

# **Consultation on the future regulatory framework for legal services in England and Wales**

Response from the Office of Fair Trading

June 2004

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# 1 INTRODUCTION

- 1.1 The Independent Review of the Regulatory Framework for Legal Services in England and Wales provides a major opportunity for radical consideration of how current arrangements for the regulation and provision of legal services can be improved. The Consultation Paper, issued on 9 March 2004, asked for responses to fundamental questions both about the future regulatory structure of the profession and about new business structures that would allow greater choice, for both consumers and professionals, in the provision of services. We welcome the opportunity to contribute to this review. The legal professions need reform to improve competition and choice for their customers.
- 1.2 The terms of reference for the review underline that the promotion of competition and innovation is central to the identification of a regulatory framework and business structures that will best serve the public and consumer interest. This has also been a key theme in recent work by the Office of Fair Trading (OFT) in the area of professional services. Since January 2000 the OFT has been conducting an ongoing review of competition in professions. A significant part of our work in this area has involved a focus upon restrictions on competition in the provision of legal services in England and Wales. The OFT is also involved in work in Scotland to address restrictions on competition in the provision of legal services in Scotland.
- 1.3 In March 2001, the OFT published a report *Competition in professions*<sup>1</sup>. The central purpose of that report was to highlight restrictions on competition in professions whatever their origin: professional rules; statute or custom and practice. Where restrictions had their origin in professional rules, we brought these to the attention of the profession concerned and called on the profession to either justify continued restriction or remove it. Where restrictions were identified which could not readily be addressed by the professions or by the OFT through the application of competition powers, we called on government to address these. In a subsequent progress statement published in April 2002<sup>2</sup>, we noted that while a number of the restrictions identified in the earlier report had been removed or justified, others remained to be addressed. It is a welcome feature of the present independent review that it takes forward a number of the important outstanding issues identified in the OFT's work on

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<sup>1</sup> OFT 328 *Competition in professions*, published March 2001, at paragraph 50, reproduced here for convenience at Annexe A. The report is available on the OFT website at [www.offt.gov.uk](http://www.offt.gov.uk)

<sup>2</sup> The OFT 385 *Competition in professions* Progress Statement, published April 2002, available at [www.offt.gov.uk](http://www.offt.gov.uk)

competition in the legal professions. In particular, the review addresses regulatory barriers to change.

- 1.4 An important theme in the OFT's work on competition in professions relates to competition scrutiny of professional rules. Current arrangements for competition scrutiny of rules of the legal professional bodies involve the OFT in both an enforcement capacity under the Competition Act 1998 (and, as from May 1 2004, under similar provisions in EC law<sup>3</sup>) and in an advisory capacity under the Courts and Legal Services Act 1990<sup>4</sup>.
- 1.5 At Chapter B, the consultation document sets out possible regulatory models and at Chapter D it considers governance and accountability issues in relation to these models. The choice of regulatory model will clearly have a significant impact on the key objective of ensuring that future regulation promotes competition and innovation. One important aspect of this will be to ensure that whatever model is selected guarantees proper competition **scrutiny** of future rules. Any change in the regulatory model will have implications for the respective scope of competition enforcement and advice in relation to rules governing the supply of legal services. A related and even more important aspect of the choice of regulatory model is the implications of the model for **competition**. One main area of focus in this response, therefore, is the implications of the proposed regulatory models for competition scrutiny and for competition. These issues are considered in Chapter 2 of this response.
- 1.6 Among the most significant restrictions on the provision of legal services that remain to be addressed are restrictions on choice of business structure. In most cases the origin of the restriction was a rule or rules of the legal professional bodies. It remains a key theme of our work on these issues that it was not for the OFT (or for any other regulator) to seek to specify how professionals should supply services. In our view, the manner in which goods and service 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 they should be

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<sup>3</sup> These changes are introduced by EC Council Regulation 1/2003, the 'Modernisation' Regulation. Modernisation provides a new framework for the enforcement of European competition law by decentralising the application of European law: national competition authorities and the courts of the Member States will apply Articles 81 and 82 of the EC Treaty alongside the European Commission. A European Competition Network has been established to co-ordinate enforcement by the various national authorities. Further, Modernisation abolishes the system of notifying agreements for exemption under Article 81(3) and the exclusive competence of the European Commission to apply Article 81(3).

<sup>4</sup> See below Chapter 2, paragraphs 2.3 to 2.5.

called on to justify the restriction or remove it. The current consultation, and in particular Chapter F, marks a significant step in the review of such restrictions. Issues relating to alternative business structure are therefore a major area of focus in this response. These issues are addressed below at Chapter 3 of this response.

- 1.7 In Chapter 4 we respond to those questions set out in the consultation document that are relevant to the work of the OFT. In the main, and to avoid repetition, answers refer to the relevant paragraphs of Chapters 3 and 4.

## 2 IMPLICATIONS OF PROPOSED REGULATORY MODELS FOR COMPETITION

### Introduction

2.1 The choice of regulatory model will clearly have a significant impact on the key objective of ensuring that future regulation facilitates and promotes competition, innovation and the public and consumer interest. One important aspect of this will be to ensure that whatever model is selected guarantees proper competition scrutiny of future rules. This is important in order to ensure that rules do not unnecessarily restrict competition, for example where they may serve the interests of suppliers rather than those of users of legal services. Any change in the regulatory model will have implications for the way in which competition scrutiny is achieved. A related and even more important aspect of the choice of regulatory model is the implications of the model for competition itself. There are a number of aspects to this. One of these is the question of who regulates; whether the model should rely primarily on professional bodies or should look to an independent regulator, and what role if any should be reserved to government. Another important question recurring throughout the chapters that relate to regulatory models is whether and to what extent one should seek to regulate by activity rather than by profession; how one addresses this issue may have important implications for competition.

### Current arrangements for competition scrutiny

2.2 Current arrangements for competition scrutiny in the context of the professions involve the OFT in both an advisory and an enforcement capacity. In relation to advisory responsibilities, general powers are now contained in the Enterprise Act 2002. These replaced and expanded on the powers contained in the Fair Trading Act 1973 which have now been repealed<sup>5</sup>. They apply to legal professional services as to other sectors of the economy. In addition to these general powers, advisory powers specific to certain important rules relating to the provision of legal services are contained in the Courts and Legal Services Act 1990 (CLSA). With regard to enforcement powers, the principal domestic competition statute is the Competition Act 1998 (CA98). Since May 1, the date at which the relevant provisions of the Modernisation Regulation<sup>6</sup> came

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<sup>5</sup>The OFT's report *Competition in professions* was conducted using the general powers of review contained in Section 2 of the Fair Trading Act 1973.

<sup>6</sup>EC Council Regulation 1/2003.

into force, the OFT also has the power to enforce the competition provisions of the European Community Treaty, Articles 81 and 82 EC. Specific advisory and enforcement provisions are set out in more detail below.

## COMPETITION ADVICE RESPONSIBILITIES

- 2.3 As noted in the consultation document, rights of audience and rights to conduct litigation are regulated in that they are reserved to those who are considered appropriately qualified. Under the Courts and Legal Services Act 1990<sup>7</sup>, the Secretary of State for Constitutional Affairs (the Secretary of State) has powers to designate bodies who wish to grant to their members rights of audience and rights to conduct litigation, or to revoke such designation. Rule changes by professional bodies are also subject to the approval of the Secretary of State where proposed changes relate to either of these two areas. The Secretary of State also has a power to call in any such rule where he believes it to be unduly restrictive.
- 2.4 In relation to each of these powers the OFT has an advisory role with respect to the potential competition effect of the proposed designation, revocation, rule change by professional body or by Secretary of State. In each case, CLSA Schedule 4 provides that the OFT must consider whether the grant, revocation or rule change would have or be likely to have, any significant effect on competition. The OFT's advice is provided to the Secretary of State and published. The relevant provisions of the CLSA are summarised at Annex 1. It must be stressed that the OFT's advisory role in this connection relates only to rule *changes*, and not to existing rules.
- 2.5 In our view, the OFT's advisory powers under the CLSA have nevertheless proved a useful way for ensuring that where changes are made to this very significant area of legal service provision the potential competition implications of such changes are fully considered prior to introduction of the change. The OFT typically provides approximately 4 to 6 such pieces of advice in any one year. An example of such an advice is that which was given in March 2003 regarding the competition implications of amendments to Bar Rules governing qualification while practising in employment. The content of this advice is summarised at paragraphs 3.18 to 3.22 below. We consider the availability of a mechanism for competition scrutiny to be of particular importance where rules that may restrict competition fall outside of the scope of the OFT's competition enforcement powers.

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<sup>7</sup> See Schedule 4 to the CLSA Parts I-IV (as amended by Schedule 5 to the Access to Justice Act 1999).

## COMPETITION LAW PROHIBITIONS

- 2.6 The main competition enforcement provisions applied by the OFT are those under the CA98. 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>8</sup>. The OFT has powers to investigate and to take enforcement action against infringements of the prohibitions.
- 2.7 Since May 1 2004, the date at which the relevant provisions of the Modernisation Regulation<sup>9</sup> came into force, the OFT is also responsible for applying and enforcing the competition provisions of the European Community Treaty, Articles 81 and 82 EC. These provisions, which mirror those of the CA98 described above, apply where the agreement or conduct under investigation may have an effect on trade between member states.

## EC CASE LAW

- 2.8 In principle, both Articles 81 and 82 EC, and since the repeal of CA98 Schedule 4<sup>10</sup>, the provisions of the CA98, apply equally in the context of professional services as they do in other sectors of the economy. Both sets of provisions are interpreted and applied in the light of Community and national case law. Developments before Community courts suggest that, in practice, it is not always clear that rules that govern the provision of professional services, and which may restrict competition, will always fall within the scope of these provisions. Examples of factors that may be relevant to assessing the scope of the provisions in the context of rules emanating from legal professional bodies governing the provision of legal services include the following:

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<sup>8</sup> See CA98 Section 60.

<sup>9</sup>EC Regulation 1/2003.

<sup>10</sup>See paragraph 1.5 above.

- the nature and extent of oversight of the decision-making process by government or regulators<sup>11</sup>;
- the composition of the decision-making body and the extent of its independence<sup>12</sup>;
- whether there are public interest considerations which must be taken into account in the decision making process<sup>13</sup>.

2.9 These factors are not intended to be exhaustive<sup>14</sup>. They are presented simply to highlight that the choice of regulatory model may significantly affect the subsequent scope for applying competition prohibitions in the context of rules governing the provision of legal services. Regulatory design should make clear that competition rules do apply. Where the model chosen is such as to make doubtful the application of the competition prohibitions, then it will be important to put in place an alternative mechanism for ensuring effective competition scrutiny.

2.10 In the remainder of our response we consider the relative strengths of two of the models set out in the consultation, Models A and B+. We consider the implications of these models both for competition scrutiny and for competition itself. We do not explicitly comment on the third model set out in the consultation document, Model B. This is because we consider that in proposing the separation of representation and regulation functions of legal professional bodies, Model B+ has clear advantages over Model B. Whatever the merits of self-regulation, they risk being seriously undermined by either the reality or the appearance of the regulator's judgement being swayed by its wish to represent the interests of its members when these may differ from the interests of users of legal services.

### **Model A: A Legal Services Authority**

2.11 Model A envisages setting up a Legal Services Authority (LSA) in which all regulatory power in relation to legal services would be vested by statute. The legal professional bodies would lose all their regulatory functions and would continue as representative bodies.

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<sup>11</sup>See for example, Case C-35/59 *Arduino*.

<sup>12</sup>See for example, Case C-35/59 *Arduino*, and Case C-185/9 *Reiff*

<sup>13</sup>See for example, Case C-35/59 *Arduino*, and Case C-309/99 *Wouters*

<sup>14</sup>For a more detailed account of the scope for enforcement action against professional bodies under Articles 81 and 82 EC, see paragraphs 65-89 of the European Commission's Report on Competition in Professional Services, published on 9 February 2004; Com(2004) 83 final

## IMPLICATIONS FOR COMPETITION SCRUTINY

- 2.12 The implications of Model A for the application of the competition prohibitions seem fairly clear. The removal of the professional bodies from any regulatory function suggests that there would be no scope for such action by the OFT in relation to anti-competitive rules. This is because if the LSA takes over the regulatory functions of the professional bodies, the Chapter I prohibition of the CA98 would no longer apply to the rules of those bodies. In this case there would be a need for a vigorous advisory regime.
- 2.13 The consultation document draws parallels between the proposed powers of the LSA and those currently exercised by the Financial Services Authority in the context of financial services. In this context, powers of competition scrutiny are given to the OFT under a special regime established by the Financial Services and Markets Act 2000 (FSMA). The OFT's role involves scrutiny of both the FSA's regulatory provisions and practices and of the regulatory provisions of investment exchanges or clearing houses who apply to the FSA for recognition or which have previously been recognised. The OFT's powers and obligations in this context are set out in more detail at Annex 2. In brief, the OFT has an obligation to keep such rules, practices and regulatory provisions under review and to report to the Competition Commission where we consider that they have a significantly adverse effect on competition. The OFT has a discretion to issue and to publish such a report if we conclude that there is no such adverse effect.
- 2.14 Our experience of applying these provisions suggests that they provide an effective, if resource intensive, mechanism for competition scrutiny of the relevant rules, regulations and practices, in circumstances where the competition prohibitions do not apply. If Model A is adopted, the FSMA provisions may therefore be a useful guide to achieving competition scrutiny in the context of the regulation of legal services. Of particular importance is the duty to report to the Competition Commission, noted above. Such a duty on the OFT provides a strong incentive to the Regulator to ensure that rules, practices and regulatory provisions do not have a significantly adverse effect on competition. This might, of course be achieved in other ways; what is important is a method to sanction or veto rules which significantly harm competition or the development of competition. It will also be important to ensure that the regulator's rule-making functions are exercised in accordance with a clear and appropriately prioritised competition objective. This might usefully include an assessment of the potential competition effects of the

individual rule viewed in the context of the other rules and in the economic context in which it will operate.

## IMPLICATIONS FOR COMPETITION

- 2.15 There may be a number of positive benefits for competition and therefore for users of legal services that follow from the adoption of Model A. Independent regulation is one potential advantage. The OFT's work in this area has led us to consider that there is a significant risk that attaches to self-regulation by the professions, which is that the resulting rules will reflect the interest of the providers rather than the users of legal services. Similarly, OECD's report on competition in professions, published in October 2002, underlines both the desirability of making available a range of service at a range of prices and the likelihood that if regulation rests with professional bodies, the level of regulation will be such that some consumers will pay more than they need to for services. Independence from government (subject perhaps to the possibility of some minimal continuing government involvement<sup>15</sup>) also seems desirable. A further potential competition advantage of Model A is that competition may be encouraged by a framework that facilitates regulation by activity or service rather than by profession. This might achieve greater clarity and transparency and help to open up markets traditionally the preserve of members of one professional body to members of others. Having a single regulator might also, as pointed out at Chapter 3 below, facilitate the establishment of Multi-Disciplinary Practices (MDP) both because of the potentially greater clarity and simplicity in rules and also by providing a single partner for negotiations with other professions involved (accountants, surveyors etc).
- 2.16 There are also, however, a number of potential threats to competition inherent in Model A. Model A would necessarily suppress alternative approaches to the regulation of legal services. Competition between regulators can be an important way of identifying cheaper forms and encouraging innovation. If Model A is adopted, a challenge for the new regulator will be to find alternative mechanisms to ensure that innovation continues and that where possible, buyers of legal services remain free to choose between a more expensive service with a high level of regulatory protection and a cheaper service that nonetheless meets a minimum standard in terms of consumer protection. A further potential disadvantage is that in distancing the profession from regulation, there may be a loss in regulatory expertise; professionals may be best placed to identify risks to independence and probity even if they are

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<sup>15</sup>See for example the restricted Government role under the FSMA set out at paragraph 28 of the consultation document.

not best placed to balance these risks against, for example, the interests of consumers when making rules that address the risks. Mechanisms for consulting the profession about rules would clearly be essential to the success of Model A.

## **Model B+ : A Legal Services Board**

### IMPLICATIONS FOR COMPETITION SCRUTINY

- 2.17 Model B+ presents a more complex picture with regard to the potential for future competition scrutiny than does Model A. Under B+, the continuing role of the professional bodies in rule-making raises that possibility that some scope for applying the competition prohibitions against bodies that make anti-competitive rules might remain. Factors outlined at paragraph 2.8 above may be critical to determining the continuing scope for such action under this model. In particular, the extent of the oversight exercised by the Legal Services Board will be an important factor as will the extent of the lay involvement in the decision making by the regulatory arm of the professional body.
- 2.18 To the extent that rules fall outside the scope of the competition prohibitions, a special regime will need to be in place to ensure that rules made comply with competition scrutiny. One aspect of this would be to ensure that a clear and appropriately prioritised competition objective be set out for both the Board and the professional body when discharging any rule-making/approval function. This might usefully include an assessment of the potential competition effects of the individual rule viewed in the context of the other rules and in the economic context in which it will operate. A second aspect to this could be to ensure that the Board had an obligation to seek competition advice from the OFT when approving professional rules or when considering applications from professional bodies to be recognised for the purposes of qualifying and supervising members to provide services. This would be similar to the current arrangements under the CLSA described above. In addition, the OFT might be given responsibilities similar to those that currently exist in relation to financial services to keep rules and practices under review and to report to the Competition Commission where we found a significant adverse effect on competition. The addition of this ongoing power of scrutiny (additional to provision of advice at the point where rules are approved or when bodies seek designation), would strengthen the OFT's capacity to provide effective competition scrutiny of legal professional rules.

## IMPLICATIONS FOR COMPETITION

- 2.19 Model B+ appears to us to have a number of potential advantages over Model A. Where Model A necessarily suppresses competition between regulators, Model B+ would allow the potential for such competition. It could also ensure that the Board was in a position to both encourage such competition, but also to step in if it appeared that such competition was weakening regulation to the point where this was endangering consumer protection. A further advantage of Model B+ would be the continued access to the expertise of the professionals in rule-making, while at the same time providing oversight to ensure that the self-regulatory element was operating in the interests of users of services rather than suppliers. The continued participation of the professions might also have cost advantages.
- 2.20 Model B+ does not appear well suited to deliver a transition from regulation by profession to regulation by service although elements of this might be achieved through the establishment by the Board of a system of guidelines for rule-making in certain areas, or by the Board co-ordinating rule-making across the professional bodies where it considered harmonised rules desirable. A capacity to choose areas in which to promote harmonised rules might also be important to the capacity of the Board to function as an effective single representative for the legal profession in negotiation with other professions in the context of MDPs.
- 2.21 The regulation of Legal Disciplinary Practices (LDP) needs particular attention under model B+. Where, say, barristers and solicitors worked together in the same LDP, problems could arise if they have different professional rules. For example, solicitors are permitted to handle clients' money and have to abide by certain rules when doing so, whereas barristers may not at present handle clients' money. It is unlikely that an LDP could be run efficiently with this kind of difference between its members. One solution would be for the Board to harmonise the relevant professional rules, as envisaged in the previous paragraph. Another solution might be for one professional body to act as the lead regulator of LDPs and to regulate the members of other professions to the extent that their conduct related to their role as members of LDPs. The OFT does not have firm views about which of these solutions would be preferable, or indeed whether there are other feasible ones, but it is clear that whatever solution is adopted it must not restrict the ability of members of different legal professions to join together in LDPs or the ability of LDPs to compete with each other and with lawyers organised in other types of business structure.

### 3 ALTERNATIVE BUSINESS STRUCTURE

3.1 In Chapter F, the consultation document sets out and discusses a range of possible business structures. Making available new business structures to lawyers implies lifting current restrictions that have been identified as restricting competition. In this chapter we consider the implications of each of the models proposed for a range of restrictions that currently deny choice to both suppliers and consumers of legal services.

#### **How current restrictions on business structure are addressed by the proposed alternative structures**

##### RESTRICTIONS ON BUSINESS STRUCTURE

3.2 Among the most significant restrictions on the provision of legal services identified in the OFT's reports and that remain to be addressed are restrictions on choice of business structure in professional rules. Restrictions identified included:

- rules that prohibit partnerships between barristers and between barristers and other professionals (both lawyers and non lawyers);
- rules that prohibit solicitors from entering partnerships with members of other professions (both lawyers and non-lawyers); and
- rules that prevent solicitors in employment to non-solicitors from providing services to third parties.

Questions raised and structures proposed in Chapter F of the current consultation on Alternative Business Structures bear directly on each of these restrictions. In relation to the restrictions on partnership in Bar rules (first bullet), the Bar has sought to justify the current total ban. The Law Society now favours lifting both the restrictions on solicitors entering partnerships with members of other professions (second bullet) and the restriction that prevents employed solicitors from providing services to third parties (third bullet).

##### THE BAR'S JUSTIFICATION FOR RESTRICTIONS ON PARTNERSHIP

3.3 As the Bar's justification for a ban on partnerships is relevant to the debate over alternative business structures, we summarise below why we think that the objection to partnerships is misconceived.

3.4 In February 2002 in response to the OFT's *Competition in professions* report, the Bar Council issued a report (the Bar response)<sup>16</sup>. In the Bar response, the Bar makes clear 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 report. 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; and
- it enables the Bar to maintain the 'cab-rank' principle.

THE OFT CONTINUES TO CONSIDER THAT THE RESTRICTIONS GO BEYOND WHAT IS NECESSARY

3.5 In its progress statement in April 2002, the OFT set out the reasons why, notwithstanding the Bar's arguments, we do not consider that the restrictions are justified. These are as follows:

3.6 The first argument relies upon an assumption that permitting partnership 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 not. On the other hand, prohibiting partnerships restricts choice: the barrister's choice to adapt his business structure in the way that best meets his needs and those of his 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 report. 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.

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<sup>16</sup> See response of the Bar Council to the OFT's report *Competition in professions* at [www.barcouncil.org.uk](http://www.barcouncil.org.uk)

- 3.7 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 response points out elsewhere however, many of the activities of solicitors and barristers remain, for the time being, significantly different. It would therefore be premature to draw the conclusion that the difference in business structure is responsible for the difference in overheads. Lifting the prohibition on partnership would allow barristers the freedom to choose alternative structures and the efficiency benefits that these might bring.
- 3.8 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.
- 3.9 In summary, the OFT does not consider that the case has been made out for the retention of either of the prohibitions on partnership imposed by Bar rules.

#### IMPLICATIONS OF PROPOSED ALTERNATIVE STRUCTURES FOR RESTRICTIONS IDENTIFIED

- 3.10 The matrix at Chapter F, p 66, of the consultation document (the matrix) sets out 4 models of possible alternative business structures. It is important to consider how far each of these models is likely to address the restrictions discussed above and to reduce, therefore, the cost to users of legal services that result from these restrictions on freedom and choice.

#### OPTIONS FOR ALTERNATIVE STRUCTURES

- 3.11 The matrix sets out 4 possible options for alternative structures. The options distinguish between practice that offers only legal services (Legal Disciplinary Practice or LDP) and practice where legal services are supplied alongside other services such as for example, accountancy or surveying (Multi-Disciplinary Practice or MDP). The other distinction that is central to the options is that between practice where those who manage the practice own it and practice which is not exclusively owned by managers. The options presented may be listed and labelled as follows:
- Option one is an LDP that brings together lawyers from different professional bodies (barristers, solicitors, conveyancers, legal executives, trade mark attorneys, patent agents, notaries) to work together on an equal

footing to provide legal services to third parties; Non-legal professionals might help in the management of such practices, but they would not be able to provide services to third parties. The practice would be owned by those who managed it.

**(LDP 1)**

- Option two is similar to Option one except that, this option would allow for a practice owned not exclusively by its managers but also by third parties such as a bank, automobile association or a supermarket.

**(LDP2)**

- Option three allows the development of practices that would bring together lawyers and other professionals such as accountants and surveyors. It could therefore offer a one stop shop to clients who require the services of more than one professional. Those who managed the firm would also own it.

**(MDP1)**

- Option four is similar to Option three except that this option would allow for a practice owned not exclusively by its managers but also by third parties such as a bank, automobile association or a supermarket.

**(MDP2)**

## IMPLICATIONS OF ALTERNATIVE STRUCTURES FOR CURRENT RESTRICTIONS

3.12 **LDP1**, if introduced, would address current restrictions on partnerships between barristers. It would also allow both barristers and solicitors to enter partnership with lawyers who were members of professional bodies other than their own. In lifting these restrictions on business structure, LDP1 would also allow clients to buy litigation and advocacy services from one and the same firm and may go some way therefore to address the related restriction in Bar Rules on barristers in independent practice conducting litigation (for a fuller discussion of this restriction see paragraphs 3.14 and 3.15 below). Introduction of LDP1 would not however address the current restrictions that prevent solicitors in employment to non-solicitors from providing services to third parties, nor would it lift the restrictions on partnerships between either solicitors and barristers and non lawyer professionals.

**LDP2**, if introduced, would bring all the advantages of addressing the restrictions that LDP1 addresses but would in addition involve lifting the restriction that prevents solicitors in employment to non-solicitors from

providing services to third parties. Partnerships involving provision of legal and other services would remain prohibited, however, so further change would be necessary if clients were to benefit from the availability of one stop shops.

**MDP1**, if introduced, would bring all the advantages of LDP1 but would in addition involve lifting restrictions in Law Society and Bar Rules that prevent solicitors and barristers from offering one stop shop services alongside non-lawyer professionals. Capitalisation and other potential benefits from third party ownership would remain restricted.

**MDP2**, if introduced, would address all restrictions on business structure identified in the OFT's reports.

## CONCLUSIONS

- 3.13 It follows from what is said above that MDP 2 is the only model the introduction of which would ensure that all of the restrictions on business structure identified in the OFT's work were addressed. We therefore strongly favour this model and consider that it is the model which is likely to maximise benefits to users of legal services in England and Wales. We recognise however, that there are a number of issues that are specific to the MDP models and that would need to be resolved, in some cases in partnership with other professions; the time-frame for introduction of MDP2 might therefore be longer than that for LDP2. We consider LDP2 to have significant advantages over LDP1 in competition terms. Resolution of issues specific to MDP2 should not be allowed to cause delay to an early introduction of LDP2. But LDP2 should be seen as a step towards MDP2 rather than an alternative to it. Creating a framework in which lawyers who are members of different regulatory bodies can offer services in partnership is likely to be a significant step toward establishing a framework where lawyers can practice with other professionals. Similarly, reform of the overall regulatory model and the establishment of a single body, whether authority or board with oversight functions (see Chapter 2 above), with regulatory responsibility for legal services is also likely to facilitate the subsequent introduction of model MDP2. In the interests of early progress, we would therefore support the early introduction of model LDP2 as an interim step towards MDP2. In 'Issues specific to MDPs' (from paragraph 3.24 below) we look at issues specific to MDPs and consider how they may be addressed.

## Implications of new business structures for other restrictions

### THE PROHIBITION ON LITIGATION BY BARRISTERS AT THE INDEPENDENT BAR

- 3.14 Questions in Chapter F related to alternative business structures have implications also for other restrictions in professional rules, even where these may not appear to be primarily about business structure. Some such restrictions were identified in the OFT's 2001 report; others emerged in subsequent work by the OFT in this area. One significant example is the prohibition in rules of the Bar on the conduct of litigation by barristers in independent practice. This was highlighted in the OFT's *Competition in professions* report in 2001 and further commented on in the progress statement in 2002. In our report, we stated that we considered that this prohibition prevents potential efficiencies and limits the number of lawyers available to conduct litigation. We underline that the OFT does not seek to oblige any individual barrister to conduct litigation. Our concern is that barristers should be free to choose. At present, the Bar dictates that in no circumstances can any member of the independent Bar conduct litigation. We consider it a significant restriction on the freedom of choice of both barristers and their clients. Whatever the future form of this rule, however, its significance is likely to be affected by the availability of new business structures.
- 3.15 We welcome the fact that each of the models that are set out in the consultation document would allow a barrister to offer services as a barrister within a practice that could offer clients the full range of legal services including litigation and advocacy. Where, following the introduction of alternative structures, it was clear that such integrated services were available to clients who wanted them, and that barristers who wished to practice in this way could do so unimpeded and without change to title or practising rights, this would clearly be a relevant consideration in assessing whether a continuing prohibition on litigation, affecting those barristers who chose to remain sole practitioners, constituted a significant restriction on competition. If a substantial number of mixed solicitor/barrister LDPs were formed, the restriction on competition entailed by a prohibition on litigation by sole practitioner barristers would be less likely to be appreciable.

## ENTRY RESTRICTIONS AND PRACTITIONER MOBILITY

- 3.16 It will be critical to the success of any new business structures to ensure that the entry and qualification requirements do not unnecessarily hinder the development of new structures. Similarly, the capacity of practitioners to move from one business form of practice to another without unnecessary restriction will be important to the success of new business structures.
- 3.17 We have been concerned for some time that the requirements which the Bar places upon those who seek to qualify other than at the independent Bar go beyond what is necessary and are disproportionate in their effect on entry to requirements set for qualification at the independent Bar. If rules that currently govern qualification at the employed Bar were to be applied also in the context of new legal and multi-disciplinary partnerships, and it would appear that failing amendment they would, then there is a real danger that such rules would significantly impede the establishment and development of new business structures at least as far as barrister participation is concerned.
- 3.18 A particular rule which we are concerned may significantly impede potential competition from barristers choosing to practice in new business structures is Rule 203 of the Bar's Code of Conduct. In advice to the Lord Chancellor provided under the Courts and Legal Services Act 1990 (CLSA), we have previously set out our concern about the anti-competitive effects of Rule 203 in the context of practice as an employed barrister<sup>17</sup>. Rule 203 requires that a barrister who has less than three years' standing must practice from a chambers or office which is also the principal place of practice of a practitioner who is suitably qualified to provide guidance (Rule 203 (1)(b)). A person is considered suitably qualified if they have been qualified to practise and have practised for six of the previous eight years, two of which must be the years that immediately precede the period of supervision (Rule 203(3)).
- 3.19 There are two aspects of Rule 203(1)(b) that give rise to concern. Both currently relate to the effects of the rule in the context of practice at the employed Bar, but the effects are likely to be similar in the context of future practice in MDP/LDPs. The first is the requirement that a barrister's place of practice must, for the duration of the qualifying period, be the same as that of a person who is qualified to supervise. The second relates to the operation by the Bar Council of a discretionary power of waiver in relation to this requirement.

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<sup>17</sup> See the OFT advice of March 2003. Since April 2001, advice given under Schedule 4 to the CLSA is published. The advice is available on the OFT website [www.oft.gov.uk](http://www.oft.gov.uk)

- 3.20 The requirement in Rule 203(1)(b) that a barrister's principal place of practice must, for a period of three years be the same as that of a suitably qualified supervisor governs both independent practice and employed practice and would also unless amended come to govern practice within future LDPs or MDPs. Its effects in the context of employed practice or LDP/MDPs are, however, very different from its effects in the context of independent practice. In independent practice, the requirement will almost inevitably be met by practice in chambers, and irrespective of whether there is, in reality, regular contact for the purposes of supervision between the qualified person and the person supervised. By contrast, in employment, the rule acts to severely restrict the freedom of a newly qualified barrister to accept an employment contract and to restrict also the freedom of potential employers to employ newly qualified barristers. This will only be possible where the would-be employer already employs a relatively senior lawyer who meets the exacting terms of Rule 203(3). In our view, the restriction inherent in this rule might be considerably relaxed, and the level of supervision maintained or even improved, if the rule were expressed in terms of regular contact with a supervisor rather than in terms of a principal place of practice. This would allow a barrister in employment or practising within an LDP or MDP to be supervised by a suitably qualified person (such as a former pupil master), whether that person shared his place of employment, was employed elsewhere or was at the independent Bar. This would greatly enhance the opportunities for barristers in employment and in newly formed alternative business structures.
- 3.21 The Bar Council has a general discretion to waive the requirements of Rule 203(1)(b) on application. Applications are considered by the Transitional Arrangements Sub-Committee. Our concern here is that the operation of a waiver system in this context creates a very high degree of uncertainty for barristers who wish to practice at the employed Bar and to acquire standing to meet the three year rule. Given that the numbers of barristers qualifying greatly exceeds the number of openings at the independent Bar, it is likely that this uncertainty affects the majority of the recently-qualified Bar. Taking into consideration the discretionary nature of the waiver system, the absence of clear published criteria, and that barristers seeking an exemption are unlikely to be in a position to make an application for waiver until they have taken up a post in a new LDP, MDP or other employment, the hurdles that face those who wish to practice outside the independent Bar are considerable.

- 3.22 In summary, the current rules and the way they are applied operate to prevent a barrister from knowing in advance whether a period of practice in employment (or in an LDP or MDP) will qualify him/her to the same degree as a period at the independent Bar. The criteria for meeting Rule 203(1)(b) should be clarified and simplified to allow a barrister who wishes to enter employment to know in advance whether the period in employment will meet the requirements. In order to widen the range of business structures that will meet the requirements, we also recommend that the Bar Council consider amending Rule 203(1)(b) to allow appropriate supervision to be undertaken by any suitably qualified person who is willing to undertake it.
- 3.23 Rule 203 is one example of a rule that may impede the establishment and development of MDP/LDPs. Similar concerns exist in relation to the requirements for completion of pupillage (the 12-month period of practical training which a barrister must undertake to qualify to practice). While we are not aware of qualification requirements of other legal professional bodies that may have similar effects, these would need to be considered to ensure that requirements do not unnecessarily impede the freedom of lawyers to choose to practice within new business structures where they consider that new structures will allow them to better meet the needs of clients.

## Issues specific to MDPs

### INTRODUCTION

- 3.24 Chapter F sets out a number of issues that arise specifically in the context of multi-disciplinary practices (MDPs). It has long been the position of the OFT that it is desirable in principle to permit the formation of such partnerships<sup>18</sup>. In the OFT's report *Competition in professions*, in 2001, we noted that restrictions on MDP may both inhibit new entry and prevent the exploitation of possible economies of scale and scope. It was and remains our view that the opportunities to provide combinations, in particular, of high-street professional services under one roof should unlock potential cost efficiencies and enhance customer choice and convenience at this level of the market. Potential benefits might accrue also from combinations at other levels of the market<sup>19</sup>.
- 3.25 We recognised in the OFT's *Competition in professions* report that particular safeguards would be necessary in particular in relation to combinations

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<sup>18</sup> See the *Entities Report*, OFT, 1986

<sup>19</sup> See OFT 328 *Competition in professions* at paragraphs 29-32 available at [www.of.gov.uk](http://www.of.gov.uk)

involving auditors<sup>20</sup>. We doubt however if the need for such safeguards in relation to audit services can justify the current blanket prohibition on MDPs outside of the field of auditing services; nor do we consider this to be a necessary implication of recent European case law. Even in the field of audit, the response of those with responsibility for regulating audit following the Enron situation has not been blanket prohibition of the provision of non-audit services by auditors but has been to consider the specific risks involved in the provision of each combination of services and only to prohibit those combinations of service where identified risks cannot be addressed by appropriate safeguard.<sup>21</sup>

- 3.26 The issue of legal professional privilege is highlighted in the consultation document as an inhibitor to the development of MDPs. In the OFT's report *Competition in professions*<sup>22</sup>, and subsequent progress statement, we highlighted the concern that where lawyers are in competition with non-lawyers, legal professional privilege may distort competition in favour of the lawyer. Government subsequently concluded that altering the scope of privilege would not be in the public interest<sup>23</sup>. However, a recent judgment of the Court of Appeal, which limits the scope of legal advice privilege to advice or assistance given by a lawyer in relation to rights and obligations, may be relevant in this context<sup>24</sup>. To the extent that the ruling restricts the scope of legal advice privilege, it may also have the effect of reducing to some degree the competition effect of legal professional privilege as well as its effect as an inhibitor on MDP. Note that the Court of Appeal's judgment is currently under appeal to the House of Lords.
- 3.27 The consultation draws a number of distinctions between MDP and LDP. It clarifies that, unlike LDPs, the process of agreeing an appropriate framework for the regulation of MDPs is one that will necessarily involve negotiation with those with responsibility for the regulation of other non-lawyer professionals. This was recognised also by the OECD in its 2002 report on competition in professions in the UK<sup>25</sup>. This may argue for a different time scale for the introduction of this business structure that takes account of the need for a

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<sup>20</sup> See *Competition in professions* Progress Statement at paragraph 3.38, available at [www.oft.gov.uk](http://www.oft.gov.uk)

<sup>21</sup> See for example the recent consultation issued 24 November 2003 by the Auditing Practices Board on Draft Ethical Standards at ES5.

<sup>22</sup> OFT 328 at paragraph 47

<sup>23</sup> 'Competition and Regulation in the Legal Services Market' DCA 2003

<sup>24</sup> *Three Rivers District Council & Ors v The Governor & Company of the Bank of England* [2004] EWCA civ 218

<sup>25</sup> See OECD Report *Regulatory Reform in Gas and electricity and the Professions in the UK*, 23 October 2002.

process of inter-professional negotiation. It does not in our view argue for the abandonment of the potential advantages that MDPs may bring. Indeed, we see one of the advantages of the reform of the regulation of the legal framework for legal services is that this is likely to result in a single entity (Authority or Board) capable of representing all of the legal profession in such negotiation. To this extent it may mark a significant step towards the facilitation of the regulatory structure for MDP. We encourage the review team to recommend that the OECD recommendation in its 2002 report on competition in the UK be taken forward, and that government now facilitate a process of discussion between professions towards a regulatory environment for MDPs.

- 3.28 To conclude on the issue of alternative business structures, it seems appropriate to recall the following point of general relevance to a consideration of any new business structure. The question of how services are supplied is generally best determined by unfettered competition between producers for the custom of consumers. Regulators at whatever level should therefore avoid prescribing how professional services should be supplied. It follows that where, as currently, restrictions are placed on the freedom of patterns of supply to evolve and improve, those restrictions should be removed unless they can be justified. Removing current restrictions in professional rules and in statute that prevent lawyers participating in LDPs and MDPs is likely to have a positive effect on competition in the supply of legal services in England and Wales.

## 4 CONSULTATION DOCUMENT QUESTIONS

In this chapter, we provide responses to the questions set out in the consultation document where these are relevant to the work of the Office of Fair Trading. In the main, this will involve reference back to the relevant paragraphs of Chapters 2 and 3.

### **Question A1**

**There are a number of important possible objectives for a regulatory system covering the provision of legal services. What objectives do you believe should form the cornerstone of a regulatory system for legal services?**

The consultation document properly identifies the relevant objectives. We welcome the recognition both in the objectives and the terms of reference to the review of the importance of a competition objective. It is in the interests of users of legal services that a regulatory regime prevent unjustified restrictions and encourage competition.

### **Question A2**

**What aspects of professional ethics, or legal precepts, do you feel are essential to a properly functioning legal services industry and in what way should they be reflected in the regulatory system?**

These aspects are properly identified in the consultation document. In our negotiations with legal professions we have recognised that it may be necessary to restrict the freedom of professionals, including aspects of freedom to compete, in order to ensure that, for example, the independence of lawyers is protected. However, lawyers are likely to best serve the interests of their clients where such restrictions are maintained at the minimum level necessary. With regard to confidentiality, see comments on privilege at paragraph 3.26 above.

### **Question A3**

**Do you consider that risks to the regulatory objectives should be a central consideration in determining how regulatory powers and resources should be used?**

Yes. Provided that all appropriate objectives are recognised and that competing objectives are appropriately balanced.

**Question B1**

**What do you see as the broad advantages and disadvantages of Model A in comparison with Model B? In particular, what do you see as the strengths and weaknesses of (i) combination and (ii) separation of regulatory from representative functions?**

See Chapter 2 above.

**Question B2**

**Which model best meets the criteria of the terms of reference?**

See Chapter 2 above.

**Question B3**

**If it were felt appropriate to separate regulatory and representative functions within professional bodies as envisaged under Model B+, how might it best be achieved?**

There would be distinct advantages in ensuring that the regulatory function was carried out pursuant to clear public interest criteria provided by statute. It would be preferable to ensure also that the composition of the Board with oversight functions reflected the interests of users of legal services. Any arrangement should ensure that the implications for competition scrutiny are recognised (see Chapter 2 above at paragraphs 2.1 to 2.10, 2.17 and 2.18).

**Question B4**

**What powers would you wish to see delegated from the Government to the Regulator?**

Powers currently exercised by government under the CLSA should be delegated whether Model A or B is adopted. The aim should be an independent Regulator.

**Question B5**

**What powers to instruct the Regulator would you wish to see Government retain?**

The retention of minimal powers such as those retained in respect of financial services appears unlikely to interfere with the key objective of ensuring that the Regulator is independent.

## **Question B6**

**What international considerations should influence the design of appropriate regulatory arrangement of legal services within England and Wales?**

Enabling providers to continue to compete effectively in an international market place is clearly a key objective. The consultation document points also to the need for a new regime to be responsive to international obligations and to be able to accommodate new market and regulatory developments. We agree, but consider also that by pooling expertise in a single regulator, whether Authority or Board, more dynamic participation by the new regulator within the relevant international bodies should also be possible. Recent publications by the European Commission (DGComp) and the Organisation for Economic Cooperation and Development (OECD) have been important in informing Chapters 2 and 3 of this response.

## **Question C1**

**Should service complaints (which are consumer centred) be operationally split from professional conduct and disciplinary issues (which are centred on the practitioners and their professional bodies)?**

The OFT's experience in this area is drawn from our work on voluntary, business to consumer, codes of practice. The Consumer Codes Approval Scheme (CCAS) is our current approach to the promotion of self regulation through codes of practice. Codes are assessed by the OFT for approval against a set of challenging core criteria which cover organisation, preparation of the code, code content, complaints handling, monitoring, enforcement and publicity. Under the CCAS code members must have in place speedy, responsive, accessible and user-friendly procedures for dealing with consumer complaints. If a code member and complainant cannot reach agreement on how to solve a complaint, the complainant must be allowed access to conciliation services. The role of the conciliation service is to try to facilitate an agreement between the code member and the complainant. This service must be subject to reasonable time limits and could be provided by the code sponsor (the administering body of a code eg a trade association). If a complaint has still not been resolved following this stage, the complainant must be allowed unrestricted access to an independent redress scheme. For the OFT's purposes, an independent redress scheme must be completely independent of the code sponsor. If a code sponsor uses a board or panel, the entire membership of the board or panel must be independent of the code sponsor and its subscribing members. If a code sponsor appoints an individual

as an arbitrator, that person must be independent of the sponsor and its subscribing members. In order to ensure impartiality, any arbitrators, adjudicators or ombudsmen adjudicating under the redress scheme cannot also sit on the code sponsor's disciplinary panel. An independent redress scheme should resolve complaints speedily, be free for the consumer if possible and must be easily accessible to the consumer without the assistance of a legal representative.

#### **Question C2**

**In connection with complaints, what are the advantages and disadvantages of (a) having a uniform complaints organisation, independent of the bodies, similar to the FOS, or (b) each body remaining responsible for its own complaints? Is the New South Wales example a useful model?**

No comment.

#### **Question C3**

**If you believe that each body should remain responsible for its own complaints, what form of regulatory oversight would you wish to see?**

No comment.

#### **Question C4**

**How do you think that disciplinary arrangements should relate to the underlying practitioner bodies? Is there a case for one single uniform disciplinary body for all lawyers?**

Under the CCAS disciplinary procedures must be independent of code sponsors and their members and also independent of the industry. This means that the procedures must have no present or past association, either directly or indirectly, with the code sponsor's sector. A code sponsor could use a board or committee to deal with disciplinary procedures. If it does, then there must be at least 50% independent representation, as well as an independent chair.

#### **Question C5**

**What should be the mechanism for funding the handling of complaints?**

No comment.

### **Question C6**

**What should be the mechanism for funding the handling of disciplinary processes?**

No comment.

### **Question D1**

**Should the Regulator be a board or an individual?**

We agree with the recommendation of the Better Regulation Task Force in its Report, *Independent Regulators*, October 2003, that a Board is preferable to an individual. We see no justification for departing from this in this instance.

### **Question D2**

**What sort of Board should the Regulator have and how should it be constituted? What would be an appropriate split between practitioner involvement and lay content in the Board? As regards the practitioner content, would you favour the inclusion of individuals on their merits, or formal representatives from different parts of the industry?**

See Chapter 2 paragraph 2.16 above. Practitioners should not dominate the Board but there should be sufficient of them to ensure its expertise. All practitioner members should be appointed as individuals on their merits.

### **Question D3**

**Who should appoint the leadership of a Regulator? With whom should that person consult? How should the appointments of the other directors of the Board be made?**

The Secretary of State should make the final decision on appointments.

### **Question D4**

**What period should the appointments be for? In what circumstances and by whom could directors be removed?**

No comment.

**Question D5**

**Having regards to the need for independence both from Government and providers of legal services, what qualities and background would you wish the leadership of the Regulator to possess? Is there anything you believe it would be important for the leadership of the Regulator not to be?**

The regulator should be impartial, fair and independent minded, and committed to the principles of the regulatory framework (including the promotion of competition). If he or she has these qualities, his or her background will not be of great importance. However, in order to promote public confidence in the new regulatory arrangements, it might be better if the first regulator were not a practising lawyer.

**Question D6**

**What mechanisms would you propose to ensure the accountability of the Regulator: (1) to Parliament; (2) to Ministers; (3) to public interest groups? Is there anyone else to whom a Regulator for legal services should be accountable and how?**

No comment.

**Question D7**

**What consultation arrangements would you wish to see the Regulator follow before exercising its powers?**

See Chapter 2 above, in particular paragraphs 2.3 to 2.5, 2.12 to 2.14, 2.17 and 2.18.

**Question D8**

**To where should the right of appeal against decisions made by the Regulator lie? On what matters should appeal be permitted?**

No comment.

**Question D9**

**This section refers to the funding issues arising from different models. What would be your suggested mechanism for dealing with these issues?**

No comment.

### **Question D10**

**What relationship should there be between the Law Officers, the Regulator and professional bodies with advocacy rights?**

The Law Officers should not have a special relationship with the Regulator or with the professional bodies to whom decision making powers may be delegated under Models B and B+.

### **Question E1**

**Should the Government have power to determine which legal services should be included in, or removed from, the regulatory framework? What consultation with the Regulator, with the providers of legal services, and with public interest groups, should there be in reaching these decisions?**

We agree that decisions as to the need for regulation of particular legal services should be left to the Government. While consultation with the regulator and providers seems appropriate, it will be particularly important to get the views of users of services and interest groups that represent them.

### **Question E2**

**What are the main factors one should consider in determining whether a service requires regulation?**

The primary factor is market failure. In the context of professional services, the chief source of such failure is inadequate or asymmetric information and more particularly, asymmetric information about product quality. The buyer of a legal service is frequently an occasional buyer who is not in a position to assess the value of what is offered. Where customers are well informed, the availability of providers regulated to different degrees or unregulated expands customer choice. However, where information is inadequate, there is a risk that services that do not incur the cost of regulation may drive out those that do and that this will reduce consumer choice. One solution to this is to find ways of improving information in order to improve the correlation between price and quality. Only where it is not possible to do this should regulation be contemplated. Such regulation should only go so far as is necessary to remove from the market those services which it is clearly not in the interests of the consumer to have available. This will improve the correlation between price and quality and assist consumers in choosing services. Regulation should aim to leave available a range of service quality at a range of prices.

### **Question E3**

**What characteristics of the regulatory framework would facilitate the inclusion of new services within the regulatory net, or the exclusion of a service presently included?**

A flexible framework that allows for the regulation (or the deregulation) of new areas of service provision, without the need to create new bodies and structures, appears desirable. Model A would appear best suited to this, but expansion of the responsibilities of a Model A regulator may bring with it disadvantages of increased complexity and bureaucracy.

### **Question F1**

**Is there potential demand, from users and providers, for Legal Disciplinary Practices (LDPs)?**

As current restrictions prevent those who would provide and buy such services from doing so, the strength of demand cannot be accurately assessed. In order to encourage innovation, restrictions on permitted business structure should be no greater than is absolutely necessary. The removal of current restrictions would allow demand to be tested and allow users of service to decide which structure best corresponds to their needs.

### **Question F2**

**How do you see the advantages and disadvantages of LDPs?**

See paragraph 1.6 and Chapter 3 paragraphs 3.10 to 3.11.

### **Question F3**

**What restrictions, if any, would you wish to see imposed on LDPs in the area of management? What restrictions, if any, would you wish to see imposed on LDPs in the area of ownership (i.e. moving from the top left hand box of the matrix in paragraph 9 to the top right)?**

See Part B paragraphs 3.11 to 3.15.

### **Question F4**

**Is there any reason why the regulatory system should distinguish between practices in the commercial and the not-for-profit sector?**

No

#### **Question F5**

**What body would you expect to regulate LDPs? What, if any, additional safeguards do you believe need to be put in place to protect the consumer?**

The answer to the first question would depend on the choice of regulatory model. The new LSA would clearly be the answer if Model A were chosen. Under Model B a professional body might need to be appointed as the main Regulator (see Chapter 2 paragraph 2.21). Where ownership and management were split, it would be necessary to ensure that this did not interfere with the independence of legal advice. Minimum fitness criteria for ownership seem appropriate. These could be established by the Regulator.

#### **Question F6**

**Is there potential demand from users and providers, for MDPs?**

See answer to question F1 above.

#### **Question F7**

**How do you see the advantages and disadvantages of MDPs? Can the current restrictions (by professional bodies) preventing the development of these practices still be justified?**

See Chapter 3 paragraphs 3.11 to 3.15 and 3.24 to 3.28.

#### **Question F8**

**What restrictions, if any, would you wish to see imposed on MDPs in the area of management? What restrictions, if any, would you wish to see imposed on MDPs in the area of ownership (i.e. moving from the bottom left hand box of the matrix in paragraph 9 to the bottom right)?**

In order to avoid unnecessary delay it might be appropriate to begin provision of MDPs where the firm is controlled by lawyers. Ultimately, decisions on who manages should be a matter of negotiation between a body or bodies representing the legal profession and those representing other professions. It seems appropriate to ensure that ownership of MDPs might be subject to prospective owners satisfying the regulator that they met a minimum 'fitness to own' criteria.

**Question F9**

**What body would you expect to regulate MDPs? Would your answer be different if lawyers were not in a majority? What, if any, additional safeguards do you believe need to be put in place to protect the consumer, and to ensure respect for independence and integrity in the exercise of professional judgment?**

We do not consider that there should be any pre-judged restrictions at this stage. It may be advantageous to begin with lawyer-regulated MDPs. As negotiations with other professions progress these could aim to address issues of how best to guarantee the independence of legal advice where the lawyer/legal team was subject to management or owned by non-lawyers.

**Question F10**

**What are the international implications for the legal professions in England and Wales if legal services were allowed to be delivered through alternative business structures?**

The development of MDPs is likely to flourish where clients perceive that this structure best serves their needs. In an increasingly international market place, a structure that is attractive to domestic clients is likely also to enhance the international competitiveness of professionals regulated in England and Wales.

# ANNEXES

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## A COMPETITION SCRUTINY OF LEGAL PROFESSIONAL RULES BY THE OFT UNDER THE COURTS AND LEGAL SERVICES ACT 1990 (CLSA)

- A.1 Under Part I of Schedule 4 to the CLSA, if the Secretary of State is considering an application from a professional or other body for designation as a body authorised to grant to its members rights of audience or rights to conduct litigation, and for approval of the qualifying regulations and rules of conduct related to such rights, the Office of Fair Trading (OFT) must be sent a copy of the application and must consider whether granting the application would have, or be likely to have, any significant effect on competition. The OFT shall give such advice as it thinks fit to the Secretary of State and shall publish any advice given.
- A.2 Under Part IV of Schedule 4, a similar obligation exists where the Secretary of State is considering recommending revocation of a designation.
- A.3 Under Part II of Schedule 4 to the CLSA, if the Secretary of State considers that it would be appropriate to seek the advice of the OFT with respect to approving alterations made by an authorised body of its qualification regulations or rules of conduct or of its rights of audience or rights to conduct litigation, the OFT is sent a copy of the application and must consider whether granting the application would have, or be likely to have, any significant effect on competition. The OFT shall give such advice as it thinks fit to the Secretary of State and shall publish any advice given.
- A.4 Under Part III of Schedule 4 to the CLSA, if the Secretary of State proposes to alter any of the qualification regulations or rules of conduct of an authorised body because they unduly restrict a right of audience or a right to conduct litigation or the exercise of such a right, the OFT must be sent a copy of the application and must consider whether making the proposed alterations **would have, or be likely to have, any significant effect on competition**. The OFT shall give such advice as it thinks fit to the Secretary of State and shall publish any advice given.

## **B THE OFT'S ROLE IN COMPETITION SCRUTINY IN FINANCIAL SERVICES**

### **Part X, Chapter III, of the Financial Services and Markets Act 2000 ('FSMA'): The FSA regulatory provisions and practices**

- B.1 Under Part X section 160 of the FSMA, the OFT must keep the FSA's regulatory provisions and practices under review (section 160(1)), and report to the Competition Commission if it considers that, individually or collectively, they have a significantly adverse effect on competition (section 160(2)).
- B.2 The OFT's report under section 160(2) must include details of the adverse effect on competition and must also be sent to the Treasury and the FSA (section 160(5)(a)), and must be published.
- B.3 The OFT may also report if it concludes that the FSA regulatory provisions or practices do not have a significantly adverse effect on competition (section 160(3)). In this case, the OFT must send a copy of such a report to the Competition Commission, the Treasury and the FSA (section 160(6)(a)), although is not obliged to publish it (section 160(6)(b)).
- B.4 Section 161 gives the OFT the power to request information for the purpose of investigating any matter with a view to its consideration under section 160.
- B.5 Under section 162, the Competition Commission is required to investigate the matter and make its own report (unless, as a result of a change of circumstances, it considers that no useful purpose would be served by a report) if the OFT has found a significantly adverse effect on competition. Section 162 also allows the OFT to require the Competition Commission to investigate if the OFT has not found any significantly adverse effect on competition and has reported to that effect.
- B.6 The Chapter I and Chapter II prohibitions of the Competition Act 1998 do not apply to agreements, practices and conduct of authorised persons and others subject to the FSA regulatory provisions, to the extent that such agreements, practices and conduct are encouraged by the latter (section 164).

**Part XVIII, Chapter II, of the FSMA: Competition scrutiny of applicant and recognised investment exchanges and clearing houses**

- B.7 Under section 303 of the FSMA, the OFT must issue a report (and send it to the Competition Commission, the FSA and the Treasury) on whether the regulatory provisions of investment exchanges or clearing houses that have applied for recognition have a significantly adverse effect on competition.
- B.8 Section 304 places an obligation on the OFT to keep under review the regulatory provisions and practices of recognised investment exchanges and clearing houses and to report (and provide copies of any such report to the Competition Commission, the Treasury and the FSA – section 304(5)(a)) if it considers that, individually or collectively, they have a significantly adverse effect on competition. The OFT must also publish its report (section 304(5)(b)).
- B.9 Under section 304, if the OFT thinks that one or more of the regulatory provisions and practices of recognised bodies, individually or collectively, do not have a significantly adverse effect on competition, it may make a report to that effect. Should it decide to do so, it must send a copy of it to the Treasury, the Competition Commission and the FSA (section 304(6)(a)) and may publish it (section 304(6)(b)).
- B.10 Section 305 gives the OFT the power to require information for the above purposes.
- B.11 Pursuant to section 306, the Competition Commission must investigate the matter which is the subject of the OFT's report if it has found a significantly adverse effect on competition. Section 306(3) also allows the OFT to ask the Competition Commission to consider a report, even if the OFT has not found any significantly adverse effect on competition.