition Authority a short statement of the position of the Law Society on the main issues that have arisen in the course of the enquiry. A few introductory points should be made to set matters in context.
- 1.4 It is a vital role of the lawyer in any democratic society to interpose and mediate between the enormous power of the State and the relative weakness of the individual citizen. An independent legal profession is essential for this. Any analysis of the solicitors' profession must therefore take into account not only the ordinary commercial conditions of the marketplace but also the needs of society as a whole. It is useful that the European Court of Justice has recently established certain fundamental principles to be applied when balancing any restriction on competition in relation to the legal profession with the wider public interest.
- 1.5 The legal services market in Ireland is a very competitive market. Concentration in the market is low and rivalry is high. The Law Society has no fixed fees, no recommended fees and no scale fees. There is a liberal regime on advertising by solicitors.
- 1.6 In addition the Law Society does not in any way restrict the numbers entering the profession each year. These numbers are high and growing rapidly. The Law Society's education system, facilities and teaching methodology are to the highest international standards.
- 1.7 Solicitors are not self-regulating. In addition to the Law Society, key roles in the regulation of solicitors are also played by the Oireachtas, the Minister for Justice, Equality and Law Reform, the President of the High Court, the Solicitors' Disciplinary Tribunal, the Independent Adjudicator and the lay members of committees.
- 1.8 As a final introductory point, it is worth noting that in a report on competition published earlier this year, the European Commission recorded that Ireland had the lowest level of regulation of the professions of all Member States.

## **2 A COMPETITIVE MARKET**

### **The issue**

- 2.1 The fundamental issue in the study is whether the market for the services supplied by solicitors in Ireland is competitive and delivers good quality services at reasonable cost.
- 2.2 The study is concerned with a regulated market. The market for solicitors' services is regulated in various respects in order to protect consumers, primarily because the market for professional services is characterised, for many clients, by information asymmetry. The case for regulation is accepted by competition authorities around the world and is not argued here (it is dealt with more fully elsewhere in the Submission).
- 2.3 The Law Society submits that the market is competitive nonetheless, and that regulation has a minimal effect on the competitive process.
- 2.4 This view is based on consideration of the following:
  - (a) the structure of the market;
  - (b) the effect on competition of the regulations, rules and bye-laws of the profession;
  - (c) the actual market behaviour of solicitor firms;
  - (d) the performance of solicitor firms.

### **The structure of the market**

- 2.5 The Society has been told by the Competition Authority's representatives that the Authority does not feel a precise definition of the relevant market is necessary, given the broad nature of the study. Suffice it then that the services provided by solicitors are legal advice and assistance, including the preparation of legal documents in various areas of legal practice.
- 2.6 There were 6,593 practising solicitors in Ireland as at 12 August 2004. At the same date there were 2,044 law firms, 70% of them consisting of one or two solicitors only. There were only 16 firms at that date with 11 or more partners.
- 2.7 Most law firms aim to cover all areas of legal practice though some do specialise in, or at least concentrate upon, particular areas, and there will be a greater level of specialisation within the larger firms. In no sense do smaller and larger firms compete in separate markets.
- 2.8 A statistic that is widely used as an indicator of the degree of competition is market concentration. Concentration of the Irish market for solicitors' services is very low. Measuring concentration in terms of the number of solicitors, the largest 100 firms employ only 32% of all solicitors, and the HHI is as low as 35 (Indecon report, Table 4.6).
- 2.9 By no stretch of the imagination could a market with so low a level of concentration be described, in structural terms, as other than competitive. Obviously, concentration will be

higher at the local level, but this does not contradict the proposition that the market is competitive. It depends on the effectiveness of the competitive constraints operating on the firms based in the local area. Clearly, competition in the supply of professional services has a spatial dimension. Solicitors provide their services from a particular location and consumers will tend to choose among the solicitors known to them and practising in their locality. But the solicitors in any locality are constrained in their market behaviour by the relative ease with which a solicitor from outside the locality can establish a firm within it, and the relative ease with which consumers can find, and contract with, a solicitor outside the locality in which they live (this will be even more the case for business than for personal consumers). The geographical boundary within which competition is effective is therefore wider than the locality within which a solicitor practises or within which the consumer chooses his solicitor.

- 2.10 Outside the very few reserved areas, any person, whether or not a qualified solicitor, can provide legal services. In fact, in a number of areas of practice the solicitor faces competition from other professionals; examples are taxation law and planning law.
- 2.11 A further competitive constraint on the market is provided by new entrants to the profession. Of course, entry is regulated. The entry requirements are designed to ensure that solicitors achieve minimum standards of knowledge and competence in a professional field of considerable and increasing complexity. The Indecon report accepts that the Law Society exercises no control whatever on the number of applicants and on the number of those completing the process of education and training. Furthermore, the Indecon report states that they do not “have any evidence that the educational and training requirements are used to restrict or damage competition” (para. 4.95). The Competition Authority team has indicated to the Society that it takes the same view.
- 2.12 The number of students registered in the Law School has been steadily increasing in recent years. In 2000, 299 students were registered in the Law School. By 2003, this figure had increased to 451.
- 2.13 The increase in the number of registered students is reflected in the increasing numbers of newly qualified solicitors entering the market in recent years. In 2000, the number of newly qualified solicitors was 350. In 2003, this figure increased to 422. In the last three years alone, nearly 1,300 newly qualified solicitors were admitted to the Roll of Solicitors, an increase of 17.5%. Approximately 70% of these were below the age of 30. The market is being supplied continuously, with the result that the overall proportion of younger solicitors in the total number of solicitors is rising steadily.
- 2.14 The number of “greenfield” solicitor firms has also increased in recent years. In 2003, 76 new firms were established.
- 2.15 Once a person is qualified and on the Roll, it is relatively easy for him to establish himself in practice. The entry costs are low (office space and equipment), the main barrier being the need to build up a client base. A number of Law Society initiatives assist the entry into practice of newly-established solicitors.
- 2.16 Summarising, the structure of the market for the services of solicitors is competitive.

## **The effect of regulations and rules**

- 2.17 Practising solicitors must abide by the regulations and rules laid down in statute or by the Law Society including the Guide to Professional Conduct of Solicitors in Ireland. These regulations and rules exist to protect the public, in particular the users of legal services, not to protect solicitors from competition. In fact, the regulations and rules that now apply in Ireland have very little effect indeed on the way in which solicitors can supply their services into the market. Thus:
- (a) the Law Society has no involvement of any kind in the fees that solicitors charge for any of their services. There are no scale fees, there are no recommendations on fees, there is no guidance given on fees to be charged or on how they should be calculated (in contrast to the position in England and Wales). Fees are a matter for negotiation between the solicitor and his client, subject to independent determination in the event of dispute, by court officials, the Taxing Master and the County Registrar;
  - (b) the remaining regulations on advertising are designed only to restrain tasteless and unduly obtrusive advertising, particularly in the field of personal injury claims. There is no restriction on the advertising of fees;
  - (c) solicitors are free to engage in any other forms of marketing of their services.
- 2.18 It is true that solicitors are prevented from participating in multidisciplinary partnerships (MDPs). The Law Society is opposed to MDPs involving lawyers for reasons that are explained elsewhere in this Submission. There are no grounds for believing that competition in the market for legal services is restricted because solicitors are not able to participate in MDPs.
- 2.19 Summarising, the present regulation of solicitors has a minimal effect on competition. The position has been different in the past. Such restrictions of competition as scale fees, numerical restrictions on entry and bans on advertising are long gone, though not all commentators appear willing to acknowledge this fact.

## **Actual market behaviour**

- 2.20 Solicitors compete along several dimensions – in the range and quality of the services they provide, in the way they advertise and market those services, and in the fees they charge. In the longer term, there is competition in the provision of new services and in the development of new and better ways of supplying existing services. Competition is reflected in the rivalry between firms for business and the expansion of the more successful firms relative to their less effective competitors.
- 2.21 This can be illustrated by the conveyancing market where there is a range of different styles of conveyancing firm, including so-called discount conveyancers, widespread advertising (including of fees), increasing use of the Internet to attract customers, shopping around by consumers and keen negotiation on fees.
- 2.22 Table 4.10 in the Indecon report gives average fees, and dispersion around the average, for typical domestic conveyancing and probate transactions. The table illustrates the large

drop in conveyancing fees since the days of the recommended scale fee. A similar picture emerges from a Consumers' Association survey reported in Consumer Choice May 2004.

- 2.23 There has been no suggestion from any quarter of collusion by solicitors. Even if, in conveyancing, some solicitors use the old scale as a starting point in negotiations on fees, or express the fee as so much less than the old scale, this is not evidence of a restriction of competition.
- 2.24 Similarly, the fact that not all solicitors choose to advertise is not evidence that competition is restricted. Subject to the constraints required by the advertising regulations (the justification for which is discussed elsewhere in the Submission), solicitors can advertise their services or not according to the circumstances of their practice. In fact the Indecon report found that 77% of solicitors do advertise, at least to the extent of being listed in the Golden Pages (paras.4.63-4.64).

### **Performance of firms**

- 2.25 The financial performance of firms, usually their profitability, may be used as an indicator of the competitiveness of a market. The Competition Authority will be aware of the limitations of this approach, both in respect of the measurement of profitability and the choice of a benchmark with which the measured profitability should be compared. The approach is particularly problematic in the case of professional sole proprietorships and partnerships supplying personal services when there is ambiguity over how profit should be measured and no meaningful capital base to which profits could be related.
- 2.26 In any event, the Law Society does not collect information on the earnings of solicitors or the fee income of firms. It is aware of occasional Press comment on lawyers' earnings but has not seen the evidence on which they are based. The Society has no knowledge of any systematic surveys in Ireland of professional earnings.

### **Conclusion**

- 2.27 The market(s) for the various legal services provided by solicitors in Ireland is competitive. The structure of the market and the ease with which solicitors, once qualified, can establish themselves in any location or area of practice, identify the market as basically competitive. There are no numerical restrictions on entry to the profession. It is a growing market with a steadily increasing flow of newly qualified solicitors. There is competition in all the usual dimensions of competitive behaviour, and in particular on fees. The Law Society has no say over the fees charged by solicitors and the restrictions on the freedom to advertise have a minimal effect on competition.
- 2.28 No evidence has been presented to the Law Society that would refute its proposition that the market for solicitors' services in Ireland is competitive.

### **3 ENTRY TO THE PROFESSION**

#### **The issue**

- 3.1 The Solicitors' Acts give the Law Society of Ireland exclusive jurisdiction in relation to "the provision of courses and the holding of examinations for the education or training (or both) of.....persons seeking to be admitted as solicitors". There are essentially two issues here:
- (a) are the requirements for entry to the solicitors' profession a means of restricting competition in the market for legal services by limiting the number of solicitors qualified to practise?
  - (b) Does the exclusive right of the Law Society to set standards for education and training for would-be solicitors further restrict competition in that market, and/or restrict competition in the separate market for education and training courses?
- 3.2 The Law Society firmly believes that the present system is in the best interests not only of the solicitors' profession but also of the wider public.

#### **Entry requirements**

- 3.3 It is universally accepted that entry into the legal profession has to be regulated in order to ensure that those providing legal services have the necessary knowledge and competence when consumers will often be unable to assess, in advance of the transaction, the precise services they need, or the quality of the service that is offered. The entry requirements that the solicitor must fulfil before he (or she) is free to practice, and the professional standards to which he is expected to adhere in his dealings with clients, provide the basic level of quality assurance that the consumer needs. As stated in the Indecon report, "...high quality education and training is fundamental in the formation of a solicitor and is of the utmost importance in ensuring protection of consumer interests" (para.4.95, emphasis added).
- 3.4 The Law Society has provided the Competition Authority with detailed information on the entry requirements of the profession, and the various stages that a solicitor has to pass through on the road to qualification, including the Professional Practice Courses and Examinations conducted by the Law Society Law School (see Answers to Questions 27-30 of the Competition Authority's Initial Questionnaire). It stands ready to provide any further information the Competition Authority may require.
- 3.5 The aim of the courses provided by the Law Society is to equip trainee solicitors to:
- (a) know and understand the principles of law underlying the more common areas of practice and to be able to apply their knowledge in a practical way and to adapt to ongoing legal changes and developments in those areas;
  - (b) understand the needs of clients in the more common areas of practice and to communicate clearly with clients while at the same time effectively meeting their legal needs; and

- (c) appreciate the ethical standards which govern the practice of law and the sense of justice which must always guide lawyers in their practice.
- 3.6 The courses are primarily for those intending to work in private practice and have a strong practical content. The requirement that each trainee solicitor completes a training contract facilitates a newly qualified solicitor in having sufficient practical training to commence practice on their own from the day they qualify as a solicitor. The traineeship requirement is not onerous and there is a more than sufficient number of solicitors willing to engage trainees.
- 3.7 The reservation of the right to practice as a solicitor to those who have satisfied the entry requirements cannot have any adverse effect on competition in the market for legal services. There are some 6,593 solicitors with a practising certificate in Ireland (and the number is steadily increasing). These solicitors offer their services from various locations around the country. Clients, for the most part, choose their solicitor from those that practise in their locality. Competition is determined by the interplay of solicitors and clients in that locality. But it is very easy for another practising solicitor to set up in a different locality, and it is also easy for a client to find a solicitor who is based in another locality. The fact that only qualified persons can practice in any locality therefore makes no difference to how competition works on the ground.<sup>1</sup>

### **No numerical restrictions on entry**

- 3.8 The Law Society accepts that it might be a different matter if there were any numerical restrictions on entry that might be designed to benefit, or have the effect of benefiting, incumbent members of the profession. The fact is that the Society imposes no restrictions whatever, whether by arbitrarily increasing the entry requirements or reducing the pass rate, fixing numerical quotas on the numbers wishing to enter the profession or seeking places at the Law School, or in any other way. The Supreme Court in the *Gilmer* case held that it would be outside the scope of the Law Society's powers to educate trainees for the Society to restrict entry on a numerical basis – not that the Law Society has any wish to do so. The number of persons entering the profession is determined by the attractiveness of the law as a career compared with alternative occupations, and the ability and determination of those who present themselves as candidate solicitors. In fact, the number of trainees entering the Law School is growing: 298 in 1996, 433 in 2003 and, as of 19th August 2004, 539 for the October 2004 course.
- 3.9 The Indecon report unreservedly accepted that the current entry requirements did not restrict competition. It concluded: "...we believe the current educational and training requirements are not disproportionate to achieving their intended goals of ensuring

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<sup>1</sup> The empirical evidence (such as it is) confirms this view of the effect of entry requirements. According to a recent review by Prof. Frank H Stephen, one "thorough" empirical study found "little support for the view that licensing restrictions in the US legal profession affect the price of legal services", another review of the US medical professions concluded that the evidence was "mixed", and a study of the licensing of architects in the UK found "no conclusive evidence of an impact on incomes." See Frank H Stephen, "The Market Failure Justification for the Regulation of Professional Service Markets and the Characteristics of Consumers", paper presented to the Conference on The Relationship Between Competition Law and Liberal Professions, European University Institute, June 2004.

minimum standards of competence and professionalism among newly qualified solicitors. Nor do we have any evidence that the educational and training requirements are used to restrict or damage competition in the market” (para. 4.95). Given the tendency of academic economists to identify regulation of entry into a profession as a source of market failure, this conclusion by a leading firm of economic consultants is particularly important.

- 3.10 The Competition Authority team has given no indication that it takes a contrary view to that of the Indecon report. Indeed, it indicated at the meeting on 5 May 2004 that it was willing to accept that the Law Society exerted no control over numbers entering the profession.

### **The Law Society’s training “monopoly”**

- 3.11 Although the Indecon report accepts that the requirements for entry into the solicitors’ profession have no adverse effect on competition, it concludes that “it would be welfare improving if the Law Society’s present monopoly status was relaxed to allow competition in the market for professional education of trainee solicitors”. The Indecon report would like to see “the possibility for other institutions, as well as the Law Society, to provide the teaching of the two professional practices courses” (para. 4.142).
- 3.12 There are a number of points that the Society would make in response to these views. First, the Law Society can confidently say that there has been no suggestion from any quarter at any time that the training provided by the Law School is in any way deficient or of an unacceptable standard. There is no question of the Law School failing to provide the quality of training that trainees, and the public, have the right to expect when the School has the exclusive jurisdiction to provide the courses. No fewer than 69 external examiners and assessors and one public interest representative are involved in the assessment of students’ work. The syllabus, teaching materials used, and course teaching of the Law School are kept under constant review by the Curriculum Development Unit which includes three non-Society members, Pat Diggins, former director of the Drumcondra Education Centre, Prof. Nigel Savage, Chief Executive of the English College of Law, and Prof. Hugh Brayne, an English based professional legal training consultant. The Unit has given the courses and teaching consistently high ratings.
- 3.13 At the meeting on 5 May, the Competition Authority team indicated it was not questioning the quality or efficacy of the education system.
- 3.14 The second point the Society would make is that the present system is highly cost-effective. It cannot imagine that, should another institution enter the market for providing courses for trainees, it could do so as efficiently as can the Law School. It also cannot imagine that the competition such an institution might provide for the training of solicitors would have the effect of lowering the costs to the trainee solicitor of his or her training, or in any other way be “welfare improving”.
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- 3.15 Education and training are services which can benefit from economies of scale, as acknowledged in the Indecon report (para.4.138). The advantages of the scale of the Law Society's education and training operation are illustrated by the physical facilities at the Education Centre at Blackhall Place (which cost €6.5 million when it came on stream in October 2000), the directly employed staff of some 44 people, and the 570 or so practitioners who are an additional teaching resource available to the Law Society in Dublin and who contribute invaluable practical experience. Obviously, while a smaller scale operation might be perfectly feasible, the Law Society doubts that it could match the efficiency of the current system.
- 3.16 If education and training were provided by a range of different institutions, there would also be a difficulty in ensuring the necessary consistency in the standards to be expected and achieved. This would be a problem even with a central system of examinations because of the large vocational element in the training programme.
- 3.17 It is no answer to these points to say that the provision of professional education and training in England and Wales is decentralised, for the market there for such courses is substantially larger than in Ireland and may well be able to accommodate a more varied mixture of providers than could operate profitably in this country.
- 3.18 On the issue of cost-effectiveness, it is worth adding that the Law Society's education and training provision is entirely self-financing. No public expenditure is involved. Moreover, it seems inevitable that any new provider would wish to make a profit from its operation, unlike the Law Society, rendering it even more likely that the fees the new provider would charge to trainees would be considerably higher than those of the Society. It is difficult to see any economic rationale for a new provider.
- 3.19 Third, it is open to the Law Society, while retaining its overall jurisdiction over the content of courses and examinations, to licence other educational institutions to provide such courses. Since the Law School commenced operations in 1978, the Society has received no applications from any other institution to provide education and training courses. The Society believes that the reason that no applications have been received is that putative institutions realise they would be unable to offer a comparable quality of service to that of the Law School and that the costs of establishing and running a course of a comparable standard would be very high.
- 3.20 If any outside provider can replicate the standards and systems of education and training of trainee solicitors which the Society, with its external examiners and practitioner participants, has put in place, then the Society will be perfectly happy to licence that outside provider.

## **Conclusion**

- 3.21 The Law Society understands that the Competition Authority accepts the need for entry into the solicitors' profession to be regulated and that it has no reservations about the Law Society's role in the process, other than the exclusive right of the Law Society to provide the practical training of trainee solicitors at the Society's Law School. The Society is confident that the Competition Authority team will have been impressed by the standard of the facilities and of the training provided. It doubts that other institutions could provide so

cost-effective, high quality training as that provided by the Law School. It firmly believes that the present system is in the best interests not only of the solicitors' profession but also of the wider public interest. However, the Law Society reiterates that it has no objection in principle to other institutions providing training courses so long as arrangements are in place to ensure that the training is of a comparable standard to that set by the Society in conjunction with independent assessors and examiners, and that the training includes a comparable level of input from the practising profession.

## 4 ADVERTISING

### The issue

- 4.1 The Solicitors (Advertising) Regulations 2002 set down the requirements to be met by solicitors when engaging in advertising. The Regulations give effect to the provisions of the Solicitors (Amendment) Act 2002. In addition to the minimal statutory restrictions on advertising contained in the 1994 Act, the 2002 Act introduced a specific provision in the law restricting advertising by solicitors in the area of personal injury claims. Advertising of this kind, and so-called “ambulance chasing” by solicitors, had become a matter of increasing public concern. The question is whether, given the policy purpose of the present regulations, any of them lead to a disproportionate restriction of competition.

### The restrictions

- 4.2 The restrictions set out in the 2002 Act prevent solicitors from publishing an advertisement which:
- (a) is likely to bring the profession into disrepute
  - (b) is in bad taste
  - (c) reflects unfavourably on other solicitors
  - (d) contains an express or implied assertion that the solicitor has specialised knowledge in any area of law or practice which is superior to that of other solicitors
  - (e) is false or misleading in any respect
  - (f) is published in an inappropriate location (which includes a hospital, clinic, doctor’s surgery, funeral home, cemetery, crematorium or other location of a similar character)
  - (g) refers to i) claims or possible claims for damages for personal injuries; ii) the possible outcome of claims for damages for personal injuries; or iii) the provision of legal services by the solicitor in connection with such claims
  - (h) expressly or impliedly solicits, encourages or offers any inducement to any person or group or class of persons to make personal injuries claims
  - (i) is contrary to public policy.
- 4.3 The purpose of the Advertising Regulations is to provide the solicitor with clear guidance on how the above statutory rules, several of which require interpretation (e.g. what is “bad taste” in respect of advertising by solicitors, or advertising that is “likely to bring the profession into disrepute”), are to be interpreted and will, as necessary, be enforced.

- 4.4 The Law Society accepts that advertising is important in any market as one source of information to consumers and one dimension of competition between suppliers. It maintains that the regulations have a minimal effect on competition and are necessary and proportionate for the protection of the public.

### **Minimal effect on competition**

- 4.5 The days are long gone when advertising by solicitors was prohibited. Solicitors are now largely free to advertise where and how they please. It is worth noting, in particular, that there is complete freedom to advertise fees. The large majority of solicitors advertise at least to the extent of a listing in the Golden Pages, and local newspapers are another popular medium for solicitors' advertising. Of course, there is considerable variation between solicitor firms in the extent of their advertising and the size of their advertising budgets, as the survey in the Indecon report reveals (para.4.61). This is a matter of no surprise. It is for each firm to decide whether advertising would be advantageous as part of the firm's general marketing of its services. The great majority of new clients for solicitors' firms in Ireland are not introduced through advertising but through the personal contacts network of the firm, in which the 'word of mouth' reputation of the firm is of crucial importance. With a personal service like legal services, a great many solicitors will find it sufficient to rely on personal recommendation for new business and will view paid media advertising as a waste of money. Solicitors' firms know their own business. It is rather disingenuous for the Indecon report to call for "more active advertising where it would enhance competition or improve consumer information" (para.4.155) when the constraints on solicitors' freedom to advertise are so limited and are intended to protect the public, not to restrict competition.

### **Indecon's evidence**

- 4.6 The Indecon report bases its argument for "more active advertising" on its survey of the economic evidence on the effects of restrictions on advertising (paras.2.95-2.104). The Law Society would point out, however, that the studies, many of which are now rather old and apply to other countries and other professions than the law, were invariably of the effect of removing severe advertising restrictions, including total bans on advertising or bans on the advertising of fees, for which there was never a public interest justification. Not surprisingly, some of these studies identified significant benefits e.g. from lower fees from the removal of such restrictions. The Law Society asserts that it would be quite erroneous of the Competition Authority to suggest, or imply, that similar beneficial effects would follow in Ireland if any of the current restrictions in the Advertising Regulations of 2002 were to be lifted. Since the market for solicitors' services is competitive, it is hard to see how the lifting of the restrictions on "cold calling" and on comparative advertising, the two restrictions in the regulations to which Indecon took exception, could have any significant impact on the competitive process and hence be beneficial to consumers.

## The case for the restrictions

- 4.7 The Law Society notes that the Competition Authority has accepted the case for restrictions on advertising that would be untruthful or misleading or likely to bring a profession into disrepute. In its decision in the *Optometrists* case, the Authority said that “a requirement that advertisements not be misleading or untruthful or of a character that could reasonably be regarded as likely to bring the profession into disrepute ... would not normally be anti-competitive” so long as competition was not restricted or innovation prevented.<sup>2</sup> The Law Society believes its regulations on advertising that is in bad taste, is misleading, or could bring the profession into disrepute meet the criteria in the *Optometrists* decision.
- 4.8 A major purpose of the regulations is to prevent advertising in inappropriate locations (e.g. hospitals, clinics, etc as specified in the regulation) and potentially intrusive and aggressive advertising in respect of personal injury claims. This kind of advertising is aimed at consumers when they may be at their most vulnerable. The Law Society believes that there is widespread support for the control of advertising in such sensitive areas.<sup>3</sup>
- 4.9 The Law Society considers that the restrictions on cold calling are justified and in the public interest. The justification is the information asymmetry that is characteristic of the supply of legal services. Where consumers are not in a position to assess the quality of a service that may be offered by the cold caller, or to assess the competence and integrity of the firm making the cold call, the possibility of the consumer being misled, perhaps with costly consequences, is obvious. The risk would be compounded if the cold caller were able to take advantage of consumers in a particularly vulnerable situation, e.g. the recently bereaved. Even the Indecon report accepts that a restriction on the freedom to solicit business is justified in the area of personal injury claims. The Law Society believes that there would be overwhelming support in the public at large for the retention of the present restriction on cold calling.

## The matter of comparative advertising

- 4.10 The problem with comparative advertising is that the consumer is not always able to evaluate the claims that are made. Dubious or unsubstantiated claims are one of the more frequent complaints that have to be handled by any body charged with enforcing

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<sup>2</sup> *Association of Optometrists, Ireland* Dec No 16, 29 April 1993, Notif CA/9/92E

<sup>3</sup> In his article, “Aspects of Regulatory Reform in the Irish Solicitor Profession: Review and Evaluation”, *Quarterly Economic Commentary*, 2003, Edward Shinnick (well-known as a critic of the legal profession) sees the advertising regulations as “beneficial since they provide information to consumers on services offered and fees charged or aim to protect the consumer against false or misleading claims” but qualifies this view by criticising the Government for introducing the changes in 1996 and 2002 on the ground that there was no independent evidence to show that the changes were needed to protect the public from the excesses of the so-called compensation culture. This is an academic point indeed, and one could counter by pointing out that Shinnick provides no evidence to support his view that the restrictions in the area of personal injury claims have a detrimental effect on competition and on consumers.

misleading advertising regulations. When the subject of the advertisement is a personal service like legal services, rather than a branded consumer product such as a motor car or a beer, and when many consumers are not in a good position to assess the quality of what is on offer, or of what is being compared, the difficulties presented by comparative advertising are increased.

- 4.11 It is these considerations which have persuaded the Law Society that the safest way of interpreting the statutory restriction on advertisements that claim a superiority over other solicitors in some area of specialisation is to prohibit any advertisement that claims specialist knowledge in some area of law or legal practice. The Law Society emphasises that it is practical considerations that led it to this view, not opposition in principle to the advertising of a specialisation. It has, however, decided that it should review its current interpretation of the regulation with a view to establishing whether there might now be a case for relaxing the ban on any advertising of specialist knowledge. The Law Society's concern in conducting this review will solely be whether the public interest would be furthered by a relaxation, balancing the benefits of more information about solicitors in the market place against the detriments of possibly misleading information.

## **Conclusion**

- 4.12 The Law Society recognises the role of advertising as a dimension of competition and as a source of information for consumers. It therefore accepts that restrictions on solicitors' freedom to advertise need to be justified as in the public interest. The Law Society maintains that the restrictions in the current Advertising Regulations, which give practical expression to the statutory restrictions set out in the Solicitors (Amendment) Act of 2002, are justified in that they protect consumers and have a minimal effect on competition between solicitors.
- 4.13 As indicated above, however, the Law Society is in the course of a review of its interpretation of the requirement that advertising shall not claim specialist knowledge superior to that of other solicitors.

## 5 CONVEYANCING

### The issue

- 5.1 Section 58 of the Solicitors Act 1954 reserves the practice area of conveyancing (that is, the drawing up of the legal documents required for transferring real property between buyers and sellers) to solicitors.
- 5.2 The Law Society believes that this restriction has no effect on competition in the market for conveyancing services and is in the public interest. No evidence that would support a contrary view has been put before the Law Society in the course of the Competition Authority's study.
- 5.3 There are three related justifications for the restriction:
- (a) the purchase of a house is one of the largest investments that any consumer will make. The consumer needs the assurance that he (or she) has good title to the property, free of any defects, for example, in relation to building regulations, planning requirements, third party rights etc. If the transaction goes wrong, the detriment to the would be-purchaser (or vendor, or the third parties in the chain) can be considerable;
  - (b) conveyancing is a complex area of legal practice in Ireland because of the out-dated property law and system of land registration; unregistered conveyancing still accounts for about half of conveyancing practice in Ireland. The complexities of conveyancing practice were fully described by Mr Patrick Dorgan at the meeting on 5 May. It is clear that the Irish conveyancing transaction involves a more complex series of steps and more complicated searches to establish title than is involved in conveyancing in England and Wales.

The streamlining of the conveyancing process in England and Wales has been greatly assisted by the introduction of integrated land and property information search facilities through the National Land Information Service (NLIS), a joint initiative between central and local government. NLIS provides nationwide access to information gathered and maintained at local level. The NLIS hub acts as the gateway to the information held by the various NLIS data providers nationwide, including all local authorities in England and Wales, HM Land Registry and the Coal Authority. For one fee to this centralised search facility, the English or Welsh solicitor can easily obtain, and rely on, all of the information relevant to the transaction being performed.

There is no equivalent of NLIS in Ireland. Data providers all operate their own separate information systems, some of which are still manual, and there is no real integration of systems that would serve to assist in streamlining the conveyancing process here. Legal searchers in Ireland must still apply separately to each data provider to obtain the up to date information on which a solicitor can rely in completing

a conveyancing transaction. This typically involves separate searches in each of the following registers or offices:-

- Land Registry or Registry of Deeds title search, or even both registries in cases of mixed title,
- Judgements Office against Vendor and Purchaser/Borrower if the purchaser is also getting a loan,
- Bankruptcy Office against Vendor and Purchaser/Borrower,
- Sheriff's Office searches against Vendor and Purchaser/Borrower if the title is leasehold,
- Companies' Office if the Vendor or the Purchaser/Borrower is a limited liability company (note that most vendors of new houses will be building companies),
- Planning Office of the relevant local authority. Planning searches can become very complicated - aside from actual planning applications affecting the property itself, other matters of concern to a purchaser can include the development plan, road-widening, compulsory purchase orders, etc. They can also be complicated by how widely spread the information of the local authority is e.g. it is understood that a planning search in one local authority in the greater Dublin area necessitates enquiries being made in 18 different offices of that local authority.
- Licensing Search if there is any liquor being sold in the premises,
- Food Licence/Registration search in appropriate cases,
- Registration search e.g. for hotels with national registration board, in appropriate cases.

The cost of searches has increased considerably over the past 5 years or so and now forms a significant portion of the outlays on a client's bill of account. The lack of an integrated information system on land and property holding inevitably means that fragmented requests to several different information sources will of necessity take longer and cost more.

Also, it is often the case that issues arise in conveyancing transactions that require knowledge of other areas of law, for example, family law, tax law, planning law etc;

- (c) the consumer will usually not be sufficiently informed about the nature of the conveyancing transaction to be able to assess in advance the quality of the service he is offered. Faced with this information asymmetry, the training and ethical standards of the qualified solicitor provide the client with a necessary quality assurance and minimise potential conflicts of interest. Furthermore, the client's funds are protected by

the solicitors' Compensation Fund and the solicitor's professional indemnity insurance protects the client against his negligence.

- 5.4 No one will question the need for conveyancing services to be provided by those with the necessary expertise, and for consumers to be protected against incompetent or unscrupulous providers of those services. The Indecon report recognised that conveyancing transactions can be complex and that it is "essential" that they be provided "by those with sufficient expertise" (para.4.165).
- 5.5 Those objecting to conveyancing being an area of practice reserved to solicitors make two points:
- (a) competition in the market for conveyancing services is restricted to the detriment of consumers;
  - (b) conveyancing services are not so special that only solicitors can be competent to provide them. Training comparable to that received by solicitors can readily be provided for non-lawyers.
- 5.6 We shall deal with these points in turn.

### **Effects of the restriction on competition**

- 5.7 The fact that conveyancing is restricted to qualified solicitors does not mean that competition in the conveyancing services market is restricted. Conveyancing is one of the more common areas of work for solicitors and virtually all firms will provide conveyancing services. There are 6,593 practising solicitors in Ireland in 2,044 firms, and the number of solicitors is steadily increasing. Solicitor firms are spread around the country as shown in Table 4.5 of the Indecon report.
- 5.8 Most people needing a solicitor for conveying a property will look for one in their locality, but they will have no difficulty in finding a solicitor further afield not least because of solicitors' advertising (increasingly on the internet). Moreover, solicitors can easily move into a new locality if they see commercial opportunities in doing so. When the total number of solicitors providing conveyancing services is large and there is a high degree of spatial mobility on both sides of the market, then the market will be competitive despite the restriction of the area of practice to solicitors.
- 5.9 We only have to look at how the conveyancing market operates to see that it is competitive. The Law Society issues no rules, recommendations or guidance to its members on how much they should charge, or on how they should calculate their charges. Nor are there any restrictions on the advertising of fees. Competition in fees at local level is very keen. A number of organisations offering a discount conveyancing service have grown up in recent years. Most clients are well aware that fees are negotiable (encouraged by the requirement that a solicitor sets out the basis for his charges at the commencement of the transaction in a section 68 letter), and are prepared to search for the solicitor who offers best value for money.

- 5.10 These various pressures ensure that solicitors' charges for, and earnings from, conveyancing services are determined by competition, and therefore are no more than reasonable for the work that is involved. Any solicitor who tried to charge "over the odds" would soon find that he was losing business to his competitors.

### **No evidence that the market is not competitive**

- 5.11 No evidence has been put to the Law Society that would refute its view that the market is competitive. The only evidence in the Indecon report is a survey of solicitors' fees for conveyancing services on the sale of a house valued at €300,000 (no detail on the survey is provided in the report). This showed that the mean conveyancing fee was €2,235 compared with the pre-1991 recommended scale fee of €3,127, which highlights a significant departure from the former scale fee. The survey revealed a certain symmetry in the distribution of fees quoted, with relatively little dispersion about the average, but this one statistic does not support an inference that price competition is less vigorous than it might be, not least when the average is no less than 28% below the earlier scale fee (Table 4.10).

- 5.12 An academic survey of fees for conveyancing of 604 firms of solicitors in Ireland in 1994 by Edward Shinnick also showed widespread discounting from the earlier scale fee with the extent of discounting varying between localities according to demand and supply conditions, as one would expect in a competitive market.<sup>4</sup> It may be that some solicitors used the old scale as a reference point for their negotiations, but that is hardly ground for saying that competition was restricted. In any event, the Society is satisfied that the survey conducted by Mr Shinnick in 1994 bears no relationship to the circumstances that pertain today. In the ten years since Mr Shinnick's survey, there has been an unprecedented increase in the level of competition in the conveyancing market, fuelled by a number of factors:-

- (a) high profile conveyancing discounts being offered by solicitors' firms;
- (b) the increasing number of new entrants to the market;
- (c) increased advertising, and
- (d) increased consumer awareness of the advantages of shopping around.

A small scale survey by the Consumers' Association reported in its magazine *Consumer Choice*, May 2004, pp.164-167, also notes some tendency for solicitors to quote a fee of 1% of the value of the property, but finds that other solicitors offered a discount of the percentage fee and still others quoted a fixed fee. The article stresses the benefits of shopping around to find the most attractive deal.

- 5.13 The Law Society maintains that no evidence has been presented to it that would show that the market for conveyancing services is other than competitive.

### **Alternative providers of conveyancing services**

- 5.14 Since the market is competitive, consumers have a choice of solicitors who provide conveyancing services of good quality at reasonable prices. Competition between solicitors ensures that they provide conveyancing services efficiently and that they are conscious of the need to constantly develop ways of improving their service for their clients. As explained by Mr Dorgan at the 5 May meeting, solicitors have been responsible for a number of innovations, for example, the abolition of the “third solicitor” (who used to act for the financial institution) and the introduction and development of solicitors’ enforceable undertakings (which facilitate the financing of the transaction).
- 5.15 These benefits of a competitive market to clients (and indeed to society as a whole) would not be increased by opening up the market to other providers, whether licensed conveyancers or lawyers employed by banks, building societies or other organisations. In fact, the evidence demonstrates that in countries where licensed conveyancers have been allowed to enter the market the impact has been so small as to make the change pointless. In England and Wales where licensed conveyancers have been permitted since 1987, there were only 275 licensed conveyancers practising on their own account in June 2002 according to the Council for Licensed Conveyancers, the body established to regulate them, and 510 in employment. Licensed conveyancers had a market share of less than 5% in 2001, according to the Office of Fair Trading. These statistics do not suggest that there have been rich pickings for new entrants to the market in England and Wales or that their entry can have had much impact.
- 5.16 In Scotland, licensed (or qualified) conveyancers have been little short of a fiasco. They were permitted from 1990 and the Scottish Conveyancing and Executory Services Board was established to regulate them. It was abolished, however, in August 2003 after a review of Scottish public bodies and its functions taken over by the Law Society of Scotland at the request of the Scottish Executive. At the time there were only 11 licensed conveyancers and 9 of these worked in solicitor firms. The Irish economy is of course more comparable in size with Scotland than with England and Wales.
- 5.17 The results of the few studies of the effects on fees are inconclusive. A survey by Professors Stephen and Love of the results of studies that have investigated the effects of removing solicitors’ exclusive right to provide conveyancing services in England and Wales found that the initial effect of the announcement to introduce competition in conveyancing resulted in a reduction in fees even before new entry took place. Solicitors surveyed in 1986 were reducing their fees in anticipation of licensed conveyancer entry.

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<sup>4</sup> E. Shinnick, “Competition, Regulation and the Determination of Fees in the Irish Conveyancing Market”, unpublished PhD thesis, University of Strathclyde, 1998.

Later in 1989, when licensed conveyancers were introduced, surveys found fees in markets where this competition existed were lower. However, between 1989 and 1992 fees increased and this increase was greater than the increase in markets where no licensed conveyancers existed. The authors comment that “these results should caution against the assumption that multiple professional bodies will necessarily be to the benefit of consumers”.<sup>5</sup>

- 5.18 The Indecon report refers to a study in New South Wales, Australia. This examined the effect of a number of measures that were taken in the early 1990s to increase competition in conveyancing including removal of advertising restrictions in 1991, the introduction of licensed conveyancers in 1993 and the abolition of scale fees in 1994.<sup>6</sup> While the study showed that competition had increased in the NSW conveyancing market, the effect of licensed conveyancers cannot be disentangled from that of the removal of the other restrictions. The likelihood is that the effect would have been considerably less than that of the other changes which had a much more obvious impact on the competitive process than the entry into the market of relatively few licensed conveyancers. It is therefore misleading of Indecon to quote this study to support its proposition that the introduction of licensed conveyancers in Ireland would lead to lower fees.
- 5.19 The Law Society therefore maintains that it is unlikely, if licensed conveyancers were to be allowed in the Ireland, that they would have any perceptible effect. On the other hand, a system for the training and regulation of licensed conveyancers would have to be set up. The cost of training licensed conveyancers in narrow and, in many cases, inadequate knowledge and skills (inadequate because the wider and more rounded skills possessed only by a fully-trained solicitor will often be required by, but lacking in, a licensed conveyancer), the necessary regulation and an equivalent to the solicitors’ Compensation Fund, would be considerable. The Competition Authority must take these additional costs into account.
- 5.20 The Law Society rejects any suggestion that licensed conveyancers should be trained alongside trainee solicitors in the Law School and should have access to the solicitors’ Compensation Fund. The Law School courses are designed to train solicitors in all aspects of practice and it would be impossible to provide a separate course to train people for conveyancing only, given that so many other areas of law touch on conveyancing.
- 5.21 The Compensation Fund was established by solicitors in 1954 as a ‘badge of trust’ by the profession to reassure the public that they could entrust their monies to solicitors with confidence that any loss would be made good by the profession, should a colleague misappropriate those funds. The profession has contributed to this Fund over the 50 years since then, in times of recession as well as in times of profitability. It is not a Fund

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<sup>5</sup> F Stephen and J Love, “Regulation of Legal Profession”, *New Palgrave Dictionary of Economics and Law*, 2000.

<sup>6</sup> J Baker, “Conveyancing Fees in a Competitive Market”, *Law Foundation of New South Wales*, 1996.

that could, or should, simply be 'opened up' to non-solicitors to facilitate the provision of conveyancing services. Solicitors have property rights in the Compensation Fund. Apart from the violation of solicitors' constitutional rights to their property that would result from opening up the Compensation Fund to non-solicitors, it is essential to the whole system that the Society has full disciplinary and regulatory powers over those whose dishonesty can give rise to claims on the Compensation Fund.

- 5.22 If the market were also to be opened to lawyers employed by commercial organisations, there would be further regulatory costs to take into account.<sup>7</sup> It is the amount of such regulatory costs that has dissuaded the UK Government from any move to allow employees of financial organisations to provide conveyancing services to the general public.
- 5.23 The Law Society is concerned that, if financial organisations were able to move into the market, there would be a risk of conflict of interest and indeed, where the organisation has market power, of anti-competitive conduct such as the bundling of services or conditional selling of different services. The Government took the same view in the debates that preceded the 1994 legislation in rejecting a recommendation of the (then) Fair Trade Commission that banks should be permitted to enter the conveyancing market. The unavoidable fact is that the employed solicitor can be subject to pressures incompatible with the core values of the profession. It is hard to see how the employed solicitor could be expected to disregard the commercial interests of his employer, be it bank, insurance company, supermarket or whatever.

## Conclusion

- 5.24 The Law Society strongly believes that it is in the public interest for the practice of conveyancing to continue to be reserved to solicitors who have received the necessary training and are supported by professional indemnity insurance, the Compensation Fund, and a disciplinary procedure to deal with any complaints.
- 5.25 The Law Society suggests that it is incumbent upon the Competition Authority to give evidence to show that the present system is not working in the best interests of consumers and that any change to that system, for example permitting licensed conveyancers, would bring benefits to consumers that would outweigh the not inconsiderable training and regulatory costs that would be involved.
- 5.26 It would be irresponsible of the Competition Authority to propose that the Government provide a blank cheque to cover the cost of introducing licensed conveyancers.

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<sup>7</sup> Building societies are empowered to provide conveyancing services (by the Building Societies Act, 1989) but so far have not sought the regulations that would enable them to do so.

## **6 MULTI-DISCIPLINARY PARTNERSHIPS (PRACTICES)**

### **The issue**

- 6.1 Multi-Disciplinary Practices (MDPs) are prohibited under Section 59 and 64 of the 1954 Act. Section 71 of the 1994 Act permits the Law Society to allow fee-sharing between solicitors and other professionals provided that the Minister for Justice, Equality and Law Reform and, in the event of regulations being proposed, the Minister for Enterprise, Trade and Employment have consented. No such regulations have been introduced.
- 6.2 The arguments in favour of MDPs are familiar; it is suggested that a “one-stop-shop” for professional services can lead to cost savings and increased convenience to some consumers, and to cost savings to providers of professional services from economies of scale or of scope, cost savings which in a competitive market would be at least partly passed on to consumers. The Law Society does not deny these theoretical advantages of MDPs though there is evidence to suggest that the advantages are easily overstated (see para. 6.20 below).
- 6.3 The Law Society is aware of no evidence that would demonstrate that competition in the markets for legal services would be enhanced by the introduction of MDPs.
- 6.4 The fact is that few countries do permit MDPs. The reason is that there are also disadvantages in the MDP type of organisation for professional services, particularly when lawyers are involved. These are the risk that they pose to the core values of the profession, values which are designed to protect the public rather than the profession. Even for the sceptic, the risks are well enough illustrated by the Enron and Arthur Andersen collapses.
- 6.5 As yet, no effective regulatory way of dealing with these disadvantages has been found. In these circumstances, the Law Society of Ireland remains opposed to the introduction of MDPs in Ireland.

### **The threat to core values**

- 6.6 The core values, or duties, of the solicitor that are the underlying rationale for restrictions on MDPs include the independence of advice, the duty of loyalty (avoiding conflict of interest), the duty of confidentiality, and the client’s right to legal professional privilege. It is notable that the Indecon report, while favouring MDPs in principle, indicated that it “would, however, be very concerned if MDPs did impact on independence, avoidance of conflicts of interests or client confidentiality” (para.4.182) and that the European Commission, in its Report on Competition in Professional Services in June of this year, took a similar view: “business structure and ownership regulations may be necessary to ensure practitioners’ personal responsibility and liability towards clients and avoid conflicts of interest” (para.61).
- 6.7 Moreover, the European Court of Justice has confirmed that not every arrangement which restricts the form of business structure that may be employed infringes the competition

rules of the European Union – in *Wouters*, a restriction on MDPs was held not to infringe Article 81 because “it was necessary in order to ensure the proper practice of the legal profession.”

6.8 We shall deal with the core value issues in turn.

### **i) Independence**

6.9 The solicitor has a duty to ensure that advice given by him is totally independent and free from any suggestion of outside influence. Such independence of advice cannot be guaranteed if the solicitor is practising in an MDP in which control is exercised by, or shared with, non-lawyer professionals. The solicitor’s advice in recommending other professionals may also be biased in favour of his non-lawyer colleagues in the same MDP.

6.10 In *Wouters*, the Court gave an authoritative, unambiguous and very powerful expression of what independence means when it declared that the core duties required lawyers to be “in a situation of independence vis-à-vis the public authorities, other operators and third parties, by whom they must never be influenced. They must furnish, in that respect, guarantees that all steps taken in a case are taken in the sole interest of the client”<sup>8</sup>.

### **ii) Conflict of interest**

6.11 It is conceivable that, if MDPs were permitted, the lawyer would have some influence upon the client’s demand for services from which he himself would benefit. Therefore, the lawyer might be pressurised to persuade the client to pay for services that were either unnecessary or of poor quality. This “feeding” problem would be more likely to occur in an MDP which included other professionals keen to provide additional services. The lawyer could be pressurised or influenced by partners who would not view the avoidance of conflicts of interest as a core value in the same way that lawyers do, if at all.

6.12 Another source of potential conflict of interest is where the solicitor in an MDP found himself acting on both sides of a transaction. “Ring fencing” and “Chinese walls” within MDPs are not a satisfactory solution to such situations (and have not been favoured by the courts).

### **iii) Confidentiality**

6.13 Legal professional privilege means that certain communications between legal professionals and clients are protected from disclosure. It is unique to, and lies at the heart of, legal practice. It is a cornerstone of systems of justice throughout the world. In many respects, the solicitor has no higher duty than that of maintaining the confidences of the client. If a solicitor practises only with other solicitors, the client’s secrets are not

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<sup>8</sup> *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C309/99)[2002] E.C.R. 1-1577(ECJ)

jeopardised because all legal professional colleagues have the same duty and the solicitor and his or her firm are responsible to the client for any unauthorised disclosure of confidential information.

- 6.14 Problems may, however, arise in MDPs where non-lawyers are not under the same duty of confidentiality. What if the information relates to confidential contingent liability of the client and the partners or affiliates of such solicitors perform audit services for the same client and the applicable audit standards would require the disclosure of the client's secret? The potential conflict of duties is clear.

### **Effects on competition**

- 6.15 There is no evidence that there is unsatisfied demand from consumers for the so-called one-stop-shop for professional services and no grounds for believing that the already competitive market for legal services could become more competitive with the introduction of MDPs. Indeed, there could be a risk that competition would be reduced in the long term.
- 6.16 The Court in *Wouters* noted that there could be a diminution in the level of competition on the market for legal services if MDPs were permitted: "...In those circumstances, unreserved and unlimited authorisation of multi-disciplinary partnerships between the legal profession, the generally decentralised nature of which is closely linked to some of its fundamental features, and a profession as concentrated as accountancy, could lead to an overall decrease in the degree of competition prevailing on the market in legal services, as a result of the substantial reduction in the number of undertakings present on that market."
- 6.17 In England & Wales, the OFT's consultants LECG, although supporting a change in the rules with regard to MDPs, added that there was a risk that a small number of accountancy firms could come to dominate the market for legal services (para.204) and "the evidence we have suggests that the strongest advocates of MDPs are the Big Five accountancy firms...given the strong market position of the Big Five firms, there is some risk that permitting MDPs would allow them to leverage whatever market power they have from accountancy markets to legal service markets."<sup>9</sup>
- 6.18 It is impossible to predict with any certainty what changes to the structure of the market for legal services, and to the nature and degree of competition in that market, would result from the introduction of MDPs but it is hard to see how there could be any significant beneficial effects in the short term when competition is already very effective in delivering a range of good quality legal services at reasonable prices.

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<sup>9</sup> Office of Fair Trading, Competition in professions, March 2001, pp.324-325.

- 6.19 Even where MDPs have been permitted, in jurisdictions such as Washington DC and New South Wales, there has been limited take-up by lawyers. This implies that the advantages of MDPs, whether to firms or consumers, are less than their advocates suggest.
- 6.20 Charles River Associates, in their paper<sup>10</sup> on MDPs (drawing mainly on experience in Canada), concluded that there are some disadvantages to relying exclusively on MDPs for professional services. Most of the 14 firms the consultants interviewed who had used the services of an MDP expressed some of the following concerns:
- (a) Insufficient expertise in specialised areas of the law.
  - (b) Insufficient diversity of opinion and insufficient checks and balances on services provided.
  - (c) Potential conflict between obtaining audit and operating advice from the same firm.
  - (d) Risk of becoming too focussed on "business consulting" and losing sight of legal responsibilities.

## **Regulation issues**

- 6.21 It is sometimes suggested that the answer lies in devising a system of regulation which would protect the core value rights of the clients of lawyers in an MDP. The onus of demonstrating how this can be done rests with those who propose the introduction of MDPs. The Law Society does not believe that such a system, which properly protects clients, can be devised.

## **Conclusion**

- 6.22 The Law Society strongly believes that it is in the public interest for MDPs to remain prohibited for the legal profession. Should a firm proposal for resolving the issues surrounding MDPs that are identified in this Submission be forthcoming from the Competition Authority or anyone else, it hopes that it will be given the opportunity to make further representations.

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<sup>10</sup> Charles River Associates, "Multi-disciplinary professional practice: a consumer welfare perspective", 1999.

## **7 REGULATION OF SOLICITORS**

### **The issue**

- 7.1 The need for regulation of the legal profession is universally accepted because of such sources of market failure as information asymmetries and “externalities” (e.g. by the European Commission in its recent Communication on Competition in Professional Services, paras. 24-29, Indecon report, paras. 2.10-2.33 and the Competition Authority’s Consultation Document 2 (Architects) note 3.2). The Law Society therefore believes that it does not need in this Submission to argue the case for regulation of the solicitor profession. The issue is the form and extent of the required regulation and, in particular, the regulatory role of the Law Society
- 7.2 The Law Society is familiar with the debates about the regulation of the legal profession in England and Wales, stimulated by the Clementi review. It sees no case in Ireland for any of the root-and-branch changes to regulation that are being mooted in the course of that review. For one thing, there is a major contrast between the very satisfactory performance of the Law Society of Ireland in complaints-handling and the many years of very unsatisfactory performance by the Law Society of England and Wales in this regard. The latter has been the subject of years of severe criticism from successive Legal Services Ombudsmen, Lord Chancellors and others and this has been a major factor in the establishment of the Clementi review. By contrast, the very satisfactory performance of the Law Society of Ireland in complaints handling is verified in the reports and statements of the Independent Adjudicator. For example, he has reported to the Minister for Justice, Equality and Law Reform that ‘the Society does an admirable job in complaints handling’. In addition he has described the system as ‘extremely satisfactory’ and as ‘a fully resourced state-of-the-art operation well ahead of its counterparts in Northern Ireland, Scotland, England and Wales’. No evidence has been brought to the attention of the Law Society of Ireland that would suggest that the present system in Ireland is in need of radical reform. Despite this, a Law Society of Ireland review of regulatory procedures and systems, designed to ensure that best practice is followed at all times, was established early in 2003. The Task Force undertaking this review is independently chaired by the former Secretary of the Department of Justice and chef-de-cabinet of the European Commission, Joe Brosnan.

### **The functions of regulation and representation**

- 7.3 Much of the function of regulating the solicitors’ profession in Ireland is delegated by the Oireachtas to the Law Society of Ireland. The Law Society’s regulatory functions comprise:
- (a) setting and monitoring standards of entry to the profession
  - (b) setting and monitoring standards of continuing training and development
  - (c) setting and monitoring standards of practice

- (d) dealing with complaints about standards of practice
  - (e) maintaining the roll of solicitors who are fit to practice
  - (f) dealing with solicitors whose fitness to practise is in doubt.
- 7.4 The cornerstone of regulation is the function of maintaining the Roll of Solicitors: in a sense, everything else rests on this function. The four core regulatory functions - education, standards, maintaining the Roll, and fitness to practise - form an integrated whole.
- 7.5 Underpinning the regulatory structure are the essential ethical standards or “core values” of the profession, namely the duty to:
- (a) give independent advice and assistance which puts the client’s interest first (subordinate only to a higher duty to serve the interests of the administration of justice)
  - (b) uphold client confidentiality
  - (c) not act where there is a conflict of interest.
- 7.6 The Law Society’s representational role comprises:
- (a) improving standards of practice
  - (b) supporting practitioners in their practice
  - (c) providing strategic leadership for the profession
  - (d) promoting and representing the profession
  - (e) promoting and providing continuing professional development
  - (f) advising government, other professions and the public on legal matters
  - (g) assisting and promoting law reform
  - (h) promoting scholarship, research and the advancement of knowledge
  - (i) fostering collaboration with other relevant bodies
  - (j) providing a benevolent function for members
  - (k) promoting law as a career.
- 7.7 The Law Society carries out its regulatory role in a responsible, transparent and responsive way and believes that its regulatory processes fully comply with human rights

and due process requirements. The determining consideration in the Law Society's rule making and regulatory enforcement decisions is the public interest, not the private interests of the profession and its members. The Law Society's function in representing its members' interests does not conflict with its regulatory role. Regulation and representation are distinct but complementary functions. The Law Society has very defined structures which separate its regulatory and disciplinary functions from its representational role. Thus, for decades, the Council of the Law Society has delegated all of its regulatory powers and functions to two committees, the Compensation Fund Committee (which deals with matters of a financial nature) and the Registrar's Committee (which deals with non-financial matters). Both of these Committees operate totally independently of the Council. Minutes of the meetings of the Committees are not circulated to the Council and the Council has no role in the deliberations or decisions of the Committees.

### **Advantages of regulation by professionals**

7.8 It is essential in a democratic society that the manner in which the legal profession is regulated does not compromise the independence of the profession. The perception of this independence is also vital to public confidence in the legal process, particularly where that process is required to protect citizens against abuses of power by the state. A central role for the legal profession in its own regulation is fundamental for this. In addition, there are several practical advantages of a system of regulation in which the profession is involved compared with the alternative of regulation by a public agency of some kind.

#### **i) expertise**

7.9 One of the difficulties faced by a regulator is information asymmetry – the regulator is unlikely to be as well informed about the regulated market as are the participants in that market. This difficulty is clearly less serious when professionals exercise the regulatory function (self-regulation) or share in that function (co-regulation). As one economist has put it, "Self regulation has one advantage over state regulation. Self regulation entities – companies, groups of professionals – have the information to do it, a government agency does not."<sup>11</sup> The Law Society is able to draw on a large pool of experienced and knowledgeable solicitors to assist it in carrying out its regulatory functions. This input means that the regulation of the legal services provided by solicitors can be well attuned to the needs of both the profession and the public and can be delivered in a cost-effective way. Public regulators can have difficulties recruiting and retaining experienced staff.<sup>12</sup>

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<sup>11</sup> J Kay, *The Truth about Markets*, 2003, p.371.

<sup>12</sup> For evidence on this in the UK, see K Boyfield and T Ambler, *Do the UK Regulatory Agencies provide Taxpayer Value*, London Business School, March 2004.

## **ii) flexibility**

- 7.10 Notwithstanding the statutory elements in, and backing to, the regulatory system, the involvement of the Law Society means that regulation can be more flexible and more readily – and speedily – adapted to changing circumstances than with a more bureaucratic public regulator.

## **iii) commitment**

- 7.11 Professionals feel more ownership of, and commitment to, regulation when they have had a say in its development and know that they will be held accountable for its effectiveness. The effect is to secure the collective extension of a professional's self-discipline. As one public regulator has recently put it, the core rationale for regulation by professionals is, "at the most basic, that the profession as a whole has an incentive to ensure that quality of service is maintained."<sup>13</sup>
- 7.12 Advocate General Jacobs noted the advantages of what the Law Society would call "informed regulation" in the Pavlov case:<sup>14</sup>

"I have argued that the specific features of the markets for professional services require some kind of regulation. Opponents of professional regulation insist that the State or at least State-controlled regulatory bodies should regulate the professions since there are dangers of abuse of regulatory powers. However, in economic terms again an information problem arises. The complex nature of those services and their permanent evolution through rapidly changing knowledge and technical developments make it difficult for parliaments and governments to adopt the necessary detailed and up-to-date rules. Self regulation by knowledgeable members of the professions is often more appropriate since it can react with the necessary flexibility. The main challenge for every competition law system is therefore to prevent abuses of regulatory powers without abolishing the regulatory autonomy of the professions."

- 7.13 The Law Society is confident that the Competition Authority, in its assessment of the regulation of solicitors in Ireland, will discover no "abuses of regulatory powers".

## **Co-regulation, not self-regulation**

- 7.14 Regulation of the professions is often styled "self-regulation" but in the case of the regulation of solicitors in Ireland the reality is very different. This is because of the extent of external oversight and lay involvement in the regulatory structures and procedures. These are set out in detail in the Law Society's initial submission to the Competition Authority in April 2002 but are of such importance to the Competition Authority's appreciation of the Law Society's regulatory role that the main points are repeated here:

- (a) under section 82 and the Sixth Schedule of the 1954 Solicitors Act, all regulations setting fees relating to apprenticeship, training, examinations, courses and admission require the concurrence of the President of the High Court
- (b) under section 40 of the 1940 Act, all regulations relating to education, training, examinations, courses and admission require the concurrence of the Minister for Justice, Equality and Law Reform
- (c) only the President of the High Court can strike a solicitor off the Roll or suspend a solicitor from practice
- (d) regulations providing for incorporated practices or fee-sharing with non-solicitors require the concurrence of the Minister for Justice, Equality and Law Reform, after consultation with the Minister for Enterprise, Trade and Employment
- (e) regulations relating to interest on clients' moneys require the consent of the President of the High Court
- (f) under section 25 of the 1960 Act, applications and appeals by the Society or by solicitors to the President of the High Court under the Solicitors Acts are subject to rules of court made by the Superior Courts Rules Committee
- (g) under sections 8 and 9 of the 1994 Act, the rules of procedure in relation to complaints made under those sections require the concurrence of the President of the High Court
- (h) the Minister for Justice may direct the Society to make or amend its regulations relating to professional indemnity insurance
- (i) the Disciplinary Tribunal is appointed by the President of the High Court and includes ten lay persons nominated by the Minister for Justice, Equality, and Law Reform
- (j) the Independent Adjudicator has oversight powers in relation to complaints handling
- (k) solicitors who engage in investment business other than business incidental to the provision of legal services must register with the IFSRA and comply with the provisions of the Investment Intermediaries Act 1995 and the Investor Compensation Act 1998

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<sup>13</sup> Amelia Fletcher, (chief economist, Office of Fair Trading, London) , "*The liberal professions – getting the regulatory balance right*", paper presented to the Conference on The Relationship Between Competition Law and Liberal Professions, European University Institute, June 2004.

<sup>14</sup> Opinion of Mr Advocate General Jacobs, delivered 23 March 2000, M-718475-2

- (l) European Union Directives (for example, the Establishment Directive and the second Money-laundering Directive) may dictate that the Irish Government legislates in a way that impacts on the way that solicitors practise throughout the EU.

7.15 The effect of these several checks and balances that are built into the system is that the Law Society would soon be brought to account were it to neglect its over-riding regulatory duty of protecting the public interest. This duty was made crystal clear in the High Court recently by Mr. Justice Nicholas Kearns in the *Kennedy* case:

“...the duty of care which arises in the course of an investigation by the Law Society of a solicitor is to the public rather than the individual solicitor. To hold otherwise and to find that a duty of care existed to the solicitor, or to both the public and the solicitor, would be to uphold two incompatible duties and would completely undermine the capacity of the Law Society to exert proper supervisory and regulatory control of the profession...Its duty is to protect the public against loss and to ensure that solicitors conform with their obligations.”<sup>15</sup>

### **Likening the regulation of solicitors to the operation of a cartel is completely without foundation**

7.16 A not infrequent criticism of “self-regulation” to be found in the academic literature is that the regulation of entry and the formulation of rules on how solicitors shall practice means that “self-regulation” is equivalent to a self-serving cartel in the supply of professional services. Nothing could be further from the truth as far as solicitors in Ireland are concerned.<sup>16</sup> Subject only to its duty to protect the public in the conduct of its regulation of the profession, the Law Society is committed to the general principle that competition in the markets for legal services will best serve the public interest.

7.17 There is not a shred of evidence that the Law Society has acted in a cartel-like way:

(a) it exercises no control over the numbers entering the profession: the Indecon report concluded “...we believe the current educational and training requirements are not disproportionate to achieving their intended goals of ensuring minimum standards of competence and professionalism among newly qualified solicitors. Nor do we have any evidence that the educational and training requirements are used to restrict or damage competition on the market” (para.4.95)

(b) it exercises no control or influence over the fees charged by solicitors. There are no scale fees, no recommended fees, no guidance on fees or on how they might be

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<sup>15</sup> *Kennedy v Law Society of Ireland*, HC, unreported, Kearns J, 30<sup>th</sup> July 2003

<sup>16</sup> The Competition Authority will surely accept that the (largely) academic evidence that has been produced on the effects of restrictive rules on the supply of professional services is irrelevant to the present case in that it applies to countries and/or time periods when there were severe restrictions on competition, e.g. scale fees or total bans on advertising, restrictions that went beyond those that could be justified as protecting the public in a market with information asymmetries. There are no such restrictions arising from the Law Society’s regulatory activities in Ireland.

calculated. Solicitors' fees are determined by market forces, often by negotiation, in a competitive market

- (c) the Law Society's regulation of advertising is limited to the restriction of advertising that would be tasteless or unduly obtrusive. Otherwise, solicitors are free to advertise where and how they choose. There are no restrictions on the advertising of fees
- (d) the Law Society's disciplinary procedures are directed solely at the duty of protecting the public. The Indecon report stated: "We have examined the complaints, discipline and enforcement procedures in detail and have found no evidence that they are in any way used to institute any anti-competitive practices or damage consumer interests. It appears to us that the enforcement procedures are logically structured, fair and open. Indeed, we believe that they are appropriately designed to protect consumer interests and to maintain high standards in the profession." (para.4.91)

### **Alternatives to the present system of self- or co-regulation**

- 7.18 The Competition Authority has not provided any evidence that the present system of regulation is failing in any serious respect. There has been comment about the complexity of the system and the longevity of some of the rules and procedures. But it is the complexity of the services of solicitors that means that their regulation will be far from simple. And the fact that certain rules may have been "developed centuries ago" does not mean that those rules are inappropriate to present day conditions.
- 7.19 Any objection to the present system seems to be based on the notion that it is by definition undesirable for the regulatory and representation functions to be combined in the one body. We have endeavoured to show in this submission that any fear that the Law Society's conduct of its regulatory duties and functions would be subverted by its complementary role of representing the interests of the solicitors' profession are groundless.
- 7.20 Drawing on the options under discussion in England and Wales in the Clementi review, we can imagine that the more obvious alternatives to the present system would be the creation of a state regulatory agency which would take over the Law Society's regulatory role lock, stock and barrel or, at the least, some state supervisory body that would delegate the regulatory function to the Law Society and then oversee how the Society carried its regulatory duties. The Law Society would view the first of these as fundamentally incompatible with the independence of the legal profession that is crucial to a democracy. Even the second of these could undermine the independence of the profession.
- 7.21 It follows from what has been said above that the Law Society sees no justification for such a sweeping change. It would merely add the obvious point that any alternative will involve considerable costs. First, there is the cost of setting up the new system, which is bound to be considerable and would not be offset by savings elsewhere. Second, there are the on-going running costs of the system. The Law Society cannot know the

magnitude of these costs, but it is confident that they would be considerably in excess of the costs of the present system (€4.1million in 2003). All of these costs are currently internalised to the profession whereas the running costs of any alternative would fall, in part at least, on the public purse.

7.22 Moreover, the Law Society is strongly motivated to keep running costs to a minimum. There is no such incentive with a state agency. Indeed, in a state system of regulation the incentives can operate in exactly the opposite way because of the “empire-building” tendencies of official bureaucracies. Third, compliance costs are also likely to be larger where regulation is by a state agency of some kind. This is largely because the agency will be less informed than a professional institution about the regulated profession and the services it provides, and hence is likely to be more interventionist and demanding of the information it requires from those it regulates.

7.23 These points can be illustrated by the UK experience of regulation of financial services. The replacement of a largely self-regulatory system in 2000 by the statutory Financial Services Authority (FSA) heralded a steep change in the scope, size and cost of the regulation of the sector. The consequence was an increase in the budget of the FSA from £182m in 2000/01 to £221m in 2002/03, an increase of 21%. The number of staff rose from 2,039 to 2,313 over the same period. A survey for the Financial Services Practitioner Panel in 2002 found that three out of four practitioners judged that the regulatory system placed too great a burden on the industry with 35% of small firms in the sector and 15% of larger firms assessing compliance costs as more than 10% of their total costs. One leading figure in the City of London observed: “What the City wanted from a single regulator was coherence and simplicity. What they have got and what they wanted are quite a long way apart.”<sup>17</sup>

## Conclusion

7.24 The present regulatory system is effective and works well in protecting consumers and the wider public interest. There is no evidence that it is failing in any way, or that any form of public regulation (which could undermine the independence of the legal profession together with the fundamental freedoms of citizens in a democracy which this independence helps to protect) could do a better job.

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<sup>17</sup> This information is taken from the K Boyfield and T Ambler, study of UK regulatory agencies cited at footnote 12. The Law Society is not making any precise comparisons of the two systems, nor is it implying any view on the effectiveness of the regulation of financial services in the UK. It merely points to the increased cost of state over self-regulation.

## **8 FUSION**

### **The issue**

- 8.1 The Competition Authority has questioned the justification for the long-standing separation of the legal profession in Ireland into the two types of lawyer, the solicitor and the barrister, or into the two functions of legal advice and case preparation and advocacy. The purpose of the Competition Authority's study is to enquire into the state of competition in the market for those legal services provided by solicitors. The Law Society considers that the separation between solicitors and barristers has little, if any, bearing on that issue. We note that the (then) Fair Trade Commission took a similar view in its report in 1990 and expressed the view (at para. 6.43) that:

“No impression was gained that fused legal professions were necessarily better or worse than divided professions. Nor is it manifest that legal services are less costly in fused systems.”

- 8.2 There is no statutory separation of functions between the two branches of the profession. Functions that are reserved for solicitors under the Solicitors Acts may be performed by barristers, and solicitors have rights of audience in all courts. The Law Society acknowledges however that, in practice, both branches do operate separately with certain lines of demarcation between them. In its view, this separation of functions contributes to the effective working of the legal system and is in the public interest.

### **What are the alternatives to separation?**

- 8.3 The Competition Authority has provided a number of alternative “models” of how the legal profession might be organised, ranging from separation as at present to complete fusion or integration where “lawyer” would be the only protected title and one system of training and one set of rules and regulations would apply to all lawyers. Clients would have direct access to all the new-style lawyers. Intermediate models would preserve the titles of “solicitor” and “barrister” but the present restrictions on organisational form would be relaxed to allow legal disciplinary practices (LDPs) and clients would be allowed direct access to barristers. While it is helpful to have the range of alternatives spelt out in this way, the models are only skeletal in form and leave many questions unanswered, for example, the regulatory implications of each alternative and how they would be resolved.
- 8.4 The Law Society has seen no evidence that would suggest that any of the models put forward by the Competition Authority would be an improvement from the public interest point of view. The Society's main consideration is that the core values of the profession must be preserved. It doubts that this can be possible with complete fusion.

### **Issues to be addressed**

- 8.5 A number of issues are raised by the separation vs. fusion debate. They are difficult to evaluate, partly because of the variety of possible fusion models but mainly because the

effects of whatever change might be introduced will lie in the future and there is little empirical evidence to guide one in predicting what those future effects might be. Subject to that qualification, we have set out the Law Society's views under a number of headings: effects on costs, effects on competition, effects on choice, conflict of interest and externalities.

#### **a) effects on costs**

- 8.6 There are two opposing arguments on costs. The argument in favour of fusion points to the possible benefits of integration of the services now provided separately by solicitors and barristers. Conceivably some transactions that now require two lawyers could, with a fused profession, be handled by one. On the other hand, the specialisation inherent in the separation of functions leads to lower costs of provision of legal services. Both solicitors and barristers are able to concentrate on their part of the legal process and thereby to extend their experience and hone their expertise.
- 8.7 There is no evidence to indicate which of these arguments is the sounder, in particular sounder in the context of Ireland. However, the fact that solicitor advocates currently play a minor role in Ireland seems to suggest that there are insufficient cost savings from integration to make it worthwhile. Similarly, in Melbourne and Adelaide separation persists even in the absence of restrictions preventing fusion.

#### **b) effects on choice**

- 8.8 The advantage of separation is that it provides a wide range of choice of providers of legal services to users of legal services. The public already can choose among a large number of solicitors and solicitor firms. Fusion will not widen that choice; if there is any concentration of the market for what are now solicitors' services the extent of choice for potential clients might narrow, especially perhaps in the rural areas.
- 8.9 Solicitors, on behalf of their clients, now have a wide choice of barristers for both consultancy and advocacy. The Law Society's main concern about fusion is that the top barristers would be likely to join the largest firms of new-style lawyers. If access to those barristers was closed to outside solicitors and their clients, then those solicitors could find themselves with a reduced choice of sources of advocacy skills. This would most likely impact upon the smaller, rural solicitors and their clients who would find it harder to gain access to the best barristers in a fused profession.
- 8.10 This concern has been echoed by the Minister for Justice, Equality and Law Reform in a presentation on the insurance industry to the Joint Committee on Enterprise and Small Business on in April 2004:

"...The second factor is - one does not see much publicity in respect of it in the media - that the system of barristers and solicitors ensures there is rough equality of firepower between defendants and plaintiffs. Solicitors and barristers are roughly drawn from the same pool and are of equivalent capacities. In general terms, plaintiffs' barristers are as good as those of defendants. A small solicitor from a rural area can bring a constitutional

action on behalf of a client without saying that to do so would be way beyond him or her and obliging the client to approach one of the ten major firms in Dublin. People never take into account when considering the operation of the system that it is possible to approach one's family solicitor and commence a Supreme Court constitutional action. The only way that could happen is by means of a split profession. If we wanted something different, we could take the American route. However, even the Americans have a distinction between trial and other types of attorneys.

The question of why there is a split profession has not arisen too much in the deliberations of this committee but it arises in the public arena to a major degree. People can make arguments for a unified profession but they must bear in mind that they would not be able to go into a solicitor's office on the main street in Cahirciveen and state that they wanted to take a constitutional action."

### **c) effects on competition**

- 8.11 As the Law Society understands it, the Competition Authority has not suggested that fusion would increase competition in the market for legal services. In fact, there is a competitive market for the legal services provided by solicitors. It is true that there are certain requirements that must be met on the transfer of barristers into the solicitors' branch of the profession. These are laid down in statute. The rules on transfer (that a barrister must have practised for a period of three years and completed the FE-2 and FE-3 and the second Irish language examination) are not unduly restrictive, bearing in mind that, once admitted to the Roll, a solicitor can practise immediately. They are applied on a case-by-case basis and can have only a minimal effect on competition. The Law Society sees no case for change but would be prepared to consider any proposed change to those regulations aimed to make transfer easier provided the core values of the solicitors' branch were not jeopardised.
- 8.12 If fusion were to have an effect on competition, it would come from any consequential changes in the structure of the market. It is not possible to predict what these might be. A possible outcome is some increase in concentration as more business gravitated to the new-style law firms, and if those firms that remained dependent on solicitor-type business found it more difficult to access barrister-type services. The Law Society does not argue that there would be any immediate threat to competition from fusion but believes that increased concentration could be the long term result.
- 8.13 It is the view of the Law Society that the current separation of the profession into two branches encourages, rather than restricts, competition in the public interest. This is because the current system encourages specialisation in separate aspects of the litigation process and is economically efficient through ensuring that the advocacy cost overhead is sub-contracted and only purchased as required.

### **d) conflict of interest**

- 8.14 Fusion of the two branches of the legal profession is likely to heighten the problem of possible conflict of interest that arises from the dual role of the solicitor, first advising the client on the legal position and then providing the necessary expert legal services, which

may include instructing a barrister. With separation he will only advise using a barrister (which can be a costly course) when one is needed and he will instruct the barrister whom he considers best for the case. The Law Society acknowledges, of course, that the client's interests will always be the lawyer's first responsibility, but in some of the Competition Authority's models of alternatives to separation the changed incentives may lead to a conflict of interest. If solicitors and barristers work in the same law firm, and the partners' overall objective is to maximise the firm's earnings, there can be a temptation to advise the employment of an in-house barrister even if advocacy services are not required, or to provide the in-house barrister when an outside barrister would do a better job for the client. This problem is less acute, however, with the complete fusion model with only one type of lawyer.

#### **e) externalities**

- 8.15 There are wider benefits to the public interest in the separation of the legal profession into two branches. First, it allows more effective monitoring and regulation of professional conduct by the Law Society and the Bar Council than in a fused, more diverse profession. Consequences of a move to a fused profession could include new legislation, new rules and regulations, a new regulatory structure and a new education system. Each of these would have set-up costs and these could be considerable. Then there are the effects on the running costs of the new regime and on the compliance costs for the profession. While it is not possible to say whether these would be higher or lower than under the present divided profession, once fusion was a settled fact, there would inevitably be dislocation costs and costs to the profession (and probably to clients) of adjusting to a new system. The Competition Authority should be conscious of these practical consequences of a move to a fused profession before concluding in favour of any such recommendation.
- 8.16 Second, the efficient administration of justice requires that cases are prepared to the best possible extent before reaching court and are argued to the best possible extent in court. A separated profession in which solicitors and barristers specialise in their respective functions is a key factor in meeting this requirement of the justice system.<sup>18</sup>

#### **Conclusion**

- 8.17 The Law Society believes that the present organisation of the legal profession into two branches serves the public interest better than would a fused profession. No evidence to justify the contrary position has been put to the Law Society by the Competition Authority. In particular, it has not been shown how separation can be said to damage competition in the market for those legal services provided by solicitors.

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<sup>18</sup> For an elaboration of the externalities argument, see W Bishop, "Regulating the Market for Legal services in England: Enforced Separation of Function and Restrictions on Forms of Enterprise", *Modern Law Review*, 1989, pp.326-351.