
Promoting competition in professions: Developments in the UK

A speech to the 2006 Annual Fall Conference on Competition Law

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29 September 2006

Chapter 1 Introduction

1.1 The Office of Fair Trading (OFT) has a UK-wide competition programme² dedicated to the professions³ since 2000. The aim of the programme is to

¹ I am indebted to Grahame Horgan and Maria Rican for their help in the preparation of this paper. I remain responsible for its contents, including any errors or omissions.

² The OFT's Annual Reports for 2000, 2001, 2003-2005 contain brief summaries of some of the work undertaken on the professions in those years. The reports are available on the OFT web-site: <http://www.offt.gov.uk/News/Annual+report/index.htm>

³ The professions are generally defined so as to include the following characteristics: high education; qualification requirements; substantial theoretical foundation; subjective and objective recognition as a profession; a Code of Conduct; and a complaints disciplinary function. Some studies focus primarily or exclusively on the so-called 'liberal professions' (law, medicine, accountancy). Others focus on a wider group of service providers.

The Australian Competition and Consumer Commission has adopted the definition proposed by the Australian Council of Professions which defines a profession as:

'A disciplined group of individuals who adhere to high ethical standards and uphold themselves to, and are accepted by, the public as possessing special knowledge and skills in a widely recognised, organised body of learning derived from education and training at a high level, and who are prepared to exercise this knowledge and these skills in the interest of others. Inherent in this definition is the concept that the responsibility for the welfare, health and safety of the community shall take precedence over other considerations.', Dr John Southwick, Australian Council of Professions view, in *Can the professions survive under a national competition policy? Proceedings of a joint conference on competition law and the professions*, Perth, April 1997.

ensure that competition is not unnecessarily restricted as a result of the behaviour of professional service providers or their regulatory bodies; restrictions for which government is responsible (that might arise from laws, regulations or administrative practices); or market structures. This benefits efficient and innovative service providers, who compete on both a domestic and international level, and ultimately consumers.

- 1.2 With the professions' contribution to UK Gross Value Added (GVA)⁴ amounting to more than 10.18%⁵ in 2003 (where the total service sector made up 74.36% of total GVA in 2003⁶), such a programme can contribute to the significance of the UK services economy so as to allow it to continue to grow⁷ without unnecessary restrictions.
- 1.3 There are of course parallels to be drawn with regulatory reform elsewhere in the services economy. The 'Big Bang' is a dramatic example of how the lifting of restrictions on competition can trigger a major upheaval in a market so as to lead to the modernization and globalisation of that market. The 'Big Bang' refers to the abolition of London Stock Exchange (LSE) rules on fixed minimum commissions which stockbrokers were required to

In the UK, Schedule 1 of the Restrictive Trade Practices Act 1976 (legislation now defunct, as discussed in paragraphs 3.2 and 3.11, see also footnote 22) contained a list of what were considered professional services, the purpose of which was to allow for the exemption of the rules of those professions from the scope of the Act.

⁴ GVA is used in the estimation of Gross Domestic Product (GDP). In the UK, three theoretical approaches are used to estimate GDP: 'production', 'income' and 'expenditure'. When using the production or income approaches, the contribution to the economy of each industry or sector is measured using GVA. Given that we are interested in examining the contribution of various sectors to total output, the contribution to GVA is used in this analysis.

The relationship between GVA and GDP is defined as: $GVA + \text{taxes on products} - \text{subsidies on products} = GDP$.

Source: Office of National statistics:

http://www.statistics.gov.uk/articles/economic_trends/1416.pdf

⁵ Legal services contributed to 1.41% of total GVA; accountancy 1.02%; health and veterinary services 5.41%; estate agents 0.47%; architectural activities and technical consultancy 1.87%. Pharmacists make up 0.64% of total GVA but are excluded from the total as the base used in the calculations is different.

The source for all GVA figures, other than pharmacists: Input output analysis compiled by the Office of National Statistics. <http://www.statistics.gov.uk/>. 'Input Output Analysis 2006 edition'

Source for pharmacists: estimates obtained from the Department for Trade and Industry.

⁶ Source: The Blue Book. Office of National Statistics.

http://www.statistics.gov.uk/downloads/theme_economy/BlueBook2006.pdf

⁷ The above professions' contribution to GVA grew from 9.82% to 10.18% between 2001 and 2003.

charge their clients⁸. Whilst, more often, reform will be evolutionary rather than revolutionary, and this has been the case to date with reform of professions, such reform is nonetheless vital to economic performance, particularly in a global economy.

- 1.4 Recent reports by the Organisation for Economic Co-ordination and Development (OECD) and the European Commission have identified the UK to be among the European countries which has the least restrictions on competition in the professions⁹. Nonetheless, there is little room for complacency.
- 1.5 Against the backdrop of the UK experience, this paper discusses why even though some form of regulation of the professions is necessary, it is important to ensure that the chosen regulatory framework is most likely to allow providers to compete effectively. To ensure that intervention is effective and appropriate, competition agencies must be provided with a range of tools which can allow them to address restrictions for which government or the providers are responsible, or which are the result of a feature, or combination of features, of a market. A discussion of the OFT's range of regulatory tools and how they have been applied in the professions is given in this paper.
- 1.6 Chapter 2 considers the need for regulatory intervention in the professions and outlines a range of options for such intervention. Chapter 3 provides an overview of competition reform in the professions leading up to the OFT's current programme. Chapter 4 looks at the range of ways in which the UK's new competition regime allows OFT to intervene to address unnecessary restrictions and chapter 5 summarises the key developments in OFT's current reform programme since 2000. Chapter 6 looks at some international perspectives of regulation in the professions. Chapter 7 sets out further priorities of the OFT's programme of review on competition in the professions and in chapter 8 some key themes are drawn out by way of conclusion.

Chapter 2 Regulatory issues in the professions

The need for regulatory intervention in the professions

⁸ The catalyst for these changes was a case brought by the OFT in the Restrictive Practices Court. The OFT was concerned that the maintenance of fixed minimum commissions were preventing competition and thus pushing up the costs of share-buying investors and were perpetuating the division between broker and jobber (the so-called *single-capacity* system). These changes triggered series of initiatives to modernize and globalise the London securities market.

⁹ See chapter 6 below.

- 2.1 The usual starting point from an economic perspective in a free market economy is that an unregulated market provides the best solutions for consumers and for the economy. Vigorous and free competition between suppliers encourages them to provide the best service to consumers. However, there are exceptions and regulation may be necessary to help avoid market failures that would otherwise occur in an unregulated market. There are essentially three reasons why some form of regulation of professional services may be necessary.
- 2.2 The first is based on the concept of 'asymmetry of information' between professionals and their clients concerning the characteristics or quality of the service provided by the profession concerned. Professional services are best characterised as 'credence' services. The quality of 'credence' services usually only becomes apparent some time after purchase, if ever. There are two reasons for this. First, a degree of technical complexity and/or a significant degree of judgement is required in order to assess the quality of professional services, which may be beyond the consumer's experience. Secondly, there is often an ambiguous relationship between the quality of the service provided and the outcome achieved¹⁰. Thus the client will typically find it difficult to identify an appropriate provider and will not feel confident about the quality of the service he obtains.
- 2.3 In order to ensure that clients of professions receive services of adequate quality and that professionals do not induce unnecessary or inappropriate demand for the service, some form of regulation is necessary. Of course not all consumers are ill-informed and experienced consumers may therefore not require the same level of protection as one-off purchasers.
- 2.4 The second argument is based on the concept of externalities, whereby the provision of a professional service may impact not only on the client but also on third parties not directly involved in the subject matter of the transaction between the professional and the client¹¹. In order to ensure that professionals and their clients take proper account of these external effects some form of regulation is necessary.
- 2.5 Finally, regulation of professions is necessary in order to ensure that providers do not abuse their market power or engage in anti-competitive practices as such practices would result in some combination of high prices, lower quality advice or service and lack of choice in terms of services on offer.

¹⁰ For example, a lawyer may lose a case despite their best efforts, or may win as a result of external circumstances.

¹¹ For example, a poorly constructed building may jeopardise public safety.

A range of regulatory options with regard to the professions¹²

- 2.6 Regulation of the professions can take many forms. Traditionally there has been a strong focus on *ex ante* self-regulation, whereby the profession itself sets prescriptive rules as to who can act in the market, what activities they can engage in and how they can carry out these activities. *Ex ante* regulation can solve some information-related market problems inherent in the professional services sector, as it is primarily designed to alleviate the risk of parties offering services they are not competent to carry out, and to improve the incentives that members might otherwise have to offer poor quality services or to induce unnecessary demand.
- 2.7 However, *ex ante* regulation can also damage competition¹³ and in particular the development of new forms of competition¹⁴ if such regulation is more stringent than necessary. Where responsibility for *ex ante* regulation lies with the professions, whose interests can diverge from those of consumers, there is an inherent risk that the professions will disguise an opportunity to create monopoly rents for their members¹⁵ by setting disproportionately stringent *ex ante* rules whilst claiming that such rules are in the public interest in terms of protecting consumers. Adam Smith's famous quotation encapsulates this idea¹⁶.
- 2.8 There may therefore be a case for changing the regulatory balance for the professions, putting less emphasis on *ex ante* regulation and in particular on *ex ante* self-regulation and greater emphasis on *ex post* regulation and on external regulation.

¹² For a fuller account of the issues expressed in the remainder of this section see: Fletcher, A. 2006. 'The liberal professions: getting the regulatory balance right' in: Ehlermann, C. per cent Atanasiu, I. (eds). *European Competition Law Annual 2004: the relationship between competition law and the (Liberal) professions*, pp51-72, Oxford: Hart.

¹³ For a discussion of how demarcation restrictions in the private dentistry sector in the UK restricted competition, see paragraph 4.22.

¹⁴ For a discussion of how restrictions on corporate form in the private dentistry sector in the UK restricted competition, see paragraph 4.22.

¹⁵ Such as the Bar Council of England and Wales' rule that barristers at the independent bar cannot conduct litigation, despite the fact that they have undergone sufficient training to do so.

¹⁶ 'People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices...Though the law cannot hinder people of the same trade from sometimes meeting together, it ought to do nothing to facilitate such assemblies, much less to render them necessary'. Smith, A. 1776. *An inquiry into the nature and causes of the wealth of nations*, London: Methuen and Co., Ltd

- 2.9 With *ex post* regulation professionals are sanctioned for breaching professional rules or service commitments. *Ex post* regulation involves the proactive monitoring of quality, the handling of complaints, the punishment of miscreants and ensuring that consumers obtain redress for inadequate service.
- 2.10 As with *ex ante* regulation, there is a risk that where *ex post* regulation is dealt with by the profession itself this can lead to increased service commitments or to higher or different levels of service than consumers may require or need, in order to restrict output and increase professional income and profits. There may also be an issue about consumers' confidence in complaints being dealt with by the profession in an impartial manner. There can thus be a case for further complementing such regulation with an enhanced role for external regulation to ensure that a professional self-regulatory organisation's (SRO) objectives are better aligned with those of consumers. An increased role for external regulation can take a variety of forms.
- 2.11 One useful approach may be to use the threat of external regulation to condition the behaviour of a self-regulatory body.
- 2.12 A second approach might be for an external regulator or legislator to stipulate rules relating to how a self-regulatory body must function, but without itself becoming involved in the determination of rules on entry and conduct¹⁷.
- 2.13 A third approach may be for external legislation actually to stipulate the rules of conduct that members of an SRO must follow, even though the SRO then takes the primary role in ensuring compliance with these rules. This approach may also require that an external body has parallel powers to the SRO in order to ensure that the SRO is encouraged to carry out its own functions effectively.
- 2.14 A final approach to enhancing the role of external regulation may be for external regulation and self-regulation to work alongside each other, but with slightly different emphases, such that there is a degree of competition between them. This can be effective where different consumers with different needs may value the resulting choice between the minimum standards provided by non-SRO members and the higher quality SRO members. Competition between the regulatory forms may also limit the incentives of an SRO to behave anti-competitively. In both the third and

¹⁷ For example, external legislation could play a role in regulating the composition of self-regulatory boards to include both members of the profession who can provide expertise about the profession and independent members who can provide an external view.

fourth approaches, there may be a role for a competition agency in scrutinising and approving the rules of the SRO¹⁸.

- 2.15 An increased role of regulation by an external and independent body has the potential to improve the effectiveness of *ex ante* and *ex post* self-regulation whilst reducing the need for overly restrictive *ex ante* rules. However, this must be balanced with the benefits that self-regulation has to offer, such as an understanding of the market, potential flexibility, lower costs and efficiency, and the absence of political interference.

¹⁸ In the UK, such scrutiny currently exists under the Financial Services and Markets Act 2000 (see footnote 38); the Companies Act 1989; the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990; the Courts and Legal Services Act 1990 and the Access to Justice Act 1999 (see paragraph 4.8).

Non-regulatory corrective mechanisms

- 2.16 Common non-regulatory mechanisms found in other kinds of markets can also serve to correct the market failures typical to professional services, as described above. Such corrective measures include reputation¹⁹, contractual guarantees of performance quality, third-party accreditation (such as in the form of an approved code of conduct) or quality rating, and the threat of litigation by consumers.
- 2.17 It must be noted, however, that such mechanisms are imperfect and may not be appropriate for professional services sectors where purchases are rare, competition is weak, assigning responsibility for outcomes is difficult and any negative consequences are irreversible.
- 2.18 Nevertheless, in order to achieve the broadest possible effect in the marketplace, effective non-regulatory solutions that do not impede legitimate business activity should be encouraged. The OFT's use of non-regulatory measures in a broad range of service sectors, including some of the professions (in the broadest sense of that term), is discussed in chapter 4.

The need for effective tools to address restrictions on competition that have their origin in governmental measures

- 2.19 In most jurisdictions, the professions are not only regulated by their respective SROs but also by government. Restrictions on competition arising from laws, regulations or administrative practice may thus also exist: for example the reservation of certain activities, such as representation in court and the transfer of real property, to recognised professions. It is therefore important that competition agencies are not only equipped with effective enforcement powers to act against anti-competitive rules or practices of the professionals or their SROs but can also intervene in an appropriate way in relation to restrictions that have their origin in governmental measures.
- 2.20 The role of advocacy (for example through representation on steering groups, studying the market and producing reports identifying the effects of restrictions and the benefits of more competition, and informing and educating the public) to address existing restrictions for which government

¹⁹ In some cases, a sufficient proportion of well-informed (and demanding) consumers can ensure that quality is maintained for all potential clients. Consumer reports providing information on the quality of services of particular providers is one route through which consumers can become well informed. However, this mechanism faces two problems: firstly, the providers can vary quality over time and the difficulty of measuring the quality of advice, which itself can involve a high degree of professional judgement.

is responsible and the role of competition scrutiny mechanisms to assess the impact on competition of either existing or new regulations are all relevant in this regard. The OFT's experience in using advocacy to address restrictions that have their origin in governmental measures and the type of competition scrutiny mechanisms available to the OFT are further discussed in chapters 4 and 7.

- 2.21 To summarise, given the range of regulatory issues and sources of regulatory restrictions in the professions, in order to intervene effectively, competition agencies require a wide range of instruments and tools and the ability and capacity to apply these flexibly.

Chapter 3 The legacy of the old UK competition regime and early reform initiatives

- 3.1 OFT's current programme of reform builds upon work previously done by competition agencies and government to liberalise professional services. However, progress made under the old regime was piecemeal and was restricted to lifting the more obvious restrictions on competition. Responsibility for initiatives and actions regarding competition in professional services rested primarily with government.
- 3.2 Under the old UK competition regime, only government could refer a market to the Monopolies and Mergers Commission (MMC) (now the Competition Commission). Further, even where the conclusion of a monopoly investigation,²⁰ or merger²¹ investigation was that a particular type of intervention was necessary, the implementation of such conclusions rested with government and there was no requirement to follow them. In addition, under the old regime, specified professions²²

²⁰ Under the now-repealed monopoly provisions of the Fair Trading Act 1973, where the OFT or a Minister referred 'monopoly situations' to the Monopolies and Mergers Commission, it could only make recommendations to government on the outcome of the monopoly investigation.

²¹ Although merger scrutiny is not directly relevant to a programme of promotion of competition in professions, the focus of which is principally on unnecessarily restrictive rules and regulations rather than on conduct, we have included in this section key features of reforms to UK arrangements for merger scrutiny as these are an important aspect of the overall change to the UK competition regime. In respect of mergers, the OFT could only advise the Secretary of State whether mergers should be referred to the Competition Commission/MMC. The Competition Commission/MMC could report whether a merger may be expected to operate against the 'public interest'. If it concluded that it would, government could exercise the power to prohibit the merger, but was not under a duty to do so.

²² This included the following professional services:

1) The services of barristers, advocates or solicitors;

could apply to the Secretary of State for Trade and Industry to have their rules 'designated' and thus exempted from the application of the restrictive trade practices legislation in UK competition law. To the extent that an agreement constituted a designated professional rule, imposed obligations arising from such a rule, or constituted an agreement to act in accordance with such rules, the restrictive trade practices legislation would not apply to the agreement.

- 3.3 The old regime has now been replaced with a more comprehensive and modern competition regime, which is described in chapter 4.
- 3.4 Some of the work undertaken under the old competition regime to liberalise professional services is described in the following sections.

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- 2) The provision of medical or surgical advice or attendance and the performance of surgical operations;
 - 3) Any services falling within the practice of dentistry within the meaning of the Dentists Act 1984;
 - 4) The testing of sight;
 - 5) Any services which constitute veterinary surgery within the meaning of the Veterinary Surgeons Act 1966;
 - 6) The services of nurses, midwives, physiotherapists and chiropractors;
 - 7) The services of architects;
 - 8) The making or preparation of accounts or accounting records and the examination, verification and auditing of financial statements;
 - 9) Insolvency services within the meaning of section 428 of the Insolvency Act 1986;
 - 10) The services of registered patent agents (within the meaning of Part V of the Copyright, Designs and Patents Act 1988);
 - 11) The services of persons carrying on for gain in the United Kingdom the business of acting as agents or other representatives for or obtaining European patents or for the purpose of conducting proceedings in relation to applications for or otherwise in connection with such patents before the European Patent Office or the comptroller and whose names appear on the European list (within the meaning of Part V of the Copyright, Designs and Patents Act 1988);
 - 12) The services of parliamentary agents entered in the register in either House of Parliament as agents entitled to practise both in promoting and in opposing Bills;
 - 13) The services of surveyors of land, of quantity surveyors, of surveyors of buildings or other structures and of surveyors of ships.
 - 14) The services of persons practising or employed as consultants in the field of-
 - (a) civil engineering;
 - (b) mechanical, aeronautical, marine, electrical or electronic engineering;
 - (c) mining, quarrying, soil analysis or other forms of mineralogy or geology;
 - (d) agronomy, forestry, livestock rearing or ecology;
 - (e) metallurgy, chemistry, biochemistry or physics; or
 - (f) any other form of engineering or technology analogous to those mentioned in sub-paragraphs (a) to (e).
 - 15) The provision of education or training;
 - 16) The services of ministers of religion.

The MMC report into restrictions in the professions, 1970²³

- 3.5 One of the first significant projects was a government-initiated study on the effects of certain restrictions in the professions on consumers, markets and the competitive process conducted by the MMC in 1970.
- 3.6 The MMC's initial conclusion was that in many cases there were methods less restrictive of competition that could address underlying market failures in professional services.
- 3.7 The MMC found that competition from new entrants was significantly restricted in the professions insofar as standards of qualification either prevented or effectively hampered unqualified persons from practice. The MMC considered that whilst recognisable qualifications were in the public interest, consumers should also be able to choose unqualified practitioners except in cases where there were high costs from poor service or significant externalities.
- 3.8 The MMC further found that some methods of competition were barred to practitioners. For example, mandatory regulation of prices and recommended fee scales existed and were generally applied; certain business structures were prohibited; and restrictions on practice in another profession or in partnership with another profession existed (including the multi-disciplinary partnership issue). The MMC highlighted that such conduct restrictions can result in higher prices, less efficient use of resources, discouragement of new developments and a tendency towards rigidity in the structure and trading methods of professional service providers. It further considered that the presence of *ex ante* quality control in the form of entry restrictions weakened the case for such conduct restrictions.
- 3.9 The MMC's subsequent analysis of restrictions in the context of various individual professions in which they operated²⁴ highlighted in further detail

²³ *A report on the general effect on the public interest of certain restrictive practices so far as they prevail in relation to the supply of professional services, Monopolies and Mergers Commission, 1970*

²⁴ (1) Advertising restrictions on advocates (Scotland).
(2) Advocates: Senior Counsel and Juniors (Scotland).
(3) Advertising restrictions on solicitors (Scotland).
(4) Advertising restrictions on solicitors (England and Wales).
(5) Advertising restrictions on barristers (England and Wales).
(6) Barristers: Queen's Counsel and Juniors (England and Wales).
(7) Advertising restrictions on accountants (England and Wales).
(8) Restrictions on fees charged by architects;
(9) Advertising restrictions on veterinary surgeons;
(10) Advertising restrictions on surveyors;
(11) Advertising restrictions on stockbrokers.

why existing restrictions operated against the public interest (the exceptions were advertising restrictions on barristers and advocates). In a number of instances this led to the relaxation or the lifting of restrictions.

- 3.10 For example, the 1994 MMC report on the supply of *Private Medical Services* (PMS) by consultants working in the state-run National Health Service (NHS) found that the British Medical Association's (BMA) fee guidance for consultants' private work acted against the public interest. The MMC considered that the publication of fee guidelines led to consultants' fees being higher than they would otherwise have been and represented an attempt on behalf of consultants to organise the PMS market. The BMA subsequently withdrew guidance relating to private or specialist consultancy fees.
- 3.11 Most importantly, the MMC's subsequent analyses demonstrated that given information asymmetries and potentially diverging interest between service providers and consumers, there were dangers inherent in self-regulation by the profession. Highlighting this point was important since, as explained above, the restrictive trade practices legislation in UK competition law did not apply to the professions.
- 3.12 The initiatives described above therefore highlighted the need to fully apply competition rules to the professional services sector, in order to address both existing and future restrictions, and to ensure that restrictions only existed where they were necessary to protect the public interest.

Statutory reforms

- 3.13 In the 1980s and 1990s, further significant steps were taken by government to liberalise certain of the professions, principally legal services.
- 3.14 Legislative changes brought an end to solicitors' monopoly on the provision of conveyancing services²⁵ and permitted authorised practitioners to undertake certain conveyancing functions in relation to land transactions²⁶.
- 3.15 Further legislative changes brought an end to barristers' monopoly over advocacy in higher courts and solicitors' monopoly over litigation by allowing both existing and new professional bodies (such as the Institute of Legal Executives and the Chartered Institute of Patent Attorneys) to

²⁵ The Administration of Justice Act 1985

²⁶ The Courts and Legal Services Act 1990

apply for such rights²⁷. As a result of further extended rights of audience²⁸ all barristers and solicitors currently have full rights of audience subject to the qualification requirements of their respective professional bodies.

Chapter 4 The new UK competition regime

- 4.1 While many of the more obvious restrictions on competition in the professions were successfully addressed under the old regime, much remained to be done. Enhanced enforcement powers and a wider range of regulatory tools have more recently allowed the OFT to pursue reforms and to address existing or potential restrictions on competition for which the professions or government are responsible.
- 4.2 The new competition regime significantly differs from the old regime in three aspects. First, the regime has increased the independence from government of arrangements for competition scrutiny. The OFT is an independent competition agency with powers of investigation and enforcement. The regime also provides the Competition Commission, rather than government, enforcement powers in relation to mergers and market investigations. Secondly, the regime provides the competition agencies with a broader range of tools for both enforcement and advocacy. Thirdly, the regime applies fully to the professions.
- 4.3 The new competition regime is described more fully below.

The OFT's enforcement powers

- 4.4 The most significant enforcement powers available to the OFT are those contained in the Competition Act 1998 (CA98). In principle, the provisions of the CA98 are fully applicable to the professions²⁹. Chapter I of the CA98 prohibits agreements between undertakings, decisions by an association of undertakings and concerted practices which have the object or effect of preventing, restricting or distorting competition within the UK and which may affect trade within the UK. Chapter II of the CA98

²⁷ The Courts and Legal Services Act 1990

²⁸ The Access to Justice Act 1999

²⁹ When the CA98 first came into force it carried an exclusion regime for the rules of professional bodies similar to that in the Restrictive Trade Practices Act 1976 discussed in paragraph 3.2.

Even though no rules had ever been designated under the exclusion regime of the CA98, the OFT strongly advocated for the removal of this exemption regime as it potentially constituted a significant limitation on the application of competition legislation to the professions. Despite strong lobbying by the professions, government repealed the exclusion regime (see further chapter 5)

provides that any conduct by one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the UK.

- 4.5 The CA98 provisions are modelled on European Community competition law in Articles 81 and 82 of the EC Treaty. Since May 2004, the OFT also applies Articles 81 and 82 EC where it applies the CA98 to an anti-competitive agreement or practice which may also affect trade between Member States of the European Union.
- 4.6 In addition to the civil provisions described above, the professions are also subject to the criminal cartel provisions of UK competition law which applies to individuals responsible for hard-core cartels³⁰ and to the merger provisions.
- 4.7 The OFT has used its enforcement powers under the CA98 in order to address³¹, inter alia, restrictions in fee setting³², restrictions in advertising³³ and anti-competitive membership rules³⁴. For example in 2000, the OFT reviewed general British Medical Association's fee guidance to medical practitioners and after discussions amendments were made to that guidance. However, concerns remained that a single nationally agreed

³⁰ Section 188 of the Enterprise Act 2002 provides that an individual is guilty of an offence if he or she dishonestly agrees with one or more other persons that undertakings will engage in one or more of the prohibited cartel activities (price-fixing; limitation of supply or production; market-sharing, and bid-rigging). The commission of a criminal cartel offence can lead to imprisonment for up to five years and/or an unlimited fine.

³¹ The OFT's experience has been that the professions, when confronted with well articulated arguments, have often responded to the plausible threat of enforcement by amending their rules as requested. After lengthy negotiations in the course of which unsubstantiated arguments relating to the public interest are typically put forward, SROs generally conclude that it is in their interest to amend their regulations voluntarily. This has avoided the need for full investigation and formal decision.

³² For example, the Notaries Society repealed its recommended fee guidelines to its members, see: <http://www.offt.gov.uk/nr/rdonlyres/f31b45e9-5af8-4fc8-a246d006a93aef6c/0/may2004.pdf>

³³ For example, the Law Society of Northern Ireland revoked its rules which prohibited fee advertising and comparative fee advertising. In addition, the restrictions on soliciting have been relaxed, subject to safeguards see: <http://www.offt.gov.uk/NR/rdonlyres/BFCEF722-53A2-4B6C-A25C-7F6E367EBEDD/0/Dec2005.pdf>

³⁴ For example, in the Glasgow Solicitors' Property Centre (GSPC) case in 2003, the OFT intervened to prevent GSPC from operating membership criteria that were not objective and transparent in circumstances where there was a strong suspicion that vague criteria were being employed by GSPC to exclude a potential member who might compete 'too vigorously', see: <http://www.offt.gov.uk/news/press+releases/2003/pn154-03.htm>

fee for locum charges could have detrimental effects on fee competition. The BMA withdrew its guidance given the concerns outlined by the OFT. (The BMA have recently introduced new arrangements which assist locums to calculate their fees independently.)

The OFT's advisory powers

- 4.8 The OFT also has specific advisory functions in relation to certain professional services similar to its competition scrutiny role in relation to financial services³⁵. Government can request the OFT to assess whether proposed amendments to auditors' rules³⁶ and rules relating to rights of audience and rights to conduct litigation³⁷, over which Ministers have powers of veto, are likely to have a significant effect on competition. This has allowed the OFT to highlight the potential negative impact on competition of certain rule changes (and the need to lift or relax already existing professional restrictions, although this is not strictly within the scope of its advisory powers)³⁸.
- 4.9 The OFT also has general capacity to advise on the impact on competition of any form of proposed regulation (formal legislation, codes of practice, information campaigns etc).
- 4.10 In 2002 the UK introduced a competition assessment element to the mandatory Regulatory Impact Assessment (RIA) of proposed UK-wide regulation³⁹. The competition assessment requires policy-makers to answer a series of questions that will determine the likely impact of proposed regulation on a market so as to identify and assess potential competition concerns or benefits.

³⁵ Under the Financial Services and Markets Act 2000 OFT must issue a report as to whether any regulatory provision or combination of regulatory provisions of a clearing house or an investment exchange applying for 'recognition' status from the Financial Services Authority has a significantly adverse effect on competition. In addition, the OFT must keep under review the regulatory provisions and practices of recognised bodies and the regulating provisions and practices of the Financial Services Authority. These provisions replaced the similar provisions for scrutiny that had been provided under the Financial Services Act 1986 (FSA 1986). The FSA 1986 was the first UK legislation to place a duty on the OFT to scrutinise rules of an SRO.

³⁶ The Companies Act 1989.

³⁷ The Courts and Legal Services Act 1990, in relation to England and Wales, and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, in relation to Scotland.

³⁸ Previous OFT advice under the Courts and Legal Services Act 1990 can be found on the OFT web-site <http://www.offt.gov.uk/News/Publications/Leaflet+Ordering.htm>

³⁹ Similar RIA schemes are also in place in the devolved administrations of Scotland and Wales. However, these RIA schemes are non-mandatory.

- 4.11 Policy-makers can also obtain advice from the OFT as part of the competition assessment which allows the OFT to make informal recommendations on how to lessen any potential anti-competitive effects. Where the OFT has significant concerns, it can alert the government department which oversees the RIA process, which in turn can exercise the power to refuse RIA clearance to the proposed regulation.
- 4.12 The OFT recently advised on a competition assessment in relation to the Legal Services Reform Bill (for a discussion of the Bill see paragraphs 4.14-4.15 and 5.10- 5.14). The OFT welcomed the pro-competitive benefits likely arise from the proposed new licensing structure that would facilitate alternative business structures for the provision of legal services.
- 4.13 The OFT is working closely with the government department in charge of RIA's to improve the process and in particular to ensure that competition issues are picked up sufficiently early in the RIA process.

New forms of statutory scrutiny: The Legal Services Reform Bill and the Compensation Bill

- 4.14 A further type of statutory competition scrutiny is contained in recently proposed legislation – the Legal Services Reform Bill and the Compensation Bill, both of which are currently before Parliament.
- 4.15 The Legal Services Reform Bill, if adopted in its current form, will have the effect of substantially removing responsibility for professional rules governing the legal profession from the SROs, set up following the previous review of legal services outlined in chapter 3 above, and transferring them to a government oversight regulator (the Legal Services Board). It will thus remove the scope for applying the competition enforcement legislation against such rules. Alternative competition scrutiny arrangements in the Bill therefore provide the OFT with the discretion to report on competition matters. If the OFT is not satisfied with the response of the Legal Services Board, it may refer the matter to the Secretary of State who must then take the OFT's advice to the Competition Commission. The Secretary of State may ultimately direct the Legal Services Board to take such action as is appropriate to meet the OFT's concerns.
- 4.16 The Compensation Bill aims to tackle poor practice in the claims management sector and to provide safeguards for the public against rogue companies providing claims management services. Claims management services are defined broadly in the Bill to include advice or other services in relation to the making of a claim for compensation, restitution, repayment or other remedy or relief in respect of loss or damage or in respect of an obligation (whether pursued through the civil courts, tribunals (e.g. in employment cases) or compensation schemes (e.g. for criminal injuries)).

The Bill provides for the precise areas and activities to be regulated to be defined and subsequently amended, as necessary, by statutory order. When making such an order, the Bill provides that the Secretary of State must seek advice from the OFT.

- 4.17 Both regimes therefore provide an avenue for the OFT, as the competition agency, to raise competition concerns, and require government to take account of competition issues and to balance such issues against a range of other public interest considerations.

Market studies and market references⁴⁰

- 4.18 In certain instances, a more general review of a profession may be necessary to determine whether a market for professional services is working well for consumers and, if not, what measures need to be taken to ensure that competition is not unnecessarily restricted.
- 4.19 Under the changes to the OFT's remit introduced by the new competition regime, the OFT can undertake studies that reflect this broader perspective. It has the power to investigate markets that do not appear to be meeting the needs of consumers. The outcome of such market study can be recommendations to government or sector regulators to address such market problems⁴¹; the commencement of investigation and enforcement action against companies suspected of breaching consumer law or competition law; or a market reference to the Competition Commission.
- 4.20 The OFT can make a reference to the Competition Commission for investigation where there are reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK for goods or services prevents, restricts or distorts competition in the UK or part of it.
- 4.21 The Competition Commission can conduct more in-depth assessments of a market and is responsible for deciding on the competition questions that have been referred to it by the OFT, by a sector regulator or by a Minister. The views of the body making the market reference will provide the natural starting point for the Commission's own investigation. However, it may, when deciding whether there is an adverse effect on competition, base its decisions on different features from those identified by the

⁴⁰ For further information on market studies, please refer to the OFT's guidance *Market studies*, available on the OFT web-site <http://www.offt.gov.uk/NR/rdonlyres/03AD31EC-3533-40BE-AE79-2A83424E9C9B/0/OFT519.pdf>

⁴¹ For example, the OFT can make recommendations that: information be published to help consumers; firms be encouraged to take voluntary action; consumer codes of practice be introduced; or the government or sector regulators amend legislation or practice rules.

referring body and will reach its own conclusions on the effects of any features of the market subject to investigation. Finally, it is entirely for the Commission to decide how any adverse effects on competition or detrimental effects on customers should be remedied.⁴²

- 4.22 In its 2003 study of private dentistry in the UK (although not directly relevant to the regulation of the profession itself but to the licensing of the provision of that service)⁴³ the OFT found that, while it was appropriate to have some demarcation restrictions between dentists and other professions complementary to dentistry (PCDs)⁴⁴, it was inappropriate that PCDs should be prevented from selling their services directly to the consumer. The OFT also challenged restrictions on corporate form that limited any dentistry business to engage only in dentistry (or ancillary business) and to have a majority of directors that were registered dentists. These restrictions were viewed as limiting the range and type of businesses which can enter the market, to the detriment of consumers. The OFT recommended amendments to legislation so as to allow selected registered PCDs to carry out the business of dentistry and to lift the restrictions on the formation of corporate bodies in dentistry. The OFT further made recommendations to address information-related market problems and to improve the monitoring and enforcement of standards.
- 4.23 An OFT study into the control of entry regulations in the community pharmacy sector⁴⁵ showed that entry control into the industry was unduly impeding the way that the market worked to the ultimate detriment of the public. The OFT recommended that the control of entry regulations created by government should be lifted as they inhibited price competition, stifled efficiency improvements and innovation, limited the availability of pharmacy services, and imposed substantial regulatory burdens.

⁴² For further information on market references, please refer to the OFT's guidance *Market references*, available on the OFT web-site <http://www.offt.gov.uk/NR/rdonlyres/03AD31EC-3533-40BE-AE79-2A83424E9C9B/0/OFT519.pdf> and the web-site of the Competition Commission: <http://www.competition-commission.org.uk>

⁴³ See <http://www.offt.gov.uk/Business/Market+studies/dentistry.htm>

⁴⁴ These comprise dental hygienists, dental therapists and dental technicians.

⁴⁵ OFT guidance *The Control of entry regulations and retail pharmacy services in the UK, a report of an OFT market investigation*, January 2003. The report is available on the OFT website: <http://www.offt.gov.uk/NR/rdonlyres/BABF839A-3088-4EBB-B3A9-00D955719EE0/0/oft609.pdf>

Super-complaints

- 4.24 Another innovation in the new UK competition regime are 'super-complaints' under which designated consumer organisations can require the OFT to take a wider look at markets. A fast-track complaints procedure requires the OFT to respond to such complaints which suggest that there are market structures or practices that are working against the interests of consumers. After a 90 day period OFT must make known its findings and state what action, if any, it proposes to take.
- 4.25 Whilst super-complaints are a relatively new tool and have not yet been used in the context of the professions, they provide the OFT with an additional avenue for investigating markets and to address any competition concerns identified with the range of powers available at its disposal.

Consumer protection legislation

- 4.26 Finally, in certain cases it may be more appropriate for the OFT to use consumer protection legislation in order to address information-related market failures that are typical in the professions, rather than to use its powers under competition legislation.
- 4.27 The OFT has consumer protection legislation powers to approve and promote consumer codes of practice which meet its criteria under the OFT's Consumer Codes Approval Scheme. This scheme is designed to help consumers to identify businesses that have standards of customer service above the basic requirements of the law and is another innovation of the new regime.
- 4.28 The OFT has had initial discussions with trade associations in the will writing sector regarding a possible application under the scheme. Potential parallels with other services outside the professions demonstrate how an OFT-approved code can boost consumer confidence and can provide a more appropriate alternative to direct regulation by government. For example, the OFT- approved code of practice for estate agents run by the Ombudsman for Estate Agents Company Ltd enables clients to access free dispute resolution via the Ombudsman for Estate Agents scheme; provides for best practice when giving property valuations; and surveys consumers to test consumer satisfaction and code compliance levels.
- 4.29 In order to strengthen arrangements for consumer redress where service by estate agents is inadequate, recent legislative proposals would also enable government to require all estate agents to belong to a redress scheme, approved by government, and for the investigation and determination by an independent person (the Ombudsman) of relevant consumer complaints.

Chapter 5- OFT Review of competition in professions

5.1 The tools now available to the OFT under the UK's new competition regime are being used to underpin its current programme dedicated to reviewing competition in professional services in the UK. This agenda was triggered by an OFT report entitled *Competition in professions*⁴⁶, published in March 2001 which identified restrictions on competition in three professions: law, accountancy and architecture in England and Wales. Following the publication of the report, a broader review commenced. The review's strategy and its impact on professional services is explained more fully below.

Competition in professions report

- 5.2 The basis of the *Competition in professions* report was a consultation exercise which allowed 93 professional bodies across a whole sector to identify possible restrictions on competition⁴⁷.
- 5.3 The scope of the report was not limited to the identification of restrictions that had their origin in professional rules but also identified restrictions that arose from law or other sources. The report challenged those responsible for the restrictions identified and raised the presumption that restrictions should be promptly removed unless they could be justified as benefiting consumers.
- 5.4 The majority of restrictions on competition were found to originate in professional rules and were thus for the SROs to either remove or justify. Professional bodies were given 12 months to do this. The OFT emphasised that if appropriate action was not taken by the professions to remove rules which appeared to infringe UK competition law, it would use its competition enforcement powers.
- 5.5 Some restrictions, for example, those that had their origin in statute, were for government to address. For example, the report called on government to remove the exclusion of professional rules from the Chapter I prohibition which existed at the time⁴⁸.

⁴⁶ *Competition in professions*, A report by the Director General of Fair Trading, March 2001, available on the OFT web-site:

http://www.offt.gov.uk/NR/rdonlyres/B08439C8-C5F6-4946-8AFF-71C050D34F46/0/oft328.pdf?bcsci_scan_A2018E0826464712=0_per_centbcsci_scan_filename=oft328.pdf

⁴⁷ Professions where the provisions were predominantly in the public sector, for example in the medical and teaching professions, were excluded.

⁴⁸ See footnote 29.

Competition in professions - Progress statement⁴⁹

- 5.6 In April 2002 the OFT published a progress statement reviewing progress made by the professions and by government in addressing restrictions identified in the 2001 report.
- 5.7 Many of the conduct restrictions (restrictions on comparative advertising; cold-calling restrictions; restrictions on payment of referral fees; restrictions on direct access to the professional) were addressed by the relevant SROs. In other cases, the OFT found the professions' arguments to justify restrictions on competition sufficiently persuasive. The lessons of the 2001 report were also used to inform work across the whole range of professions and throughout the UK. This was particularly effective where lessons learned by SROs based in England and Wales were taken on board by their sister organisations in Scotland and Northern Ireland.
- 5.8 The report therefore allowed the OFT to achieve considerable liberalisation in the professions without incurring the costs involved in running a significant number of enforcement cases.
- 5.9 However, some of the more significant restrictions, in particular those on business structure within the legal profession, remained. These restrictions were the result of both statutory restrictions and restrictions contained in professional rules. While the report did not immediately result in the lifting of these restrictions, it was a key driver in the decision by government in 2004 to launch an independent review towards reform of the regulation of legal services.

Review of the Regulatory Framework for Legal Services in England and Wales⁵⁰

- 5.10 The review, led by Sir David Clementi, considered what regulatory framework would best promote competition, innovation and the public and consumer interest in legal services. In addition, the review explored which type of regulatory framework would be independent in representing the public and consumer interest and would be no more restrictive or burdensome than is clearly justified.
- 5.11 The main recommendations of the review, which are set out below, were broadly accepted by government and are contained in government's

⁴⁹ *Competition in professions*- Progress statement, April 2002, available on the OFT web-site:

<http://www.offt.gov.uk/NR/rdonlyres/23B43E4F-2D9C-485C-9F7C-4FF8CAB80FAF/0/oft385.pdf>

⁵⁰ The published *Report of the Review of the Regulatory Framework for Legal Services in England and Wales*, December 2004, can be found on: <http://www.legal-services-review.org.uk/>

legislative proposals, the Legal Services Reform Bill, to reform the way legal services are regulated and delivered. At the time of writing the Bill has completed the pre-legislative scrutiny stage and it should be introduced to Parliament in the next session.

- 5.12 As described in paragraph 4.15 above, the Legal Services Reform Bill provides for a Legal Services Board (LSB) to act as the single external oversight regulator in legal services to provide consistent oversight regulation of professional bodies such as the Law Society and the Bar Council⁵¹, which would retain day-to-day regulatory functions. The Bill also provides for effective competition scrutiny by the OFT of key regulatory decisions. These proposals are designed to improve *ex ante* regulation.
- 5.13 Further, the Bill includes proposals to improve consumer complaints handling, by setting up a single independent body (Office for Legal Complaints) to handle complaints in respect of all members of front-line bodies, subject to oversight by the Legal Services Board. Professional bodies would also be required to make governance arrangements to separate their regulatory and representative functions. These proposals are designed to improve *ex post* regulation.
- 5.14 Finally, the Bill proposes to lift restrictions on alternative business structures that could enable different types of lawyers and non-lawyers managing and owning legal practices so as to allow them to adapt business structures to meet client need.

Chapter 6 The international perspective

- 6.1 Other reviews both by international organisations and by other national competition agencies have made an important contribution to a climate of reform of professions in Europe and beyond.

⁵¹ The Review concluded that the system was flawed in part as a result of:

- the governance structures of the main front-line bodies being inappropriate for the regulatory task they faced;
- the over-complex and inconsistent system of oversight regulatory arrangements for existing front-line regulatory bodies;
- there being no clear objectives and principles which underlie this regulatory system;
- the system not having sufficient regard to consumers.

OECD Report on *Competition in Professional Services*⁵² and its *Review of Regulatory Reform*⁵³

- 6.2 An OECD report on competition in professional services in member nations, published in 2000, was valuable in not only underlining key principles for high-quality regulation of professional services, as endorsed by member countries in the *OECD Report on Regulatory Reform*⁵⁴, but also considered the extent to which different member nations had succeeded, through advocacy and competition enforcement, in eliminating restrictions in the supply of professional services.
- 6.3 Further, an OECD report on *Regulatory Reform in Gas and Electricity, and the Professions*, published in 2002, which assessed regulatory policies in 16 member countries as part of its Regulatory Reform programme highlighted whether the reform initiatives in each member nation were likely to achieve high-quality regulation of professional services.
- 6.4 Whilst both reports highlighted that the UK, amongst many other countries, had succeeded in removing some of the most severe restrictions and had widened reserved or exclusive rights to professions⁵⁵, the reports also noted that the CA98 provided for an exclusion mechanisms for professional rules from the Chapter I prohibition. This was identified as anomalous to the manner in which the UK was driving forward competition policy reform in the professions and the report thus helped in endorsing steps towards the further liberalisation of professional services already described above. The OECD generally recognised and endorsed the work undertaken by the UK both in equipping itself with the tools to drive competition reform in the professions and in using these to tackle unnecessary restrictions.

⁵² OECD report on *Competition in Professional Services*, available on <http://www.oecd.org/dataoecd/35/4/1920231.pdf>

⁵³ OECD Reviews of Regulatory Reform, *Regulatory Reform in the United Kingdom* <http://www.oecd.org/dataoecd/46/32/2766184.pdf#search=%22Regulatory%20Reform%20in%20Gas%20and%20Electricity%2C%20and%20the%20Professions%20%22>

⁵⁴ *OECD Report on Regulatory Reform*, 1997, available on <https://www.oecd.org/dataoecd/17/25/2391768.pdf#search=%221997%20OECD%20Report%20on%20Regulatory%20Reform%22>

⁵⁵ The UK reported that the division between solicitors and barristers in the legal profession had broken down in recent years, widening the rights for solicitors to appear in courts. In addition, the UK and Australia reported the successful establishment of a new profession providing conveyancing services, with lower entrance requirements than lawyers.

The European Commission review on *Competition in Professional Services*, February 2004⁵⁶ and *Follow-up to the report on Competition in Professional Services*⁵⁷

- 6.5 The European Commission's advocacy and enforcement work to increase competition in the professions has also been valuable in driving forward competition policy in Europe in line with the European Union's wider strategy to be the most competitive and dynamic knowledge-based economy in the world by 2010.
- 6.6 The European Commission's review on *Competition in Professional Services* set out the scope for reform and for modernising specific professional rules⁵⁸. It further advocated scrutiny of professional regulation by application of a proportionality test: rules must be objectively necessary to attain a clearly articulated and legitimate public interest objective and they must be the mechanism least restrictive of competition to achieve that objective.
- 6.7 The Commission's review further reported on its stock-taking exercise on regulation in the professions across the EU⁵⁹. The study showed significantly different levels of regulation between Member States and between different professions. The UK was generally shown to be among those Member States that have a liberal regulatory regime⁶⁰. The study

⁵⁶ Commission of the European Communities *Report on Competition in Professional Services*, 9 February 2004.
http://ec.europa.eu/comm/competition/liberal_professions/final_communication_en.pdf

⁵⁷ Commission of the European Communities *Follow-up to the report on Competition in Professional Services of 9 February 2004*, 5 September 2005.
http://ec.europa.eu/comm/competition/liberal_professions/sec200564_en.pdf

⁵⁸ The report focused on six key professions, namely lawyers, notaries, accountants, architects, engineers and pharmacists, and analysed in detail five key restrictions on competition (i) fixed prices, (ii) recommended prices, (iii) advertising regulations, (iv) entry requirements and reserved rights, and (v) regulations governing business structure and multi-disciplinary practices.

⁵⁹ This work was carried out by the Institute for Advanced Studies in Vienna.

⁶⁰ The study compared the situation in the Member States for such things as regulation of market entry and regulation of conduct, as well as overall regulation. Countries with most regulations for all professions were Austria, Italy, Luxembourg, Germany, and possibly Greece. Belgium, France, Portugal and Spain appear to be in the medium field, whereas the UK, Sweden, Denmark, the Netherlands, Ireland and Finland show rather liberal regulatory regimes (with the exception of pharmacists in the Nordic countries).

sought also to demonstrate that lower degrees of regulation in the professions allows for more overall wealth creation⁶¹.

- 6.8 The Commission's review recommended that Member States conduct widescale reform to modernise the rules affecting the professions, for example by putting in place pro-competitive and transparency enhancing accompanying mechanisms to strengthen consumer empowerment.
- 6.9 In 2005 the Commission reported on progress in reviewing and eliminating restrictive and unjustified restrictions in legislation and the rules and regulations of professional bodies.
- 6.10 The Commission found that most progress was being made in countries like the UK where there was a structured programme of pro-competitive or regulatory reform⁶². It was further noted that in these countries there was a close partnership between government and competition agencies, and that often substantive reform in a given sector is preceded by an in-depth analysis of existing restrictions by the competition agency. The Commission therefore recommended that any widescale reform to the professions and modernisation of the rules affecting the professions should be taken up by national competition agencies who should seek to engage relevant government departments so as to work with them to drive necessary reform.
- 6.11 The Commission further recommended that analytical work be undertaken to review existing restrictions. A first stage of this could be to identify those restrictions on competition which can be removed quickly without further analysis being necessary e.g. certain fixed and recommended prices, and certain advertising restrictions. At the same time, more substantial structural analysis should begin to open the way for wider reforms and assessments of existing rules should be made to determine whether those rules are necessary for the public interest, whether they are proportionate and whether they are justified.

⁶¹ The Commission concluded that in countries with low degrees of regulation, there were relatively lower revenues per professional, but a proportionally higher number of practising professionals generating a relatively higher overall turnover. This would suggest that low regulation is not a hindrance but rather a spur to overall wealth creation. Going further, the Commission noted that a high level of regulation would discourage efficiencies and lower wealth.

⁶² The Commission noted that the UK, amongst four other competition agencies (Denmark, Ireland, Netherlands and Finland) had taken or were taking a general programme of action to bring reform to the professions.

Other competition agencies reviews

- 6.12 The OFT has also found the work of other competition agencies valuable in informing its work and strategy on competition in the professions.
- 6.13 The Australian Trade Practices Commission's analysis on professional restrictions imposed on the architecture profession⁶³ and the legal profession⁶⁴ was particularly useful given that many of the features of both these professions at the time were similar to those in the UK. In addition, the Australian experience that the removal of the lawyers' monopoly on conveyancing and the barristers' monopoly on courtroom work combined with a liberalisation of restrictions on advertising was estimated to have resulted in a 12% fall in overall legal costs⁶⁵ helped strengthen the case for liberalisation of similar restrictions in the UK.
- 6.14 The OFT has therefore taken a continued interest in the work of other competition agencies. In March 2003, a report commissioned by the Irish Competition Authority identified a number of restrictions on competition across a range of eight professions in the construction, legal and medical sectors of the Irish economy. The specific professions reviewed were engineers, architects, dentists, optometrists, veterinary surgeons, medical practitioners, solicitors and barristers. This report was used as the starting point by the Irish Competition Authority to carry out a series of in-depth reports into each of the eight professions⁶⁶. The Danish and the Dutch competition agencies have also conducted reviews on competition in the professions.

Developments in European Community case law

- 6.15 Developments in European Community law, in particular cases before the Community courts, are directly relevant to the UK as the Competition Act 1998 is to be applied in a manner consistent with European competition law.

⁶³ Trade Practices Commission: *Study of the Professions – Architects*, Final Report September 1992.

⁶⁴ Trade Practices Commission: *Study of the Professions – Legal*, Final Report March 1994.

⁶⁵ OECD Round Table Report: Chapter 3, Regulatory Reform and Professional Business Services (focus on lawyers, accountants, architects and engineers).

⁶⁶ The Indecon's Assessment of Restrictions in the Supply of Professional Services, March 2003 as well as the Irish Competition Authority's reports on the individual professions are on <http://www.tca.ie/>

- 6.16 In *Wouters*⁶⁷ the European Court of Justice (ECJ) considered the application of Article 81 EC to a regulation of the Dutch Bar association that prohibited partnerships between members of the Dutch Bar and accountants. The judgment underlines that, in principle, rules of professional bodies fall within the scope of the Article 81 EC prohibition as decisions by an association of undertakings. The court held that in the circumstances in which that professional rule operated it could reasonably be considered necessary for the proper practice of the profession. On this basis it therefore fell outside the scope of Article 81 EC.
- 6.17 In *Arduino*⁶⁸ the ECJ held that where a Member State requires or favors the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere, it infringes its obligations under EU law. The ECJ further set out the circumstances under which the involvement of economic operators in the setting of restrictions emanating from a state measure would be likely to lead to an infringement of a Member State's obligations under EU law.
- 6.18 The scope of both these cases has been the subject of considerable debate amongst practitioners and academics⁶⁹. In particular the *Wouters* case has been seen by some commentators as providing the legal profession with a broader exemption from the competition rules going beyond its facts. In reality, given developments in the market for legal services, this may prove to be wishful thinking.

Chapter 7 Taking forward the programme

- 7.1 The OFT's competition programme on the professions is still ongoing and whilst in recent years much of the focus of the programme has been on legal services, the OFT aims to continue its work in relation to all the professions and in particular to keep under review the way in which professions are evolving in regulation.
- 7.2 The OFT has also been active in applying its enforcement powers in Scotland⁷⁰ and Northern Ireland⁷¹ and has been increasingly involved in

⁶⁷ Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten (Raad van de Balies van de Europese Gemeenschap intervenient)* [2002] ECR I-1577

⁶⁸ Case C-35/99, *Manuele Arduino, third parties Diego Dessi, Giovanni Bertolotto and Compagnia Assicuratrice Ras SpA*, [2002] ECR I-1529.

⁶⁹ See for example Ehlermann, C. per cent Atanasiu, I. (eds). *European Competition Law Annual 2004: the relationship between competition law and the (Liberal) professions*, pp51-72, Oxford: Hart.

⁷⁰ See footnote 34 for a discussion on the Glasgow Solicitors' Property Centre case. In addition OFT looked into whether the Law Society of Scotland's rule which requires

advocacy to government in Scotland and Northern Ireland to ensure that progress similar to that made in England and Wales on reforming the regulatory framework in the legal profession (set out in chapter 5) is also made in Scotland and Northern Ireland. When dealing with the legal profession, it is necessary to appreciate that Scotland and Northern Ireland each have their own legal systems which are different to that of England and Wales. The OFT's advisory functions therefore needs to take account of the reality of the devolution arrangements in Scotland and Northern Ireland. It has been involved in assessing which regulatory structures in the professions best serve consumers and in highlighting why existing restrictions on competition, in the context in which they apply in Scotland and Northern Ireland, need to be lifted in the interest of consumers.

Scotland

- 7.3 In Scotland, the OFT was on the working group set up by the Scottish Executive to research and report on competition and regulation in the legal services market in Scotland. The OFT worked to ensure that the group's report⁷², published on 2 May 2006, highlighted to Scottish Ministers a range of restrictions on competition in professional rules and in regulation.
- 7.4 In the course of this work, OFT held bi-lateral meetings with the Law Society of Scotland (LSS) following which the LSS agreed to the removal of fee recommendations previously issued by the LSS and to the lifting of restrictions on advertising, including comparative advertising. The OFT is now working to ensure that other necessary reforms identified in the report are taken forward.

Northern Ireland

- 7.5 In December 2005, OFT sent a submission on reform of legal services in Northern Ireland to the Working Group chaired by Sir George Bain to review the regulation of Legal Services in Northern Ireland⁷³. The

solicitors to purchase professional indemnity insurance through the Master Policy is an arrangement that prevents restricts or distorts competition in the market for solicitors' services. For further information see the case closure summary on the OFT web-site: <http://www.of.gov.uk/NR/rdonlyres/39E1A6EB-C527-426A-BB78-FD2AAD7A6A79/0/April2005.pdf>

⁷¹ See footnote 33 for a discussion on the Law Society of Northern Ireland case.

⁷² Available on the Scottish Executive's web-site
<http://www.scotland.gov.uk/Publications/2006/04/12093822/0>

⁷³ Available on the website for the Department of Finance and Personnel:
<http://www.dfpni.gov.uk/consultation-response-office-of-fair-trading.pdf#search=%20OFT%20Northern%20Ireland%20legal%22>

submission highlights the case for structural reform as well as a range of restrictions on competition in both statute and professional rules. The OFT intends to remain engaged as the review progresses.

Chapter 8 Conclusion

- 8.1 It is in the nature of professional services that some regulation of the professions is generally necessary. The role of competition agencies is to ensure that regulation of the professions does not unnecessarily restrict competition, and that market players do not engage in anti-competitive agreements or practices. A well-developed competition programme to promote competition in the professions is critically important, particularly to economies such as the UK in which the service sectors, including the professions, play a significant part.
- 8.2 The interest of governments and competition agencies in liberalisation of the professions is nonetheless relatively recent. This is because the professions have traditionally been eloquent, powerful and well-connected lobbyists who have historically sought protection from competition and exemption from competition laws through reliance on restrictive regulation by their professional bodies on the basis that, as professionals, they are in the best position to ensure that standards are maintained and consumers' interests are protected.
- 8.3 In the UK, after early work carried out at the initiative of government in the 1970's and 1980's, a new competition regime provided competition agencies with enhanced powers and independence from government and has thus given a new impetus to the promotion of competition in the professions. Proponents for the status quo in the professions have found their positions increasingly challenged and less tenable.
- 8.4 In this new regime, the fact that the OFT is independent of government, takes its own enforcement and other initiatives, rather than just being an adviser to government, and has a broad choice of instruments and approaches at its disposal, means that it has the ability to tackle restrictions in the professions, arising either from the professions themselves or from government action, in a strategic and flexible way that best suits each individual situation. In some cases, the threat or actual use of enforcement powers is appropriate; in other cases market studies, market investigations, competition advocacy and engagement in the regulatory impact assessment process can deliver the required results faster, and more effectively, than enforcement action.
- 8.5 Where restrictions on competition exist, or are proposed, in relation to a profession, the onus should be on the defenders or proponents (e.g. the government in the case of some new form of regulation) to show why the restrictions are essential and proportionate to achieve their principal purpose, such as the protection of consumers, while not unduly restricting

competition. Where the professions maintain self-regulatory powers, competition agencies can seek to ensure that such powers are subject to independent oversight by influencing government decisions on the regulatory framework.

- 8.6 Whilst much of the work in the UK has focused historically on the traditional professions, the development of the service economy has led to the creation of new professions and service sectors (sometimes through the reform of traditional professions, such as the legal profession) which then seek to defend and promote their professional interests, though self-regulation or formal government regulation initiatives. Accordingly, in addition to tackling the traditional professions, competition agencies need to be constantly on watch to identify attempts to restrict competition in new and evolving service sectors.
- 8.7 Finally, there has been considerable benefit to national initiatives from the international debate, such as within the EU and the OECD and from the individual initiatives in other countries. In particular, competition agencies can learn from each other by looking at how particular problems in the professions and in professional services have been tackled in different countries using the various roles and powers that national agencies have under their own domestic regimes. Where international consensus is developed about the desirability of reform, professions and others that argue for the status quo in the face of consumers' interests will find their position increasingly difficult to sustain.