

# Competition in professions

Progress statement

April 2002

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# 1 INTRODUCTION AND BACKGROUND

- 1.1 In March 2001, OFT published its report on competition in professions (the report). The report identified restrictions on competition in the provision of professional services in England and Wales. In that report, we focussed on three professions: law, accountancy and architecture.
- 1.2 The report was a key stage in an ongoing programme of review of competition in professional services in the UK. It built upon past progress by the competition authorities and government departments who, working in tandem, and often with the professions, had brought about significant changes in response to a range of concerns. The report highlighted remaining restrictions, whether arising from law, professional rule or other source, that continued to constrain freedom to compete in the professions reviewed. We noted in the report our intention that the lessons of the report would inform work across the whole range of professions and throughout the UK.
- 1.3 We have no desire to specify how professionals should supply services. Our concern is with restrictions on the freedom of suppliers. The manner in which goods and services are supplied is generally best determined by producers competing freely for the custom of consumers. Where others – especially suppliers acting collectively – restrict the way in which services are supplied, the onus should be on them to justify the restriction or remove it.
- 1.4 The report therefore challenged those responsible for the restrictions identified. It raised a presumption that those restrictions should be removed unless they can be justified as benefiting consumers. Those in favour of maintaining restrictions were called upon to justify them or to remove them. Some restrictions, for example, those that had their origin in statute, were for Government to address. Others, and this was the majority, were found to originate in professional rules. The professional bodies concerned were therefore called upon to take prompt action to remove unjustified restrictions. A period of 12 months was allowed for professional bodies to progress this.

## **Why a progress statement?**

- 1.5 The purpose of this statement is to review the progress that has been made in the last 12 months and to consider what further work needs to be done to free the forces of competition in the area of professional services. Significant progress has been made in addressing rules identified in the report. We welcome the fact that each of the professional bodies identified in the report has taken some positive action following that report. In some cases, restrictions have been removed or are in the process of being removed. In other cases,

professional bodies have sought to justify restrictions as necessary in the public interest and in the interests of consumers. In some instances, after careful consideration, we find these arguments sufficiently persuasive that we do not at the moment intend to take the matter further. In other cases, however, we remain concerned that freedom to compete continues to be unnecessarily restricted.

- 1.6 In short, last year's report challenged a number of anti-competitive restrictions to be removed or justified. Some have been or are being removed. Some have been justified. But as this progress statement also explains, there are serious outstanding issues.
- 1.7 The concerns identified in our report are not, of course, limited to the three professions reviewed. They may equally arise across the whole range of professions. We have encouraged all professions to take account of the conclusions in the report and it is clear that some professional bodies have been assisted by the report in assessing and amending their rules with a view to ensuring that they do not infringe competition law.

## 2 THE OFT: AN EXPANDED ROLE

- 2.1 The range of powers at OFT's disposal, to address restrictions on competition in professional services has developed and expanded since the report was published. Certain developments are introduced by the Enterprise Bill, currently before Parliament.<sup>1</sup> Key developments in OFT's powers are noted below. Recent developments should strengthen the OFT's ability to take action against unjustified restrictions in professional rules. In addition, where Government action is necessary to address competition concerns, OFT's new role in scrutinising regulation will provide a useful mechanism for ensuring publicly that Government addresses competition concerns effectively.
- 2.2 The principal existing competition statutes are the Competition Act 1998 (CA98) and the Fair Trading Act 1973 (FTA). Both apply to the professions, subject to certain potential limitations in the case of the CA98. In addition, the Companies Act 1989, the Courts and Legal Services Act 1990 (CLSA) and other legislation also give OFT specific advisory functions in relation to certain professional rules (specifically, auditors' rules and rules relating to rights of audience and rights to conduct litigation) over which Ministers have powers of veto.

### Developments in the application of the CA98

- 2.3 The CA98 contains two prohibitions. The Chapter I prohibition applies to agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK or any part of it and which have as their object or effect the prevention, restriction or distortion of competition within the UK. The Chapter II prohibition applies to conduct on the part of one or more undertakings that amounts to the abuse of a dominant position in a market and which may affect trade within the UK or any part of it. These two prohibitions are modelled on European Community competition law and are applied consistently with it.<sup>2</sup> OFT has powers to investigate and to take enforcement action against infringements of the prohibitions.
- 2.4 In the context of the application of the CA98 to professional rules, the following developments in OFT's powers are relevant:
- **Proposed Repeal of Schedule 4, CA98**  
Schedule 4 provides for an exclusion from the Chapter I prohibition for agreements which constitute designated professional rules. Specified

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<sup>1</sup> The Enterprise Bill was published on 26 March 2002. Further information can be found on the DTI website at [www.dti.gov.uk](http://www.dti.gov.uk)

<sup>2</sup> See CA98 Section 60,

professions can apply to the Secretary of State for Trade and Industry in order to have their rules designated. Designation of such rules would be automatic although it would be subject to revocation on the advice of OFT. The report highlighted the exclusion in Schedule 4 as a potentially significant limitation on the application of the CA98 to the professions.<sup>3</sup> Following a key recommendation in the report that Schedule 4 be removed, DTI announced that it would take this recommendation forward.<sup>4</sup> Provision for repeal is included in the Enterprise Bill<sup>5</sup> now before Parliament. The proposed repeal of the provision underlines the principle that professional services should be subject to competition law in the same way as other goods and services in the economy.

- **Case law developments**

As noted above, the CA98 is to be applied in a manner consistent with European competition law. Developments before the Community courts may therefore be relevant to the application of the CA98 to professional rules as are developments in UK jurisprudence. Recent judgments that are likely to be of particular significance in this regard include, first, *Wouters*,<sup>6</sup> in which the European Court of Justice considered the application of Articles 81 and 82 of the EC Treaty to a regulation of the Dutch Bar association that prohibited partnerships between members of the Dutch Bar and accountants and, secondly, *GISC*<sup>7</sup> in which the Appeals Tribunal of the Competition Commission in the UK considered an appeal against an OFT decision applying the Chapter I prohibition to rules of the General Insurance Standards Council.

## Other developments

2.5 Issues that arise in the provision of professional services frequently raise questions that relate to both competition and other aspects of consumer protection. In many cases, the enforcement of competition law will provide the best way to promote consumers' interests. In other cases, action using consumer protection legislation may be more appropriate. In yet other instances, a broader perspective may be necessary involving a review of the market to ensure that competition works well for consumers. A new Markets and Policy Initiatives Division (MPID) has been set up within OFT to undertake reviews that reflect this broader perspective. MPID's work may be relevant to addressing issues arising in professional service markets in a number of ways:

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<sup>3</sup> See OFT report Part XII, paragraph 43.

<sup>4</sup> See Press Statement of 8 March 2001 by Stephen Byers, Secretary of State for Trade and Industry.

<sup>5</sup> The Enterprise Bill was published on 26 March 2002. Further information can be found on the DTI website at [www.dti.gov.uk](http://www.dti.gov.uk)

<sup>6</sup> Case C-309/99 *Wouters*, Judgment of 19 February 2002.

<sup>7</sup> Cases Nos. 1002/2/1/01 (IR) 1003/2/1/01 1004/2/1/01 – *Institute of Independent Insurance Brokers V DGFT/ Association of British Travel Agents Ltd V DGFT*.

- **Market investigations**

OFT will investigate markets that do not appear to be meeting the needs of consumers. The Enterprise Bill<sup>8</sup> also gives OFT power to refer markets to the Competition Commission when it has competition concerns<sup>9</sup>.

- **Super-complaints**

A fast track complaints procedure is being introduced to respond to complaints from certain designated consumer organisations where there are market structures or practices that are working against the interests of consumers. There will be a 90 day period for OFT to respond stating what action if any it proposes to take.

- **Regulatory impact assessment**

OFT will provide advice and analysis to Government, on the impact of laws and regulations, with a 90 day period for Government to respond.

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<sup>8</sup> The Enterprise Bill was published on 26 March 2002. Further information can be found on the DTI website at [www.dti.gov.uk](http://www.dti.gov.uk)

<sup>9</sup> In place of the so-called 'monopoly' provisions of the FTA.

### 3 PROGRESS ON RESTRICTIONS IDENTIFIED

3.1 As noted above, some of the restrictions identified in our report were for Government to address, although the majority fell to be addressed by the professions.

#### Action by professions

3.2 In all, six professional bodies were identified in the report as responsible for professional rules that appeared to be restrictive of competition. Three of the bodies identified were in the accountancy profession, one was in architecture and two were in the legal profession.

#### ACCOUNTANCY

3.3 The bodies identified were the Institute of Chartered Accountants in England and Wales (ICAEW), the Association of Chartered and Certified Accountants (ACCA) and the Association of Accounting Technicians (AAT). The following restrictions were identified in the report as having their origins in professional rules of these bodies:<sup>10</sup>

- Prohibition on advertising fee comparisons.<sup>11</sup>
- Prohibition on seeking the business of potential clients by telephone, sometimes known as 'cold calling'.<sup>12</sup>
- Prohibition on making or receiving payment for referring clients to accountancy professionals.<sup>13</sup>

3.4 The ICAEW, the largest of the regulatory bodies, moved promptly to address concerns in the report. Changes that liberalise all three conduct prohibitions identified were agreed by the ICAEW Council and have been in force since 1 November 2001. The ICAEW has removed the prohibition on 'cold calling' and amended its ethical guidelines to allow its members, subject to guarantees relating to compliance with ethical standards, to pay commission to third parties for the introduction of business. The prohibition on comparative fee advertising has also been lifted. These changes meet the concerns expressed in the report.

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<sup>10</sup> For each of these restrictions, see the report at paragraph 50.

<sup>11</sup> See report at paragraph 50.

<sup>12</sup> See report at paragraph 50.

<sup>13</sup> See report at paragraph 50.

3.5 The ACCA, the second largest of the accountancy bodies, has also taken prompt steps to amend its rules in the light of the report. New rules took effect at the start of this year. The AAT has altered its guidelines on professional ethics in accordance with the approach taken by the ICAEW. The new guidelines took effect from 1 March this year. Again the changes appear to address effectively all three concerns.

## ARCHITECTURE

3.6 With regard to architecture, the report highlighted one restriction:

- The Royal Institute of British Architects (RIBA) issues fee guidance to clients in the form of recommended fee scales.<sup>14</sup>

3.7 RIBA has sought to justify the existence of the fee guidance on the basis that it cannot restrict competition because 1) it is merely indicative and 2) it is addressed to clients and not to members. It considers that the guidance is a useful yardstick by which a client who may be ignorant of what a reasonable charge is can forecast the cost of the service.

3.8 OFT considers that the guidance may facilitate collusion and could act to restrict or distort price competition. This is the case whether or not the guidance is indicative rather than mandatory and whether or not it is addressed to members or their clients. Guidance issued by a professional body may hinder the ability or incentive of efficient firms to compete by reducing price to reflect their lower costs. It may also protect those who are less efficient and reduce the incentive they have to improve. Certainly, we encourage the provision of information to clients. This is fundamental to the ability of clients to make informed choices. The issue is rather who should provide the information and how it is provided. Where there is a need for transparency, this can often be better achieved by individual firms or third parties issuing information to prospective clients.

3.9 RIBA has agreed to amend the fee guidance and intends to submit a revision of the information that it publishes on fees. It will be for RIBA to demonstrate that the revision meets the competition concerns failing which OFT intends to pursue this issue.

## LAW

3.10 A number of rules both of the Law Society and of the General Council of the Bar were identified in the report as potentially restrictive of competition.

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<sup>14</sup> See report at paragraph 50.

*Restrictions in Law Society rules<sup>15</sup>*

- 3.11 The following rules and guidance issued by the Law Society were identified as potentially restrictive of competition:
- Restrictions on Multi-disciplinary practices (MDPs) (Solicitors' Practice Rules 4 and 7). Rule 7 prohibits the sharing of fees with non-solicitor professionals. Rule 4 (see below) prevents solicitors from full participation in MDPs regulated by other professional bodies.
  - Prohibition on employed solicitors acting for third parties (Practice Rule 4), which prevents solicitors, employed by non-solicitors, from offering their services to persons other than their employers.
  - Prohibition on advertising fees by making comparisons with fees of another solicitor.
  - Prohibition on seeking business by telephone from potential clients ('cold-calling').
  - Prohibition on making or receiving payment for referring a client to a solicitor (Practice Rule 3).
  - Fee guidance for non-contentious work such as probate and conveyancing. The guidance is indirectly based on the Solicitors' (Non-Contentious Business) Order 1994.
- 3.12 As part of its own programme of regulatory reform, which commenced prior to the publication of the report, the Law Society has been active in addressing the issues raised in that report.
- 3.13 The Law Society Council has adopted a recommendation from the Regulatory Review Working Party to amend Practice Rule 4, subject to the implementation of measures necessary for consumer protection. This amendment will allow solicitors employed by non-solicitors to provide services to third parties.
- 3.14 The Law Society Council will be asked by its Working Party to reconsider a proposal, which it originally rejected, to remove the ban on sharing fees with non-solicitor professionals (Practice Rule 7). Changes to primary legislation may be necessary to enable the Law Society to regulate non-solicitor partners of MDPs. These are concerns for the Lord Chancellor's Department to address,

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<sup>15</sup> For each of these restrictions, see the report at paragraph 50.

and the Lord Chancellor has indicated that these issues will be included in a consultation exercise to be conducted before the summer recess.

- 3.15 The Law Society has abolished the prohibition on comparative fee advertising and also removed the prohibition on 'cold calling' to business. The prohibition remains in respect of non-business clients. The Law Society argues that the restriction is necessary to protect consumers and highlights the area of personal injury litigation as one in which, in the absence of the prohibition, public detriment might result. We accept this point.
- 3.16 The Council will consider proposals later this year to amend the prohibition on payment of referral fees. The restriction hampers the development of new forms of marketing that could bring clients and professionals together. We look to the Law Society to take prompt action to lift the restriction.
- 3.17 The Law Society has indicated that it is willing to withdraw the fee guidance currently issued in relation to probate and conveyancing work. We look to the Law Society to take prompt action to lift the restriction.
- 3.18 While only some of the restrictions have been removed, amended or justified, we consider that for the time being, the most effective way to achieve the aims in the report is to encourage the Law Society to proceed with its programme of reform and to review progress regularly to ensure that the Law Society is proceeding in a timely and appropriate manner. So long as self-deregulation is proceeding effectively, public action is not immediately necessary.

#### *Restrictions in Bar rules<sup>16</sup>*

- 3.19 The following rules of the Bar were identified in OFT's report as potentially restrictive of competition:
- Prohibition on advertising comparisons of fees.
  - Restriction on direct access to a barrister (rather than indirect access via a solicitor).
  - Prohibition on comparative advertising of success rates.
  - Prohibition on barristers forming partnerships
    - with other barristers, or
    - with members of other professions.

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<sup>16</sup> For each of these restrictions, see OFT's report at paragraph 50.

- Withholding from barristers in independent practice rights to conduct litigation work at present carried out by solicitors.
- 3.20 In February 2002, the Bar Council issued a report (the Bar response) in response to the issues raised by OFT.<sup>17</sup> We are grateful to the Bar for the work that it has done to provide this response.
- 3.21 In the Bar response, the Bar proposed to amend two of its rules to meet concerns raised in the OFT report. The first amendment is to lift the restriction on comparative advertising of fee rates. The Bar Council approved this amendment on 23 March 2002, and the amendment took effect from that date.
- 3.22 The second rule that the Bar proposes to amend is the rule that currently restricts clients from enjoying direct access to a barrister, and that requires therefore, the involvement of a solicitor. The Bar proposes that direct client access should be allowed in a number of areas. The Bar is currently drafting rules and guidance that it considers necessary to underpin this change, and aims to be in a position for the rules to take effect from 1 January 2003.
- 3.23 We welcome both these developments. It will be important to ensure that the revised rules contain no unnecessary limitations on the freedom of barristers to accept instructions directly from clients, and the freedom of clients to engage the services of a barrister without intervention by a solicitor. We note also, however, that the practical effect of the amendment is likely to be limited to the extent that barristers in independent practice are not granted rights to conduct litigation (see below at paragraph 3.25).
- 3.24 With regard to the rule that prohibits advertising a barrister's success rate, the Bar argues that the restriction is justified and that advertising in this way should continue to be prohibited. The Bar argues that it is impossible to relate success and failure to winning and losing cases and that there is therefore no clear definition of success and failure. There is a danger that advertised success rates might, in the context of the Bar, mislead prospective clients rather than inform them. The Bar also considers that if success rates did come to be regarded as a measure of quality, this might encourage barristers to avoid difficult cases. There is force in these arguments, and we consider that in the particular context of advertising barristers' services, a restriction on advertising success rates may be justified. We do not at present intend to pursue this issue further in the context of the Bar.

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<sup>17</sup> See response of the Bar Council to OFT's report 'Competition in professions' at [www.barcouncil.org.uk](http://www.barcouncil.org.uk)

- 3.25 In the Bar response, the Bar clarifies that it does not intend to lift the prohibition on the conduct of litigation by barristers in independent practice. Litigation services include collecting evidence, carrying on correspondence and dealing with disclosure of documents. In our report, we stated that we considered that this prohibition prevents potential efficiencies, restricts freedom of choice, and limits the number of lawyers available to conduct litigation. We underline that OFT does not seek to oblige any individual barrister to conduct litigation. Section 40 of the Access to Justice Act expressly empowers the Bar Council to lift the prohibition, but at present, the Bar dictates that in no circumstances can any member of the independent Bar conduct litigation. In our view, such a rule restricts the freedom of choice of barristers and of their clients.
- 3.26 There are essentially three strands to the Bar's argument:
- Prohibiting litigation is intrinsic to the maintenance of a dual profession. In the Bar's view, a dual profession is in the public interest.
  - Clients can already seek litigation services from solicitors. Preventing barristers from providing such services is therefore unlikely to be a significant restriction.
  - Regulatory difficulties arising from liberalisation would be significant and in particular necessary arrangements to allow barristers to handle clients' money would be onerous.
- 3.27 The Bar's assertion that it is in the public interest to maintain a dual profession is based on a number of arguments. Arguments relating to the potential concentration in the profession and to the possible impact of this for the 'cab-rank' principle are considered below in the context of the prohibition on partnership. In the context of litigation, the Bar emphasises two issues. First, it is argued that the dual profession allows barristers to specialise in advocacy and advice and this enhances the quality of the service provided in these areas. Secondly, it is argued that the dual profession allows clients to benefit from the specialist knowledge of solicitors when choosing barristers.
- 3.28 We question these arguments, not because of any objection to specialisation, but because the rule in question **imposes** specialisation. The objection is not to the dual profession but to the rule that imposes a regulatory division by restricting what barristers are free to do. With regard to specialisation, while we entirely agree that specialisation may raise quality and enhance efficiency, and thus benefit consumers, the question that the Bar's prohibition on litigation raises is whether a blanket prohibition is necessary to achieve this. Permitting barristers who wish to conduct litigation to do so, will not deprive clients of the benefits of specialisation. In the legal profession in other jurisdictions, where

no such prohibition is imposed, and in other professions specialisation can and does emerge in response to client needs. With regard to the argument that a dual profession is necessary to ensure that the choice of barrister is an informed one, we note that the maintenance of a dual profession in which the client must pay for the services of both a solicitor and a barrister is unlikely to be the most efficient way of addressing the issue of informed choice.

- 3.29 The Bar argues that the prohibition on barristers conducting litigation is unlikely to be significant where litigation services, and combined litigation and advocacy services, are already available through solicitors' firms. We note that, for as long as the prohibition remains in place, it is necessarily difficult to quantify the extent of client demand for similar services offered by barristers. In our view this is an argument for lifting the restriction rather than maintaining it.
- 3.30 The Bar points to the difficulty and the cost associated with putting in place the regulations necessary to underpin the provision of litigation services by barristers. It emphasises in particular the regulatory costs of handling clients' money. The aim of such regulation would be to safeguard customers against those barristers – presumably few in number – tempted to appropriate client money without having provided their services adequately, or at all. In our view, this is essentially a practical problem rather than one of principle. It should not prevent the Bar from allowing its members to conduct litigation, even if there were for the time being, a continuing prohibition on handling clients' money. This would give some barristers, in some areas of practice, where, for example the barrister considers it unnecessary to take fees on account, an important freedom. Where it is necessary to handle clients' money, practical solutions might then be explored, adopting a cost/benefit analysis, to determine the most effective way of addressing the question.
- 3.31 We intend to pursue this issue further.
- 3.32 In the Bar response, the Bar makes clear also that it does not intend to relax restrictions on partnership either between barristers or between barristers and members of other professions. In both cases, and broadly for the same reasons, it considers the restrictions to be justified. The Bar's arguments are set out in Section 3 of its response. In essence, there are three arguments by which the Bar seeks to justify a total ban on partnership:
- It promotes competition and choice by maximising the number of competing undertakings.
  - It serves to minimise costs in the provision of barristers' services.
  - It enables the Bar to maintain the 'cab-rank' principle.

- 3.33 The first argument relies upon an assumption that permitting any partnership between barristers will lead to an inadequate choice of barristers that would be detrimental to competition and the public interest. We question this as a general proposition. While it may be true that in some areas of barristers' practice, the number of practitioners is relatively small, not all areas of practice are concentrated. In any event, competition rules exist to prevent concentration, where this may damage competition. The total ban fails to discriminate between partnerships that may increase competition and choice and those that may be detrimental to competition and choice. On the other hand, prohibiting partnerships restricts choice: barristers' choice to adapt their business structures in the way that best meets their needs and those of their client is restricted. This choice should be open to the barrister as a barrister, and without the need to requalify and to market oneself as a solicitor – a solution proposed in the Bar's response. Similarly, the client's choice to seek the benefits of an integrated service is restricted where partnerships with non-barrister professionals are prohibited. In any event, in the context of partnerships between barristers and other professionals, partnership may expand the availability of barristers.
- 3.34 The Bar's second argument relies on the observation that solicitors' overheads in partnership are significantly higher than those of barristers in sole practice. As the Bar's report points out elsewhere however, many of the activities of solicitors and barristers remain, for the time being, significantly different (although we note that this is partly as a result of current restrictions on what barristers may do). It would therefore be premature to draw the conclusion that the difference in business structure is responsible for the difference in overheads. Equally, it would be premature to infer that the lower overhead costs of barristers is a symptom of inefficient under-capitalisation resulting from restrictions on access to capital. Nevertheless, lifting the prohibition on partnership would allow barristers the freedom to choose alternative structures and the efficiency benefits that these might bring.
- 3.35 Thirdly, the Bar argues that prohibiting partnerships enables the Bar to maintain the 'cab-rank' principle. While it may be the case that barristers in partnership might not be subject to the 'cab-rank' principle, the principle would continue to apply to barristers in independent practice and might apply also at the level of the partnership.
- 3.36 The OFT intends to give further detailed consideration to these issues.

## Government action

3.37 A number of issues raised by OFT were for Government to address, for example:

- Repeal of CA98 Schedule 4.<sup>18</sup> The exclusion is specific to professional rules and may operate to exclude professional rules from the scope of the CA98 Chapter I prohibition. The OFT report pointed out that the exclusion procedure in Schedule 4 has no equivalent in European Community competition law on which the provisions of the CA98 are modelled. Repeal of the Schedule would thus remove this curious anomaly in the application of UK competition law to professional rules. It would also help ensure that professions are subject to the incentives that exist elsewhere in the economy not to engage in anti-competitive activity.
- 50%-rule that restricts the conduct of statutory audit to auditors who practise within a firm that is under the control of individuals qualified to conduct statutory audit.

3.38 These concerns are for the Department of Trade and Industry (DTI) to address. The response to the key recommendation that CA98 Schedule 4 be removed has been noted above.<sup>19</sup> We look forward to the repeal of the Schedule. DTI has yet to indicate what if any steps it considers to be appropriate in relation to the 50% rule. We recognised also in the report that to relax the restriction would require amendment of UK and European law, the latter obviously being a matter over which the UK Government does not have sole control. We recognised in our report that in taking any decision, it would be necessary to balance competition concerns against the public interest benefit from the maintenance of auditor independence – bearing in mind that the ‘consumer’ of audit services is the public and not just the business paying for its audit.<sup>20</sup> Any action will clearly need to reflect lessons that emerge from the Enron situation. Reviews of this are in hand across Government.

3.39 In relation to legal services, the OFT report raised questions about the following:

- QC system.<sup>21</sup> Governmental involvement in distinguishing between junior barristers and QCs has no parallel in other markets. In addition, we question the operation of the system as a quality mark. A mark will generally be of value to consumers only where certain conditions are met. One of these is that it be

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<sup>18</sup> See paragraph 2.4 above.

<sup>19</sup> See paragraph 2.4 above.

<sup>20</sup> See OFT report at paragraph 48.

<sup>21</sup> See OFT report at paragraphs 45 and 46.

awarded according to clear criteria and in a transparent way that has particular regard to the experience of purchasers. Whether the QC system meets this condition remains open to debate. Another condition is that the mark should be capable of being lost as well as won (and that continued holding of the mark should be contingent upon continued high quality performance). This condition is clearly not met by the QC system. Moreover, we remain concerned that the QC system may operate to distort competition. One sign of this is the step-change in fees that QCs are said to command upon taking silk; another is that custom and practice has given rise to some de facto demarcations as to what work is and is not suitable for QCs. It has also been suggested frequently, that the operation of the QC displays elements of a quota system and that some quantitative as distinct from purely qualitative criteria may apply. In this regard, we note with interest that the number of QCs appointed in 2002 is markedly higher than in any other recent year.

- Legal professional privilege.<sup>22</sup> We recognise that there are fundamental arguments for protecting exchanges between lawyers and clients. However, where lawyers are in competition with non-lawyers (eg, in tax work), legal professional privilege may distort competition in favour of the lawyer.
- Extension of rights to provide conveyancing services.<sup>23</sup> Fuller implementation of Sections 34-52 of the Courts and Legal Services Act 1990 (CLSA) would allow banks and building societies to provide conveyancing services.
- Extension of rights to provide probate services.<sup>24</sup> Further implementation of Sections 54 and 55 of the CLSA would be likely to increase competition in the market for probate services.

3.40 These matters are for the Lord Chancellor's Department (LCD) to address. LCD recently announced its intention to consult on these matters before the summer recess. The results of that consultation will be published in due course. Where this work leads to proposals for change to laws and regulations, OFT looks forward to the opportunity, in line with its new role,<sup>25</sup> to contribute on these issues.

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<sup>22</sup> See OFT report at paragraph 47.

<sup>23</sup> See OFT report at paragraph 50.

<sup>24</sup> See OFT report at paragraph 50.

<sup>25</sup> See above at paragraph 2.1 and following.

## 4 OTHER PROFESSIONAL BODIES

- 4.1 Where any professional body in the UK adopts or maintains a rule that restricts competition, OFT is ready to use its available powers with a view to achieving the removal of unjustified restrictions. In the accountancy profession, bodies identified in the report have acted to remove unnecessary restrictions. We have called upon other bodies in that profession, to take similar steps where appropriate. Work is also ongoing with regard to other legal professional bodies not covered in the report. Where the rules of any body include rules that are similar or identical to those identified as restrictive in the report, the professional body should act promptly to justify or remove them.
- 4.2 We noted in the report our intention that the lessons of the report would inform work across the whole range of professions and throughout the UK. We have encouraged all professions to take account of the conclusions in the report. It is clear that some professional bodies have been assisted by the report in reviewing rules, and in seeking to ensure that any amendments which are made to rules do not infringe competition law. OFT stands ready to assist in this regard.
- 4.3 For example, we are currently considering a rule of a professional body that prohibits any form of comparative advertising, including comparative fee advertising, in relation to services provided by its members. It is argued that the rule is necessary, in essence, because the professional body considers it impossible to compare any two instances of service provision. As a consequence, the professional body argues that advertising that compares services would be misleading.
- 4.4 It is clearly in the interests of consumers that advertising should not be misleading. Rules of most professional bodies, and those of the body under consideration, already require this. Other rules of the professional body also require that advertising by its members be legal, decent, honest and truthful, and that it only contain information that is factual and verifiable. A further requirement is that advertising not bring the profession into disrepute.
- 4.5 OFT considers advertising to be an important element of competition on any market. Advertising makes consumers aware of available choices and, given rules against misleading advertisements, provides them with a better picture of the merits of each of the suppliers, the quality of their services and their fees. A simple prohibition on comparative advertising of services denies information to clients that would help them to choose a provider. It also restricts the ability of more efficient service providers to develop their services.

4.6 A blanket prohibition on advertising services is likely to go beyond what may be necessary to protect consumers. In particular, we do not accept that prohibiting comparisons on elements such as price, where these are factual and verifiable, can be justified in the interests of consumers. This is an issue which OFT will pursue with the professional body in question, as with any professional body that maintains in force rules that may unnecessarily limit freedom to advertise.

## 5 CONCLUSION

- 5.1 OFT's report in 2001 was a key stage in an ongoing programme of review of competition in professional services in the UK. It built upon past action to highlight remaining restrictions that continued to constrain freedom to compete in the professions reviewed.
- 5.2 The report challenged those responsible for the restrictions. It raised a presumption that restrictions identified should be removed. Proponents of restrictions were called upon to justify them or to remove them.
- 5.3 In this statement we have reviewed the progress that has been made in the last 12 months and considered what further work needs to be done to free the forces of competition in the area of professional services. Significant progress has already been made in addressing rules identified in the report. Some restrictions have been removed. Others, professional bodies have sought to justify as necessary in the public interest. We remain concerned that important freedoms continue to be unnecessarily restricted. Where this is the case, OFT is ready to use its available powers to remove unnecessary restrictions that work against the interests of consumers.
- 5.4 Some of the issues in OFT's report were addressed to Government. The proposed repeal of schedule 4 is an important step. Where Government has indicated that work is in hand, we look forward to welcoming progress and to contributing to that progress where appropriate.
- 5.5 Freedom to compete is a fundamental theme throughout our work. At no point do we prescribe, even tentatively, how professional services should be supplied. We believe that this is generally best determined by unfettered competition between producers for the custom of consumers. Where others restrict the freedom of patterns of supply to evolve and improve, it is right that the onus should be on them to justify the restriction or remove it. The freedom to compete that results will benefit those who use professional services and those who serve them well.