INDECON'S ASSESSMENT OF RESTRICTIONS IN THE SUPPLY OF PROFESSIONAL SERVICES

Prepared for the Competition Authority by

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March 2003

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INTRODUCTION AND BACKGROUND

This study is submitted to the Competition Authority by Indecon International Economic Consultants in association with London Economics. The study concerns an assessment of competition among eight distinct professions in Ireland.

In view of the Government's response to the OECD Report on Regulatory Reform in Ireland (published 25 April 2001) and following discussion with An Tánaiste and Minister for Enterprise, Trade and Employment, Mary Harney, TD, the Competition Authority decided to conduct a section 11 study of restrictions in the professions under the Competition Acts, 1991-1996.

The Terms of Reference for the study are as follows:

- To study and analyse methods and practices affecting competition in the provision of certain professional services, with a view to identifying any potential or actual restrictions on competition, whether arising from legal provisions, professional rules or customs, or otherwise, that have an appreciable effect on competition.
- To identify and evaluate any consumer benefits claimed for any such restrictions and to consider whether the restrictions are proportionate to the achievement of any such benefits.
- The study focuses on professions in the medical, legal and construction sectors, specifically: medical practitioners, dentists, veterinarians, optometrists, solicitors, barristers, engineers and architects.

SPECIFIC NATURE OF PROFESSIONAL SERVICES

The eight professions under review have an important function in Irish society and because their work influences critical areas of people's lives - such as health, food safety, legal rights and security of building structures - they occupy a special place in our everyday lives. The professions are comprised of talented and committed individuals whose work has contributed to the widespread recognition of the value of professional services. Most practitioners operate to high ethical and professional standards and Ireland has a long tradition of producing high calibre professionals in all fields.

The way the professions are regulated has, however, important and often unintended consequences as practitioners are inevitably subject to economic and competitive forces. If regulations or restrictions result in unnecessarily high prices or barriers to the provision of professional services or disincentives to innovate, the negative consequences for Irish consumers can be significant.

In many cases, regulation of the professions in areas such as codes of ethics, professional competence, trustworthiness and client/patient confidentiality have no impact on competition. In some other cases, however, regulation may sometimes damage competition. But even if this is the case, the restrictions may be justified if there are wider public policy benefits. At the same time, it is essential to ensure that regulation does not simply protect certain practitioners or serve to support narrow vested economic interests. It is important to also recognise that in most cases maintaining standards and facilitating competition are mutually supportive.

The difference between restrictions/regulations that maintain standards and those which simply support the commercial interests of small groups within the professions was highlighted in the most recent OECD report on competition in professional services (OECD, 2000) as follows:

> "The need for ethical standards or codes of behaviour, and the desirability of high standards of professional competence to ensure integrity and public confidence, are unquestionable. But the two objectives of promoting competition and maintaining professional standards are not necessarily contradictory…Regulation usually controls entry by defining qualifications and limiting practice to those who demonstrate them. But it also often extends to purely commercial matters, by preventing or controlling price competition, advertising, business relationships, and participation of foreign professionals on nationality grounds. These regulatory controls have turned structurally competitive industries into cartels. Regulations to ensure quality are necessary in some settings but deserve close examination. Regulations to prevent price and other ordinary forms of competition harm consumers without improving quality of service; their principal effect is to benefit members of the profession…But suppression of all competition is not necessary to assure quality. Professional services are characteristically specialized and differentiated, but they are sufficiently subject to market forces that competition among professionals would benefit consumers… Restrictions on competitive practices, such as price competition, truthful advertising, use of non-deceptive trade names, and relationships with other kinds of businesses, as well as limitations on foreign participation on grounds of nationality, do not explicitly address the issue of quality. In theory, it has been claimed that removing these restrictions and permitting these practices would lead to market failures. But in fact, barring these practices has correlated with higher prices and less innovation, without improving quality" (pp. 17-20).

The key principle in deciding which regulations of a given profession are desirable is to ensure that they directly target any market failures in a manner that least distorts competition on the market. This is summarised in the following principle, which in competition parlance is known as the *proportionality principle*.

Principle of Appropriate Regulation of the Professions
Regulation of professions should be focussed on those markets in which undesirable effects remain and should address the market failure using means that restrict competition least.
Source: OECD (2000, p. 8).

GUIDING PRINCIPLES FOR ANALYSIS

On the basis of the proportionality principle, we formulate five specific tests of proportionality in advance of considering the restrictions encountered in each of the eight professions.

First, *entry requirements* should aim to provide a minimum quality standard and ensure ethical behaviour by practitioners in their dealings with clients or patients. The requirements must not be used to artificially control the numbers entering the profession. They must not be used to target the 'wished for' numbers in the profession. They should be designed to ensure that supply is responsive as much as possible to changes in demand in the market. Further, no single regulatory body should have a monopoly on the provision of the professional education and training necessary to gain admission to a given profession.

Second, *fee competition* among members of a profession is a very important factor serving to promote competition on the market. Fee schedules (whether mandatory or recommended) limit price competition, confer rents on suppliers and generally reduce economic welfare.

Third, *advertising* in the context of professional services is pro-competitive. Subject to the proviso that advertisements are not in bad taste or do not bring the profession into disrepute or do not exploit the limited information that some consumers may have, there should be no restriction on the type or nature of adverts that practitioners may place. Fee advertising should not in general be restricted; nor should comparative advertising or any advertising that highlights that a practitioner has any specialist expertise knowledge.

Fourth, as an indirect entry restriction, *demarcation* should be subject to the same tests as those for entry. Where para-professionals are advocated, their training should be as rigorous as that required of professionals in the particular area and they should be adequately indemnified to ensure consumer protection.

Finally, there should be no restriction on the *organisational form* of professional businesses unless there are very good public interest reasons. Professionals should generally be allowed to choose the organisational form most appropriate to their business needs, including the right to establish practices with members of other professionals, trades or occupations. Given their rigorous education and training, a professional's advice and ethical standards are independent of organisational form, so that a consumer's interests are guaranteed irrespective of business structure.

ANALYSIS OF THE PROFESSIONS

In evaluating the proportionality of the restrictions in each profession, we adopt a standardised structure for our analysis, which entails the following elements:

- Description of market definition and services provided by the profession;
- Description of market size, structure and patterns of demand;
- Description of the customers/clients of the profession and their characteristics;
- Analysis of the nature of competition, if any, on the market;
- Examination of the restrictions/regulatory requirements in the profession;
- Evaluation of the key restrictions on competition in the profession; and,
- Summary of main conclusions regarding the key restrictions on competition.

In deciding whether a given restriction constitutes a *key restriction*, and so whether it merits closer examination, reference is made to the guiding principles and tests of proportionality. Our analysis of each key restriction entails first setting out the regulatory body's justification(s) for the restriction and then our evaluation of the justification(s). In this way, the onus is on the regulators to justify why the restrictions are necessary and our task is to assess the validity of the arguments on the basis of competition principles.

In what follows, we present a tabular summary of our main conclusions in relation to the restrictions on competition that currently exist in each profession. The restrictions are grouped under the four headings of entry restrictions/requirements, restrictions on conduct, restrictions on demarcation and restrictions on organisational form. After each table, the conclusions are discussed.

COMPETITION AND THE SOLICITORS' PROFESSION IN IRELAND

Our analysis suggests that there are significant restrictions imposed on the solicitors' profession in Ireland and we believe these have an appreciable effect on competition. We do not believe that any potential benefits of these restrictions outweigh the adverse implications for competition on the market.

Summary of Main Conclusions for the Solicitors' Profession

Entry Restrictions

1. THE LAW SOCIETY'S MONOPOLY ON THE PROVISION OF THE PROFESSIONAL PRACTICE COURSES FOR TRAINEE SOLICITORS IS LIKELY TO RESTRICT THE NUMBER OF ENTRANTS TO THE PROFESSION.
2. THE REQUIREMENT THAT SOLICITORS WHOSE SECOND OR SUBSEQUENT PLACE OF QUALIFICATION IS NORTHERN IRELAND OR ENGLAND AND WALES HAVE 3 YEARS POST-QUALIFICATION EXPERIENCE IN THE JURISDICTION IN WHICH THEIR QUALIFICATION WAS SUBSEQUENTLY OBTAINED BEFORE ENTERING THE ROLL OF SOLICITORS IN IRELAND MAY ACT AS A BARRIER TO ENTRY TO THE IRISH PROFESSION.
3. THE REQUIREMENT THAT BARRISTERS HAVE THREE YEARS POST-QUALIFICATION EXPERIENCE IN ORDER TO TRANSFER TO PRACTISE AS SOLICITORS IS LIKELY TO ACT AS A BARRIER TO ENTRY TO THE SOLICITOR'S PROFESSION.

Restrictions on Conduct

4. WITH THE EXCEPTION OF PERSONAL INJURY SERVICES, THE RESTRICTIONS ON COMPARATIVE ADVERTISING AND THE PROHIBITION ON SOLICITORS MAKING UNSOLICITED APPROACHES TO CLIENTS OR MEMBERS OF THE PUBLIC IN ANY AREA OF THE LAW IS LIKELY TO RESTRICT NORMAL COMPETITIVE BEHAVIOUR ON THE MARKET FOR SOLICITORS' SERVICES.

Restrictions on Demarcation

5. THE RESTRICTIONS ON SOLICITORS BASED IN NORTHERN IRELAND AND ENGLAND & WALES, TOGETHER WITH LAWYERS FROM OTHER EU MEMBER STATES, PROVIDING CONVEYANCING, TRUST AND PROBATE SERVICES IN IRELAND, IN THE SAME WAY THEY CAN PROVIDE OTHER LEGAL SERVICES IN IRELAND, ARE LIKELY TO RESTRICT COMPETITION ON THE MARKET FOR THESE PARTICULAR SERVICES IN IRELAND.
6. THE ABSENCE OF A SYSTEM OF LICENSED CONVEYANCERS REDUCES COMPETITION ON THIS SEGMENT OF THE MARKET.

Restrictions on Organisational Form

7. THE PROHIBITION ON SOLICITORS FORMING LIMITED LIABILITY PARTNERSHIPS AND LIMITED LIABILITY COMPANIES HINDERS THE PROFESSION IN COMPETING INTERNATIONALLY AND MAY REDUCE ECONOMIC EFFICIENCY.
8. THE PROHIBITION ON SOLICITORS PRACTISING WITH MEMBERS OF OTHER PROFESSIONS IS LIKELY TO REDUCE COMPETITION AND DYNAMIC EFFICIENCY (INNOVATION IN LEGAL AND FINANCIAL SERVICES).

Law Society's Monopoly on the Provision of Professional Education and Training

The Law Society's monopoly on professional education serves to restrict the numbers entering the profession and we believe the requirement to have consistency of standards could be achieved in a manner less restrictive of competition. A more efficient system would allow a person seeking to become a solicitor to undertake all stages of the education and training process outside of Dublin, as well as in the capital. This might be achieved under a carefully constructed system in which the Law Society would license the professional practice courses to independent institutions (e.g. universities and private educational institutions). The system envisaged would have three significant advantages over the present system. First, it could allow for the education of a greater number of trainee solicitors and this in turn would increase entry to the profession. Secondly, the possibility of qualifying as a solicitor at a decentralised law school as well as at Blackhall Place would likely reduce the cost of qualification. Third, it would facilitate a more regionally based system of training provision. The removal of the current restriction on others providing the professional practice courses would not only reduce the barriers to entry to the profession, it could also contribute to easing the recruitment difficulties experienced by solicitor firms and this in turn would promote competition.

Restrictions on the Transfer of Solicitors from Other Jurisdictions

The current regulations serve to restrict solicitors whose second or subsequent place of qualification is Northern Ireland or England and Wales from practising as solicitors in Ireland unless they have had three years post-qualification experience in the jurisdiction in which qualification was (subsequently) obtained. The requirement does not apply to solicitors whose first place of qualification is Northern Ireland or England and Wales. The requirement has the effect of restricting entry to the solicitors' profession in Ireland and thereby potentially impacts in a negative manner on competition on the market for solicitors' services. Accepting the relevance of the 'Establishment Directive', which requires lawyers qualified in one EU Member State to be admitted to the profession of another Member State after three years establishment and effective practice of the law of the State to which entry is sought, there may be a case for restricting solicitors whose second or subsequent place of qualification is Northern Ireland or England and Wales from becoming sole practitioners in Ireland until they have served three years practice as solicitors in Ireland. However, there is no competition basis for this conclusion if the solicitor so qualified intends to work in an established practice in Ireland.

Thus, on competition and public interest grounds, solicitors whose second or subsequent place of qualification is Northern Ireland or England and Wales should be permitted to practise as solicitors in Ireland without having three years post-qualification experience in the jurisdiction in which their qualification was subsequently obtained provided they do not begin their careers in Ireland as sole practitioners. After a sufficient period of time (3 years), during which they will have acquired experience of Irish law, they should be allowed to open their own practices in Ireland.

The principal effect of this proposal would be to make it easier for solicitors qualifying in other countries to transfer to the solicitors' profession in Ireland. It would also serve to overcome recruitment difficulties experienced by solicitors' practices in Ireland and would serve to enhance competition.

Restrictions on the Transfer of Irish Barristers to the Solicitors' Profession in Ireland

The key restriction on Irish barristers wishing to transfer to the solicitors' profession is the requirement to have practised as a barrister in Ireland for a period of at least three years. Owing to the differences in professional formation between barristers and solicitors, we accept the need for barristers to take the requisite examinations and to spend a period of training in a solicitor's office. However, we believe the three years experience requirement has little or no justification. We believe it could hinder more rapid transfer of newly qualified barristers to the solicitors' profession, and thereby acts as an inappropriate restriction on entry.

Restrictions on Advertising by Solicitors

The restrictions on advertising are limited and are generally consistent with the need to protect the public interest. Further, advertising is common in the profession. However, we would support more active advertising where it would enhance competition or improve consumer information. In particular, we do not believe that the restrictions preventing solicitors from highlighting superior specialist knowledge or making unsolicited approaches to clients or members of the general public are justified (with the exception of personal injury services, where we believe the public policy objective of minimising the risk of fraudulent claims in the insurance industry is appropriate).

Irish Solicitors' Monopoly on Providing Conveyancing, Trust and Probate Services in Ireland

We accept that conveyancing and trust/probate services are sometimes complex and that it is essential that the providers of these services have sufficient expertise. Nevertheless, we believe that competition in these areas could be improved without compromising quality. The importance of enhancing competition in these areas cannot be overestimated, primarily because they constitute legal services that most, if not all, people require at some stage in their lives.

We doubt whether standards would fall if the market was open to specialised licensed conveyancers, provided they were trained to a high and consistent standard. The training required of specialised licensed conveyancers should be as high as that required for solicitors in the area of conveyancing.

Furthermore, we are not convinced that solicitors based in Northern Ireland and England and Wales, as well as lawyers entitled to practise in other EU Member States, should be prevented from directly selling their services in the Irish market if they have the required expertise and if they believe they could compete with their Irish-based counterparts in these areas. However, we accept that, for some members of the general public, there may be difficulty in ascertaining whether overseas-based providers have the requisite knowledge of the Irish legal environment. Where such practices do not employ Irish-trained solicitors, we believe the freedom to supply these should initially be restricted to business/corporate sectors (e.g. commercial conveyancing). Where overseas-based law firms employ Irish-trained solicitors, no restrictions should be placed on the sale of their services in Ireland. Such overseas-based providers should be required to contribute to the Compensation Fund to provide maximum protection to consumers.

Prohibition on Solicitors Forming Limited Liability Companies

We do not believe that the current ban on solicitors forming limited liability businesses is an effective way of protecting consumers and we believe it hinders normal competitive behaviour. We believe that, given the requirement for practising solicitors to have professional indemnity insurance and to contribute to the Compensation Fund (which currently has reserves of €27.5 million and additional insurance of €20 million), the prohibition is no longer necessary.

The introduction of limited liability businesses would allow greater specialisation of solicitor practice areas and would enhance competition. In the specific case of limited companies, this would enhance new forms of market entry and allow existing practices to develop and expand their range of services. We believe, however, that the precise organisational form should be left to the judgement of practitioners and feel that many solicitors may continue to operate as sole traders or in unlimited partnerships.

Prohibition on Solicitors Forming Multidisciplinary Practices

For reasons not dissimilar to those advanced for relaxing the restrictions on organisational form, we believe there are strong grounds for permitting solicitors to form multidisciplinary practices (MDPs) in Ireland. In this regard, we would point to the realisation of economies of scope and reduction in transactions costs for clients, particularly for larger users who might want the benefits of accessing a range of legal and financial services in a one-stop shop environment. We do not accept the argument that solicitors would not be able to function ethically with other professionals and believe that MDPs could be required to accept appropriate regulations and guidelines as rigorous as those for solicitors. We do not see MDPs as being necessarily in conflict with the core values of the solicitors' profession, namely independence, avoidance of conflicts of interest and client confidentiality.

COMPETITION AND THE BARRISTERS' PROFESSION IN IRELAND

Our research suggests that there is very little price competition in the barristers' profession in Ireland and that the extensive restrictions outlined below have a significant and adverse impact on competition.

Summary of Main Conclusions for the Barrister's Profession

Entry Restrictions

1. THE KING'S INNS MONOPOLY ON THE PROVISION OF THE DIPLOMA IN LEGAL STUDIES COURSE, A CONVERSION COURSE FOR NON-LAW GRADUATES AND OTHERS (MINIMUM AGE 25 YEARS) SEEKING ADMISSION TO TRAIN AS BARRISTERS, IS LIKELY TO RESTRICT THE NUMBER OF ENTRANTS TO THE PROFESSION.

2. THE KING'S INNS MONOPOLY ON THE PROVISION OF THE BARRISTER-AT-LAW (BL) DEGREE COURSE IS LIKELY TO RESTRICT THE NUMBER OF ENTRANTS TO THE PROFESSION.

3. THE ABSENCE OF REMUNERATION OF DEVILS DURING THEIR PERIOD OF PUPILLAGE IS LIKELY TO ACT AS AN ENTRY BARRIER TO THE PROFESSION.

Restrictions on Conduct

4. THE RULES PREVENTING BARRISTERS FROM ADVERTISING ARE LIKELY TO RESTRICT THE OPERATION OF COMPETITION BETWEEN BARRISTERS.

5. THE PROHIBITION ON CLIENTS DIRECTLY ACCESSING THE SERVICES OF BARRISTERS IN ALL AREAS OF WORK (INCLUDING CONTENTIOUS WORK) IS LIKELY TO RESTRICT COMPETITION BETWEEN BARRISTERS.

Restrictions on Demarcation

6. THE CUSTOMS AND TRADITIONS SERVING TO MINIMISE THE NUMBER OF 'SOLICITOR ADVOCATES' IN THE SUPERIOR COURTS LIMIT THE SUPPLY-SUBSTITUTABILITY BETWEEN THE TWO BRANCHES OF THE LEGAL PROFESSION AND THEREFORE ARE LIKELY TO RESTRICT COMPETITION ON THE MARKET FOR BARRISTERS' SERVICES.

7. THE PROHIBITION ON FULLY QUALIFIED EMPLOYED BARRISTERS (HAVING FULFILLED THE PUPILLAGE REQUIREMENTS AS WELL AS BEING CALLED TO THE BAR) COMPETING WITH PRACTISING BARRISTERS (MEMBERS OF THE LAW LIBRARY) IS LIKELY TO RESTRICT COMPETITION ON THE MARKET FOR BARRISTERS' SERVICES.

Restrictions on Organisational Form

8. THE REQUIREMENT THAT BARRISTERS OPERATE ONLY AS SOLE PRACTITIONERS AND THE PROHIBITION ON BARRISTERS FORMING MULTIDISCIPLINARY PRACTICES WITH OTHER PROFESSIONALS ARE LIKELY TO RESTRICT COMPETITION ON THE MARKET FOR BARRISTERS' SERVICES.

King's Inns Monopoly on the Provision of the Diploma in Legal Studies Course

The requirement that a minimum level of knowledge in the theory and practice of the law is necessary to gain admission to train as a barrister may be fulfilled either by gaining a primary university degree in law or by completing a conversion course in law equivalent to a primary law degree. Currently, only the Honorable Society of King's Inns (the 'Society') can offer such a conversion course in Ireland. Given that the Diploma in Legal Studies course is precisely a conversion course, there are no valid economic arguments as to why other educational institutions with legal faculty should be prevented from offering courses equivalent to the Diploma to candidates without approved law degrees hoping to become a barrister. Relaxation of the Society's monopoly would improve efficiency in a number of ways. First, competition between providers would result in more competitive fees for the conversion course resulting in a reduction in the overall cost of the qualification process. Second, extended provision could provide greater entry possibilities for non-law graduates and others hoping to be admitted as barristers.

King's Inns Monopoly on the Provision of the Barrister-at-Law (BL) Degree course

The Society's monopoly on the provision of the BL degree course is reflected by a cap on the number of entrants to the course per year (120). The actual number of places on the course has consistently been less than the stipulated 120 places during the past decade according to data submitted by King's Inns. Both the cap on the number of places available and the apparent limit on the actual number of entrants to the course serve to artificially restrict the numbers entering the profession. A more competitive market structure in the provision of the BL would address this concern, subject to the proviso of a sufficient number of practitioners available to provide instruction, which we accept is an essential requirement of the course. By way of implementing the more competitive scenario, we would envisage a new system in which the Society would license provision of the BL degree to independent institutions in a manner that would allow the Society to retain control of the curriculum and of the content, holding and marking of the examinations comprising the course (including the Annual Entrance Examination). This change would facilitate an expansion of the number of places on the BL degree and would provide competition in the provision of the education of barristers with resultant benefits in terms of competitive fees and possible teaching innovations.

Absence of Remuneration for Devils during Pupillage

The absence of remuneration for devils or pupils serves to increase significantly the overall cost of becoming a barrister and for this reason we believe that it acts as an entry barrier to the profession. We believe that this source of entry barrier may be particularly pronounced for pupils from lower income groups or those who have no familial tradition of legal practice. There is a widespread perception among practitioners (and indeed the Bar Council) that there is a high rate of attrition among newly qualified barristers, a view that is supported by our analysis of King's Inns data. We believe the cost of the qualification process, which is significantly underscored by the absence of remuneration for devils, may contribute to the perceived high exit rate among new or recent members to the profession.

We believe there would be merit in the Bar Council initiating a system that encourages masters to remunerate their devils and to also take steps to encourage sponsorship and award schemes to facilitate lower income groups entering the profession. This could have social as well as competition benefits. We would finally point out that payment for trainees is a normal feature of other professions.

Prohibition on Advertising by Barristers

Economic research shows that advertising has a pro-competitive effect in the context of professional services markets. The barristers' profession is no exception. Allowing advertising would help newly qualified barristers build their practices and, in the process, check the perceived high rate of attrition from the profession. We believe it would help to reduce fees, without compromising quality, and, coupled with direct access, would improve competition among seniors and juniors and so enhance consumer welfare.

Prohibition on Direct Access to Barristers by Clients in Contentious Work

The absence of direct access by clients ignores differences in the degree of information asymmetry across users of barristers' services. There are well-informed lay clients as well as uninformed (first-time) lay clients and the intermediation of the solicitor may be less relevant for the former. The current arrangements do not adequately account for this fact because there is no self-selecting mechanism whereby lay clients would have the option of either direct access or access through a solicitor. (The Direct Professional Access Scheme is limited to institutional users.)

We are not convinced by the argument that direct access would entail a fundamental change in the profession, where barristers would have to become more like solicitors in that they would carry greater administrative burdens, which would detract from specialising and concentrating on advocacy. Administration is an essential part of running any professional practice and, regarding the argument that barristers would have to employ assistants and secretaries, it is relevant to note that there are no rules preventing barristers from having such assistance as part of their practices currently.

The absence of choice of directly accessing a barrister in all areas of work (including contentious work) or approaching a solicitor first impedes the operation of price and non-price competition in the market in that for the client who is well informed the direct access route might be the lower cost option than the solicitor-barrister route. The likely cost savings are presently lost to society through the present restriction on direct access. Direct access in contentious matters is now permitted in Australia and in England and Wales.

The Solicitor-Barrister Distinction and Solicitor Advocacy in the Superior Courts

The distinction between barristers and solicitors in some areas is a matter of custom and tradition, and by limiting supply substitutability between the two branches of the legal profession may hinder competition and efficiency.

The Bar Council states that the absence of 'solicitor-advocates' is proof enough that the two branches are different to the extent of warranting separation in the manner that presently obtains. However, the absence of solicitor-advocates may in part be explained by the rules and customs of the superior courts. Virtually all of the justices in these courts are drawn from the barristers' profession and are familiar with the methods of advocacy employed by barristers. Saying that, there are some welcome signs that the customs may change in the future. The recent passing of the Courts and Officers Act, 2002 and the appointment of a former solicitor to the bench of the High Court may facilitate future developments in this area. Also relevant is the continuing appointment of solicitors as judges in the Circuit Court, where there have also been few solicitors-advocates in the past.

Restrictions on Employed Barristers

Employed barristers may not appear with or directly brief practising barristers (i.e. members of the Law Library). To take a hypothetical example, a company employing a barrister must first engage the services of a solicitor in order to access a practising barrister for the purpose of taking a case in, say, the High Court. Apart from acting as an in-house legal adviser, the employed barrister is redundant in the litigation and advocacy services taken by his/her employer. Curiously, where a (practising) solicitor and barrister have the same employer, the solicitor is entitled, by virtue of the Courts Act, 1971, to represent the employer in court, but the barrister is not – even in circumstances where the barrister may have had a prior career at the Bar.

Fully qualified barristers now in employment are in effect prevented from competing with practising barristers (members of the Law Library). This is a very obvious restriction on competition in favour of practising barristers. It could also, in some cases, represent an inefficient use of scarce talent – the skills of the employed barrister.

There are no valid economic reasons as to why fully qualified barristers in employment should not be able to provide the same services to their employers as those provided by practising barristers, the benefits of which would be significant.

Requirement that Barristers Operate only as Sole Practitioners

We have found none of the arguments advanced for this restriction to be justified on competition grounds (e.g. that relaxing the restriction would lead to high concentration in the profession). If the requirement to act as a sole trader was relaxed, it would still be a matter of choice for the barrister as to whether to enter into partnership/other business structure or not. We would expect that many barristers would, in the short term at least, continue to operate as sole practitioners. Relaxing the present requirement would introduce flexibility and choice into the organisational form of business adopted by counsel to the benefit of clients.

Prohibition on Barristers Forming Multidisciplinary Practices with Other Professionals

The Bar Council opposes the formation of MDPs for similar reasons to partnerships between barristers. It also indicates that barristers might form alliances with the larger law (i.e. solicitor) firms, and indeed with the big accounting firms, and suggests that this could cause a further loss of access to barristers' services by smaller clients particularly. It is our judgement that the evaluation of the Bar Council's arguments against partnerships and other business structures among barristers apply *mutatis mutandis* in the case of MDPs involving barristers. If anything, MDPs would expand, rather than contract, the ability of users to access the services of barristers, particularly if fully qualified employed barristers are allowed to compete with members of the Law Library.

COMPETITION AND THE ENGINEERS' PROFESSION IN IRELAND

In general, we believe there are relatively few restrictions on competition in the engineers' profession in Ireland. The two areas outlined below, however, represent potential restrictions that we believe should be addressed. We also believe that, in considering applicants for the title of chartered engineer (CEng MIEI), which is statutorily protected, the IEI should be as flexible as possible in the requirement that candidates must have their application 'supported' by four chartered engineers. The requirement is tantamount to existing competitors deciding whether to accept a new competitor on board. The need for flexibility in this regard arises partly because of the low number of chartered engineers compared with the general population of engineers.

Summary of Main Conclusions regarding the Engineer's Profession
Restrictions on Conduct
1. THE CONTINUED PUBLICATION OF THE HISTORICAL ACEI/IEI FEE SCALES (ON THE ACEI'S WEBSITE) COULD RESTRICT OR DISTORT COMPETITION AMONG REGISTERED AND UNREGISTERED CONSULTING ENGINEERS.
2. THE ADVERTISING CODES OF THE ACEI AND THE IEI ACT AS A BARRIER TO ENTRY FOR NEW PRACTICES AND COULD RESTRICT NORMAL COMPETITIVE BEHAVIOUR AMONG FIRMS.

ACEI's Continued Publication of Historic Fee Scales on its Website

The historic fee scales instituted by the ACEI and IEI in the 1960s may have been motivated by a need to protect the incomes of engineers during periods of high inflation and, to a lesser extent, on the basis of providing clients with information about prices in a field where they have less information than suppliers.

However, the latter argument is unlikely to hold in general owing to the fact that most clients of professional engineers are (repeat) business or government clients and are likely to be relatively well informed and have more buyer power than personal customers. The first argument is largely irrelevant in the present environment owing to the relative stability in consumer price inflation achieved in recent years and in any case would not be acceptable on competition grounds.

Fee scales reduce price competition between competing firms and can be used as vehicles for tacit collusion. Furthermore, their existence could discourage an efficient firm from pricing significantly below the level implied by the fees on the basis of relatively low costs.

We do not accept the ACEI's argument that the historical fee scales provide valuable information to clients. Clients' best interests are served by obtaining quotes from competing practitioners, members and non-members of the ACEI.

On competition grounds, the historical fees should be removed from the ACEI website and the ACEI should not provide information to firms or clients on fees.

Advertising Codes of the IEI and ACEI

Both sets of advertising rules are very similar in content and in general have the objective of imparting factual information. Further, there are no bans on price advertising in either organisations codes, although advertising of fees is rarely, if ever, undertaken in practice. However, we believe that it is inappropriate for the codes to specify the size of advertisements or that the statements should be confined to being discrete and moderate in tone. On competition grounds, the codes should be adjusted to provide more flexibility to firms to undertake normal competitive advertising, including that of a comparative nature, providing it is truthful.

COMPETITION AND THE ARCHITECTS' PROFESSION IN IRELAND

Like the engineers' profession, our analysis suggests there are relatively few restrictions on competition in the architects' profession. While we support the proposed new register of architects we believe that it is important to ensure that this is not implemented in a manner that acts as a barrier to entry or gives the RIAI disproportionate control of the process. Given the present structure of the profession, in which a diverse range of practitioners operate, we would be concerned, on competition grounds, if just one of the present regulatory organisations was to have responsibility for governing the proposed register. We also believe that the issue of the publication of fees and restrictions on advertising should be addressed.

Summary of Main Conclusions regarding the Architect's Profession
Entry Restrictions
1. THE WAY IN WHICH 'GRANDFATHER' INDEPENDENT ARCHITECTS AND *SOME* MEMBERS OF THE GROUP OF INDEPENDENT ARCHITECTS IN IRELAND (GIAI) WILL BE ASSESSED FOR ENTRY TO THE PROPOSED NEW REGISTER OF ARCHITECTS COULD ACT AS A BARRIER TO ENTRY TO THE PROFESSION GOING FORWARD.
Restrictions on Conduct
2. THE RIAI DOES NOT HAVE RECOMMENDED, MANDATORY OR MINIMUM SCALES OF CHARGES. IT DOES, HOWEVER, PUBLISH INFORMATION ON THE LEVELS OF CHARGES BASED ON SURVEYS AND MARKET RATES AS A WAY OF INFORMING CONSUMERS/CLIENTS. WE BELIEVE THIS PRACTICE IS LIKELY TO RESTRICT COMPETITION ON THE MARKET.
3. THE RIAI'S RESTRICTIONS ON PAID AND PRINT MEDIA ADVERTISING BY ITS MEMBER ARCHITECTS, WHICH ARE NOT GIVEN IN THE CODE OF CONDUCT, ARE LIKELY TO RESTRICT COMPETITION ON THE MARKET FOR ARCHITECTURAL SERVICES IN IRELAND.

Criteria for Membership of New Register for Some GIAI Members and 'Grandfathers'

The Building Control Bill, the Heads of which were approved by the Government in December 2001, proposes to protect the title (but not the function) of architect and establish a national register of architects in Ireland. The objective is to achieve a consistent level of quality across the profession by setting a standard that must be fulfilled before a person can assume the title of architect. The establishment of such a standard, it is argued, will serve to protect the interests of consumers in the face of asymmetric information, particularly personal users of architects' services. Thus, under protection of title but not reservation of function, customers would continue to have choice as to whether to commission the services of a registered architect or another provider in the market.

RIAI members will be automatically transferred to the proposed register of architects. In addition, members of the architectural organisations comprising the 'Minister's List' will also be allowed to transfer to the new register. The four organisations on the Minister's List are the Group of Independent Architects in Ireland, the Irish Architects Society, the Architects and Surveyors Institute and the Incorporated Association of Architects and Surveyors. A panel of independent architects will be convened to assess membership of *some* of the members of the GIAI. Depending upon on training and professional experience, the assessment will include either an interview with the panel, some of whose members will be drawn from abroad, or an interview and written examination. In each case, a portfolio of the candidate's drawings will supplement the interview part of the assessment. The Bill also makes allowance for architects who are not members of the five architectural organisations in the form of a 'grandfather clause'. Independent or self-taught architects with 10 or more years experience in Ireland will be permitted to gain entry to the new register subject to the same form of assessment that will apply to those members of the GIAI for which assessment for entry will be deemed necessary.

At the present time, there is no additional information on the criteria (beyond vaguely stating training and professional experience) that will be used to distinguish whether a GIAI member or 'grandfather' practitioner will have to undergo either a panel interview or a panel interview and written examination. If such criteria are not clarified for potential applicants in advance of application for registration, the criteria could hardly be described as transparent. In the absence of clarification, we would be concerned that the requirements might potentially be used to artificially control the number of entrants to the new register.

RIAI Practice of Publishing Fee/Price Information in the Market for Architectural Services

On competition grounds, there are no valid arguments for the RIAI's practice of publishing fee information in the market. Further, it emerged from our empirical analysis of the market that the majority (approximately two-thirds) of an architect's fee income is derived from corporate/institutional clients, which consist mainly of government (central and local) users. This means that information asymmetry is generally unlikely to be present in the market. On balance we are not convinced that published fee information provides valuable information to any consumer in the market. The presence of published fee information could potentially prevent an efficient firm from charging fees below the published levels, thus restricting effective competition and indeed inhibiting potential entry of new cost-oriented competitors. Both types of competitor are central to competition. The most efficient way for price information to be conveyed in the market is either by obtaining quotations from competing suppliers or through advertising of fee information.

The RIAI's fee information is not necessary for the operation of competition on the market. On competition grounds, the practice should cease.

RIAI Restrictions on Print Media Advertising by Member Architects

The RIAI restricts marketing and promotion of its members' activities in two areas. First, articles written in newspapers/periodicals must be commissioned on an independent basis and secondly the RIAI does not permit paid, print media advertising except where print media coverage is given to the architect's own work. The Institute considers the first restriction to be in the interest of the consumer as such a process is "far more likely to encourage factual or balanced reports". In defence of the second restriction, the RIAI states that "print media advertising could result in the dominance of the market by a small number of large architectural practices which the Institute believes would not be in the long term interest of the consumer or the quality of the built environment, and would prevent and restrict new entrants to the profession".

Regarding the first argument, we do not see any reason why practitioners would write untruthful, unbalanced or poor reports in newspapers, periodicals or journals. The market would decide because it is in the interests of both parties (namely the architect and the publisher) to publish competent reports. Currently, a recently qualified member would first have to obtain approval in order to publish his or her article, which might not only be of benefit to him/herself, but also may be of use to the wider architectural community by providing valuable new information.

In relation to the second restriction, we are not convinced of its validity. On the contrary, advertising ought to encourage new entry and innovative methods, as well as informing consumers.

COMPETITION AND THE VETERINARY SURGEONS' PROFESSION IN IRELAND

Our research indicates that there are significant entry restrictions, demarcation restrictions and conduct and organisational restrictions on competition in this profession. In our judgement, any potential benefits of these restrictions are not justified when account is taken of the adverse implications for competition in the profession.

Summary of Main Conclusions re Key Restrictions in the Veterinary Surgeons' Profession

Entry Restrictions

1. THE POSITION OF ONE INSTITUTION AS THE SOLE PROVIDER OF VETERINARY EDUCATION IN IRELAND AMOUNTS TO A MONOPOLY SITUATION, WHICH HAS THE POTENTIAL TO ACT AS A BARRIER TO ENTRY TO THE VETERINARY PROFESSION AND ADVERSELY AFFECT POTENTIAL COMPETITION IN THE MARKETPLACE.

2. THE RESTRICTION IN PLACE IN RELATION TO THE NUMBER OF STUDY PLACES AVAILABLE EACH YEAR AT THE FACULTY OF VETERINARY MEDICINE POINTS TO A SIGNIFICANT CONSTRAINT ON ENTRY TO THE PROFESSION, WHICH WE BELIEVE IS LIKELY TO ACT AS A BARRIER TO POTENTIAL COMPETITION.

3. THE ABSENCE OF RECOGNITION OF NON-EU/EEA TRAINED VETERINARY SURGEONS PERMITTING SUCH INDIVIDUALS TO REGISTER TO PRACTISE IN IRELAND RESULTS IN A BARRIER TO ENTRY TO FOREIGN PRACTITIONERS AND MAY CONSTRAIN POTENTIAL COMPETITION IN THE PROFESSION.

Restrictions on Conduct

4. THE RESTRICTIONS PLACED ON ADVERTISING BY VETERINARY SURGEONS ARE LIKELY TO BE HARMFUL TO NORMAL COMPETITIVE BEHAVIOUR IN THE MARKETPLACE.

Restrictions on Demarcation

5. THE LIMITATION ON THE SCOPE OF PRACTICE OF VETERINARY NURSES CONSTRAINS ENTRY INTO THE MARKET OF A NEW INDEPENDENT BRANCH OF THE PROFESSION AND THEREFORE LIMITS POTENTIAL COMPETITION IN THE PROFESSION.

Restrictions on Organisational Form

6. THE PROHIBITION ON THE FORMATION OF LIMITED LIABILITY PRACTICES BY VETERINARY SURGEONS IS LIKELY TO CONSTRAIN THE GROWTH OF VETERINARY PRACTICES AND THE ENTRY OF NEW AND POSSIBLY MORE EFFICIENT PRACTICES INTO THE MARKET.

Position of One Institution as Sole Provider of Veterinary Education

The present position of one institution being the sole provider of veterinary education in Ireland constitutes a monopoly and, in our view, this feature has the potential to act as a barrier to entry to the veterinary profession, which would be harmful to competition and damaging to the interests of consumers. This does not, however, reflect the current high standards of education provided by the Faculty of Veterinary Medicine in UCD.

While there may be economies of scale in the provision of veterinary education, the current high demand for study places suggests that such economies may not prevent another provider from operating in the market for veterinary education. We believe that it should be feasible to develop a system whereby one or more new providers of veterinary education could be established on a decentralised or regional basis, while preserving the current standards of veterinary education as regulated by the Veterinary Council. Such a system would have significant advantages over the present system. First, it could facilitate competition in the provision of veterinary education and allow for the education of a greater number of veterinary surgeons, which in turn would assist in increasing entry to the profession. Secondly, the possibility of qualifying as a veterinary surgeon at a decentralised veterinary school as well as at the current Faculty of Veterinary Medicine would, in our view, reduce the cost of qualification facing students. Third, it would facilitate a more regionally based system of education. While Indecon do not doubt the quality of education presently being provided by the Faculty of Veterinary Medicine, the establishment of one or more other veterinary schools would allow for greater flexibility and would reduce the barriers to entry to the profession. We also believe this could contribute to easing the recruitment difficulties experienced by veterinary practices and would enhance competition on the market.

Most students may continue to choose to undertake their training at the current Faculty unless other providers offer advantages in terms of the number of places, the location of training etc. We accept, however, the need to balance the objectives of competition with the subsequent financial costs of developing other providers. This is particularly the case given the current pressures on exchequer costs. Our conclusions on access to veterinary surgeons trained in other countries and the merits of the introduction of paraprofessionals take account of this factor.

Restriction on Number of Study Places Available for Veterinary Education

A second area that has important implications for competition concerns the restriction on the number of student places available at the Faculty of Veterinary Medicine.

The principal justification submitted by the Veterinary Council in relation to the restriction on the number of study places is that the high cost of veterinary education and the requirement to ensure ongoing high standards act as a direct constraint on the number of places that can be provided on an annual basis at the Faculty. The Council also submits that it has no involvement in the determination of study places, with the annual number of places available decided upon by the Faculty, the Higher Education Authority and the Department of Education and Science.

The substantial gap between the number of final acceptances and the number of overall and first preference applications for the veterinary medicine degree course through the CAO system, coupled with the very high CAO points requirement, points to a significant constraint on entry to the profession. This is likely to act as a significant barrier to potential competition in the profession. Moreover, practitioners have indicated that they have experienced considerable difficulties in recent years in relation to recruitment of qualified professionals required to meet the increasing demand for veterinary services.

The main argument submitted by the Veterinary Council in relation to the constraint on the number of study places available at the Faculty of Veterinary Medicine concerns the high cost of veterinary education. This suggests that an important constraint on study places is the amount of funding available to the Faculty of Veterinary Medicine. However, notwithstanding the conflicting interests of exchequer costs and competition objectives in this area, our analysis of the number of applications for and entrants to the veterinary medicine course points to the presence of a significant constraint on entry to the profession, which is likely to be harmful to potential competition in the profession in Ireland. While this may point to the need to re-examine the funding of veterinary education in Ireland, it also underscores the importance of facilitating entry to the Irish veterinary profession from external sources, including the registration of individuals from outside Ireland.

Absence of Recognition of non-EU/EEA trained Veterinary Surgeons Wishing to Practice in Ireland

A third area where we would have concern in relation to entry restrictions concerns the absence of recognition of non-EU/EEA trained veterinary surgeons wishing to practise in Ireland. According to the Veterinary Council, there are currently no formal arrangements in place in relation to the recognition and transfer requirements for registration of veterinary surgeons trained in non-EU/EEA countries. Only EU/EEA trained veterinary surgeons possessing scheduled qualifications may apply for registration.

The absence of recognition of veterinary surgeons trained in non-EU/EEA countries effectively amounts to a restriction on external entry to the Irish veterinary profession. This restriction is more critical given the limitation on the number of study places available in the Irish Faculty of Veterinary Medicine, described above. In the interests of promoting competition in the veterinary profession, the level of entry to the profession should reflect the demand for veterinary services while ensuring the provision of these services by individuals that meet the required minimum standards of education and training. Our findings in relation to the increasing demand for veterinary services, coupled with the difficulties experienced by existing veterinary practice in relation to recruitment in recent years, point to a clear need to boost the level of entry of trained veterinary surgeons into the profession in Ireland. The funding constraints on the provision of additional study places for veterinary training in Ireland underscores the requirement to open up the level of access to the Irish profession from overseas and, in particular, to facilitate the recognition of veterinary surgeons trained in non-EU/EEA countries. We would further argue that by facilitating increased entry of third-country nationals, the Irish veterinary profession would also benefit through the diversity of training and experience acquired by these individuals in their home countries.

Restrictions Placed on Advertising by Veterinary Surgeons

Another area where potential competition concerns arise concerns the restrictions in place on advertising by veterinary surgeons. While we note the arguments given by the Veterinary Council and Veterinary Ireland in relation to the potential adverse implications for consumers stemming from inappropriate persuasive advertising by practitioners, we would not accept that advertising is likely to be damaging. In particular, given the very high standards of education and training that veterinary surgeons must attain before being permitted to register as practitioners in Ireland, and the importance of reputation effects within a profession such as that of the veterinary surgeon, it is difficult to argue that advertising of fees or comparative advertising is likely to mislead consumers.

We would agree that advertising which is misleading, deceptive, abuses consumers' lack of information on the nature of veterinary services or is in bad taste is likely to be injurious to animal and/or public welfare. However, our survey of the economic research on advertising within professional services has shown that there is little incentive for an individual practitioner to engage in such pernicious forms of advertising, since the longer-term adverse implications for his/her reputation are likely to outweigh any short-term commercial benefits.

We would also be concerned that the restrictions on advertising in the profession are likely to act as a barrier to entry and innovation. The existing restrictions on comparative and fee advertising are likely to make it very difficult for a newly trained veterinary surgeon or a practitioner from outside Ireland to establish his/her practice in Ireland. Furthermore, the current restrictions are likely to constrain innovation within the veterinary surgeons' profession by preventing new entrants who possess specialist competencies in a particular area (e.g. exotic animals) from informing consumers of their services and fees.

Subject to the proviso that advertisements are not in bad taste, do not bring the veterinary surgeons' profession into disrepute or do not exploit the limited information that some consumers may have, we do not believe that there should be any restriction on the type or nature of adverts that veterinary surgeons may place. Consumers in Ireland would stand to benefit from the provision of more information on the costs, range and quality of services offered by existing veterinary surgeons and new entrants to the profession, if the existing restrictions on advertising were relaxed.

Absence of Legal Status for Veterinary Nurses and the Demarcation Restrictions on the Scope of Practice of Veterinary Nurses

A fifth restriction operating in the veterinary surgeons' profession that we believe is likely to be harmful to competition concerns the absence of legal status for veterinary nurses and the demarcation restrictions on the scope of practice of such professionals. Currently, according to the Veterinary Council, while veterinary nurses do exist, they do not have legal status as a separate branch of the profession and are only permitted to operate under the supervision of registered veterinary surgeons.

The current position of veterinary nurses within the veterinary profession effectively constitutes a demarcation restriction and thus an indirect entry restriction. This restriction is linked to the statutory protection of the title of veterinary surgeon and reservation of function, so that only registered veterinary surgeons may provide veterinary services to the public. In particular, veterinary nurses do not currently have separate legal status, must work under the supervision of a registered veterinary surgeon and are only permitted to undertake specific tasks/procedures.

However, while they do not possess legal status, veterinary nurses do exist on a de facto basis within the profession, and we have estimated from Veterinary Ireland's survey of the profession in March 2002 that there are around 535 nurses in practice, compared with an estimated 1,277 veterinary surgeons in private practice.

The principal argument against the current demarcation restrictions operating in relation to veterinary nurses is that, by limiting the scope of practice of nurses, these demarcation restrictions remove the ability of veterinary nurses to provide certain services independently of veterinary surgeons, act as an indirect entry restriction and thus limit potential competition in the overall market for veterinary services.

As veterinary nurses do not possess the qualifications and training to carry out the entire range of veterinary procedures undertaken by registered veterinary surgeons, we accept, in the interests if animal and public welfare, that their scope of practice should be limited to those functions for which they are qualified. It should, however, be possible for veterinary nurses who are suitably qualified to undertake more limited procedures on an independent basis and to offer these services directly to the general public. This would enable veterinary nurses to form independent practices offering certain veterinary services – possibly including limited testing, validation and certification or ancillary care for companion animals - for which they are trained. This would, however, require that veterinary nurses be given separate legal status and be registered on a separate basis. In this light, we would support the proposal of the Council in relation to the amendment of the existing legislation to provide for creation of a new title of veterinary nurse and to set out what schedules acts/procedures that may be undertaken by such nurses. However, in drawing up new legislation on this area, we would also recommend that veterinary nurses be permitted to practise independently of veterinary surgeons in the case of certain services.

Prohibition on Practice of Veterinary Medicine by Corporate Bodies

An important organisational restriction operating within the veterinary profession concerns the prohibition on the practice of veterinary medicine by corporate bodies or limited liability companies. This restriction has its basis in the Veterinary Surgeons Act, 1932. The main justification submitted by the Veterinary Council in relation to the prohibition on the practice of veterinary medicine by bodies corporate is that limited liability practices would compromise the independence of practitioners and would result in a conflict of interest between the commercial interests and legal position of a limited liability practice and the professional and ethical requirements set out by the Council.

We believe that the restriction on the formation of corporate bodies by veterinary surgeons is likely to constrain the growth of veterinary practices and the entry of new and possibly more efficient practices into the market. In relation to the important requirement of ensuring the protection of animal welfare, we believe that this can be accomplished through the requirement for practitioners to have adequate professional indemnity insurance or adequate practice capitalisation. The removal of the restriction on the practice of veterinary medicine by corporate bodies could facilitate the development of the profession, and by extension the welfare of the animal population and animal owners, by allowing improved access to capital that may be needed to invest in improved equipment, infrastructure and services. It may also facilitate innovative veterinary surgeons to expand their practices. However, in tandem with the OECD's recommendation on this issue, we believe that while practitioners should have the option to incorporate their practices, they should not be obliged to do so.

COMPETITION AND THE MEDICAL PRACTITIONERS' PROFESSION IN IRELAND

Many of the regulations in the medical profession are appropriately designed to protect patient interests and are justified. There are, however, extensive restrictions that we believe are not proportionate to the achievement of any such benefits and prevent the medical profession from engaging in legitimate competitive practices. Some of these restrictions may also act to restrict the development of healthcare investment. The key restrictions are outlined in the table below.

Summary of Main Conclusions re Key Restrictions in the Medical Practitioners' Profession in Ireland

Entry Restrictions

1. THE LIMITATION ON THE NUMBER OF STUDY PLACES AVAILABLE AT THE IRISH SCHOOLS OF MEDICINE ACTS AS A CONSTRAINT ON GRADUATE ENTRY TO THE MEDICAL PROFESSION IN IRELAND AND IS THEREFORE LIKELY TO LIMIT POTENTIAL COMPETITION IN THE MARKETPLACE.

2. THE PROCESS OF REGISTRATION OF DOCTORS WISHING TO TRANSFER FROM OTHER COUNTRIES TO PRACTISE IN IRELAND CONSTITUTES A POTENTIAL BARRIER TO ENTRY WITHIN THE MEDICAL PROFESSION.

3. THE PROCESS OF DETERMINATION OF THE NUMBER OF CONSULTANT POSTS AND THE FILLING OF SUCH POSTS IS SUCH THAT THE SUPPLY OF CONSULTANTS IS NOT SUFFICIENTLY RESPONSIVE TO THE DEMAND FOR SPECIALISED HEALTHCARE AND ACTS AS BARRIER TO COMPETITION WITHIN THE PROFESSION.

4. THE PROCESS OF CREATION OF GMS POSTS AND FILLING OF VACANCIES MAY ACT AS A BARRIER TO ENTRY TO THE MEDICAL PROFESSION BY RESTRICTING THE CREATION AND DEVELOPMENT OF NEW AND POTENTIALLY MORE INNOVATIVE GP PRACTICES, LIMITING THE CHOICE OF GPS AVAILABLE TO PATIENTS AND CONSTRAINING COMPETITION.

Restrictions on Conduct

5. THE PRACTICE OF REFERRAL OF PATIENTS TO SPECIALIST CONSULTANTS IN MOST CASES IS LIKELY TO BE HARMFUL TO CONSUMER INTERESTS THROUGH INCREASING THE COST OF ACCESS TO PATIENTS OF SPECIALISED HEALTHCARE SERVICES.

6. THE RESTRICTIONS PLACED ON ADVERTISING BY DOCTORS RESTRICT THE AVAILABILITY OF INFORMATION TO PATIENTS AND COULD RESTRICT COMPETITION BETWEEN PRACTITIONERS.

Restrictions on Organisational Form

7. THE TRADITION WITHIN THE MEDICAL PROFESSION PRECLUDING THE PRACTICE BY GPS OF MEDICINE WITHIN LIMITED LIABILITY STRUCTURES IS LIKELY TO CONSTRAIN THE GROWTH OF GP PRACTICES AND THE ENTRY OF NEW AND POSSIBLY MORE EFFICIENT PRACTICES INTO THE MARKET.

Limitation on the Number of Study Places Available at the Irish Schools of Medicine

An important constraint operating within the medical profession in relation to entry requirements concerns the limitation on the number of study places available on an annual basis across the five schools of medicine in the State.

The substantial gap between the number of applications and places offered through the CAO system for the undergraduate medicine degree courses points to a significant constraint on entry to the medical profession, which potentially could act as a barrier to competition in the profession in Ireland. Moreover, individual general practitioners have indicated that they have experienced considerable difficulties in recruiting doctors into their practices in recent years, which may also point to possible shortages in the supply of doctors. While this highlights the need to examine the capacity of the schools of medicine, we understand, however, the very significant exchequer costs involved in providing third level medical places and the need to balance the public expenditure impacts against any competition implications.

Process of Registration of Doctors Wishing to Transfer from Other Countries to Practice in Ireland

In the case of EU Nationals who have been awarded a qualification in medicine by a competent body or authority designated for that purpose by a Member State, the process of registration in Ireland is relatively straightforward. However, non-EU nationals or persons not possessing recognised qualifications from EU institutions must sit an examination to gain registration status in Ireland and the Medical Council authenticates the individual's existing qualifications where these are not already recognised. We believe that this process may take up to 6 months to complete.

While we understand the need to carefully control the process of registration of doctors so that only persons that are suitably trained and experienced may practice medicine in Ireland, we believe that the existing regulations concerning transfer requirements for non-nationals and particularly non-EU nationals are likely to constrain potential entry to the medical profession in Ireland. By acting as a barrier to entry of professionals wishing to practise medicine, the current regulations are likely to adversely impact on potential competition in the market for medical services. We believe that the objective of ensuring high quality educational/training standards could still be achieved through the implementation of appropriate arrangements between the Medical Council and the regulatory and educational institutions in other countries that would facilitate a more streamlined and speedier system of registration for such applicants. This could build on the Medical Council's existing Temporary Registration Assessment Scheme (TRAS) by inter alia speeding up the process of full registration of those participating in the TRAS.

Process of Determination of the Number of Consultant Posts and the Filling of such Posts

We believe that another feature of the medical profession that is likely to adversely impact upon the supply of consultants and the competitive environment in the market for health care concerns the process of determination of the number of public consultant posts and the approach to filling these posts. The key issues from a competition perspective in relation to the process of determination and filling of public sector consultant posts in the Irish health service concern the length of time required to create and fill posts, and the structure of Comhairle na nOspidéal.

In relation to the creation and filling of posts, we understand that it takes considerable time to fill permanent public consultant posts in the health boards and in some voluntary hospitals the process is very lengthy. In particular, the average time taken to fill a health board post through the Local Appointments Commission (LAC), at up to one a half years, appears inordinate compared with most other public sector appointments and particularly compared with the norms prevailing in the private sector. The average time taken to advertise health board consultant posts also appears excessive.

In our view, the current process of filling of consultant posts, in terms of the length of time required, constitutes an effective restriction on entry to the consultant practitioner part of the medical profession. Given the increased demand for specialist medical care, both at national and regional level in Ireland, it is evident that the current system prevents the supply of consultants from adjusting to demand. This, in turn, is likely to adversely affect potential competition and consumer interests.

We would also be concerned, in relation to the structure of Comhairle na nOspidéal, that the composition of the board could potentially result in a bias towards maintaining the existing size and composition of the consultant community rather than reflect the demand for specialist practitioners. Combined with the absence of any explicit consumer/patient representation on Comhairle, this would adversely affect the public and patients' interests and also limit potential competition in the medical profession

Process of Creation of GMS Posts and Filling of Vacancies

Potential competition concerns within the medical profession also arise in relation to the operation of the GMS scheme. GMS contracts permit individual doctors or doctors in partnership with GMS contract principals to provide services free of charge to medical cardholders under the Health Act 1970. We believe that aspects of the process of creation of GMS posts and the filling of GMS vacancies may frustrate the formation of new GP practices.

It is our view that the existing process of determination of GMS contracts may act as a barrier to entry to the medical profession, particularly in relation to the creation of new GP practices. This is particularly likely to be the case in rural or more deprived areas where the possession of a GMS list is much more important in ensuring the successful expansion and development of a new GP practice. Through confidential individual submissions to this study, we understand that the existing process may have the potential to restrict entry of new GP practices into the market. Where new GMS lists are created, the majority are likely to be based on assistant positions within existing practices, rather than independent contracts permitting individual GPs to form new practices. This feature of the current system has also meant that an increase in the population of many towns, for example, has not resulted in a corresponding increase in the number of new GMS contracts. Where GMS contracts are restricted, we also believe that this is likely to result in restricted choice available to patients, as the importance of GMS lists in developing new practices, particularly in small towns and rural areas, means that in the absence of such a contract, GPs can only cater for a much smaller proportion of the overall market (around 30% of the population are eligible to hold medical cards).

Given the importance for practice development of possession of a GMS list, it is our view that, subject to the operation of reasonable conditions regarding the educational and other standards required by doctors, it should be possible for any suitably qualified GP to apply for a GMS contract. In the interests of promoting competition and patient choice, we believe that no limit should be placed on the number of contracts awarded within a given area. This would facilitate the entry of new GP practices and allow the number of practices to respond to market demand.

Practice of Referral of Patients to Specialist Consultants

Another requirement or restriction operating within the medical profession that we believe is likely to be negative from the perspective of promoting competition and patient choice is the consultant referral system. The referral system requires that patients first attend their GP, who then refers the patient to a suitable consultant. In other words, patients do not have direct access to the consultant community within the Irish health service. According to the Medical Council, the consultant referral system is based on the principle that the GP is the primary carer and acts as a 'gate keeper' within the medical profession.

We note the argument that the medical profession benefits from the referral system through a division of labour that allows the GP to provide general first point of contact medical care to his/her patient, while the consultant community focuses on the provision of specialist care. This approach may also facilitate patients by reducing search costs. In other words, the GP acts as a 'gatekeeper' within the medical profession.

However, our view is that the referral system does not facilitate vertical integration within the provision of health services, whereby GP's and specialist practitioners could work under one practice structure, offering a range of general and specialist services to patients. By opening up the direct supply of specialist services to patients, competition between providers would also be greater, which would benefit consumers through greater choice and lower costs.

Secondly, the referral requirement could potentially reduce the choice of consultant available to patients and the ability for patients to choose their preferred specialist. This is particularly likely to be the case in respect of patients who are well acquainted with their health condition and with the range of specialist services available. In other words, the argument that patients lack the knowledge required to chose the most suitable specialist for their needs breaks down in the case of patients who are intensive users of the health services and who are well informed as to their health condition and service needs.

In relation to the argument that the patient does not have access to sufficient information on the most appropriate specialist medical care, we believe that this issue could in part be addressed by reference to the regulations in place concerning advertising and publicity, which we discuss below. We would, however, envisage that even if there is a relaxation of this requirement, most patients would continue to be referred to consultants by their GPs.

Restrictions placed on Advertising by Medical Practitioners

A fourth area where we would have particular concern in relation to the impact on competition in the medical practitioners' profession concerns the restrictions in place in relation to advertising. While we note the arguments given by the Medical Council, the IMO and the IHCA in relation to the potential adverse implications for patients stemming from inappropriate misleading advertising by medical practitioners, we would not accept that such advertising is likely to be significant in its extent throughout the medical profession. In particular, given the very high standards of education and training that doctors must attain before being permitted to register as practitioners in Ireland, and the importance of reputation effects within a profession such as that of the medical practitioner, it is difficult to argue that advertising is likely to mislead consumers.

If a medical practitioner is fully registered, and therefore meets the educational, training and other attributes necessary to practise – as the Medical Council would argue as being the objective of registration – then we do not see why comparative informative advertising, pertaining to fees or the range and quality of health services offered, should be restricted in the medical profession.

We would also be concerned that the restrictions on advertising in the profession are likely to act as a barrier to entry and innovation. The existing restrictions in relation to practise announcements, in particular, are likely to frustrate the entry of new practices. Moreover, the current restrictions are likely to constrain innovation within the medical profession by preventing new entrants who possess specialist competencies in a particular area from informing patients of their services and fees.

We believe that if advertising restrictions were relaxed or removed in the medical profession, the pro-competitive effects just mentioned would follow as practitioners would have no incentive to engage in unscrupulous campaigning. We would have confidence that the ethics, professionalism and commitment of the medical profession would not result in exploitation simply if doctors were permitted to engage in normal advertising behaviour.

Tradition within the Medical Profession Precluding the Practice of Medicine by GPs within Limited Liability Structures

A fifth area restriction that we consider is likely to be potentially harmful to competition within the medical practitioners' profession concerns the tradition within the profession that precludes the practice of medicine by GPs within limited liability structures.

While it can be argued that the formation of limited liability practices by health professionals would result in a conflict of interest vis-à-vis the professional and ethical requirements generally imposed by the profession's regulatory body, given the ethics of the medical profession, we do not believe that this would be the case. Moreover, other forms of patient protection could be introduced, if required.

We believe that the tradition precluding the operation by general practitioners of limited liability practices is likely to constrain the growth of GP practices and the entry of new and possibly more efficient practices into the market. In relation to the important requirement of ensuring the protection of the patient, we believe that this can be accomplished through the requirement for practitioners to have adequate professional indemnity insurance or adequate practice capitalisation.

The removal of the current tradition/restriction on organisational form of GP practices could also facilitate the profession, and by extension the patient, by allowing improved access to capital that may be required to invest in improved equipment, infrastructure and services. It may also facilitate innovative GPs to expand their practices and could facilitate much needed capital involvement in the sector.

However, in tandem with the OECD's recommendation on this issue, we believe that while practitioners should have the option to incorporate their practices, they should not be obliged to do so.

COMPETITION AND THE DENTISTS' PROFESSION IN IRELAND

Our analysis suggests there are significant restrictions on competition that have an appreciable adverse effect on consumer interests. We do not believe that these are justified by any potential benefits.

Summary of Main Conclusions re Key Restrictions in the Dentists' Profession

Entry Restrictions

1. THE ABSENCE OF REGISTRATION STATUS FOR SUITABLY QUALIFIED DENTURISTS AND DENTAL TECHNICIANS IS LIKELY TO RESULT IN A BARRIER TO ENTRY TO THE PROFESSION AND THEREFORE ADVERSELY AFFECT POTENTIAL COMPETITION IN THE MARKET.

2. THE TRANSFER ARRANGEMENTS IN RELATION TO DENTISTS FROM NON-EU COUNTRIES WISHING TO PRACTISE IN IRELAND ARE ALSO LIKELY TO ACT AS A BARRIER TO ENTRY TO THE PROFESSION AND CONSTRAIN POTENTIAL COMPETITION IN THE MARKET.

3. THE LIMITATION ON THE NUMBER OF PLACES AVAILABLE FOR STUDY AT IRISH SCHOOLS OF DENTISTRY ACTS AS A BARRIER TO ENTRY TO THE PROFESSION AND IS THEREFORE LIKELY TO CONSTRAIN COMPETITION IN THE MARKET FOR DENTAL SERVICES.

Restrictions on Conduct

4. THE RESTRICTIONS PLACED ON ADVERTISING BY DENTISTS, BY CONSTRAINING NORMAL COMPETITIVE BEHAVIOUR, ARE LIKELY TO ADVERSELY AFFECT COMPETITION IN THE DENTISTS' PROFESSION.

Restrictions on Demarcation

5. THE RESTRICTION THAT DENTAL HYGIENISTS MUST WORK UNDER THE SUPERVISION OF DENTISTS IS LIKELY TO CONSTRAIN THE ENTRY OF NEW PRACTICES OPERATED BY HYGIENISTS, REDUCE THE OVERALL SUPPLY OF DENTAL SERVICES AND ADVERSELY AFFECT COMPETITION AND CONSUMER INTERESTS.

Restrictions on Organisational Form

6. THE PROHIBITION ON THE PRACTICE OF DENTISTRY BY CORPORATE BODIES IS LIKELY TO CONSTRAIN THE GROWTH OF PRACTICES AND THE ENTRY OF NEW AND POSSIBLY MORE EFFICIENT DENTAL PRACTICES INTO THE MARKET.

Absence of Registration Status for Suitably Qualified Denturists and Dental Technicians

A key restriction within the dentists' profession concerns the absence of registration status of dental technicians and denturists. Currently in Ireland, no legal title of denturist or dental technician exists. The present absence of legal status for technicians and denturists prevents these related dental professionals from selling their products directly to the public.

The principal competition concern that arises in relation to the exclusion of denturists and dental technicians from registration is that this practice amounts to reservation of title and practice of dentistry. This may prevent the development of alternative avenues of provision of standard dental services, such as those offered by denturists and dental technicians, and is therefore likely to have negative implications for consumer welfare and potential competition in the provision of dental services.

While we note the arguments put forward by the Dental Council and the Irish Dental Association in relation to the requirement for ensuring that patients are treated by suitably trained and qualified professionals, we believe that these concerns can be overcome by the creation of appropriate new classes of auxiliary dental worker. To gain registration, each category of individual would have to show evidence of appropriate education /training and the initiative is designed to improve quality of service in the supply and fitting of dentures.

In relation to denturists, it is clear that the present system which restricts the direct sale of dentures to the public by denturists results in substantial cost increases facing consumers, as dentists may place substantial mark-ups on the cost of dentures. Subject to the proviso that professionals must have appropriate educational/training requirements, we are of the view that the interests of consumers and of competition generally would be furthered through the granting of registration status for denturists and dental technicians to allow the latter to sell these products directly to the public as well as via dentists.

Limitation on the Number of Places Available for Study at Schools of Dentistry

An important constraint on entry to the dentists' profession in Ireland concerns the limitation on the number of places available for study at the Irish schools of dentistry. This limitation acts as a direct barrier to entry to the profession.

Our analysis of CAO data points to a substantial gap between the demand for places on the dentistry degree courses and the available number of places. Furthermore, this is a pattern that has persisted over the last decade and has been evidenced by the continued very high CAO points requirements for entry to the dentistry degree courses. This points to a significant constraint on entry, which we believe is likely to act as a potential barrier to competition in the dentists' profession in Ireland. Moreover, evidence has shown that the majority of dentists have experienced considerable difficulties in recent years in relation to recruitment of qualified professionals required to meet the increased demand for dental services in Ireland.

We understand the role of the Dental Council in relation to ensuring the quality rather than the quantity of dental graduates. We are also aware that resourcing constraints restrict the supply of study places at the dental schools. However, our analysis of the CAO applications and the number of offers issued points to a high level of demand for each course. The limitation on the number of places available for study therefore acts as a direct constraint on undergraduate entry to the profession in Ireland, which we believe is likely to constrain potential competition in the dentists' profession. We are, however, aware of the need to balance public expenditure and competition interests and there are inevitable limits to available public expenditure to pay for the training of dentists.

Transfer Arrangements in Relation to Dentists from Non-EU Countries Wishing to Practice in Ireland

Another aspect of entry to the dentists profession in Ireland that raises potential competition issues concerns the transfer arrangements in relation to dentists from non-EU countries, or individuals who do not possess qualifications from recognised EU Institutions wishing to practise in Ireland. Under the current arrangements, an individual must submit to the Dental Council details of his/her qualifications attained, while a special Council examination must then be undertaken, and the applicant must also undergo a vetting procedure to ensure good standing as a professional.

We are in agreement with the views of the Dental Council that the educational requirements must be set so as to ensure that dentists attain a minimum standard of education and training required to safely and efficiently engage in practice. However, our examination has shown that the requirements facing applicants from outside the EU who wish to register to practise in Ireland are onerous in nature, requiring applicants to submit their qualifications, sit a Council examination and also undergo a vetting procedure, including an interview.

We believe that the current transfer arrangements in respect of non-EU dentists are likely to represent a barrier to entry to the profession in Ireland and, as such, could be potentially harmful to competition in dentists' profession. Our view is that the appropriate educational / training requirements for dental practices in Ireland could still be achieved through the operation of reciprocal arrangements between the Dental Council and the regulatory / educational bodies in other non-EU countries.

Restrictions Placed on Advertising by Dentists

Another area where we would have particular concern in relation to the implications for competition in the dentists' profession concerns the regulations operating in relation to advertising and publicity.

While we note the arguments given by the Dental Council and the Irish Dental Association in relation to the potential adverse implications for patients stemming from inappropriate misleading advertising by dentists, we would not accept that such advertising is likely to be significant in its extent throughout the profession. In particular, given the very high standards of education and training that dentists must attain before being permitted to register as practitioners in Ireland, and the importance of reputation effects within a profession such as that of the dentist, it is difficult to argue that advertising which misleads consumers is likely to be pervasive in the profession.

If a dentist is fully registered, and therefore meets the educational, training and other attributes necessary to practise, then we do not see why comparative informative advertising, pertaining to fees or the range and quality of health services offered, should be restricted in the dentists' profession.

We would also be concerned that the restrictions on advertising in the dentists' profession are likely to act as a barrier to entry and innovation. In particular, the Council's guidelines on press announcements in relation to dentists setting up practice (which prohibit a dentist setting up practice from advertising more than six times in his/her first year) are likely to severely constrain the ability of dentists entering the market to promote new practices and therefore limit competition in the marketplace. This may also constrain the entry of more innovative dental practices, offering a wider range of specialist services to patients.

Subject to the proviso that advertisements are not in bad taste or do not bring the dentists' profession into disrepute or do not exploit the limited information that some consumers may have, we believe that advertising and promotion should be permitted that facilitates normal competitive behaviour.

Restriction that Dental Hygienists Must Work under the Supervision of Dentists

A third area where we are concerned that current regulations are likely to be anti-competitive concerns the restriction that dental hygienists must work under the supervision of dentists.

The Dental Council, in its submission, states that the provisions in relation to demarcation of activities ensure that only properly trained and qualified practitioners can provide services to the public. Given the provisions, "the consumer is protected from the charlatan, the unqualified and the incompetent".

However, we believe that dental hygienists with sufficient training and/or experience should be allowed to form practices of their own independently of dentists where they may undertake specific dental procedures. Dental health in western economies has improved dramatically over the years and Ireland is no exception. Much of the demand today is for basic oral hygiene and minor treatment of the gums. Permitting dental hygienists to work on their own would in our view be a significant development in meeting demand and improving competition in the marketplace.

Prohibition on the Practice of Dentistry by Corporate Bodies

The fifth key restriction that we believe is likely to be harmful to competition in the dentists' profession concerns the organisational restriction that prohibits the practice of dentistry by corporate bodies. This restriction has its legal basis under the Dentists Act, 1985.

The standard argument put forward in relation to the prohibition on the formation of limited liability practices by health professionals is that this would result in a conflict of interest vis-à-vis the professional and ethical requirements generally imposed by the profession's regulatory body. In order words, as the dentist, in this case, must take final responsibility for the care of his/her patient(s), the operation of limited liability would contravene this requirement and would mean that the interests of the patient may not be fully protected.

Notwithstanding the above argument, we believe that the restriction on the formation of corporate bodies by dentists is likely to constrain the growth of practices and the entry of new and possibly more efficient dental practices into the market. In relation to the important requirement of ensuring the protection of the patient, we believe that this can be accomplished through the requirement for practitioners to have adequate professional indemnity insurance or adequate practice capitalisation.

The removal of the restriction on organisational form of dental practices could facilitate the profession, and by extension the patient, by allowing improved access to capital that may be needed to invest in improved equipment, infrastructure and services. It may also facilitate innovative dentists to expand their practices. However, in tandem with the OECD's recommendation on this issue, we believe that while practitioners should have the option to incorporate their practices, they should not be obliged to do so.

COMPETITION AND THE OPTOMETRISTS' PROFESSION IN IRELAND

Our research indicates a number of restrictions on entry, conduct and demarcation that have a potential negative impact on competition.

Summary of Conclusions for the Optometrists' Profession

Entry Restrictions

1. THE LIMITATION ON NUMBER OF STUDY PLACES AVAILABLE FOR THE OPTOMETRY DEGREE COURSE ACTS AS A BARRIER TO ENTRY TO THE PROFESSION AND IS LIKELY TO CONSTRAIN POTENTIAL COMPETITION IN THE MARKETPLACE IN IRELAND.

Conduct Restrictions

2. THE CONTROLS ON ADVERTISING BY OPTOMETRISTS ARE LIKELY TO BE HARMFUL TO NORMAL COMPETITIVE BEHAVIOUR WITHIN THE PROFESSION.

Restrictions on Demarcation

3. THE RESTRICTIONS CONCERNING THE PROHIBITION ON THE SALE OF READYMADE SPECTACLES OR OTHER VISUAL AIDS BY PERSONS OTHER THAN REGISTERED MEDICAL PRACTITIONERS OR OPTICIANS IS UNDULY RESTRICTIVE FROM A COMPETITION PERSPECTIVE.

Other Regulatory Issues

4. THE COMPOSITION OF MEMBERSHIP OF THE OPTICIANS BOARD SHOULD INCLUDE SPECIFIC CONSUMER REPRESENTATIVES.

Limitation on Number of Places on Optometry Degree Course

An important restriction that we believe is likely to constrain potential competition in the optometrists' profession concerns the limitation on the number of study places available on the Optometry Degree course at the DIT.

According to the Opticians Board, the number of places on the DIT Optometry Degree course is determined by the DIT and depends on both the demand for places and the availability of teaching resources.

According to the DIT, a large number of applications for the optometry degree course is received each year. The level of demand for the degree course is also evidenced by the high points requirements, which, according to the CAO reached 510 in 2002. In addition, our survey findings point to the existence of significant difficulties faced by optometrists' practices in recent years in relation to recruitment of qualified staff to meet demand for optical care. This may reflect shortages in the supply of graduates.

While we understand the argument made by the Opticians Board in relation to the importance of ensuring quality rather than quantity of graduates, our research on the number of places available on the Optometry Degree course at DIT and the very high CAO points requirements points to the presence of a significant constraint on entry to the profession at graduate level in Ireland. While this feature may reflect both resource constraints as much as the educational/training requirements set by the Opticians Board, we believe that the constraint on places acts as a barrier to entry and is likely to be harmful to potential competition in the optometrists' profession in Ireland. As in the other professions, we accept, however, the need to balance the conflicting objective of public expenditure and competition in this area.

Controls on Advertising by Optometrists

A second area where competition concerns arise in the optometrists' profession concerns the controls in place in relation to advertising. These concern the Opticians Board's Rules in relation to advertising and publicity, which have their basis in the Opticians Act, 1956. These controls restrict false or misleading advertising, advertising that is in bad taste, canvassing for business, touting, and other forms of comparative advertising by practices.

Notwithstanding the reforms that were carried out in relation to the controls on advertising stemming from the 1993 Decision of the Competition Authority, we are of the view that the current restrictions on advertising by optometrists/opticians are likely to be harmful to competition in the profession. In particular, the restrictions on comparative advertising are likely to be harmful to normal competitive behaviour within the marketplace. The evidence shows that restricting advertising is likely to have negative effects on competition in professional service markets. Subject to the proviso that advertisements are not in bad taste, do not bring the optometrists' profession into disrepute or do not exploit the limited information that some consumers may have, we do not believe that there should be any restriction on the type or nature of adverts that optometrists/opticians may place. In particular, we do not believe that comparative advertising should be prohibited nor should any advertising be prohibited that highlights that a practitioner has any specialist expertise knowledge. Neither should unsolicited approaches to potential and existing customers be prohibited.

Prohibition on Sale of Spectacles/Other Visual Aids by Persons Other than Opticians or Registered Medical Practitioners

An area where we believe that significant concerns arise in relation to the potential adverse impact on competition in the optometrists' profession concerns the restrictions governing the sale of spectacles or other visual aids by persons other than registered medical practitioners or opticians. This restriction has meant that reading glasses or ready-made spectacles sold in a range of standard magnifications can not be sold other than by registered opticians or medical practitioners.

The principal argument in favour of restricting the provision of a service of product to suitably qualified professionals is that this approach maximises the likelihood that consumers will be provided with the highest quality of service or product in question. In the case of optical services, however, a distinction needs to be made between the services provided by an ophthalmic optician or optometrist and those provided by a dispensing optician. From the perspective of ensuring that patient welfare is safeguarded, it is reasonable to expect that the scope of practice of an optometrist is limited to those areas where he/she is suitably qualified.

However, we believe that the prohibition on the sale of spectacles (including readymade spectacles) and other visual aids by persons other than registered opticians or medical practitioners may be unduly restrictive from a competition perspective. It should be noted in this regard that proposals have been developed by the Minister for Health and Children that would allow for the sale of readymade reading spectacles by persons other than registered opticians. We would regard such a development as leading to an improvement in competition and consumer welfare.

Composition of Membership of the Opticians Board

Another aspect of the regulation of the optometrists' profession where concerns arise as to the potential adverse implicatiosn for competition and consumer interests concerns the composition of membership of the Opticians Board. The size and composition of membership of the Opticians Board is set out in statute under the Opticians Act, 1956.

The presence of existing practitioners on the board, where six out of the eleven members are optometrists/dispensing opticians, gives rise to a concern of potential regulatory capture. An important requirement in relation to the operation of a regulatory body such as the Opticians Board is that the body, in achieving its the objectives in relation to regulation of the profession, is not overly influenced or constrained by the vested interests of existing practitioners within the profession.

Our view is that the composition of the Board, in relation to the extent of presence of members from the profession and the absence of any legislative based consumer/patient representation, is not appropriate to ensuring competition within the profession. While representation of the profession on the Board is necessary to ensure that policy is informed by the knowledge and experience of practitioners, sufficient explicit consumer representation should be guaranteed through having appropriate consumer representation on the Board.

CONCLUSION

In some of the professions reviewed, normal competitive forces are, in general, in operation with resultant benefits for efficiency, lower prices and innovative supply of services. In other professions the extent of barriers to competition are very significant and we believe these barriers have an appreciable adverse impact on consumer interests. Given the importance of these professions in Irish life, we believe that the specific restrictions identified should be addressed by the Competition Authority and other agencies in consultation with the professions.

Glossary of Terms

Anti-Competitive Practice

An anti-competitive (restrictive) practice can be defined as any strategy that distorts, restricts or prevents competition on a relevant market. Price fixing, collusive tendering and predatory pricing are all examples of anti-competitive practices.

Asymmetric Information

This refers to a difference in information between two parties. Many economists rely on economic models that assume both parties in a transaction have perfect information. But information in the real market is often asymmetric. Economist George Akerlof introduced the concept in his classic 1970 paper, The Market for 'Lemons'. In the used-car market, the seller's information is based on sales that he conducts every day, but the buyer's information is based on a purchase conducted only a few times in his/her life. The information is therefore highly unequal, and the resulting unfair exchange is often an inefficient allocation of resources, or market failure.

Barrier to Entry

Barriers to entry are legal, financial, logistical or natural constraints that protect an existing firm from potential competitors. Barriers to entry are a prime source of the market power of a firm and of reducing the level of competition between firms within a market.

Cartel

These are organisations of independent firms that act collectively to improve their economic return by attempting to monopolise the market. Fixing price above the competitive level is the direct consequence of cartel activity, which is illegal under competition law.

Chiselling

Where members of a price-fixing group sell output at prices below that agreed by the cartel. Where a cartel sets price above the competitive level, each member of the cartel has an incentive to increase profits by selling more than its quota by reducing price below the cartel price. The likelihood of chiselling, and thus the stability of cartel activity, depends on the ability of the cartel to detect and police 'cheating' and on the ability to credibly punish 'cheaters'.

Collusive Agreement

An agreement between two (or more) producers to restrict output so as to increase prices and profits. Price fixing and collusive tendering are examples of collusion. Due to its illegal nature, collusion is 'tacit' or 'covert'. Related to cartel.

Competition Economics

Competition economics refers to that branch of economics concerned with improving the operation and efficiency of markets throughout the economy. It is closely related to competition policy and law (antitrust). The economic foundation of competition analysis is industrial economics or industrial organisation.

Consumer Surplus

Consumer surplus is the value that the consumer gets from each unit of a good minus the price paid for it. Consumer surplus is maximised under perfect competition and minimised under monopoly market structure.

Concentration (Market and Aggregate)

Market concentration refers to the number and size distribution of firms within a relevant market. The two most popular measures of concentration are the concentration ratio and the Herfdindahl-Hirschman index (HHI). The former cumulates the market shares of the four or five largest firms in the market, while the HHI is defined as the sum of the squares of the market shares of all firms in the market.[1] The concentration ratio ranges in value between 0 (perfect competition) and 100 (monopoly) and the HHI between 0 (perfect competition) and 10,000 (monopoly). Market share is typically measured by reference to data on sales or net output. High market concentration does not necessarily imply market power. Aggregate concentration looks at the share of the very largest firms in a given economic sector and is measured by adding up the shares of the 100 largest firms in the sector (100-firm concentration ratio). This is the broadest measure of concentration.

Conditional Selling

The practice where a firm will supply a good or service only if the buyer also agrees to purchase another good or service supplied by the same firm.

[1] For example, in a market of six firms with market shares of 40%, 20%, 10%, 10%, 10% and 10%, the four-firm concentration is 80% and the HHI is $40^2 + 20^2 + 10^2 + 10^2 + 10^2 + 10^2 = 1,600 + 400 + 100 + 100 + 100 + 100 = 2,400$.

Credence Good

A credence good is one whose quality cannot be assessed before or after consumption. These goods are prevalent where the consumer must have specialist information or knowledge to assess quality attributes of goods and services. Professional services may in some cases constitute an example of credence goods.

Cross-Subsidisation

This occurs when revenue from one activity can be used to support (subsidise) other activities.

Deadweight Loss

Deadweight loss is a measure of inefficiency. It is equal to the loss in total consumer and producer surplus when output is below or above its efficient level. Generally, these market inefficiencies are attributable to market imperfections created by market power, taxes, regulations, or other factors.

Dynamic Efficiency

This refers to a criterion for evaluating projects or decisions that generate a stream of benefits and/or costs into the future. When a set of alternatives is being considered, the dynamically efficient alternative generates the largest present discounted value of net benefits, profits, or surplus. Dynamic efficiency embodies the concept of technological change, which includes process innovation (e.g. reducing the cost of producing a given good/service) and product innovation (e.g. improving an existing product/service to the final user).

Economic Rent

The income received by the owner of a resource over and above the amount required for the owner to offer the resource for use.

Economies of Scale

Features of a firm's technology that lead to falling long-run unit cost or average total cost as output or scale of production increases. For example, a widget producer may find that its average long run costs will fall significantly as its fixed costs (e.g. rental costs on capital) and variable costs (e.g. wages) are spread over more units of production.

Economies of Scope

Decreases in average total cost that occur when a firm uses specialized resources to produce a range of goods and services. For example, a consulting engineering firm may find it profitable to combine architectural as well as engineering services in its mix of client services.

Efficient Market

This refers to a market in which the price embodies all currently available relevant information. Resources are then allocated to their highest-valued use. See Pareto efficiency below.

External Benefit

External benefit is the benefit that accrues to people other than the buyers of a good. This is related to the concept of a positive externality (see below). For example, an apple grower might benefit from her neighbour's activities as a bee-keeper through the pollination activities of the bees even though the apple grower bears none of the costs of bee-keeping.

External Cost

External cost is the cost that is borne by people other than the producer of a good. This is related to the concept of a negative externality (see below). For example, members of the general public may suffer from pollution caused by a nearby firm.

Externality

A cost or a benefit that arises from an economic transaction that falls on a third party who does not participate in the transaction. This situation occurs because the externality is not included in the supply price or the demand price and is therefore not accounted for in the transaction price. Externality is one type of market failure that causes inefficiency. Negative externalities are generally more noticeable than positive externalities. For instance, a poorly constructed building may lead to casualties or poor diagnosis of a potentially fatal disease may give rise to an epidemic. As an example of a positive externality, successive generations of a community may derive pride from an aesthetically pleasing and purposeful building, even though they did not directly contribute to its cost.

Focal Point

This refers to a way of achieving tacit collusion or covert cartel activity. Two or more firms in a relevant market may agree on a focal point price to boost earnings without having to make contact with each other. A previously mandatory or recommended fee scale might act as a focal point. A focal point is succinct, easy to remember and salient (e.g. say 1% of the value of a given transaction).

Hypothetical Monopoly Test

See relevant market below.

Long Run

Long run is a period of time in which a firm can vary the quantities of all its inputs.

Market Failure

This refers to the situation in which the market does not use resources to achieve the greatest possible consumer satisfaction. Sources of market failure include asymmetric information (see above) and market power (see below).

Market Power

This refers to the ability of buyers or sellers to exert influence over the price or quantity of products or services exchanged on a market. Market power depends on the number of competitors on each side of the market. If a market has relatively few buyers, but many sellers, then the buyers tend to have relatively more market power than sellers. The converse occurs if there are many buyers, but relatively few sellers. If the market is controlled on the supply side by a single seller, we have a monopoly, and if it is controlled on the demand side by one buyer, we have a monopsony. Most markets are subject to some degree of power by the participants in it. In competition/antitrust analysis, market power is understood to imply the ability for a firm to act independently of its rivals, its customers and ultimately of consumers.

Monopoly

A market in which there is a single seller of a unique product or service with no close substitute and in which that single seller is protected from competition by barriers to entry preventing the entry of new firms. As the single seller of a unique good or service with no close substitutes, a monopoly firm essentially faces no competition. The demand for a monopoly firm's output is the market demand. This gives the firm extensive market power, making a monopoly firm a price-maker. However, while a monopoly can control the market price, it cannot charge more than the maximum price that buyers are willing to pay.

Oligopoly

This refers to a market in which a small number of sellers or businesses compete (an oligopsony is a market with a small number of buyers). Oligopolies are usually (but not exclusively) characterised by high concentration and barriers to entry.

Opportunity cost

The opportunity cost of an activity (or choice) is the highest-valued alternative activity that is forgone. For example, the opportunity cost of having more nurses and doctors is the quantity of other goods (e.g. entertainment) that would have to be sacrificed in order to direct more scarce resources into healthcare.

Pareto Efficiency

A Pareto efficient allocation of resources is one in which no one individual can be made better off without making someone else worse off.

Perfect Competition

The opposite market structure to monopoly. In this market structure, firms are price-takers, there is freedom of entry and exit, information is perfect and firms earn normal profits (there are no economic rents or supernormal/abnormal profits). Perfect competition is the most efficient market structure and is the welfare benchmark against which other forms of market structure (monopoly, oligopoly) are compared.

Producer Efficiency

Producer efficiency occurs when firms cannot lower the cost of producing a given output by changing the resources they use.

Producer Surplus

Producer surplus is the price a producer gets for a good or service minus the opportunity cost of producing it.

Public Good

A public good is a good or service that can be consumed simultaneously by everyone, even if they do not pay for it. A pubic good is non-excludable in consumption. A public good can exist in nature (such as the air we breathe), can be produced by a government (such as national defence) or can be produced by private individuals or firms (such as over-the-airwaves radio programs).

Private Interest Theory

See rent-seeking behaviour below.

Public Interest Theory

A theory of economic regulation that states that regulations are implemented to satisfy the needs of consumers and producers in order to maximize total surplus - that is, to attain economic efficiency.

Regulatory Capture

Control of a regulatory agency by those entities, usually the businesses of a particular industry, that the agency is designed to regulate. Those industries subject to economic regulation that is intended to protect the public interest (consumers) invariably find it beneficial to exert influence over the regulatory agency. One common way of doing this is to have former or future employees in the industry 'temporarily' work for the regulatory agency.

Relevant Market

In competition/antitrust analysis, the relevant market contains all those substitute products and regions that provide a significant competitive constraint on the products and regions of interest. In the relevant market, goods or services are close substitutes from either consumers' or producers' point of view. Relevant market definition includes definition of the relevant product or service market and of the geographic scope of the relevant product or service market. The conceptual approach to delineating the relevant market in competition work is the 'hypothetical monopolist test' or 'SSNIP test' or '5-10% test'. The test originated in the US Horizontal Merger Guidelines issued jointly by the Department of Justice and the Federal Trade Commission. According to the 1992 Guidelines:

> "A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximising firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price [SSNIP], assuming the terms of sale of all other products are held constant [usually taken to be either 5 or 10%].

Rent-Seeking Behaviour

This refers to the activities of individuals or firms to obtain special privileges, such as monopoly power, which may enable them to increase their incomes. This may include using up resources to acquire such privileges from governments or their agencies. Rent-seeking is directly unproductive and wasteful of scarce resources.

SSNIP Test

See relevant market above.

Tying

Tying occurs when purchases of one distinct product force buyers to buy another distinct product.

1 Introduction and Background

1.1 This study is submitted to the Competition Authority by Indecon International Economic Consultants in association with London Economics. The study concerns an assessment of competition among eight professions in Ireland.

Background to Study

1.2 In view of the Government's response to the OECD Report on Regulatory Reform in Ireland (published 25 April 2001) and following discussion with An Tánaiste and Minister for Enterprise, Trade and Employment, Mary Harney, TD, the Competition Authority decided to conduct a section 11 study of restrictions in the professions under the Competition Acts, 1991-1996.

1.3 The Authority is aware of the existence of restrictions in the supply of professional services and is concerned about anti-competitive effects arising from these restrictions, beyond their need to solve imperfections in the market for professional services. Such effects could serve to raise prices of services and adversely affect consumer interests.

1.4 The Authority therefore wishes to examine the nature of the restrictions in the professions, the degree to which they might produce anti-competitive effects and whether any such anti-competitive effects might be rationalised on the basis of enhancing consumer welfare.

1.5 As a result of the information and understanding gained from undertaking this research, the Competition Authority may seek or recommend various amendments to existing regulatory practices in the professions in order to enhance competition therein.

Terms of Reference

1.6 The overall objective of the study, as set out in the invitation to tender, is to assess the methods and practices affecting competition in the provision of certain professional services in Ireland and to evaluate and identify which, if any, of the restrictions are proportionate in terms of meeting any benefits claimed for them.

1.7 The Terms of Reference are precisely as follows:

- To study and analyse methods and practices affecting competition in the provision of certain professional services, with a view to identifying any potential or actual restrictions on competition, whether arising from legal provisions, professional rules or customs, or otherwise, that have an appreciable effect on competition.
- To identify and evaluate any consumer benefits claimed for any such restrictions and to consider whether the restrictions are proportionate to the achievement of any such benefits.
- The Study focuses on professions in the medical, legal and construction sectors, specifically: medical practitioners, dentists, veterinarians, optometrists, solicitors, barristers, engineers and architects.

Key Elements of Study

1.8 The study has four focused elements, as follows:

- Description of the professions, their regulators and most significantly the restrictions likely to affect competition;
- Assembly of quantitative and qualitative evidence of restrictions and their impact through competitive channels to consumer welfare;
- Analysis of the likely economic impact of restrictions and assessment of which restrictions, if any, are justified; and
- Conclusions regarding unnecessary restrictions.

Methodology and Data Sources

Methodology

1.9 We have fulfilled the Terms of Reference using a common approach to competition assessment applied to each of the eight professions. The approach comprises firstly undertaking an empirical economic/competition analysis of the profession and secondly an examination of the restrictions on competition in the profession. The latter is undertaken with reference to the findings of the empirical analysis, *a priori* arguments arising from competition principles and previous research in the area of professional services regulation, and our own research/consultations with the principal organisation(s) involved in the regulation of the profession.

Empirical Analysis of Competition in the Professions

1.10 The empirical analysis of competition in each profession comprises four parts as follows:

- Definition of the relevant market and services provided;
- Market size, structure and patterns of demand;
- Customers and their characteristics; and
- Nature of competition, if any, on the market.

1.11 The main results of the empirical analysis are then summarised in a fifth sub-section.

1.12 In competition/antitrust analysis, relevant market definition is the first stage in examining the degree of competition occurring on the market. It includes definition of the relevant product market and of the relevant geographic market. The former refers to those products or services that compete with each other to a sufficient extent to exercise a competitive constraint and the latter refers to the geographic area in which competition between the relevant products or services takes place. Thus, the relevant product or service market includes all those products or services viewed as sufficiently interchangeable by consumers (demand substitutability) or suppliers (supply substitutability).

1.13 In delineating the boundary of the relevant market, it is generally useful to review the objective characteristics of the product or service, the nature of demand and supply, and the attitudes of different types of user. Such evidence is used to inform the so-called 'hypothetical monopolist test' or 'SSNIP test' (where SSNIP denotes small but significant non-transitory increase in price). The test seeks to frame the relevant market in order to identify the smallest relevant group of producers or providers capable of exercising a competitive constraint on the market. The following fundamental principle of competition analysis is worth bearing mind in assessing the boundary of the relevant market: *a relevant antitrust market is something worth monopolising*. While the SSNIP test may be less relevant in a sectoral policy study than in a specific competition case (such as a merger investigation or assessment of dominance), it is useful to consider aspects of relevant market definition in terms of the services provided and also in terms of the geographic area in which the services are provided.

1.14 The analysis of relevant market definition carried out in this report is informed by both qualitative and quantitative evidence supplied by the organisations responsible for regulating the professions, evidence assembled by Indecon/London Economics and other relevant sources (e.g. official publications). (Data sources are outlined in more detail below.) As part of the market definition stage, we also highlight the key skills, requirements and core values of each profession. Owing to the nature of professional services in a country's economic activity, we believe consideration of core values and skills is useful in understanding the identity of each profession, as the values identified underpin many of the arguments used to justify the various restrictions imposed.

1.15 Our quantitative analysis of market size, structure and demand, which follows the analysis of relevant market definition, looks at the number and growth of practitioners and practitioner businesses in the profession, changes in fee income among practitioner units and the size distribution of practices, which informs us about the level of concentration in supply. The numbers and growth statistics presented are set against the level of demand in the profession and against relevant demand indicators such as population changes. Changes in fee income over time should be broadly reflective of supply and demand conditions where the market functions competitively. There is, of course, the possibility that members of a given profession may earn economic rents arising from barriers to entry or conduct restrictions.

1.16 Our analysis of customers of professionals and their characteristics focuses on how users break down in terms of business/government clients, on the one hand, and personal customers, on the other, and the quality of information among these categories of user. Knowledge of the frequency of usage and quality of information between business and personal consumers is relevant to investigating the extent to which there is asymmetric information in the market for professional services. Asymmetric information between practitioner and client is one of the main arguments advanced to justify regulation of professional services. However, despite the weight attached to this particular form of market failure, no comprehensive attempt has previously been made by professional organisations to assess the extent to which consumers are characterised by an information deficit in markets for professional services. We believe that our analysis is the first such quantification in Ireland of asymmetric information in this context.

1.17 In reviewing the nature of competition, if any, on the market, we examine the operation of price competition in terms of its extent and of the level of fees likely to be charged by practitioners for certain services. We reveal new information from various users as well as from professionals themselves. We also review the use of non-price instruments of competition by reference to advertising and innovation. Further, in each of the eight professions, we consider the provision of information by practitioners to users. Asymmetric information between buyer and seller is not only a structural feature of professional services markets, but may also result from the actions of sellers and so may be endogenous. Finally, we look at the difficulty or otherwise in recruiting members in each profession. In a competitive market, we would expect the number of professionals to move broadly in line with demand. This refers to the fact that, for many professional services, demand tends to be income elastic. Thus, during an expansionary period in the economic cycle, demand for the services provided by professionals tends to rise, other things being equal. How well supply responds in turn will be useful to gauge in our assessment of competition.

Examination of the Restrictions in the Professions

1.18 There are four principal categories of restriction that are imposed on the supply of professional services. These are: restrictions on access or entry to the profession; restrictions on the conduct or behaviour of members of the profession; restrictions on demarcation (which includes the possibility of practitioners being bestowed with monopoly rights); and restrictions on organisational form.

1.19 For each of the eight professions under review, we identify and classify the various restrictions according to the four categories. We also provide a summary of the sector's justification of the restrictions together with any claims that the restrictions maximise welfare.

1.20 By reference to the sector's submissions, our empirical analysis of competition in the profession and our review of key issues (carried out in Sections 2-3), we present our judgement regarding the efficacy of each key restriction identified and highlighted.

1.21 Central to our judgement as to whether a given restriction should be permitted to remain in place are two fundamental questions. First, is the net effect of the restriction one that potentially restricts commercial competition among practitioners? Secondly, are there other public policy benefits that would justify the restriction?

Data Sources

1.22 In order to apply the various elements of our framework, a wide range of data/information is accessed. We utilise the following main sources:

- Data from the principal regulatory organisation(s) and other bodies that represent professional practitioners;
- Official data (e.g. Central Statistics Office, Higher Education Authority (HEA), Central Applications Office (CAO);
- New data generated and compiled by the Indecon/London Economics team through primary research, which supports the other (principal) evidence in our drawing of the conclusions. Details of the Indecon/LE surveys are given in Annex 9.

Structure of Report

1.23 The study is structured as follows. In Section 2, we review the theoretical and empirical economic bases for the existence of restrictions in the supply of professional services. This scene-setting section is reinforced in Section 3 by an examination of competition policy relating to professional services markets that have been undertaken in Ireland and in other countries. Together, Sections 2 and 3 provide the economic-competition policy context of the study. Sections 4-11 present our analysis, as outlined above, of the eight professions. Each of the sectoral sections finishes with a summary of our main conclusions.

Acknowledgements

1.24 We acknowledge the extensive inputs made by the professional representative organisations and their advisers who completed detailed questionnaires for the Competition Authority and who met representatives of the consultancy team and/or provided information or made submissions to our team. In particular, we would like to thank the Law Society of Ireland, the Bar Council, the Honorable Society of King's Inns, the Institute of Engineers of Ireland, the Association of Consulting Engineers of Ireland, the Royal Institute of the Architects of Ireland, the Group of Independent Architects in Ireland, the Veterinary Council, Veterinary Ireland, the Medical Council, the Irish Medical Organisation, Comhairle na nOspidéal, the Irish Hospital Consultants Association, the European Institute of Midwifery, the Dental Council, the Irish Dental Association, The Opticians Board and the Association of Optometrists Ireland.

1.25 We also acknowledge the valuable inputs made by the steering committee from the Competition Authority, including Declan Purcell, Dermot Nolan, Carol Boate, Ciaran Quigley, Colm Treanor, Patrick Neill and Stephen Lalor.

1.26 We would like to also thank the individual practitioners/professional services firms who made submissions or completed detailed questionnaires as part of the study. Over 2,000 professionals inputted to this research, which we understand constitutes one of the largest contributions to any review of professional services ever undertaken in Ireland. In particular, 381 solicitors responded to our (Indecon/London Economics) Survey of Solicitors, 283 barristers (juniors and seniors) to our Survey of Barristers, 473 doctors and hospital consultants to our Survey of Medical Practitioners, 317 dentists to our Survey of Dentists, 252 veterinary surgeons to our Survey of Veterinary Surgeons, 78 optometrists to our Survey of Optometrists, 225 architects to our Survey of Architects and 150 engineers to our Survey of Engineers. The survey questionnaires are reproduced in Annex 9.

1.27 We would also like to thank the various formal and informal inputs made by personal and corporate consumers and representatives of consumer interests, including the Consumer Association of Ireland. We would also like to thank the fifteen insurance companies who inputted to our analysis as well as representatives of the major health insurance companies in Ireland. The survey questionnaires are reproduced in Annex 9.

1.28 We would like to thank the more than 1,000 members of the general public who participated in our representative survey, which is reproduced in Annex 9.

1.29 Finally, we would like to thank a wide range of other individuals, professionals and organisations for making submissions to the study. Their contribution has also enriched our report.

Disclaimer

1.30 The usual disclaimer applies and the views and analysis presented in this report represent the independent views of the consultancy team.

2 Review of Theory and Evidence on Restrictions in Professional Services

Introduction

2.1 The purpose of this section is to consider the legitimate basis for the existence of restrictions in the supply of professional services. This is achieved by providing a review of the economic research that has been undertaken in relation to the imposition of restrictions on the supply side of professional services markets, particularly those that are the focus of the study. [2]

2.2 The review begins by highlighting the concept of a perceived failure in the market for professional services, and identifies and discusses the principal sources of market failure. It then outlines the case for regulation, which is motivated essentially by the sources of market failure previously identified. It also set outs the 'private interest' approach to regulation, which views regulation as a form of rent-seeking behaviour by professionals. The different forms of regulatory instruments are then outlined, where the discussion is couched in terms of *a priori* arguments advanced for the existence of rules limiting the structure of professional services markets and the conduct of practitioners. The final part of the review consists of an examination of the impact the various regulatory instruments have on competition in professional services markets by reference to previous empirical findings.

2.3 Together with the review of competition investigations in professional services that have been undertaken in Ireland and in other jurisdictions, given in Section 4, the material compiled in the present section provides part of our framework for assessing the restrictions presently prevailing in the supply of professional services in Ireland.

2.4 As a prelude to the survey that follows, we first comment upon the specific nature of the professions under review before highlighting a key regulatory principle germane to later analysis.

[2] This section is necessarily technical. The Glossary of Terms provides definitions of the concepts referred to.

Specific Nature of Professional Services

2.5 The eight professions under review have an important function in Irish society and because their work influences critical areas of people's lives - such as health, food safety, legal rights and security of building structures - they occupy a special place in our everyday lives. The professions are comprised of talented and committed individuals whose work has contributed to the widespread recognition of the value of professional services. Most practitioners operate to high ethical and professional standards and Ireland has a long tradition of producing high calibre professionals in all fields.

2.6 The way the professions are regulated has, however, important and often unintended consequences as the professions are inevitably subject to economic and competitive forces. If regulations or restrictions on the professions result in unnecessarily high prices or barriers to the provision of professional services or disincentives to innovate, the negative consequences for Irish consumers can be significant.

2.7 In many cases, regulation of the professions in areas such as codes of ethics, professional competence, trustworthiness and client/patient confidentiality have no impact on competition. In some other cases, however, regulation may damage competition or economic welfare. But even if this is the case, the restrictions may be justified if there are wider public policy benefits. At the same time, it is essential to ensure that regulation does not simply protect certain practitioners or serve to support narrow vested economic interests. It is important to also recognise that in most cases maintaining standards and facilitating competition are mutually supportive.

2.8 The difference between restrictions/regulations that maintain standards and those which simply support the commercial interests of small groups within the professions was highlighted in the most recent OECD report on competition in professional services (OECD, 2000) as follows:

> "The need for ethical standards or codes of behaviour, and the desirability of high standards of professional competence to ensure integrity and public confidence, are unquestionable. But the two objectives of promoting competition and maintaining professional standards are not necessarily contradictory…Regulation usually controls entry by defining qualifications and limiting practice to those who demonstrate them. But it also often extends to purely commercial matters, by preventing or controlling price competition, advertising, business relationships, and participation of foreign professionals on nationality grounds. These regulatory controls have turned structurally competitive industries into cartels. Regulations to ensure quality are necessary in some settings but deserve close examination. Regulations to prevent price and other ordinary forms of competition harm consumers without improving quality of service; their principal effect is to benefit members of the profession…But suppression of all competition is not necessary to assure quality. Professional services are characteristically specialized and differentiated, but they are sufficiently subject to market forces that competition among professionals would benefit consumers… Restrictions on competitive practices, such as price competition, truthful advertising, use of non-deceptive trade names, and relationships with other kinds of businesses, as well as limitations on foreign participation on grounds of nationality, do not explicitly address the issue of quality. In theory, it has been claimed that removing these restrictions and permitting these practices would lead to market failures. But in fact, barring these practices has correlated with higher prices and less innovation, without improving quality" (pp. 17-20).

2.9 The key principle in deciding which regulations of a given profession are desirable is to ensure that they directly target any market failures in a manner that least distorts competition on the market. This is summarised in the following principle, which in competition parlance is known as the *proportionality principle*.

Principle of Appropriate Regulation of the Professions
Regulation of professions should be focussed on those markets in which undesirable effects remain and should address the market failure using means that restrict competition least.
Source: OECD (2000, p. 8).

Market Failure in the Supply of Professional Services

2.10 Market failure can exist in some cases concerning the supply of professional services. There are three principal sources of potential market failure as follows:

- Asymmetric information;
- Externalities; and
- Public goods.

2.11 Asymmetric information between buyers and sellers may arise from the particular type of product that professional services constitute. Economists distinguish between 'search goods' and 'experience goods'. The former are goods that can be inspected by either touch or sight prior to purchase. Experience goods are goods the quality of that cannot be discerned prior to purchase. The distinction between search and experience goods has important implications for the ability of consumers to make judgements on services, and advertising expenditure is likely to be higher for experience goods (Nelson, 1974).

2.12 Professional services are in some cases neither experience nor search goods. Rather some professional services may constitute what is known as 'credence goods'.[3] This is a good whose quality cannot be fully assessed before or after consumption. Darby and Karni (1973) argue that this is likely to be the case when a judgement about quality requires the consumer to have specialised knowledge of the product or service.

2.13 Asymmetric information between buyers and sellers is likely to be more pronounced with credence than experience goods. In the former, and to a lesser extent in the latter, the provider acts as an expert who determines how much of the service (medical treatment, for instance) is necessary, since the customer may be unable to judge the quality of the service provided. Furthermore, quality of service is no guarantee of success: for example, a patient suffering from cancer may not recover even though he/she may have been treated by the best practitioner. Reinforcing the asymmetric information property is the fact that buyers may be infrequent consumers of professional services.

[3] The concept of a credence good was first introduced in Darby and Karni (1973).

2.14 As Stephen and Love point out, "it is important to realise that the informational asymmetry identified here may not apply to all [users] of [professional services]" (p. 989). For example, many commercial clients (e.g. insurance companies) are repeat purchasers in the market for certain professional services (e.g. legal services). These clients are "able to acquire experience and knowledge of the market over time that reduces the asymmetry between [client] and [practitioner]" (p. 989). Compared to infrequent purchasers, repeat purchasers are in less need of the 'agency function' performed by professionals – whereby the client's needs are defined and the appropriate strategy is selected (Quinn, 1982). "Furthermore, in the case of repeat users, [professionals] must be aware of the future loss of business from behaving opportunistically. They must also be aware of reputation effects that may arise from social networks even where individual consumers are not repeat purchasers. Thus, [asymmetric information] does not carry over to all segments of the markets comprising professional services" (Stephen and Love, 1999, pp. 989-9).[4]

2.15 Even in cases where asymmetric information exists, it is important to note that mechanisms other than restrictive regulations are often successfully used to address this source of market failure. For example, the OECD has noted that:

> "In many economic markets mechanisms other than regulation have arisen for addressing such 'asymmetric information' problems. Many of these mechanisms also function effectively in markets for professional services, limiting the undesirable effects of asymmetric information problems…When consumers are unable to assess the quality of services there is a danger that competition will drive down the quality of services delivered to consumers. In the absence of regulation, there are a variety of mechanisms for addressing these problems. Common mechanisms found in other kinds of markets include reputation, contractual guarantees of performance quality, performance bonds, or third-party accreditation or quality rating. Civil liability rules may also enable consumers to recover damages for harm that results, providing an incentive for providers to maintain higher quality. Where consumers make purchases repeatedly or where information about quality is easily spread amongst consumers, providers may find it beneficial to invest in a reputation for providing high-quality services…In many economic markets, including many markets for professional services, these mechanisms adequately address the 'market failure' that arises from information asymmetry. Nevertheless, there are markets where these mechanisms may be imperfect, particularly in markets for professional services where competition between members of a profession is weak, where purchases are rare, where assigning responsibility for outcomes is difficult and any negative consequences are irreversible. For example, private medical surgery might fall into this category. In contrast, large, sophisticated consumers that use the same professional services repeatedly, such as large corporations, are in less need of protection" (OECD, 2000, pp. 7-8).

[4] If we look at professional services from the perspective of the number of transactions as well as the number of buyers, it could be that a majority of purchases (e.g. 80%) are made by a minority of the buyers (say 20%). The 20% of buyers are likely to be well informed. The implication for regulation is that restrictions designed to 'protect' the 80% of infrequent purchasers will have a disproportionate effect on the 80% of transactions conducted by the well-informed buyers.

2.16 Externalities may also be a feature of professional services: they arise in situations where third parties are affected by a transaction. Negative externalities are generally more noticeable than positive externalities. For instance, a poorly constructed building may lead to casualties or poor diagnosis of a potentially fatal disease may give rise to an epidemic. As an example of a positive externality, successive generations may benefit from an aesthetically pleasing and purposeful building even though they did not incur the cost of its design or construction. It is important to point out, however, that regulation is not necessarily the appropriate response to any market failure associated with externalities. Government taxes to minimise the harmful effects of negative externalities or subsidies to encourage the benefits of positive externalities may be the optimal solution.

2.17 Professional services may in some cases have the properties of a 'public good' in that the provision of a given service involves the giving of information: when information is given to someone, it can be supplied to others at no extra cost. Thus, consumption of a professional service may be non-rivalrous and it may not be possible to prevent 'free-riding' by non-purchasers. The implication would be under-provision of socially valuable information because it may cost professionals more to provide the information than it is worth to consumers.[5]

2.18 In addition to asymmetric information, externalities and public goods, it could be said that some professional services may be characterised by a fourth source of potential market failure, namely monopoly power. As we shall see in the course of this study, practitioners of the professions under review are in some cases endowed by law with elements of monopoly power in the supply of certain services. Monopoly power can lead to less provision at a higher cost to consumers and is therefore inefficient compared with what would obtain in a competitive market. However, monopoly power in the context of professional services needs to be set against the structure of the market among the practitioners in which that power has been invested. The significance of monopoly power as a fourth source of potential market failure depends on the particular nature of the regulatory restrictions (particularly those relating to entry), which we examine in the sectoral sections later in the study.

[5] In the case of a pure or perfect public good, the market would completely fail and there would be no provision at all. This is the standard economic argument advanced for State provision of national defence.

Case for Regulation

The Market Failure Approach

2.19 The case for regulation is to address the principal sources of market failure identified above. Professional services regulation may be appropriate if, for example, it seeks to redress consumers' information deficit relative to providers' knowledge and expertise. Taken together, a legitimate purpose of regulation is to assure standards of competence, performance, ethical behaviour and personal accountability in the market. What is important, however, is to examine the impact of any regulations and to evaluate the key issue of proportionality.

2.20 In the absence of regulation, in certain circumstances, the market may not function efficiently. In the case of inadequate regulation to deal with asymmetric information, low quality service provision may predominate in the market. In the case of inadequate regulation to deal with the potential for third-parties to free-ride on transactions, consumers may become wary of seeking professional advice for fear that their client privilege would be compromised.

2.21 The former result can be demonstrated by reference to the classic study by Akerlof (1972). He showed that if consumers do not have enough information to distinguish between low and high quality goods and services, a situation could arise in which the market for high quality goods/services collapses. There is also the possibility of 'moral hazard' arising in an unregulated market, whereby the information asymmetry creates incentives for sellers to behave opportunistically, to their own benefit. For example, a practitioner may recommend a solution or form of treatment that is more than necessary to address a client's/patient's problem. This is recognised by professionals as 'feeding'.

2.22 The case for regulation would be reinforced if alternative mechanisms to minimise the effects of asymmetric information and externalities were deemed to be likely to have only a limited impact on *a priori* grounds. Examples of alternative mechanisms aimed at coordinating demand and supply are consumer reports and threat of litigation; word-of-mouth recommendation between consumers is perhaps the least formal type of alternative mechanism to regulation. The reason why these alternative mechanisms may not always be effective is in cases where the following three conditions do not prevail. [6]

- Consumers assume that providers will chose to provide a high quality service in order to induce repeat purchases;
- Consumers are quick in learning about the quality of services; and
- Consumers renew their purchases often.

2.23 These conditions may not always be met in the market for certain professional services.

The Private Interest Approach

2.24 According to the private interest approach or 'capture theory' of professional regulation, professionals 'capture' government through professional regulatory bodies and structure them so as to limit the supply of new professionals and reduce competition between existing practitioners in the marketplace. This theory has its origins in the theory of renting-seeking behaviour (Coase, 1974; Friedman, 1962; Moore, 1961; Posner, 1974; and Stigler, 1971). As a result, the capture theory predicts that restrictions will decrease the supply of professionals, increase professional fees and increase the incomes of practitioners. Regulatory capture may also be attempted by coalitions of professionals within a given profession to the detriment of both the public and non-coalition professionals. For example, regulations may be instituted to protect the interests of certain specialities within a profession or among the senior ranks of a profession. In these cases, the incomes of the coalition members would be expected to be higher than those of non-coalition members.

[6] Kreps and Wilson (1982), Milgrom and Roberts (1986) and Tirole (1988).

Regulatory Instruments

2.25 The predominant form of regulation in the supply of professional services is self-regulation. That is, regulation of a given profession by members of that profession. Self-regulation encompasses a wide range of arrangements, including private ordering without rule, legal rules and state-enforced systems of delegated rules. In the context of this study, self-regulation originates largely in statute and bestows on one or more professional bodies the power to admit practitioners, to control their conduct and to shape the organisational behaviour of practitioner units, thereby regulating the supply of the professional service to the end user.

2.26 Regulation has the potential to result in four principal forms of restriction on the right to practise and the conduct of practitioners, namely:

- Restrictions on entry into the profession;
- Restrictions on the conduct of practitioners, in terms of fees charged and advertising that can be undertaken;
- Demarcation restrictions – services that only practitioners can do; and
- Restrictions on organisational form of practitioners – practitioners may not be allowed to form bodies corporate or engage in business relationships with other professions.

2.27 Self-regulation may also involve professional bodies drawing up and implementing rules and procedures relating to discipline, complaints and the enforcement of standards.

2.28 The appropriate purpose of self-regulation is to protect consumers by maintaining standards of service and operating systems of accountability in the supply of professional services. However, self-regulation can potentially impede competition amongst practitioners. Entry restrictions may serve to create barriers to entry, thereby potentially enabling practitioners to raise prices and enjoy rents. Furthermore, restrictions governing the conduct of practitioners could be used to confer utility on suppliers rather than meeting consumers' needs.[7] The prospect of gaining such rewards could encourage groups into spending resources to secure economic benefits for the profession, leading to a social deadweight loss.[8]

[7] Shaked and Sutton (1981a).
[8] Tullock (1967).

2.29 The rationale for each of the four forms of restriction identified above is examined in the following paragraphs. As well as considering the suggested reasons for the existence of the restrictions, their effects in terms of competition are also examined.

Restrictions on Entry

2.30 Entry to a profession generally comprises four types of requirement as follows:

- Formal/academic education (typically a university degree in subject or related field);
- Experience (of a practical nature typically in an established practice);
- Personal characteristics (such as citizenship, residence, absence of civil or criminal convictions, absence of bankruptcy, language competence); and
- Completion of a licensing examination (to signal successful completion of professional education).

2.31 Entry requirements seek to ensure that professionals possess "minimum acceptable levels of competence, thus protecting consumers from the possibility of engaging the services of a sub-standard practitioner due to the inability of [not necessarily all] consumers to assess competence" (Deighton *et al.*, 2001, p. 5). The requirements have the appropriate objective of ensuring that professionals have certain skills and expertise acquired through a combination of academic and professional study coupled with practical experience in advance of entering the profession thereby guaranteeing consumers a minimum quality standard. In practice, this means that:

- The length of time required to acquire the relevant theoretical and practical knowledge must be proportional to the level of competency required;
- The entry requirements must reflect the level of competence needed to fulfil the functions of the profession; and
- The requirements must be objective and should not evolve with the 'wished entry numbers' in the profession. In other words, the requirements should be independent of the level of economic activity in the profession.

2.32 Leland (1979) examined the types of market most likely to benefit from minimum quality standards. In his theoretical model, information asymmetry is complete in the sense that purchasers do not even have partial information, such as information gathered from relatives and friends, own experience or signalling activities from suppliers. Consumers only learn the true quality of a good or service following consumption. A second feature of Leland's model is that the cost of supplying a unit of service of a given quality level is increasing in the quality level. This implies that, in order to enter the market as a provider, costs are higher as quality becomes higher. Under these conditions, Leland shows that the imposition of a minimum quality standard may be socially desirable. The following four market types are most likely to benefit from quality standards according to Leland's analysis:

- Markets in which demand is relatively price-insensitive;
- Markets with high demand sensitivity to quality;
- Markets in which the costs associated with providing quality are low; and
- Markets where the willingness to pay for low quality goods or services is low.

2.33 Leland (1979) also showed that when the cost of supplying quality is decreasing in quality – so that, for example, 'smarter' individuals may find it easier (i.e. less expensive) to meet certain educational requirements – a minimum quality standard will always be socially desirable. However, Leland's model predicts that if professional groups set quality standards themselves, it is likely that quality standards will be set too high – that is, above the socially optimal level. He explains (p. 1338) this result by stating that:

> "In choosing the optimal minimum standard, a professional group or industry seeks to maximise its net gains. As with any monopoly, extra profits can be achieved by a lower level of total supply than is socially optimal…motivating the profession to set the optimal standard too high".

2.34 There also exists a class of entry restrictions limiting the provision of professional services to nationals or citizens of the state, to residents of the state or to a member of the national/state professional body. These restrictions may be imposed on a national level or, in the case of some federal countries, such as Australia and the US, on a sub-national level. There may also be limitations on the level of investment or ownership by foreigners of national professional firms.

2.35 These types of restrictions are justified on the basis that it may be necessary for professionals to be familiar with national laws and statutory requirements. Local presence requirements are also justified by the need to maintain a direct relationship between the professional and the client/patient and the need for the consumer to have a means of redress in cases of negligence and malpractice.

2.36 Local presence and nationality requirements are prevalent in the OECD area, especially in the accountancy and legal professions and less so among architects and engineers (OECD, 2000). The report concluded that:

> "Requiring nationality and citizenship as a condition of professional practice is clearly discriminatory. As such measures do not serve as an indicator of the quality-level of a service provider, their existence is increasingly difficult to justify on consumer protection or public interest grounds. Requirements which either exclude foreign nationals altogether, or that prohibit them from using the professional title or from providing certain services are based on the view that only a national or citizen can provide a service. Over the last few years, nationality or citizenship requirements have clearly been on the retreat in the OECD area. Nevertheless, they still exist in several countries… and are most evident in the delivery of auditing services and in law… Obligations to be resident established or domiciled in the jurisdiction where the service is provided may prevent serving a market on a cross-border basis or through a temporary entry of personnel even by providers who possess valid host country titles. This more frequent barrier, imposed on individuals or on firms, is generally motivated by the desire to maintain control over the professional's standards, to allow governments and to assure collection of taxes and compliance with other laws" (p. 32).

2.37 And, taking account of the Third OECD Workshop on Professional Services held on 20-21 February 1997, it was recommended that:

> "Restrictions on market access based on nationality and prior residents requirements should be removed, local presence requirements should be reviewed and relaxed subject to availability of professional liability guarantees or other mechanisms for client protection and national regulatory bodies should co-operate to promote recognition of foreign qualifications and competence and develop arrangements for upholding ethical standards" (p. 43).[9]

[9] The Workshop also concluded that restrictions on foreign participation in ownership of professional services firms should be reviewed and relaxed (*Ibid.*). Restrictions on organisational form are examined below.

2.38 Finally, restrictions on entry often give rise to two types of statutory protection, namely protection of title and protection or reservation of function. Under the former, it is an offence for anyone, other than a member of the profession, to use a professional title and where there is also reservation of function only titled individuals can provide certain professional services. To take two examples in Ireland, both solicitors and dentists have protection of title and reservation of function. On the other hand, among the engineers' profession, protection of title applies only to chartered engineers, while architects have neither protection of title nor reservation of function.[10]

Restrictions on Conduct

2.39 Various types of conduct regulation can be found in the professional codes and rules of conduct formulated by professional bodies. These documents often describe the tasks and duties of members of the profession and because they tend to determine how members must perform their activities in an ethical way the codes are often referred to as 'guides to professional ethics'. The predominant forms of conduct restriction relate to fee competition and advertising. These are discussed in turn in the following paragraphs.

Fee Schedules

2.40 Fees for professional services have in some cases in the past been controlled by the professions themselves, the courts or by the operation of fee schedules. These can take various forms: minimum or maximum, mandatory or voluntary. They can set hourly rates for services of all kinds or absolute or relative fee levels for specific tasks. Or they might specify fees as a percentage of the value of the transaction. Recommended rather than mandatory fee scales have sometimes been allowed, provided that the charges have been determined independently and it is clearly stated that the professional and client concerned are free to agree on a fee without reference to the scale.

[10] Although, as we shall see later, the Building Control Bill will propose that protection of title be given to architects.

2.41 In economic terms, fee schedules, whatever their form, constitute a means of reducing price competition among practitioners or at the very least serve to 'soften' price competition between professionals. They reduce the level of uncertainty on the supply side of a market, to the detriment of consumers. Fee scales are a form of price collusion and imply a transfer of resources from consumers to suppliers compared with the situation of a competitive market in which there is open competition in price. They create a deadweight loss in the market and thus serve to reduce economic efficiency. As early as 1970, the MMC concluded that:

> "In general, we regard a collective obligation not to compete in price, or a restriction collectively imposed which discourages such competition, as being one of the most effective restraints on competition. The introduction of price competition in the supply of a professional service where it is not at present permitted is likely to be the most effective single stimulant to greater efficiency and to innovation and variety of service and price could be applied to that profession" (MMC, 1970, p. 78).

2.42 Thus, the removal of fee scales, whatever their nature, will not only improve price competition and efficiency, but may also lead to improvements in dynamic efficiency (in terms of, for example, new ways of providing services in the future). In addition, dynamic efficiency gains may occur through a low-cost incumbent undercutting competitors and forcing them to become more efficient.

2.43 Owing to their welfare reducing implications, fee scales have been increasingly challenged in OECD countries, as competition policy and law have been extended to the professions. This has resulted in the abolition of previously agreed fee schedules, including fees set as a percentage of the value of a transaction. An example is the solicitor's profession in Ireland, where the once recommended fee scales for conveyancing have been removed following the passing of the Competition Acts, 1991-96.

Contingency Fees

2.44 A feature that distinguishes lawyers from other professionals in many jurisdictions is the presence of restrictions preventing them from entering into contingent fee contracts with their clients. In particular, as Stephen and Love (1999) point out, "lawyers may be prohibited from entering into *contingent-fee* contracts with clients. Under such contracts the lawyer's fee is contingent on the outcome of the case" (p. 1001). In US civil cases (such as personal injury actions), "if the case is lost the lawyer receives no fee but if it is won the lawyer receives a percentage of the damage award to the client. Such contingent fee contracts are prohibited in many European jurisdictions" (*Ibid.*). In Ireland, percentage fees are prohibited in the case of contentious work; for non-contentious work, it is permissible for lawyer and client to enter into what is termed a *pactum de quota litis*, where the level of the fee will be contingent on the value of the result. The agreement must be made at the time when instructions are obtained or as soon as is practicable thereafter.

2.45 The main argument advanced against contingency fees is that they conflict with the principle that a lawyer should not have a vested interest in the outcome of a case he/she handles. Contingency fees "can produce a conflict of interest between client and lawyer over when to settle. In particular, whether the plaintiff in a tort case should accept an out-of-court settlement rather than go to court. This argument neglects the fact that such a conflict of interest can still exist under the conventional hourly-fee system" (Stephen and Love, 1999, p. 1001). The difference is that the lawyer's private interest is reversed. Under the conventional system, "the lawyer earns more the greater the number of hours put into the case. It will thus be attractive to the lawyer to continue the case provided that the hourly rate is greater than the opportunity cost of the lawyer's effort, *that is*, if super-normal profits are being made. Consequently, the lawyer has an interest in convincing the client to continue the case, *ceteris paribus*, rather than settle (Johnson, 1981). The opposite may be true under a contingency fee. Here the lawyer receives a predetermined share of any damages awarded but bears all costs incurred on behalf of the client. Thuswhen a pre-trial offer is made by the defendant to settle out of court, the interests of the plaintiff and the plaintiff's lawyer can conflict (Gravelle and Waterson, 1993; Johnson, 1981; Miller, 1987; Rickman, 1994; Schwartz and Mitchell, 1970; Swanson, 1991; Watts, 1994). Indeed, the higher the offer the more likely the interests of plaintiff and lawyer are to conflict under a contingent fee system (Gravelle and Waterson, 1993)" (Stephen and Love, 1999, p. 1002).

2.46 Stephen and Love (1999) indicated that: "The foregoing analysis implicitly assumes that the client relies totally on the lawyer's decision over settlement and that the lawyer is motivated by pure self-interest. Gravelle and Waterson (1993) allow for the variation of this assumption by incorporating a parameter in their model which varies as the client is better informed or as the lawyer is more altruistic. They find that the more informed the client is (or the more altruistic the lawyer is) the less likely a given offer will be accepted pre-trial under a contingency fee. Indeed, if the lawyer is more altruistic than selfish the probability of pre-trial settlement will be lower under a contingency fee than under an hourly fee. This result emphasises the crucial importance of the asymmetric information issue in determining the choice of fee contract. Well-informed clients are likely to prefer an hourly rate. Furthermore, the more altruistic lawyers are (the more altruistic) the more suitable is the hourly-fee contract to the client's interest. There is some limited empirical support for this result in that Kritzer (1990) reports that for a sample of tort and contract cases where the plaintiff was an organisation 81 percent of the fee contracts were on an hourly basis whilst when the plaintiff was an individual 59 percent of the fee contracts were on a contingency basis. It is to be expected that organisations are more likely to be experienced litigants than individuals"(Stephen and Love, 1999, pp. 1002-3).

2.47 It was also pointed out that: "It is frequently argued by those supporting the ban on contingency fees in European jurisdictions that permitting contingency fees will increase the volume of litigation. The higher volume of litigation in the US where contingency fees are permitted is often cited in support of this view. However, the majority of economic modelling suggests the opposite view" (Stephen and Love, 1999, p. 1003). "Miceli (1994) examines the impact of contingent fees on the pursuit of frivolous cases and find no support for the view contingent fees will encourage frivolous suits (Stephen and Love, 1999, p. 1003). Gravelle and Waterson (1993) "find that the effect of a switch from hourly to a contingency fee has an ambiguous effect on the volume of litigation and on welfare" (Stephen and Love, 1999, p. 1003).

2.48 Finally, Stephen and Love note that: "a number of authors argue that the benefit of contingency fees is that risk-averse or wealth-constrained victims of torts who under an hourly fee contract may be unwilling to pursue a claim will now do so because the risk is shifted to their lawyer" (Stephen and Love, 1999, p. 1004). Stephen and Love (1996, p. 1004) conclude their examination of the research by stating:

> "It would seem that victims are likely to be better off one-way-or-another under contingency fees even although (*sic.*) the overall welfare effects may be ambiguous".

Advertising

2.49 Advertising, promotion and solicitation for business by professionals has in some sectors been restricted and comparative advertising is generally not permitted. For instance, it was commonplace to find a prohibition on practitioners highlighting in any advertisement any particular specialised expertise they might have in their field. Attempts to justify restrictions on advertising are sometimes made on the basis that providing additional information to consumers on prices could lead to excessive price competition among professionals and result in a reduction in quality. It is also argued that there is a need to ensure that misleading information is not provided to consumers, who may not be in a position to assess untruthful or deceptive campaigning. Professional rules restricting or prohibiting advertising are often also associated with traditional notions such as the 'dignity' of the profession, which, it is argued, could be undermined by encouraging excessive competition among practitioners. The key issue here is to examine whether advertising is in general likely to be beneficial in a context where regulation is being applied to overcome information problems.

2.50 To understand and assess the various arguments for and against the use of advertising as a vehicle of competition among professionals, it is useful to review economists' views on the role of advertising more generally. As Lipczynski and Wilson (2001, p. 199) point out: "advertising can be categorised as either informative or persuasive. If advertising is informative, it is useful in providing consumers with enough information to make informed choices with regard to goods and services they demand. If advertising is persuasive, it can in certain cases distort the information that consumers receive, making it difficult for them to make informed choices. Information is a prerequisite for effective competition and ensures that resources are used efficiently to produce the goods and services that consumers demand."

2.51 According to Lipczynski and Wilson (2001, p. 201), the positive view of advertising forwarded by economists such as Stigler (1961), Telser (1964), Nelson (1974a,b, 1975, 1978) and Littlechild (1982) argues "that advertising provides consumers with valuable information, which allows them to make rational choices. Under this view, advertising therefore plays a crucial role in ensuring the efficient allocation of resources in the economy. Furthermore, the extent to which consumers are able to make informed choices depends on the knowledge and certainty they have about the attributes of a product or service. In a world of uncertainty, the variability of possible choices that a consumer makes is likely to be dispersed widely. The more information consumers have, the less dispersed the number of choices a consumer faces. Overall this means that consumers are unlikely to pay higher prices for one good or service unless 'real' product differences exist".

2.52 As Lipczynski and Wilson (2001, p. 204) state: "in reality, it appears difficult to make a clear distinction between advertising that informs and advertising that persuades. Demsetz (1974a) noted that advertising both informs and persuades consumers as to desirable aspects of goods and services. Kirzner (1997b, p. 57) adds to this when he argued that:

> "To interpret advertising effort as primary designed to persuade consumers to buy what they really do not want, raises an obvious difficulty. It assumes that producers find it more profitable to produce what consumers do not want, and then to persuade then to buy it, with expensive selling campaigns, rather that to produce what consumers do already in fact want (without need for selling effort)" ".

2.53 A large volume of empirical economic research has been undertaken examining the relationship between advertising restrictions, on the one hand, and the price and quality of professional services on the other hand. This body of evidence is reviewed below but for now it is relevant to note that it supports the informative or pro-competitive view of advertising rather than the persuasive view in the context of the professions. That is, permitting professionals to advertise their services and the prices of their services reduces fee levels and fee dispersion without a corresponding drop in quality as traditionally advanced by professional regulatory bodies.

2.54 We have little doubt that this particular body of empirical evidence has played an important role in the gradual removal of advertising restrictions in the professions in recent years. As noted in OECD (2000, p. 26):[11]

> "Abolition of advertising restrictions has benefited consumers. The removal of price advertising restrictions appears to have resulted in lower prices and increased demand for some professional services. In the United States the relaxing of advertising restrictions appears to have facilitated the growth of alternative service providers and led to greater price competition and perhaps an increase in demand for some kinds of legal services [Andrews (1980)]. A Canadian study concluded that price advertising by professionals would improve consumer access to services, lower fees and increase efficiency and innovation [Trebilcock, Tuohy and Wolfson (1979)]".

Demarcation Restrictions

2.55 Demarcation is a form of indirect entry restriction that limits how far non-members of a given profession are permitted to compete with members in terms of supplying all or a range of services associated with the profession. It is linked to statutory protection of title and reservation of function outlined earlier in that only individuals who hold the professional title are allowed to provide certain specified services. For example, under the Solicitors Acts, 1954-2002, only solicitors are allowed to provide conveyancing services for financial reward in Ireland. The historical justification for the demarcation of services is similar to that advanced for restricting entry to the profession, namely the guarantee of a minimum standard of quality and appropriate ethical behaviour.

2.56 Demarcation may not necessarily arise from legislation, but may be the result of custom and tradition. This is so for the division of the legal profession between solicitors and barristers. For example, under the Courts Act, 1971, solicitors have a right of audience in all of the courts in Ireland, but few solicitors choose to exercise this right of advocacy in the Circuit Court and superior courts, namely the High Court and Supreme Court.

[11] The second study cited in the quote taken from the OECD, namely Trebilcock, Tuohy and Wolfson (1979) found that the then prevailing prohibition on advertising in the legal profession had significantly contributed to consumer ignorance and confusion about legal fees and that it had impaired the competitive health of some segments of the legal services market.

2.57 In the analysis by Stephen and Love (1999) they note that: "Bishop (1989) analyses the separation into professions as a prohibition on vertical integration between successive stages in a production process: the preparation of a case and its prosecution through advocacy in the courts . He argues along lines similar to those of Quinn (1982) that the conflict between the agency function and the service function is particularly severe due to the large benefits which accrue from specialisation in trial advocacy. The existence of a cadre of specialist consultants and litigators (barristers/advocates) removes the temptation to supply higher cost in-house advocacy. Not only this, it may provide competition in the downstream market. Thus, one suggested potential benefit of a divided profession is that the client gets higher quality advocacy than would be available from an in-house advocate. However, the benefit is not costless. Bishop argues that the cost will be the dead-weight loss to sophisticated buyers of legal services who do not require the intermediation of a solicitor. An additional cost might be the differential transaction costs associated with employing both a solicitor and barrister rather than two solicitors within the same firm. This would be the case if economies of scope existed when the two legal advisors were from the same firm/office" (Stephen and Love, 1999, p. 1007). As concluded by Stephen and Love (1999), an evaluation of the division in the legal profession cannot be resolved on the basis of the theoretical arguments proposed by Bishop and others. In their view, "it is a question of the relative magnitudes of the costs and benefits…however, their empirical measurement is fraught with difficulty" (p. 1007).

2.58 It was also highlighted that: "Bishop (1989) also discusses external effects which have a bearing on the division issue. The first of these is that the division into two specialist branches allows more effective policing of lawyer misbehaviour due to a 'club' effect. This reduction in dishonesty will benefit future honest litigants because it will reduce the cost of achieving justice. However, the implication is that Bishop regards the division of the profession as an expensive means of achieving the benefit. The division may also allow the monitoring of the performance of the members of each branch by the members of the other. A further external effect is public capital formation through the production of high quality precedent. The existence of highly specialised and qualified advocates should produce better-argued cases and more valuable precedent. Furthermore, the recruitment of the judiciary from the ranks of the best of these specialist advocates not only ensures that those recruited to the bench have proven their worth as trial lawyers, but also should ensure high quality precedents" (Stephen and Love, 1999, p. 1008).

2.59 As indicated by Stephen and Love: "A final external effect identified by Bishop (1989) is a lowering of the cost of judicial administration. Here the main beneficiary is not the client but the trial judge. Poor advocacy places a burden on the trial judge to ensure that the decision reached is not influenced by inadequate advocacy. With highly specialised and skilled advocatesthis problem does not arise. Barristers also act as the gatekeepers to the courts. They ensure that cases are sifted and well prepared before reaching the court thus reducing the cost of adjudication. Similar external effects are adduced by Arruñada (1996) in his examination of Spanish Notaries" (Stephen and Love, 1999, p. 1008).

2.60 As we shall see below, the paucity of empirical evidence on demarcation means that it is not easy to test propositions like those advanced by Bishop (1989). Yet it is interesting to note the observations of the OECD on the issue:

> "Old distinctions and rules that separated the functions of court appearance and counselling are breaking down, in the face of increasing demand for individuals who combine skills of all kinds. In France, for example, the 'advocates', whose professional training and organisation were centred entirely upon the courts, and the 'conseillers juridiques', not members of the bar and less closely regulated, have recently merged into a single profession. And some common law countries that have maintained the distinction between barristers and solicitors are moving to abolish it" (OECD, 2000, p. 24).

2.61 Demarcation may also mean that non-professionals or para-professionals are prohibited from carrying out some of the more routine tasks carried out by professionals. For instance, prohibiting dental nurses/hygienists from undertaking some tasks currently reserved to dentists or prohibiting banks/building societies from undertaking conveyancing work provide examples of this form of demarcation.

2.62 We have already noted in our account of the study by Leland (1979) that professional regulators are likely to set quality standards too high from a social welfare point of view. Extending Leland's analysis, Shaked and Sutton (1981a) argue that the granting of monopoly rights to self-regulating professions is likely to be welfare reducing. The intuition underpinning their result is that, if a profession attempts to maximise either the relative or absolute incomes of its members, it will shrink to a size that is socially sub-optimal. They also suggest it is welfare improving to permit the entry of para-professionals. Such a group can supply a "possibly inferior service at a lower price".[12] This result is echoed in Shapiro's (1986) theoretical model of human capital and high quality. He concludes that entry restrictions – specifically in the form of a licensing examination – are unlikely to enhance overall welfare when different consumers value quality differently. This is because of the inevitable presence of users who would rather have bought low quality services at a lower price (perhaps through provision by para-professionals).[13]

2.63 Para-professionals can introduce a new basis for competition in the professions even if their market share remains low and consumers continue to remain with the original professional groupings. This follows from arguments derived from the theory of market contestability (Baumol, Panzar and Willig, 1982). According to the idea of a contestable market, competitive prices may obtain if the threat of new entry to the market is sufficient strong – actual entry need not occur for the market to be disciplined in this fashion. The idea has been very influential in deregulating various other markets (notably airlines in the US and Europe).

2.64 On the issue of para-professionals, the OECD has recently noted that:

> "[While] entry controls based on demonstrated qualifications, and licensing or accreditation based on the attainment of certain quality standards, may well be necessary to ensure the maintenance of high standard, increasing flexibility in defining regulated practices, to permit para-professionals to perform more routine tasks, would not seem to jeopardise quality standards in many professions, and may lead to better or lower-cost services" OECD, 2000, p. 42).

[12] Shaked and Sutton (1981a, p. 217).

[13] See also Stephen, Garoupa and Love (1997) who consider how members of a profession might respond to the removal of the profession's monopoly over a service through the creation of a para-profession.

Restrictions on Organisational Form

2.65 The most widespread restriction on organisational form in the professions relates to a prohibition on forming limited liability businesses. Professionals are sometimes required to practise as sole practitioners or in partnership with other members of the same profession. Limited liability partnerships or companies are in some cases not permitted. Furthermore, the requirement that partnerships be limited to include only members of a given profession serves to prohibit the formation of multidisciplinary practices (MDPs) involving members of different professions. This implies that professionals in cognate fields (for example, lawyers and accountants) are prohibited from entering into partnership with each other.

2.66 The argument made by some professions against MDPs is that it might give rise to conflicts of interests between the different professionals involved. It is also alleged that concentration on unlimited liability partnerships signals trustworthiness amongst partners and restricting organisational form in this way is argued to foster an environment in which the interests of the client are protected.[14]

2.67 It is, however, important to realise that the introduction of MDPs could give rise to economies of scope and could reduce transaction costs in the market.[15] Restrictions on establishing bodies corporate may also not be necessary to achieve the stated objectives, particularly given the requirement that practitioners hold professional indemnity insurance.

[14] Fama and Jensen (1983a, 1983b), Stephen and Gillanders (1993) and Carr and Mathewson (1988, 1990, 1991). Taken together, these purely theoretical studies conclude that unlimited liability partnership might be the optimal form of business organisation for legal practitioners. Not only might it signal trustworthiness amongst partners, it might also facilitate mutual monitoring by partners and might therefore aid in maintaining discipline and by implication professional conduct. However, as we will see in our review of empirical regulatory impact below, these theoretical conclusions tend not to occur in practice.

[15] Smith and Hay (1997) provide a discussion.

2.68 The OECD study (OECD, 2000) has highlighted the fact that:

> "In some situations, these constraints have been relaxed, because they limit the creation of new and possibly more cost-efficient business structures. The result has been the appearance of new forms of delivery for health and medical care and legal services. In the US, where restrictions on employment of doctors by non-professionals are being relaxed, chains of walk-in clinics now offer care in markets where doctors were needed. And advertising has fuelled the growth of legal 'clinics' bringing legal advice to individual consumers who had considered lawyers too expensive…Ownership and investment structures may still require some scrutiny, to ensure that professional judgments are not distorted by extraneous considerations. Professionals' fiduciary obligations are an important element of the service they provide, and personal liability for that service is a valuable disciplinary control. In considering whether to permit limited-liability corporate forms, it may be necessary to balance the risk of diluting those protections against the benefits of access to capital or management flexibility" (p. 26).

2.69 From a competition policy and consumer welfare perspective, it is generally felt that it is not appropriate to specify the precise form of organization that the professions should follow. Professional practitioners tend to be responsible and committed individuals and while some practitioners might judge that operating as a sole trader as appropriate, others might wish to practise in either limited or unlimited partnerships or in limited companies. Providing that regulations result in appropriate safeguards to protect consumer interests, such as professional indemnity insurance or adequate capitalisation etc., economists do not feel it is desirable to prevent professionals from exercising their own judgment on this commercial issue. While this would suggest the freedom of professional practitioner to incorporate, they should not be under any obligation to do so. This is consistent with the recommendation of the third OECD workshop on professional services, which recommended that:

> "Professional service providers should be free to choose the form of establishment, including incorporation, on a national treatment basis. Alternatives to restrictions on forms of establishment are available to safeguard personal liability, accountability and independence of professional service providers" (OECD, 2000, p. 43).

2.70 Removing restrictions on organisational form could facilitate practitioners obtaining access to capital that may be needed to invest in equipment and infrastructure to improve consumer services. It may also facilitate innovative practitioners to expand their practices.

Impact of Restrictions

Introduction

2.71 A large volume of empirical research has been undertaken to examine the effects of the various regulatory instruments on the level of competition occurring in professional services markets. Much of the research has focused on the regulatory impact on professional fees and incomes, and, to a lesser extent, on numbers and the quality of professional services provided. Few, if any, attempts have been made to directly estimate the effects (partial or general) of the restrictions on economic welfare (consumer surplus, producer surplus and deadweight loss). Furthermore, there have been no comprehensive studies of the impact regulation may have on technological change in professional services markets, particularly the question of whether or not welfare may be reduced due to lack of dynamic competition (i.e. competition on the basis of innovation) as a result of restrictions on, for example, entry and organisational form.

2.72 Researchers have employed a diverse range of statistical and econometric techniques depending primarily on the quality of data available. No doubt variations in the quality of data explain to a large extent the nature and accuracy of the results yielded. The vast majority of studies carried out pertain to the US, which provides a natural experiment setting where States with and without restrictions can be compared or inter-State variation in restrictiveness can be examined. For example, the basic framework for analysis of regulatory impact on professional fees is to specify a regression equation relating the fee for a given service of a sample of professionals to a list of explanatory variables (such as years of experience, age, qualifications, time to complete given task etc.) that also includes a control for the presence of a particular restriction. In the case of advertising, this would amount to the introduction of a qualitative or 'dummy' variable indicating whether the State or geographic area in which the professional practises restricts advertising of fees or not. The research then focuses on the question of whether the econometric model of fee competition differs significantly between States or geographic areas with and without the restriction. The expectation on theory grounds is that restricting fee advertising leads to higher prices and, as we shall see, that belief is generally supported by the facts.

2.73 In keeping with the structure of the previous sub-section, our survey of the research is organised under four principal headings as follows:

- Impact of entry restrictions;
- Impact of conduct restrictions (namely restrictions on fee competition and restrictions on advertising);
- Impact of restrictions on demarcation; and
- Impact of restrictions on organisational form.

2.74 Under each heading, the survey of the evidence is organised on a profession-by-profession basis. As will be seen, virtually all the evidence relates to three groups of professions – the legal profession, medical professions and optometry. We believe the paucity of evidence on the environmental professions (namely architects and engineers) stems from the fact that they have been less heavily regulated than the other professions. At the end of our survey, we provide an overall conclusion by drawing together the main strands of the results.

Impact of Entry Restrictions

Legal Profession

2.75 Stephen and Love point out that: "Entry to the (US) legal profession has grown over the years (for Europe, see Bowles, 1994; Faure, 1993; Helligman, 1993; Herrmann, 1993; and Ogus, 1993; for the US, see Curran, 1993; and Lueck, Olsen and Ransom, 1995). Indeed as Curran (1993) points out the American Bar Association has been less successful than its medical counterpart in limiting the growth of the profession. It has not regulated the numbers qualifying to practise in the same way as the American Medical Association. Of course, established members of the legal profession may have an interest in encouraging an expansion of new entry to the lower reaches of the profession as this might reduce the salaries paid to new entrants due to excess supply. However, this argument only holds as long as the new entrants to the profession are unable to provide the basis for an increase in the number of law firms and thus to compete away the rents earned by existing firms" (Stephen and Love, 1999, pp. 993-4).[16]

[16] In our analysis of the solicitors' profession in Section 4, we advance the argument that, in terms of identifying the relevant market for assessment of competition purposes, the relevant unit of competition is the private solicitor firm (sole practitioner, principal or partnership) and not the individual solicitor. Thus, what may ultimately matter is the net entry and penetration (post-entry growth) of *solicitor firms* over time.

2.76 However, while the research has noted an expansion in the US legal profession, the increased numbers entering the profession has not necessarily coincided with greater competition in terms of reduced fees and a greater range of services. In this regard, Stephen and Love (1999) refer to the geographic restrictions on movement that imply barriers to entry into specific service markets for existing members of the profession in the US. In a number of jurisdictions, lawyers may only appear before courts in the local area to whose bar or professional association they have been admitted (US, Belgium, Germany, for example).

2.77 Stephen and Love (1999) indicate that: "In the case of legal advice, even when there are no formal restrictions on practising in a given locality, other restrictions on behaviour such as prohibiting advertising may raise the cost of entry (through an inability to quickly generate goodwill) and thus constitute a barrier to entering a particular spatial market. Alternatively, prohibitions on 'undercutting' or 'supplanting' existing suppliers may reduce the incentive to enter a local market where rents are being earned. Thus, although there may be no formal barriers to entering a local market, such markets may not be contestable" (p. 994). This is due to the presence of conduct restrictions, such as restrictions on the ability to advertise.

2.78 Stephen and Love (1999, p. 994) have also pointed out that empirical examinations of the effects of such restrictions for the legal profession are evident in the US (Holen, 1965; Kleiner, Gay and Green, 1982; Pashigian, 1977). They have tended to concentrate on the effect that lack of reciprocity between State bar associations may have on practitioner numbers and on lawyers' incomes. The studies conclude that the lack of reciprocity agreements between State bar associations have reduced numbers and enhanced the incomes of existing practitioners, particularly in States where demand for legal services has been buoyant, due to increased economic growth, for example. With the supply of practitioners not responding significantly to increased demand, due to the lack of reciprocity, the way the market has dealt with the increased demand has been for fee levels to rise on average. The research concludes that lack of reciprocal agreements causes rents to be conferred on incumbent lawyers and this represents a diminution of consumer welfare compared to a more competitive market situation.

Medical Professions and Optometry

2.79 According to Olsen (1999), a careful examination of the empirical research yields "no consistent picture of the impact that entry requirements to the medical profession ('medical licensure') have on income, prices, supply or the quality of medical professionals. Early studies in this area focused on estimating the return to medical education under the assumption that higher than average returns to medical education, as opposed to other types of education, would be an indication of monopoly rents obtained through the capture of licensure. Friedman and Kuznets (1945), for example, compared the incomes of physicians to dentists, and found that physicians had average incomes 32.5 percent greater than dentists. According to their calculations only approximately half of this increased income could be a result by the extra training requirements for physicians. As a result, they concluded that barriers to entry must explain the remainder of the differential returns. Early studies by Sloan (1970) and Fein and Weber (1971) also found higher than average returns to medical education and reached similar conclusions" (Olsen, 1999, p. 1023).

2.80 Olsen noted that "Lindsay (1971, 1973) demonstrated that these empirical studies overestimated the returns to medical education. Lindsey noted that medical professionals were characterized not only by higher than average incomes but *also* by higher than average weekly hours worked. For instance, during the period of the Fein and Weber (1971) study, 1966, physicians worked an average of 62 hours per week. As a result, estimates of the returns to medical education must be decreased to offset the disutility of working longer hours. Lindsay (1973) corrected for the hours worked bias for the time periods covered by all three of the earlier studies and found, as would be expected, much smaller differential returns to the medical profession. In some cases, he found negative differential returns, dependent on the discount rate chosen, to medical education. Hence, Lindsay's results seriously question the conclusions of earlier studies that entry barriers provided by, among other factors, medical licensure had led to higher than average returns" (Olsen, 99, p. 1023).

2.81 According to Olsen, "Leffler (1978) also noted that the differential returns to medical education were overestimated not only because of an hours-worked bias but also because of the increased expected mortality of physicians, progressive income taxation, and 'differential probabilities of conscription taxation' (Leffler, 1978, p. 167). After adjusting for these factors, Leffler found much lower differential returns to medical education. Leffler did find positive differential returns, again dependent on the discount rate, in some years, particularly the late 1960s and early 1970s. However, he attributed these to transitory demand shocks rather than entry barriers" (Olsen, 99, p. 1024).

2.82 Olsen indicated that: "Other studies have estimated hours-adjusted rates of return to medical education with more recent data (Burstein and Cromwell, 1985; Marder and Willke, 1991) and have found positive differential rates of return. For example, Burstein and Cromwell (1985) found internal rates of return, hours-adjusted, equalling approximately 12 percent for physicians and dentists from 1970 to 1980. Likewise, Marder and Willke (1991) found estimated internal rates of return, hours adjusted, by physician speciality in 1987 and found that such returns varied from a low of 1.5 percent for paediatrics to a high of 58 percent for pathology (where hours adjustment *increased* the rate of return) and 3.7 percent for General Practice. Thus, even though rates of return to medical education are not as high as estimated originally, substantial returns do appear to exist, especially for some medical specialities" (Olsen, 1999, p. 1024).

2.83 According to Olsen's review: "In addition to studies focusing on estimating the differential return to medical education, other studies have estimated the impact that licensure has on the medical professional's income directly. For example, early studies on professional licensure by Holen (1965), Benham, Maurizi and Reder (1968) and Maurizi (1974) suggested that licensure (as measured by licensure exam difficulty) was used to increase the incomes of professionals. The support for this conclusion was, however, mixed in these studies. For example, Benham, Maurizi and Reder (1968) found licensure to have a significantly positive on dentists' incomes. Licensure, however, was found to have a negative, and sometimes significant, impact on physicians' incomes. In addition, the studies used small samples of older aggregate data, rather than recent aggregate data. Further, neither Holen nor Maurizi attempted to control for the possibility that other demand or supply variables had a significant impact on professional income" (Olsen, 99, p. 1024)

2.84 Olsen pointed out that: "Shepard (1978) found that lack of reciprocity between jurisdictions significantly limited the number of dentists and, as a result, increased average income for dentists. Shepard, however, used state level aggregate data for a single year (1970) which limits the validity of the results. Pashigian (1980) found that licensing in a number of occupations, including physicians, dentists, optometrists, pharmacists, nurses and other allied health occupations, restricted the mobility of licensed professionals, all else being equal, but did not significantly raise incomes. Noether (1986) found that that entry restrictions for foreign medical school graduates increased average physician income during the early 1960s. However, Noether's data indicate that entry restrictions have not effective since 1965 in increasing physicians' incomes" because "of the increased ability of foreign medical school graduates to enter the US market" (Olsen, 1999, p. 1025).

2.85 Finally, despite difficulties in measuring the quality of medical services, some studies have been undertaken to see whether entry restrictions affect the quality of medical services provided. Haas-Wilson (1986) generally found that regulations in optometry had no significant impact on quality as measured by the thoroughness of the eye exam. Carroll and Gaston (1981) found mixed support for their conclusion that licensure results in decreased quality of several professions. Their results were strongest for dentistry, although the variable they used to measure the quality of a dentist's services – how long the patient must wait to receive an appointment rather than by a direct measure of the effectiveness of the dentist's services – is questionable at best. More recently, Kleiner and Kudrle (2000) examined the role of variation in entry restrictions in improving the quality of dental services to consumers and the effect of restrictive regulations on the prices of certain services and on the earnings of practitioners. Using US data on the dental records of incoming Air Force personnel to examine empirically the effects of varying licensing stringency across states, the researchers found that tougher entry requirements do not improve quality, but do raise prices and enhance the earning of practitioners. Kleiner and Kudrle's results cast doubt on the public interest or market failure approach to professional regulation and point to a more prominent role for the capture theory of regulation in states with more stringent licensing regimes.

Impact of Restrictions on Fee Competition

Legal Profession

2.86 In contrast to the considerable empirical research on the role of advertising restrictions (discussed below), relatively little work has been carried out on the impact or effectiveness of recommended or mandatory fee scales among the legal profession.

2.87 As Stephen and Love (1999) point out, "Arnauld and Friedland (1977) examined the relationship between the incomes of a sample of lawyers and (*inter alia*) the minimum fee recommended (where there was one) for a simple legal transaction for a sample of lawyers in California and Pennsylvania. They found that lawyer income rose as the recommended fee rose. It should be noted that the dependent variable here is lawyer income and not the (actual) fee for the standard transaction" (p. 1000). Their research therefore established a positive relation between the imposition of a fee schedule and practitioner income in the market for the simple legal transaction in question.

2.88 The authors, however, argued "that the influence of fee schedules on prices may be even greater than they demonstrate because high prices may induce entry, which will moderate the effect on lawyer incomes. Strikingly, they also suggest that there may be widespread variance on the fee schedule" (Stephen and Love, 1999, p. 1000).

2.89 Stephen and Love state that: "There is some limited evidence that such 'cheating' on recommended schedules for lawyers does exist. Stephen (1993) reports evidence from a sample of solicitors' conveyancing bills for 1984, when a scale of recommended fees was in force, that more than 40 percent of these solicitors charged conveyancing fees below that recommended by the Law Society of Scotland. Furthermore, statistically significant geographical patterns were identified in the determinants of these fees even though the fee schedule applied to all Scottish solicitors. However, this evidence must be qualified by the fact that large numbers of solicitors failed to cooperate in this study suggesting that the data analysed may not have been representative of the population of solicitors (Stephen and Love, 1999, p. 1000)..

2.90 Shinnick and Stephen (2000) present stronger evidence of 'chiselling' (reducing price on a previously agreed level). On the basis of telephone survey data relating to 604 (private) solicitor firms in Ireland in 1994, the authors found that the recommended fee scale for conveyancing was far from the standard fee due to the presence of fee discounting across the country. However, the discounting reported by Shinnick and Stephen does not necessarily imply that fees were determined competitively in their sample. It is more likely that fees were determined by local conditions of demand and supply (which they authors did not control for) and while their results appear to reject the notion of a 'national cartel', they are not incompatible with a more localised form of collusion (the authors did not consider the role of local bar associations in Ireland). In an earlier study using the same sample of data, Shinnick (1998) provides some support for the view that the national recommended fee may provide a 'focal point' against which solicitors discount.[17] The use of a scale fee as a focal point from which to discount may provide an anchor that keeps prices higher than they would otherwise be.

[17] At the time, the Law Society recommended a conveyancing scale fee for the purchase of a property of 1.5% of the property value and 1% plus £100 on the sale of the property. Under the Competition Act, 1991, the Law Society is prohibited from publishing scale fees in relation to conveyancing. At the time, the Law Society's scale fees were 'recommendations'. The situation today is that the Law Society no longer recommends scale fees for conveyancing.

Architects

2.91 Drawing upon both published data and extensive survey information on architects and their clients, Button and Fleming (1992) considered the effects of the regulatory reforms on the architectural profession in the UK begun in the 1980s, specifically on fees, incomes and profits of architects. The package of reforms consisted of the replacement of mandatory fee scales by recommended fee scales in 1982, deregulation of advertising within the general legal restrictions that apply to all advertising and relaxation of the restrictions on organisational form to allow architects to form limited liability companies and to permit architects to form MDPs (subject to avoidance of conflicts of interests). The authors made allowance in their econometric analysis for cyclical and other external influences on incomes and profits in addition to the regulatory changes.

2.92 They found that the package of reforms from 1982 exerted a mild downward pressure on fees, earnings and profits of architectural practices. However, the slight falls were found to have been more the result of trends prior to the liberalisation than because of the reforms. The authors noted that:

> "The majority of architects also stated [in a 1989 survey carried out by Loughborough University] that it was now competitive forces that determined the fees they charged" (p. 108).

2.93 Along with the relaxation of the organisational restrictions, Button and Fleming (1992) proceeded to say:

> "These results may be seen as offering some very tentative support to the contention that the greater flexibility now permitted in fee setting, coupled with the ability of architects to establish themselves in a wider variety of organisational forms, has essentially lubricated the market and led to more efficient market clearing" (p. 112).

2.94 And they concluded that:

> "With regard to fees and competition, self-regulation would appear to have been, in practice, marginally detrimental. One way of looking at it is to say that mandatory fees provided a floor, and, even if this was set too high, it was only having a marginal effect on salaries and unemployment levels among architects. However, the key point is that if the regulations were not having a significant impact on incomes, then they seemed not be serving many of the purposes suggested by the RIBA (i.e. protecting against monopsony power of some clients). They were also, from our basic regression analysis results, clearly harmful in exerting a negative effect on the employment prospects for architects…The marginally higher fees associated with the mandatory scale and the higher profits earned prior to 1982 would seem to have permitted some transfer of economic rent from clients, but this was at the expense of higher unemployment within the profession" (pp. 115-116).

Impact of Restrictions on Advertising

Legal Profession

2.95 According to Stephen and Love (1999): "The empirical studies of advertising by members of the legal profession find that law firms that advertised charged, on the whole, lower fees than those than did not advertise" (p. 997). Cox, DeSerpa and Canby (1982) find that advertisers charge lower fees and have less fee dispersion than non-advertisers. Schroeter, Smith and Cox (1987) report that market-wide advertising lowers fees for all firms in the market and that generally those firms that advertise charge lower fees than those choosing not to advertise. According to Love and Stephen (1996, p. 236): "Love *et al.* (1992) and Stephen (1994) explicitly allow for different types of price, non-price and Yellow Pages advertising in studies of a routine legal service (conveyancing), and suggest that under some circumstances both price and non-price market-wide advertising may have a downward effect on overall fees". Along with the earlier study by Stephen *et al.* (1993), the study by Stephen (1994) indicates that advertising is unlikely to lead to price discrimination by law firms.

2.96 Stephen and Love (1999) have suggested that: "The hypothesis that non-price advertising will be much more common than price advertising is supported by evidence from the legal profession in the UK and in the US" (Stephen and Love, 1999, p. 998). According to Love and Stephen (1996, p. 233): "Stephen, Love and Paterson (1994) show that within 2 years of advertising being permitted [in the UK], the percentage of English solicitors' firms which had advertised within 6 months prior to an extensive survey was 46%; but only 2% of firms had advertised the price of any service. Six years later (in 1992), the proportion of advertising firms had risen to 59%, but price advertising was carried out by just 4% of firms. And in Scotland, Stephen (1994) estimates that within 3 years of being permitted to do so, over half of Scottish solicitors' firms engaged in advertising, but less than 3% advertised the price of any service". Stephen and Love (1999) point out that: "The Federal Trade Commission (1984) study of attorney advertising found similar low levels of price advertising across US states" (p. 998).

2.97 According to Stephen and Love (1999, p. 998): "Empirical work on the quality of legal services in the presence of lawyer advertising does not present such a clear-cut view as that on fees". Love and Stephen (1996) indicate that: "there are variations in how quality is measured in these studies" (Stephen and Love, 1999, p. 998). As Love and Stephen (1996, p. 237) indicate: "Muris and McChesney (1979) compare the quality of a high-advertising legal clinic with that of more traditional providers of legal services, using the subjective opinions of users and the more objective criteria of how different providers perform in actual cases of child allowance in divorce cases, the latter measure estimated in a regression equation to allow for other exogenous determinants of quality. On both measures the legal clinic is judged to provide higher quality, but there can be no guarantee that this is due to its advertising, which is not directly measured. The most curious study is that by Murdock and White (1985), which employs the confidential ratings given to individual attorneys by fellow professionals and judges, and compares these between advertisers and non-advertisers. Their conclusion that advertisers are more likely to be low quality firms has been heavily criticised by Thomas (1985) as revealing little about whether advertising lowers quality":

> ""[The study] does, however, tend to confirm the unsurprising view that successful, older, well established lawyers, who are respected and admired by their colleagues, are less likely to advertise. They do not, however, need to advertise (166)"" (Love and Stephen, 1996, p. 237).

2.98 Cox, Schroeter and Smith (1986) find that quality of services tends to be lower in those localities with market-wide advertising. However, within these regions, they find no statistically significant differences in the quality of work produced by advertisers and non-advertisers. Domberger and Sherr (1989) find that quality (measured by time taken) rose as a result of liberalisation of rules on advertising and competition in England and Wales.

Optometry

2.99 A substantial amount of empirical research has been undertaken to examine the effects of advertising regulation on the fees of optometrists and on the quality of their services. The studies on the relationship between advertising and fees are mainly US-based and fall into three general categories. According to Love and Stephen (1996, p. 234), the first approach involves comparing optometrists' fees "across states with varying severity of restrictions on advertising, the null hypothesis being that, *ceteris paribus*, the severity of such restrictions has no effect on fee levels. The results consistently reject this hypothesis: States which restrict or ban professional advertising are found to have higher fees on average than those that permit advertising (Benham, 1972; Benham and Benham, 1975; Feldman and Begun, 1978, 1980 and 1985; Bond et al., 1980 and 1983)".[18] Benham (1972), using data based on a national sample of 634 consumers, found that spectacles were more expensive in states where advertising is restricted, the difference in the average price being US$6.70. However, the difference in price between the most and least restrictive states was found to be US$19.50. "Feldman and Begun (1980) also finds that the dispersion of fees is higher in states which prohibit or restrict advertising, apparently providing direct support for Stigler's hypothesis on the informational effect of advertising and its impact on price dispersions" (Love and Stephen, 1996, p. 234).

2.100 The second line of studies on advertising and fees concentrates on the fees charged by advertisers compared with those choosing not to advertise (Kwoka, 1984; Maurizi et al., 1981). The first of these studies finds that the presence of advertising lowers fees for all firms in the market and advertisers have lower fees than non-advertisers. The second study finds that advertisers charge lower fees than non-advertisers for spectacles and contact lenses.

2.101 As Love and Stephen (1996) indicate: "The third approach explicitly tests the Stiglerian hypothesis of the informational effect of advertising by examining the impact of market-wide advertising on the fees of individual firms" (p. 236). They go on to note that Haas-Wilson (1986) report that firms in markets with advertising present charge lower optometry fees than firms in markets in which advertising is not prevalent, providing support for the advertising-as-information hypothesis.

[18] The same methodology was applied by Cady (1976) to examine the impact of restrictions on advertising in the retail drug market. Cady found that pharmacies located in states where advertising restrictions were prevalent charged between 2% and 9% more for prescription medicines than their counterparts operating in unrestricted states. Cady estimated that consumers could have saved a total of US$150 million on prescription drugs if no advertising restrictions existed. His overall conclusion is relevant in the context of the present review: "advertising can act as a significant stimulus to market competition through the provision of salient, useful information. To ignore this effect and to view all advertising as abusive, deceptive and contributing to imperfect market conditions is potentially detrimental to consumer welfare" (p. 29).

2.102 Compared with the empirical research on advertising and fees, the results relating to advertising and quality of service provided are ambiguous. As Love and Stephen (1996, p. 237) indicate: "Studies examining differences between markets that do and do not restrict professional advertising generally conclude that there is no evidence of such restrictions raising average quality (Bond et al., 1980, 1983; Haas-Wilson, 1986; Haas-Wilson and Savoca, 1990). Indeed, Kwoka (1984) finds that the average quality, in terms of time taken to provide the service, in markets permitting advertising is generally greater than where the use of advertising is restricted". Interestingly, Kwoka also reports a significant difference between non-advertisers in markets where advertising is permitted and their counterparts in restricted markets: the quality of service provided by the former tends to be higher on average, pointing to the potential benefits of advertising on the quality of professional services.

Medical Profession

2.103 The main finding from the various empirical studies of the relationship between advertising and professional fees for optometrists surveyed above is that advertising has a downward effect on fees, implying that the informational properties of advertising outweigh the persuasive effects in the context of professional services. An exception to this general pattern in the research is the US study by Rizzo and Zeckhauser (1992), which finds that physicians who advertise charge higher prices than those who do not. This study is notable not only for this result, but also because of the fact that it is the only study to formally control for the effects of quality and quantity in the advertising-price relation (Love and Stephen, 1996). While advertisers are found to charge higher prices, they produce work of a higher quality and have reduced output. This is explained by the process in which advertising affects consumer demand: while advertising increases demand at all levels of output, it also makes consumers less sensitive to changes in price, which corresponds to the notion of brand loyalty. The net effect is that while advertisers charge higher prices, they tend to spend more time on their patients, enabling them to achieve a better quality service.

Architects

2.104 Button and Fleming (1992) found that, for the UK architectural profession, the relaxation of advertising regulations, initially in 1979-80 and more fully in 1987, had only a limited impact on advertising behaviour by members of the professions. The authors then questioned whether this form of deregulation has been of any value. They concluded that advertising deregulation has been, on balance, beneficial:

> "At the margin, [advertising deregulation] probably has been useful. While many clients (at least in the medium term) have not changed their method of acquiring information about architectural services, at the margin some have and presumably to their benefit" (p. 114).

Impact of Restrictions on Demarcation

Legal Profession

2.105 As Stephen and Love (1999, pp. 995-6) point out (quotes below), empirical studies of the deregulation of legal services in England and Wales between 1985 and 1992 focusing on conveyancing (title transfer) services provide some (albeit limited) insights on the relaxation of a profession's monopoly rights and the impact of a para-profession. "Until the mid-1980s, solicitors had the exclusive right to provide conveyancing services for financial reward. This monopoly was revoked in 1985", following the passing of the Administration of Justice Act in that year, "and by 1987 the first licensed conveyancers (non-solicitors licensed to provide these services) were offering their services in competition with solicitors in some areas of the country (Stephen and Love, 1996; Stephen, Love and Paterson, 1994). Paterson *et al.* (1988) report that solicitors surveyed in 1986 were reducing fees in anticipation of licensed conveyancer entry. Later surveys, however, provide a more complex picture of the effects of entry. Survey data for 1989 revealed solicitors' conveyancing fees in a sample of locations where licensed conveyancers had entered compared with those where there were no licensed conveyancers were lower (Love *et al.*, 1992) and were less likely to involve price discrimination (Stephen *et al.*, 1992). These results appear to support the conventional view that monopoly rights will operate to the disadvantage of clients of lawyers. A subsequent survey conducted in 1992 and covering the same locations as the earlier surveys produced results less conducive to the traditional economic view". The conveyancing fees of both solicitors and licensed conveyancers in markets where there were licensed conveyancers "had risen between 1989 and 1992 by more than those in markets where there were no licensed conveyancers; in addition licensed conveyancers feeing practices were more like those of solicitors than before (Stephen, Love and Paterson, 1994)". There is the suggestion from this evidence "that the threat of entry is a more powerful restraint on solicitors' behaviour than actual entry".

2.106 According to Stephen and Love (1999, p. 996): "Stephen and Love (1996) have sought to explain the results by the fact that licensed conveyancers produce a limited range of services and therefore have the same interest as lawyer conveyancers in maintaining high fees", which is reinforced by recognition of the fact that licensed conveyancers may in some cases face greater risks than solicitors, as Stephen and Love (1999) also note (p. 996).

2.107 Anecdotal evidence suggests that solicitors account for about 95% of the share of the conveyancing market in England and Wales today. In other words, licensed conveyancers constitute a fringe segment of the market and given that it is now 15 years since the arrival of the first para-professionals the 5% market share is likely to be representative of the long-run equilibrium market structure (unless, of course, there is some other regulatory change to the market in that jurisdiction). Nevertheless, evidence from New South Wales in Australia (Barker, 1996) reveals that the introduction of licensed conveyancers, coupled with relaxation of restrictions on fee advertising, may result in significant lowering of solicitors' conveyancing fees (the author reports a 17% decrease in the average fees charged by small firms during 1994-96, yielding an estimated average annual savings to consumers of US$86m).

2.108 Stephen and Love (1999) noted that it is not easy to find empirical evidence to test propositions advanced by Bishop (1989) and others to explain the division of the legal profession into barristers and solicitors. Bishop himself "cites the former Chief Justice of the United States, Warren Burger, in support of the higher quality of advocacy and the higher quality of the judiciary in England [and Wales] as compared to the US" [where the legal profession is fused]. However, Bishop does not regard this testimony as determinative" (Stephen and Love, 1999, p. 1008). Of greater relevance, in his view, is the "spontaneous evolution of barrister-like specialists in Australian states where there is *de jure* a fused profession" (Stephen and Love, 1999, p. 1008).

Impact of Restrictions on Organisation Form

Legal Profession

2.109 Relatively few assessments of the impact of organisational restrictions have been undertaken. As discussed earlier, Fama and Jensen (1983a & b) argue that "professional partnership accompanied by unlimited liability constitutes a solution to the moral hazard problem posed by the information asymmetry between client and professional. The willingness of one professional to risk his or her wealth by entering into a partnership with another professional signals to clients trustworthiness of members of the partnership and provides a guarantee that there will be mutual monitoring among partners. Stephen and Gillanders (1993) present evidence that mutual monitoring takes place within UK law firms and that *ex ante* screening of prospective partners is likely to dominate *ex post* monitoring" (Stephen and Love, 1999, pp. 1008-9). According to Stephen and Love (1999),"he persistence of sole practitioner firms in legal practice also seems to run counter to this signalling function of partnership" (p. 1009): around 50% of law firms in the US are sole practitioners; the corresponding proportion in England and Wales is approximately 40%. "However, Carr and Mathewson (1990) point out that the proportion of sole practitioner firms in the US has been declining for a number of years" (Stephen and Love, 1999, p. 1009). Comparing US states where limited liability is permitted with those in which it is not, these economists report that average law firm size rises where limited liability is permitted and this they see as evidence in support of efficiency gains.

Medical Profession

2.110 Several econometric studies, carried out in the US, designed to isolate the effects of differences in regulation, have demonstrated that greater competition in several health care sectors has led to lower prices and costs, without sacrificing quality of care. In dentistry, some States limited how dentists could employ the assistance of dental hygienists, and others did not. A FTC staff study found that the restrictions increased the costs of individual procedures by from six to 30 percent, and increased the average cost of a visit to the dentist by from seven to 11 percent. Another series of studies about eye care estimated that restraints on advertising and other commercial practices increased the prices charged for examinations and eyeglasses by as much as 25 percent. The average quality of professional examinations and products was about the same whether or not these practices were permitted. And the range of variation in quality was about the same, too. Where the practices were permitted, those providers who advertised did tend to do less thorough (but still adequate) examinations; significantly, they also tended to charge lower prices."

Architects

2.111 Button and Fleming (1992) found that for UK architects abolition of the rule preventing practice under limited liability led to very considerable growth in this form of organisation. According to figures submitted by the Royal Institute of British Architects (RIBA), in 1984, just 1.7% of all architectural practices in the UK were limited liability companies. Four years later, however, the corresponding proportion grew to 7.5% and, as the authors note, the change took place almost entirely at the expense of 'sole principal' practices, which accounted for 51% in 1988 compared with 56.5% in 1984.

2.112 Button and Fleming (1982) also found that the reforms also affected the sizes of architectural practices. Until the early 1980s, before the regulatory reforms (referred to above), the smallest sizes of practice (i.e. employing one or two full-time architectural staff) increased proportionately at the expense of all other size groups. Since then (and certainly since 1984, when the reforms were introduced), this trend has been reversed. The smallest group has declined proportionately and all other size groups have increased, both in relative and absolute terms. Conclusions must be drawn carefully, since, as the authors remark, the timing of the change may be coincidental, but increased competitive pressures following liberalisation may have put the very smallest practices at a competitive disadvantage. However, it is also relevant to recall their view that, along with the reforms to fee schedules, the relaxation of the organisational requirements may have led to "more efficient market clearing" in the profession (see quote at paragraph 2.94).

Summary of Regulatory Impact

2.113 It is difficult to attempt an overall summary of the large amount of empirical economic research that has been carried out on assessment of the impact restrictions on professional services markets have on fees, incomes and profits of practitioners and practitioner firms and on the quality of their work. As already remarked, differences in results can be related to differences in data quality, and thus in sampling, and to variations in statistical methodology applied. Moreover, different results are also explained by differences across the professions and their different regulatory histories.

2.114 The work on the price and quality effects of advertising accounts for the majority of the research. The early work is clear in its findings that advertising restrictions are likely to increase average professional fees. Since these studies of the 1970s and early 1980s, the methodology has become more sophisticated with improvements in data quality and advances in econometrics that allow for price-quality interactions and various selection effects among other things. Nevertheless, there does exist a degree of consensus on some important issues:

- Where advertising is restricted, professional fees tend to increase as does fee dispersion on the market. Advertising has the effect of lowering professional fees on average.
- Much of the research suggests that this price effect occurs without any clear evidence of a reduction of quality. There is little evidence of quality reductions due to advertising and even where advertisers have lower quality than non-advertisers, the overall effect of quality in markets permitting advertising tends to be higher than in more restrictive markets.

2.115 Our judgement is that there is very little evidence to support the use of advertising restrictions to maintain quality standards and a substantial amount of evidence to suggest that advertising does increase consumer information and can reduce fees as a result. We believe that freeing up advertising leads to pro-competitive effects in professional services markets. Owing to their specialist education and training acquired over many years, as well as their professional values, practitioners have little or no incentive to engage in untruthful, persuasive campaigning, which, in the long run, will lead to a loss of clients/patients. Rather the dominant strategy in an open market environment is for professionals to engage in informative advertising, even in the absence of rules and regulations governing the nature of advertising that can be undertaken.

2.116 The empirical evidence on fee schedules is that lower than average fee levels are likely to result when fee scales are removed altogether or when they are relaxed (for example, from mandatory to recommended). The evidence on the other restrictions (demarcation and organisational form) suggests that in the case of at least two professions (namely the introduction of para-professionals in the legal profession and relaxation of restrictions on organisational form in the architectural profession) relaxing or removing regulation can have a significant effect on fee competition and on the size structure of practitioner units that may make the adoption of more efficient work practices more likely. Our view on para-professionals is that their introduction on the market is likely to be most benefit to competition when coupled with other forms of deregulation, notably removal of advertising restrictions, while also ensuring adequate protection of consumer interests.

Conclusion

2.117 This section has considered the basis for the existence of restrictions in professional services markets. We saw that market failure is perceived to characterise professional services markets and regulation is justified on the basis of addressing the failure(s). However, the market failure approach is one of two schools of thought on professional regulation. The other – the private interest approach – sees regulation as a form of rent seeking by professionals. Relaxation of self-regulation would, it is proposed by proponents of the private interest approach, improve economic welfare: greater competition would ensure that professional fees would fall towards the competitive level and these effects would occur without a consequent fall in the quality of professional services provided.

2.118 We also reviewed the instruments of professional regulation and their justifications by professional bodies and associations. Professional regulations take four broad forms, which are summarised below.

2.119 First, there is regulation of the number of professionals through quantity or quality controls by means of registration, certification or licensing. It is argued by professional organisations that both forms of entry regulation serve the public interest by ensuring minimum standards of competence and ethical behaviour and serve to protect consumers from the potential damaging effects of excessive competition.

2.120 Second, related to direct entry regulation are restrictions acting to demarcate one profession from another and to reserve the function(s) of a given profession to its members only. Reservation of function constitutes indirect entry regulation and is justified by professional bodies using similar arguments to those advanced for regulating entry directly.

2.121 Third, regulation of conduct takes the form of restrictions on fee competition and on advertising. These restrictions are justified by professional organisations on the basis that the potentially damaging effects of persuasive advertising may be particularly pronounced in the context of professional services markets where consumers are less informed than those providing the services. Advertising, it is argued by self-regulators, needs to truthful and should be limited to preserve the dignity and standing of the profession in society. The traditional argument advanced by professional bodies for fee schedules is that the availability of published fee scales (whether mandatory or recommended) provides users of professional services with a convenient reference point in a market where there is information asymmetry between buyers and sellers.

2.122 Finally, restrictions on organisational form serve to limit the business structure of professional services firms to sole practitioners and partnerships, which are generally confined to members of a given profession. The formation of limited liability businesses is prohibited in some professions. Also sometimes prohibited is the formation of multidisciplinary practices (MDPs), in which members of a given profession would enter into business with members of another profession, trade or occupation. The alleged justification of the restrictions on organisational form is to ensure that only suitably qualified people have control of an undertaking and that there is an acceptable degree of accountability on the part of those offering services. A corporate practice could, it is suggested by professional bodies, pass into irresponsible, non-professional hands. It is sometimes also suggested by self-regulatory organisations that allowing professionals to incorporate would alter the size distribution of practices and spawn higher concentration levels in the profession.

2.123 Following our examination of the various types of restriction and their suggested justifications, we then reviewed the empirical economic evidence on their impact. The evidence suggests that relaxing or removing the restrictions would improve competition and thus consumer welfare, particularly in regard to fee schedules and restrictions on advertising. On the basis of the empirical evidence surveyed, serious doubts have been raised about whether restraints on competition in the professions are necessarily beneficial. Thus, it has been recommended that any entry restriction that can be used to artificially control the numbers entering a profession should be removed and that entry requirements should be independent of the level of economic activity occurring in the profession. Likewise, it has been proposed that advertising rules should be liberalised, subject to the requirements that advertisements should not bring the profession into disrepute, should not be in bad taste and should not abuse the trust of potential clients or exploit their lack of knowledge. Furthermore, it has been recommended by a number of researchers that para-professionals should be permitted to undertake routine tasks traditionally reserved to professionals. It has also been advocated that professionals should be allowed to have choice over the organisational form of their businesses, including the right to incorporate and to form MDPs.

3 Competition Policy and Professional Services

Introduction

3.1 This section consists of two broad reviews as follows:

- Review of competition investigations relevant to professional services undertaken in Ireland; and
- Review of competition investigations on professional services carried out in other jurisdictions.

3.2 The first review looks at previous competition investigations that have been undertaken in Ireland that are relevant for the purpose of this study. In the course of the review, we examine studies undertaken by the Fair Trade Commission and the Restrictive Practices Commission, interventions and enforcement actions by the Competition Authority and decisions made by the Authority in respect of agreements or practices notified to it by professional associations.

3.3 The second review is structured in the same way as the first review, but this time we examine the competition material accumulated in other countries. To this end, we cast a wide net by looking at relevant OECD and European Commission reports as well as by looking at enforcement and notification decisions made by national competition agencies.[19]

3.4 Along with the comprehensive review of the theoretical and empirical economic research provided in the previous section, the surveys undertaken here provide relevant background information prior to the detailed sectoral investigations carried out in the subsequent sections. At the end of the section, we identify a set of key principles for regulation of professional services markets given in OECD (2000). On the basis of these principles and the various sources of evidence presented in this section and in Section 2, we then outline a series of 'informal tests of proportionality' covering the different types of restrictions/requirements encountered in the sectoral sections, namely restrictions on entry, conduct, demarcation and organisational form.

[19] The *NOVA* case, which relates to multidisciplinary practices in the legal profession, is treated in relation to the solicitors' profession in Section 4.

Competition Policy and Professional Services in Ireland

Fair Trade Commission/Restrictive Practice Commission Reports

3.5 Prior to the enactment of the Competition Act, 1991, the Fair Trade Commission (previously the Restrictive Practices Commission) was responsible for advising the Minister for Industry and Commerce on competition matters in Ireland. Following Ministerial requests, the Fair Trade Commission/Restrictive Practices Commission undertook a number of studies into restrictive practices in the following professions:

- Dentistry;[20]
- Legal;[21]
- Engineering;[22]
- Architects, surveyors, auctioneers and valuers;[23]
- Accountancy;[24]
- Patent and trade market agents.[25]

3.6 In these reports, the Commission set out its views on competition in the provision of professional services and made some specific recommendations in relation to restrictions in place within these professions. The approach of the Commission was to balance the need for Government to consider "circumstances where there may be a justification for the retention of certain professional restrictive practices" with the need for Government to "intervene in the public interest in order to seek the elimination of these restrictive practices".[26]

[20] Restrictive Practices Commission (1982a).
[21] RPC (1982b, 1985) and Fair Trade Commission (1990a).
[22] RPC (1987a).
[23] Fair Trade Commission (1990b).
[24] RPC (1987b).
[25] Fair Trade Commission (1989).
[26] RPC (1987b, p. 48).

3.7 One of the salient themes of the various reports relates to the anti-competitive effects of fee schedules in the supply of professional services. The Commission held that:

> "Competition in prices charged for any good or service is the most important feature of a free market economy. Such competition is the most powerful encouragement to improve efficiency, to experiment with innovatory methods, and to introduce a choice of different combinations of price and service. Conversely, any prohibition of, or restraint upon, price competition by a group of persons supplying the same good or providing the same service, or any action or agreement which has the same or a similar effect, is the most detriment to the kind of market activity which most benefits the consumer" (RPC, 1987a, para. 58).

3.8 On the effects of fixing prices, the Commission, in the same report, made it clear that:

> "Where competition in fees is prohibited, or even severely restrained, there is protection for the inefficient and incompetent, and such a situation benefits the established practitioner at the expense of the new entrant to the profession. There is the possibility, also, that there will be over-charging for some work performed and undercharging for other work. Since fees will be higher than they would be in a competitive market, the consumers of the service suffer at the expense of the providers of that service" (para. 5.10).

3.9 As to the arguments advanced to justify fee scales in the profession, the Commission stated (at paragraph 5.11) that:

> "[It] cannot accept the arrangements most frequently put forward by those who advocate that there should be no fee competition in the professions. It has been argued that fixed fees give advance notice of the eventual charge, and thus they provide certainty and simplicity; they fix uniform authorised maximum fees, and thus prevent over-charging; and they help maintain the quality of service, and, indeed, lead to competition in quality rather than price. We believe that an indication can be given in advance of the likely cost of a service, without having this determined by a professional association. We consider that fixed fees are likely in general to lead to higher charges than would otherwise occur, and they certainly do not allow for charging below the authorised level. Nor do we believe that fee-fixing leads to the maintenance or improvement of the quality of the service, but rather that fee competition can improve standards quite considerably. We disagree in particular with those professions which claim that fee competition will inevitably result in reduced standards".

3.10 For instance, in relation to the then scale of fees published by the Institute of Engineers of Ireland (IEI) and the Association of Consulting Engineers of Ireland (ACEI), which set out in fine detail the fees to be charged for projects and which incorporated four Model Forms of Agreement covering different kinds of engineering services, the Commission concluded that:

> "Even if the bodies were to make it explicit that the fee levels quoted were merely recommended, as distinct from mandatory, we consider that recommended or maximum fees would tend to become fixed charges in the minds of engineers, with the consequent diminution of price competition…We consider that it is an unsatisfactory situation in which representative bodies can set their own charges. This, in our view, is another strong reason for not favouring guidelines of any kind in relation fee levels" (paras. 5.2 & 5.6).

3.11 As regards advertising, the Commission stated that freedom to advertise goods and services is second in importance only to price competition in the effective operation of a competitive economy, and for very much the same reasons.[27] The Commission took the 'Stiglerian' or pro-competitive view of advertising, which we outlined in Section 2:

> "…Advertising is an important stimulus to improving efficiency and to the introduction of innovatory methods, and it is a primary means of ensuring that there is effective price competition. At the very least, consumers require accurate information regarding the availability of goods and services in order to make an optimal choice from alternatives. Selection among competing suppliers or providers can be made properly only if information is available to consumers, who can then choose the most appropriate combination of price and quality…Any prohibition or restriction upon the freedom to advertise, conversely, which is imposed on suppliers of goods or providers of services, is an extremely serious limitation upon competition or upon effective competition, to the disadvantage of the consumer…A prohibition upon advertising of fees, in particular, will tend to limit effective competition in fees" (RPC, 1987a, para. 5.16).

3.12 The Commission made it clear in its reports that it did not accept that restrictions upon advertising either increase the quality of the service provided or help to maintain standards, or that advertising lessens the confidence of consumers in the competence, integrity or independence of the providers of professional services. Nor did the Commission accept the view that advertising, by its very nature, brings into disrepute the profession or individual practitioners. In the Commission's view, there are safeguards – for example, in the form of entry requirements serving to provide a minimum quality standard – that provide protection for consumers from incompetent and dishonest practitioners.

[27] *Ibid.* and RPC (1987c).

3.13 As a general rule, the Commission, in its reports, considered that providers of professional services should not be restricted by their professional bodies from advertising, nor should restraints be imposed upon the medium used or the size and frequency of advertisements. At the very least, it held, advertising should be permitted that provides useful information to clients and potential clients. This includes:

- The name of the firm, partnership or practice;
- Its address(es) and telephone number(s);
- The name of the principal and the names of partners;
- Qualifications of person engaged; and
- Availability.

3.14 The Commission also held (e.g. RPC, 1987a & b) that professional bodies should not be permitted to prevent the provision of detailed information regarding the services offered, including where there is specialisation in one or more areas or whether general services are offered or whether particular types of client are being sought. This, it was argued, would be of assistance to potential clients in selecting a particular member of a profession who might be best suited to handle their individual business.

3.15 At the same time, however, the Commission, in its investigations, recognised that there are grounds for allowing a degree of control to professional bodies in respect of the contents of advertisements placed by their members, even though certain items are already covered by the laws of the State. Accordingly, the Commission held, professional bodies should not be prevented from requiring that advertisements placed by their members:

- Should not be such as would bring the profession into disrepute;
- Should not be false or misleading in any respect;
- Should not be in bad taste;
- Should not reflect unfavourably on other persons in the profession.

3.16 In the opinion of the Commission, the above would ensure that advertising by members of a profession would have regard to professional propriety, while still affording to individual practitioners a considerable amount of freedom with regard to the content of their advertisements.

3.17 The Commission's views on fee competition and advertising are clearly expressed in their studies. On the other forms of restrictions, the Commission's approach is more a case-by-case approach. The studies of the statutory restrictions on the provision of dental prostheses (published in 1982) and of the solicitors' monopoly on the provision of conveyancing services for reward (in 1982 and 1985) are noteworthy in the context of reservation of function (demarcation). Also notable is the Commission's recommendation to introduce a system of protection of title to professionals operating in the construction sector in Ireland, including architects.

3.18 In dentistry, 'prosthesis' refers to an artificial replacement for one or more teeth and/or associated structures, while 'prosthetics' is the art or science of providing (dental) prostheses. The remit of the 1982 study on dental prostheses was to consider, pursuant to the Restrictive Practices Act, 1972, whether the restrictions imposed on 'dental mechanics' (i.e. non-dentists) in relation to the supply of prostheses to members of the public, and given the force of law by sections 45 and 46 of the Dentists Act, 1928, were unfair or unjust or in any other respect operate against the common good. The sections reserve to dentists or others statutorily qualified all aspects of the practice of dentistry.

3.19 The Commission found that "the denial to mechanics of the right to provide dentures to the public is by its nature a restrictive practice, and is objectionable unless it can be shown that it offers advantages which outweigh its disadvantages" [RPC (1982a, p. 43). The proponents of the law (i.e. the Dental Council) defended the restrictive practice by claiming that it is necessary to protect the oral health of the public. The mechanics, naturally enough, did not accept this argument. To assess the weight of the arguments, the Commission found it necessary to look at the dangers that might arise if the law was relaxed or removed to allow mechanics to provide and fit prostheses.

3.20 The Commission found that the arguments in support of the restrictive practice were not of sufficient strength to justify their continuity in statute and recommended that section 45 of the 1928 Act be amended so as to provide that the general prohibition on the carrying on of dentistry by a non-dentist did not apply to the provision of dentures to a person of 18 years or over provided it did not involve work being done on living tissue. The Commission noted that its recommendation represented a degree of liberalisation that did not seem to exist in any other country at the time, but added that circumstances differ from one country to another and the recommendation was based on the belief that Irish circumstances did not justify making the supply of dentures by non-dentists an offence punishable by law.

3.21 In its 1982 report into the solicitors' monopoly on conveyancing in Ireland, the Commission found that the monopoly constituted a restrictive practice and, finding no public interest reasons to justify a vendor from employing a non-solicitor as his/her conveyancer, owing to the fact that the legal work involved in selling is generally less demanding than that in buying, the Commission recommended that the reservation to solicitors of certain conveyancing acts required by section 58 of the Solicitors Act, 1954 should apply to documents under seal and not (as at that time) to documents whether or not under seal. The Commission also recommended that changes to the then requirements of registration at the Land Registry and to practices among lending institutions be made so as to give effect to its primary recommendation that sellers should have the right to employ non-solicitors to carry out their conveyancing work (noting that buyers or sellers of real property had, and continue to have, the right to do their own conveyancing work).

3.22 Finally, the views of the Commission (1990a) in its study of the legal profession are particularly relevant in the context of restrictions on entry. It noted specifically that:

> "The fact that each profession, however, exercises complete control over the numbers of persons admitted to the profession, and their qualifications, is clearly of direct and critical relevance to the Commission. Barriers to entry are one of the most important factors in the analysis of competition. If the barriers to entry are set at a very high level, with relatively few entrants as a consequence, there tends to be a lessening of competitive pressures, and a weakening, in particular, of price competition. As a group or individually, members of a profession may be enabled to exercise market power, to raise prices above competitive levels, and to enjoy monopoly profits. Within the scope of the practices listed in the 1972 [Restrictive Practices] Act restrictions on the numbers entering imposed by a profession itself appear to the Commission to be designed to exclude the entrants to the profession, and they appear to restrict or to be likely to restrict the exercise by any person of his freedom of choice as to what services he will supply. Such entry restrictions are likely also to secure a substantial or complete control of the provision of a class of services, and are likely to have the effect of limiting or restricting free and fair competition, and of being a restraint of trade" (para. 7.128).

3.23 The Commission proceeded to state (at paragraph 7.129) that:

> "The great danger arising from a situation where the existing members of a profession can determine precisely how many new entrants are admitted to the profession, in the opinion of the Commission, is that the number admitted might be restricted to a level which was believed to match the perceived requirements of the profession, and not of the public. If the power of controlling entry to the profession is exercised in the light of the profession's own perception of the demand for members of the profession, this is quite likely to lead to a situation where the protection and promotion of the interests of those already within the profession become paramount, however much this might be claimed to be in the public interest. The Commission considers that such self-protection would amount to both a restrictive practice and an abuse of a dominant position which would be seriously disadvantageous to the common good. In principle, the Commission favours freedom of entry to a profession, consistent with the maintenance of acceptable, but not excessive, standards, with the market for professional services being allowed to determine the number of practitioners".

Activities of the Competition Authority in relation to Professions

Relevant Irish Legislation

3.24 The Competition Act, 1991, which established the Competition Authority as Ireland's national competition agency, transposes into Irish law EU competition provisions outlined in the EC Treaty. Section 4(1) provides that "all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or any part of the State are prohibited and void". Secondly, section 5 absolutely prohibits the abuse of dominance by any undertaking having a dominant position in Ireland or in any substantial part of Ireland in certain specific circumstances. Under section 7, as amended, agreements, decisions or concerted practices have to be notified to the Competition Authority to request a certificate that indicates that these agreements do not contravene section 4(1). A number of professional associations have notified their codes of conduct, ethical rules etc. to the Competition Authority to receive such a certificate.

3.25 Since the enactment of the Competition (Amendment) Act in 1996, the Competition Authority has enforcement powers (including criminal sanctions) for breaches of competition law in Ireland and these have applied to the professions.

3.26 While the Competition Acts, 1991-1996 have been repealed and replaced by the Competition Act, 2002, for the purpose of this survey the relevant pieces of legislation are the 1991 and 1996 Acts and in what follows we review, first, notification decisions by the Competition Authority and then enforcement actions by the Authority in respect of professional services.

Notification Decisions of the Competition Authority

The Association of Optometrists, Ireland

3.27 This 1993 decision[28] was the first and "still the leading decision" (according to Power, 2001, p. 23) by the Authority concerning a notification from a professional association, in this case the Association of Optometrists, Ireland.

3.28 The regulations governing the supply of optometry services in Ireland are a mixture of mandatory regulations imposed and enforced by a statutory regulatory body – the Opticians Board - and voluntary provision imposed and enforced by a professional association, namely the Associations of Optometrists. This decision by the Competition Authority relates to the voluntary regulations of the Association of Optometrists and is considered by Power (2001, p. 26) as the "leading Authority decision on the relationship between the Competition Acts and other legislation" given the linkage between these regulations and the statutory regulations of the Opticians Board.

3.29 The Competition Authority decision relates in particular to the Memorandum, Articles of Association and Code of Ethics of the Association of Optometrists. Membership of this organisation is not mandatory but, as described by Hurley (2001, pp. 55-6), "it would appear from the Authority's decision that membership has certain advantages for opticians, such as access to the associations' professional indemnity insurance scheme".

3.30 The Opticians Act, 1956 protects the title of registered optician in Ireland also reserves to that profession certain activities, notably the provision of prescriptions for eyeglasses or spectacles by ophthalmic opticians to members of the general public.

[28] Competition Authority Decision of 29/4/93 in respect of Notification No. CA/9/92E.

3.31 As described by Hurley (2001, p. 56): "while the Opticians Board is a statutory organisation, the Board is made up almost entirely of members of the profession (medical doctors, opticians and dispensing opticians) and is funded by fees paid by the profession. It is responsible for the training of opticians, setting up and maintaining the register of opticians. There are two registers of opticians:

- The register of Ophthalmic Opticians;
- The register of Dispensing Opticians".

3.32 Hurley (2001, p. 56) continues: "the education and entry requirements for acceptance onto the two registers differ. For example, ophthalmic opticians are required to undertake a full-time third level degree course in optometry, while the training for dispensing opticians is undertaken on a part-time basis. Reservation of function means that only ophthalmic opticians (along with medical doctors) can conduct eye examinations and prescribe spectacles. Dispensing opticians are only permitted to dispense prescriptions for spectacles".

3.33 Hurley (2001, p. 56) outlines that: "the approach adopted by the Competition Authority in dealing with this notification was to:

- Establish the facts, parties and products concerned;
- Set out the relevant legislation governing the market and the entry requirements;
- Outline the market for optometry services;
- Set out the arrangements that are being notified and the views of the Association;
- Establish the views of third parties and the findings of previous competition investigations into optometrists' rules both in Ireland and in the UK; and
- Set out the Competition Authority's assessment and decision".

3.34 The Authority found that there is a degree of overlap between the rules, membership and sources of funding between the statutory Opticians Board and the voluntary Association of Opticians, Ireland, although the scope of the former body is wider than that of the latter. In particular, the Authority found that virtually all practitioners on the Board's Register of Ophthalmic Opticians are also members of the Association. In addition, the rules of the Association are derived mainly from the Rules of the Opticians Board, and members of the Association are required not only to abide by its rules but also by the Rules of the Board. The Board laid down rules and restrictions governing advertising and prohibited comparative advertising and references to prices in advertisements.

3.35 As noted by Hurley (2001, p. 57): "the Association's code in relation to advertising, while referring to the Board's Rules, went somewhat further by also prohibiting discounts to groups etc. The Association justified its restrictions on advertising on the basis that:

- Patients should choose opticians on the basis of quality of service;
- There is a need to prevent misleading advertising;
- There is a need for the optician to provide objective advice without monetary overtones".

3.36 According to Hurley (2001, p. 57): "it is clear from the Competition Authority's decision that the market for opticians was changing as new entrants were not prepared to comply with either set of rules. Existing firms also wished to advertise in order to compete with new market entrants. As a consequence both the [Board] and the [Association] had taken enforcement action against firms that were not prepared to comply with their rules, particularly concerning advertising in the years prior to the notification. Following a complaint to the Director of Consumer Affairs, the Optician's Board had liberalised, somewhat, its rules on advertising".

3.37 As pointed out by Hurley (2001, p. 57): "the Competition Authority concluded that the Association of Optometrists, Ireland was an association of undertakings, as many of its members were self-employed and that its Code of Ethics (even where the Code was only recommendatory) constituted decisions by an association of undertakings and therefore came within the remit of section 4(1) of the 1991 Competition Act. This is because the Association had taken action against members for breaches of the recommendations and they could not therefore be considered as mere recommendations".

3.38 Summing up, Hurley (2001, pp. 57-8) noted that: "the Competition Authority found that some of the provisions in the Code of Ethics and the actions taken to enforce these restrictions were in contravention of section 4(1) and were anti-competitive. These included:

- Guidelines in relation to premises, that would prevent practitioners from offering services in an innovative way;
- Restrictions on advertising, which the Authority considered to be a serious restriction on competition on the basis that individuals should be free to advertise their qualifications and services in whatever manner they think fit;
- Restrictions on price competition, in particular requirements on members to set charges in a particular way;
- Restrictions on granting group discounts".

3.39 "Following discussions with the Competition Authority, the Association deleted these restrictions from its Code of Ethics so that it no longer offended against section 4(1) and the Association was granted a certificate" (Hurley, 2001, p. 58).

3.40 As described in Hurley (2001, p. 58): "the Competition Authority found that the Association's power to expel its members did not offend against section 4(1) *per se*. However, where this power is used to sanction a member for a breach of any of the Association's rules, which in the Authority's opinion is anti-competitive, then the use of the power to expel may also be in breach of section 4(1)."

3.41 Further, Hurley (2001, p. 58) noted that: "the Competition Authority considered that other restrictions on this market set out in the Opticians Act, 1956 relating to the training of opticians did not fall within the remit of the Competition Act, 1991 as they were covered in separate legislation. This may be why limitations on the number of training places, while of serious concern to the Competition Authority, were not considered to be anti-competitive. The Authority's decision in this instance does not appear to distinguish between the direct provisions of the 1956 Act and restrictions arising from responsibilities conferred on the Opticians Board under the Act. The Opticians Act does not directly restrict the number of training courses for opticians; rather it delegates responsibility for the training of opticians to the Opticians Board."

The Institute of Chartered Accountants of Ireland (ICAI)[29]

3.42 The Competition Authority had previously ruled that the ICAI's Bye-Laws[30] (relating to the internal rules of the ICAI) did not contravene section 4(1) of the Competition Act, 1991. This notification by the ICAI related to its Rules of Professional Conduct and its Ethical Guide for Members on the basis that they are decisions by an association of undertakings within the meaning of section 4 of the 1991 Act. While members of the ICAI discharge some functions under statute, notably under the Companies Act, 1990, the ICAI is not the only regulatory body for the accounting profession and the title of accountant is not protected in law like that of optician.

[29] Competition Authority Decision of 18 September 2000 in respect of Notification Nos. CA/827/92E and CA/828/92E

[30] Competition Authority Decision No 520 of 12 October 1998.

3.43 The Authority concurred with the ICAI's view that its rules and ethics constitute decisions by an association of undertakings as it was in line with EU case law and Competition Authority thinking as indicated in the Optometrists decision.

3.44 As pointed out by Hurley (2001, p. 59): "the Competition Authority, following its initial assessment, issued statements of objections in both cases and published a notice of its intention to refuse a certificate or licence to the arrangements notified". The Authority's objections to some of the rules included:

- "The requirement on existing accountants to communicate to incoming accountants any concerns they may have in relation to a client, as it could hinder a client changing the supplier of a service;
- Obligations on new accountants to inform and get the consent of incumbent accountants before accepting a contract with a client;
- References to fees, such as a fee calculated by reference to the custom of the profession and the dangers of accepting fees at low levels;
- Prohibitions on cold calling;
- The prohibition on comparative fee advertising in promotional material" (Hurley, 2001, p. 59).

3.45 As described in Hurley (2001, pp. 59-60), "the Competition Authority considered that these restrictions were in contravention of section 4(1) as:

- A consumer should be able to change his supplier without reference to his existing supplier (which under existing arrangements had effective first refusal);
- It restricted accountancy firms' ability to freely compete for business;
- Reference to fees could lead to minimum prices being set for services; and
- It was an essential element of competition that consumers be able to compare prices".

3.46 As stated in Hurley (2001, p. 60): "the Competition Authority held an oral hearing on these matters following from which the ICAI agreed to amend its rules generally to the Authority's satisfaction. There was on outstanding difficulty in relation to comparative price advertising. The ICAI argued strongly that, as no standard product or price structure existed, to remove this prohibition would conflict with an EU Directive[31] dealing with comparative advertising and that this Directive included a specific exemption that allowed Member States to prohibit comparative advertising in professional services for this very reason. The Authority accepted the arguments of the ICAI and the certificate was issued to the ICAI.[32]"

Summary of Findings in Relation to Notifications

3.47 According to Hurley (2001, p. 60): "It appears somewhat surprising that, since the Competition Authority has viewed (since 1993) that professional associations are associations of undertakings and are subject to the Competition Acts, more professional associations have not notified their codes of conduct or ethical guidelines to the Competition Authority to receive a certificate". We understand that the Authority has issued certificates to just two professional associations, the Association of Optometrists, Ireland and the Institute of Chartered Accountants of Ireland, and in each case found anti-competitive practices within the notified agreement that had to be removed before the certificate was granted.

3.48 Hurley (2001, p. 60) also describes how the two principal bodies for the engineers' profession (the Institution of Engineers of Ireland (IEI) and the Association of Consulting Engineers of Ireland (ACEI)) notified a joint agreement on their Conditions of Engagement (COE), which included recommended fees and charges. "However, the bodies withdrew their notification before the Competition Authority had come to a final decision on the arrangements involved." We examine both bodies in more detail later in Section 6 and the current state of the COE.

[31] Directive 97/55/EU OJ L 290.

[32] Similar arguments were not accepted by the EU Commission or the Court of First Instance in relation to the *EPI* decision on the basis that EU competition rules are Treaty provisions and over-ride provisions contained in Directives (see below).

Enforcement Actions by the Competition Authority relating to the Professions

3.49 Table 3.1 below summarises the enforcement activities of the Competition Authority in relation to the professions in Ireland.

Table 3.1: Enforcement Activities of the Competition Authority in relation to Professional Associations

Professional Organisation	Nature of Activity/ Complaint	Action by Competition Authority	Outcome
Irish Veterinary Union (IVU) 1996	IVU were recommending fees for services to farmers for carrying out compulsory TB tests on cattle and refused to supply other services to farmers who refused to pay recommended TB fees.	Brought Court proceedings against the IVU under section 6 of the Competition Act, 1991 (as amended).	IVU agreed not to recommend fee levels to members and to inform its members that a refusal to supply services to farmers who refuse to pay fee levels was contrary to Competition Act, 1991.
Association of Consulting Engineers of Ireland (ACEI) 1998	ACEI had written to Aer Rianta indicating that it would urge its members not to take part in tendering process for new building at Dublin airport.	Wrote to ACEI indicating that such actions were in breach of section 4(1) the Competition Act, 1991 and would bring proceedings if this re-occurred.	It emerged during the investigation that a number of engineering firms had tendered for project despite ACEI advice.
Pharmaceutical Association of Ireland (PSI) 1997/98	Exclusive agreement with one third-level institution (TCD) to provide the only third-level course for pharmacy in Ireland.	Wrote to PSI and TCD stating that in its view that this agreement is contrary to sections 4(1) and 5 of the Competition Act, 1991 and threatened to bring proceedings against the PSI.	The Minister for Education and Science has decided to increase the number of training places from 70 to 120 and the Higher Education Authority (HEA) initiated a call in August 2000 for proposals from third-level colleges to provide courses. RCSI now providing degree course, while UCC has an application for accreditation outstanding.

Source: Indecon adaptation of enforcement actions as summarised in OECD (2000) and Hurley (2001, Table 5.1).

3.50 The Competition Authority has summarised the IVU case in the following terms:

> "Following the passage of the 1996 Act, The Minister [for Enterprise, Trade and Employment] referred to the [Competition Authority's] Director of [Competition] Enforcement a complaint from the ICMSA (a farmers organisation) alleging that the Irish Veterinary Union (IVU) and its members were engaged in a price–fixing in respect of fees charged to farmers for carrying out compulsory tuberculosis (TB) tests on cattle.
>
> In April 1997 the Authority received a complaint form an individual farmer alleging that, when they had gone to the vet who was prepared to carry out TB testing for a lower rate than that charged by IVU members, local vets had refused to supply any other services.
>
> Authority officers conducted an investigation into the allegations during the course of which they interviewed a number of individual farmers as well as representatives of the IFA and ICMAS. In February authorised officers from the Authority carried out a search of the IVU offices on foot of a warrant issued under section 21 of the Act, as amended. During the course of the search they copied a number of documents. These included a newsletter issued to IVU members dated 29 March 1996 which included a list of recommended minimum fees and stated that it was vital to strictly adhere to these. In a subsequent newsletter dated 24 March 1997 reference was made to recommend minimum fees for other clinical services.
>
> The Authority brought court proceedings against the IVU under section 6 of the 1991 Act, as amended. The proceedings were settled in October 1998 after the IVU gave undertakings to the court that it would not recommend minimum fees to be charged by its members for carrying out annual testing for TB and Brucellosis and/or for providing clinical veterinary services. It further undertook to inform its members that:
>
> 1. Any agreement regarding the change of such minimum fees
> 2. The operation of and recommended minimum fee system; and
> 3. The refusal to provide clinical service to farmers who refused to pay such recommended fees
>
> were contrary to section 4 of the Competition Act, 1991. The IVU also agreed to pay the Authority's costs" (OECD, 2000, pp. 133-134).

3.51 The Authority summarised the ACEI case in the following terms:[33]

> "In February 1997 the Authority received a complaint alleging that the Association of Consulting Engineers of Ireland had written to Aer Rianta informing it that it would urge its members not to take part in a competitive tending process in respect of a proposed terminal extension being undertaken by Aer Rianta in Dublin Airport. When contacted by the Authority the ACEI claimed that they felt that the competitive tendering process was in breach of Department of Finance guidelines. Following an investigation it appeared that, in fact, a number of firms had tendered for the project. The Authority was nevertheless concerned that the ACEI should have threatened such action. The Authority wrote to the ACEI in January 1998 informing it that, in the Authority's view, such actions were in breach of the Competition Act and that it would bring proceedings in the event of any repetition".

[33] *Ibid.*, p. 134.

3.52 Note that the action by the ACEI was not part of its professional rules and was therefore not enforceable as the Association was not in a position to sanction members for not complying with its recommendation. The ACEI's action was obviously not effective as a number of member consulting engineering firms ignored the ACEI and tendered for the contract.

Developments in Relation to other Professional Services Sectors

3.53 There have been relevant policy proposals and developments in relation to a number of professions that may not have been the subject of a formal Commission Authority decision or enforcement action but which have implications for competition in these sectors. The Competition Authority has commented on some of these developments.

Legal Profession

3.54 The OECD was critical in its recent review of regulatory reform in Ireland (OECD, 2001) of the regulations governing the legal profession. Despite recent reforms in the legal sector, there are, according to the OECD, unnecessary restrictions in the market for legal services in Ireland. The OECD is of the view that the relevant self-regulatory bodies, namely the Bar Council and the Law Society, should not retain control over entry to the profession and that restrictions placed on the form of ownership of legal firms should be liberalised.

3.55 Further reforms of the legal profession in Ireland that have been suggested by the OECD are:

- Removing the restriction on non-lawyers providing conveyancing services;
- Making solicitors responsible for paying barristers and enabling clients to instruct barristers directly;
- Liberalising restrictions on business structures; and
- Suppressing publications, such as surveys of costs, which may be influencing fee levels.
- Along with its suggestion to remove control of entry to the solicitors' and barristers' professions by the Law Society and Bar Council respectively, the reforms would, in the opinion of the 2001 OECD report on regulatory reform in Ireland, boost both efficiency and quality in the market for legal services in the State.

3.56 A report for the National Competitiveness Council and Forfás on the requirements for regulatory reform in the business services sector in Ireland also identified concerns in relation to the "terms of entry and conditions affecting new, younger entrants"[34] to the legal professions. This report points to the rise in the educational and academic qualifications required to enter the legal profession over the past decade or two, which, in its opinion, has arisen as a consequence of the limited number of training places available at Blackhall Place (solicitors) and King's Inns (barristers). This in turn, according to the report, is because the self-regulating bodies are entirely responsible for the educational programmes and examination standards that determine entry to the profession. The report recommends that the Government should, in principle, move away from allowing self-regulatory bodies to control the educational programmes and examination standards governing entry to the professions.

3.57 While the report for the National Competitiveness Council points to the rise in the educational qualifications required in entering the legal profession, according to Hurley (2001) the report "is not very persuasive that this had lead to shortages in the supply of legal services in the Irish economy".[35] Hurley proceeds to state (p. 66) that:

> "The Report does not provide any evidence of staff shortages in the legal sector or take account of the general increase in demand for all third level and professional courses. This increase in demand is apparent across all sectors and arose as a consequence of wider social factors such as the general rise in the educational standards of the Irish population over the past number of decades and the age profile of the Irish population that meant that there were increasing numbers of young people at the age cohort where they were seeking access to third level and professional education programmes".

Moves Towards the Protection of Professional Titles

3.58 In responding to the OECD report on regulatory reform in Ireland (2001), An Taoiseach set out the Government's support for the regulatory reforms recommended by the OECD as a means to secure the progress Ireland has made over the past decade in economic and social development, in particular at a time when the economy is facing overall capacity constraints that could restrict future economic growth.[36] As Hurley (2001, p. 66) explains, "Irish Government policy is to support regulatory reform by eliminating unnecessary regulation, placing the emphasis on quality regulation and the application of competition policy to all relevant sectors as a tool of regulatory reform".

[34] *Ibid.*, p. 39.
[35] *Ibid.*, p. 66.
[36] Department of An Taoiseach, Press Release: 'Taoiseach Responds to OECD Regulatory Report', April, 2001.

3.59 According to Hurley (2001), "however, when one examines the developments within some professional services the trend is towards the introduction of more regulations with statutory backing rather than removing existing restrictions" (p. 67). Table 3.2 below summarises recent policy proposals in relation to the protection of professional titles in a number of different professions. Notable in the context of this study is the proposal to protect the title (but not function) of architect, under the Building Control Bill, 2001. The proposals are justified by some on the basis of addressing concerns on the belief that there is information asymmetry between buyers and sellers in each market and that protection of title would ensure protection to clients and members of the public.

Table 3.2: Recent Proposals to Protect or Register Professional Titles

Sponsoring Government Department	Report	Proposals	Justification
Department of Health and Children	Statutory Registration for Health and Social Professionals, July 2000.	Introduce statutory system of compulsory registration (defined as "each individual member of a profession is recognised by a specified body as competent to practise…all persons wishing to practise must be registered and can be prosecuted for practising if not registered") for professions such as care workers, social workers, physiotherapists, chiropodists etc.	Protection to consumers and for qualified professionals from misconduct of non-qualified practitioners. Under the proposals, it would be possible to discipline misconduct. The Proposals also allow for the development of education and training programmes.
Department of the Environment	The Report of the Strategic Review Committee on the Construction Industry, Building our Future Together (June 1997) and the Forum for the Construction Industry, Progress Report 2000.	Statutory registration of the title (but not function) of architect, building surveyor and quantity surveyor.	To ensure consumer protection, quality, health and safety and efficiency in the industry.
Department of Enterprise, Trade and Employment	Review Group on Auditing, July 2000.	Prohibit persons holding themselves out as an auditor without being qualified to do so. The Review Group also considered statutory protection of the title of accountant but decided not to make such a recommendation (but it should be kept under review).	An additional safeguard in the accountancy profession. Danger that some accountants could opt out of new, more onerous regulatory regime and continued to practise as accountants.

Source: Indecon adaptation of recent public policy developments and Hurley (2001, Table 5.2).

3.60 According to Hurley (2001, p. 68), "there are a number of common features to the new registration and regulatory regime being proposed in the building and health sectors, namely:

- A new statutory registration board would be established with responsibility for registration;
- The new board would be funded by the profession;
- Professionals and professional associations would be in the majority on the board and would be closely involved in its operation; and
- Some provision would be made for 'grandfather' clauses, for individuals already in practice prior to the introduction of statutory registration".

3.61 "The Competition Authority expressed concern that health professionals would have '*effective control*'[37] of the proposed Registration Council for that sector and that customers' interests should be adequately represented. It should also be noted that professional associations were most heavily involved in the development of these proposals. In the case of the health professionals, it would appear that existing professional associations have a veto over the proposals, as the Department of Health states that **if** the proposals "*are acceptable to the professions*",[38] the Department will set about drafting the necessary legislation immediately", as emphasised in Hurley (2001, p. 68).

3.62 Interestingly, in relation to the three sectors, Hurley (2001) notes that, in all official reports underpinning the new developments, there are no specific references to the competition implications of the proposals. As she concludes:

> "There is market failure and asymmetric information associated with each sector. But this does not appear to be articulated in detail in any of the reports and it is therefore difficult to determine whether the regulatory response is appropriate or excessive. The deliberative process, did not appear to balance the potential benefits of these regulations in terms of quality and public safety with the potential adverse anti-competitive side affects or involve the Competition Authority in this type of analysis from the outset when these proposals were being developed" (p. 68).

[37] Comments of the Competition Authority on the Department of Health's proposal (2001, p. 11).
[38] Department of Health and Children, Statutory Registration for Health and Social Professionals (2000, Conclusion).

Summary of Irish Experience

3.63 As Hurley (2001, p. 70) sums it up: "competition law has been applied to the professions in Ireland through a mixture of Competition Authority decisions and enforcement actions. Government policy is supportive of regulatory reform and applying competition law to all sectors of the economy as a means of improving efficiency". She continues: "there are also developments within particular sectors such as the health sector and the construction sector where the introduction of new regulations is being considered by Government Departments without apparent regard to the implications for competition. The introduction of new regulations such as the protection and reservation of titles may be justified in the public interest and quality. However, proposals in the health and construction sectors appear to have been developed in consultation with the professional associations representing existing professionals and without regard to the impact on competition on the relevant markets. The OECD observed that, in Ireland, "consultation tends to be informal and is often with producer groups".[39] Existing professionals, however well intentioned, have a vested interest in the introduction of new regulations (such as protection of title) as such regulations may protect them from competition from alternative and perhaps cheaper competitors".

Competition Policy and Professional Services in Other Countries

Introduction

3.64 This part of our review examines the evolution of thinking within the OECD on professional services and how the EU is approaching this sector through decisions the Commission has reached and other recent policy developments of relevance to the wider services sector. Accompanying the survey of international experience is a set of tables, provided in Annex 1, setting out various competition interventions and studies regarding the professions under examination in this report that have been undertaken in other countries.[40]

[39] OECD (2001, p. 48).

[40] The tables include latest information on outcomes following the UK Office of Fair Trading Report on competition in four professions (solicitors, barristers, architects and accountants) published in March 2001.

3.65 The various interventions in Annex 1, which are arranged by profession (those under the remit of the study and other professions), clearly demonstrate the view that fee schedules damage competition on the market, that advertising rules should be liberalised, subject to the requirements that adverts should not be in bad taste or bring the profession into disrepute or abuse the trust of some potential clients or exploit their lack of knowledge. Taken together, the various interventions are supportive of removing restrictions on organisational form (including removing prohibitions on multidisciplinary practices) and on introducing para-professional activity where it can be introduced (e.g. where consumer protection can be assured).

OECD Reports on the Regulation of Professions

3.66 As Hurley (2001, p. 37) points out, "until as recently as 1985, regulations and restrictions governing the professions continued to enjoy widespread exemption from competition law in most OECD member countries [including Ireland]. This exemption reflected a belief that competition among professionals would not provide socially optimal outcome."

3.67 The OECD report on competition and the professions published in 1985 "accepted that the range of regulations imposed in OECD countries in medicine, law and architecture were achieving their quality assurance objectives, whatever their impact on competition within the professions. There is also an underlying assumption in the report that professionals could be trusted to regulate themselves in the public interest and not as a means of pursuing their commercial and professional self-interests. Such a view could be associated with the traditional standing and status of the professions within many societies".

3.68 Hurley also notes that: "the potential adverse consequences of this general exemption were recognised in the 1985 report as restraints on competition in the professions arising from regulations were identified as leading to "excessive costs and lack of innovation and insufficient information as to available services" (OECD, 1985, p. 7). Concern was expressed over the increasing costs of professional services given the growing market for such services and the OECD called for a careful examination of the "need and justification for mandatory fees schedules" (OECD, 1985, p. 8). The existing balance between the necessity for regulations in order to assure quality standards and competition within the professions was therefore beginning to be examined. However, the report argued that the "application of competition policy to the professions must be carefully balanced to ensure that the benefits of regulation, e.g. the quality and the integrity of the professions, are preserved" (OECD, 1985, p. 79)" (Hurley, 2001, p. 38).

3.69 "As part of its programme of regulatory reform that aims to assist governments improve the quality of their regulations, the OECD issued a report in 1997 on a number of sectors including the professional business services sector. It concentrated on lawyers, accountants, engineers and architects as being of particular interest to business users. In this report, the OECD emphasised the lower level of protection required by these users who generally have the knowledge to make their own judgements about standards of professional performance and thus do not need the same level of protection as members of the general public" (Hurley, 2001, p. 38).

3.70 As pointed out by Hurley (2001, p. 38): "this report also underlined the obstacles to international trade caused by national regulatory rules such as nationality and local presence requirements, restrictions on investment and ownership and recognition of qualifications".

3.71 According to Hurley (2001, p. 38), "the 2000 OECD (Roundtable Report) report concludes that most member countries are making significant progress, albeit at times incrementally, in increasing competition in professional services by applying competition rules to the professions. This is being achieved through competitive advocacy and greater competition law enforcement. However, while the extension of competition law to the professions has resulted in the dismantling of some regulatory controls on the professions in most member countries, the 2000 report also observed that many regulations, some of which may have anti-competitive effects on the relevant markets, remain in place." According to OECD (2000, p. 10), changes in the professional services sector:

> "Remain relatively slow and incremental in part because the rents professions can earn from anti-competitive arrangements can be large and the interests of professional associations are highly concentrated".

3.72 As noted in Hurley (2001, p. 38), the report "argues that there is a continuing need to remove restrictions that are not necessary to maintain suitable standards of quality, but are in the interests of the existing members of the professions. As a consequence, public interest arguments put forward by professional associations, when arguing for the maintenance of existing regulations or the introduction of new regulations, should be carefully scrutinised by policy makers, and national competition authorities should be consulted in the process."

3.73 "The OECD recommended that the regulation of professions should be focused on those markets in which undesirable effects remain and should address market failure using the least restrictive and high-level regulations" (Hurley, 2001, p. 39). The principles of regulation put forth by the OECD in its 2000 report are, in our view, universally appropriate to professional services markets and there are spelled out at the end of this section.

EU Approach to Applying Competition Law to the Professions

3.74 "The EU has only recently developed its approach in applying competition rules to the professions. This is because professional services tend to be provided on a national or local level and the condition that "intra-Community trade must be appreciably affected for the EC Treaty rules on competition to apply" (European Commission, 1999, p. 42) may not be met" (Hurley, 2001, p. 41).

3.75 According to Hurley (2001, p. 41), "however, given the recent public statements of the EU Commissioner for Competition, Mario Monti, in which he questioned whether some professional associations act as cartels,[41] the Commission may be starting to take a greater interest in the implications for competition of the activities of professional associations and the need for greater competition in professional services. In the recently published EU Competition Report (2000), the Commission sets out its current policy in relation to competition in the professions. This is geared towards:

- Maintaining purely ethical rules while abolishing restrictions on prices and advertising;
- Widening the range of prices and service quality on offer to consumers;
- Making services more accessible to citizens; and
- Improving the provision of information enabling consumers to make more informed choices.[42]".

3.76 The Commission also encourages Member States to "press ahead with the liberalisation of the sector" (EC, 2000, p. 50).

3.77 Hurley (2001, p. 41) describes that the Commission has taken action against three professional bodies "on the basis that their rules and regulations are contrary to the provisions of Article 81 and 82 of the EU Treaty, from which the Commission derives its responsibilities in relation to competition". Article 81(1) provides that all arrangements[43] between undertakings that have the object or effect of preventing, restricting or distorting competition in the common market or any part of the common market are prohibited. Article 81(2) provides that arrangements prohibited by Article 81(1) are prohibited and void. Article 81(3) provides that the Commission (and only the Commission) may exempt such anti-competitive arrangements in certain specific circumstances.[44] Article 82 of the EC Treaty absolutely prohibits the abuse of dominance by an undertaking having a dominant position in the common market or any substantial part of the common market, for which there is no exemption.

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[41] Speech by Commissioner Monti, 'Fighting Cartels, Why and How', delivered at the Third Nordic Competition Policy Conference 11/12 September, 2000.

[42] European Commission (2000, p. 49).

[43] These arrangements are (a) agreements between undertakings, (b) decisions by associations of undertakings or (c) concerted practices involving undertakings.

[44] Article 81(3) of the EC Treaty provides:

"The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- Any agreement or category of agreements between undertakings;
- Any decision or category of decisions by associations of undertakings;
- Any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question". See Power (2001, pp. 5-8).

3.78 In what follows, we consider the relevant Commission actions. It is particularly relevant to focus on the last decision because it rules on restrictions relating to advertising and solicitation of business.

3.79 First, as described in Power (2001, p. 7), "the Commission found in *CNSD*[45] that price-fixing was a breach of EC competition law irrespective of the national regulatory rules. The Commission found that the tariff for certain services to be provided by customs agents was set at a meeting and that this arrangement was a breach of, what is now, Article 81. The Commission decision was appealed to the Court of First Instance[46] but CNSD's appeal was dismissed".

3.80 Second, "in *COAPI*,[47] the Commission found that the multilateral fixing of charges for Spanish and overseas residents who obtained advice and services from Spanish industrial property agents was in breach of, what is now, Article 81" (Power, 2001, p. 7).

3.81 Third and finally, the Commission, in its *EPI*[48] decision, dealt with regulations on advertising in the European Patent Office's (EPI) Code of Conduct. The purpose of the Code was to regulate members' conduct. This case differs from the previous two in that Commission decision relates to a notification from the EPI in respect of its Code of Conduct with a view to obtaining a negative clearance or, failing that, an exemption from the prohibition on restrictive practices.[49]

3.82 As pointed out by Hurley (2001, p. 44), "the approach in this case is somewhat different in that the EPI and Commission entered into a series of discussions and negotiations in advance of the final Commission Decision being published. This meant that the Code of Conduct was amended and re-submitted to the Commission on a number of occasions during 1996 and 1997."

3.83 "However, like the previous two cases, the EPI had also been delegated certain regulatory powers over its members by public authorities. In this case, an international convention (the 'Munich Convention'), which set up a common body of law between the contracting States in the field of patents, gave certain responsibilities and disciplinary powers to the EPI. All European patent representatives are members of the EPI. Patient representatives are both self-employed and employed within patent or legal firms" (Hurley, 2001, p. 45).

[45] Commission decision of 30 June 1993 in case No. IV/33.407-CNSD (OJ 1 203, 13.8.1993).
[46] Case T-513/93 *CNSD v Commission*.
[47] Case No. IV/33.686 (OJ L122 2.6.1995).
[48] Case No. IV/36.147 (OJ L106 23.4.1999).
[49] Decision 99/267/EC paragraph 1.

3.84 Hurley (2001, p. 45) notes that "a similar approach to the earlier two cases was taken in determining that EC rules apply and the same three conditions had to be met" (namely that the EPI is an association of undertakings, that the EPI holds a dominant position in the relevant market and that trade between Member States is affected by the Code). "The Commission found that the prohibitions contained in the EPI Code on (i) comparative advertising, (ii) soliciting services from other members' clients and (iii) exchange of views between members on a particular case were in conflict with EC competition rules. Given the nature of the market and the risks associated with a sudden transition to a completely open market, the Commission permitted such activities for a limited transitional period up to April 2000 when a new EU Directive on comparative advertising was planned to come into effect" (Hurley, 2001, p. 45).

3.85 The EPI appealed the Commission's decision to the Court of First Instance, which gave its judgement on 28 March 2001.[50] As described by Hurley (2001, pp. 45-6), "the issues under review were the provisions in respect of comparative advertising and on members soliciting services from other members' clients". The appeal centred on provisions contained in the Directive on comparative advertising.[51] This Directive permits Member States to maintain or introduce prohibitions on the use of comparative advertising in professional services. According to the Directive, state bodies or self-regulatory bodies can impose these bans on comparative advertising. The representatives of the EPI argued that the Commission was incorrect in stating that this derogation did not apply in this case. As outlined by Hurley (2001, p. 46), "the Court found that:

- A provision in a Directive cannot have precedence over Treaty provisions and the provision in relation to comparative advertising in a Directive did not mean that such practices automatically fall outside the scope of Article 81(1) of the Treaty;
- Fair comparative advertising makes it possible to provide more information to consumers and regulations concerning comparative advertising restricts the ability of efficient professionals to develop their services and thereby restricts competition, and it upheld the Commission decision in relation to this aspect of the Code of Conduct of the EPI;
- Other practices such as bans on exchanging views on clients did not constitute a restriction on competition and the Commission decision in these aspects was annulled".

[50] Judgement of the Court of First Instance, 28 March 2001 in case T–144/99 *EPI v Commission*.
[51] Directive 97/55/EU OJ L 290.

3.86 "The Court therefore appeared to reach its decision solely on the basis of whether the regulation under dispute restricted competition or not. It did not accept the arguments of the EPI that the derogations in the Directive on comparative advertising meant that the competition rules of the Commission no longer applied" (Hurley, 2001, p. 46).

Summary of EU Principles in Applying Competition to Professional Associations

3.87 In OECD (2000), the EU summarised the main principles established by the three relevant Commission decisions outlined above:

- Professional associations are an association of undertakings within the meaning of Article 81;
- Collective price-fixing and restrictions on publicity are a violation of Article 81;
- Necessary restrictions to assure quality of services and to avoid conflict of interest are not considered restrictions on competition; and
- Even where a Member State delegates to a professional organisation the power to fix prices, the use of this power by a professional association is not shielded from the application of Article 81.[52]

3.88 It is also clear from the above-mentioned CFI ruling that EU competition rules, because they are Treaty provisions, take precedence over other EU legislative provisions contained in Directives and Regulations. "The scope of EU competition law is therefore wider, and its application clearer, than Member States' competition law even though these competition laws are based on the Treaty provisions" (Hurley, 2001, p. 47).

[52] OECD (2000, p. 190).

EU Internal Market in Services

EU Policies on Cross-Border Trade and Competition in Professional Services

3.89 According to Hurley (2001, p. 47), "the EU has taken a number of internal market initiatives to facilitate and encourage intra-community trade in services, including professional services. For example, the public procurement directives establish procedural rules for the publication of calls for tenders and awards of public contracts. These directives have opened up the market for some professional services such as engineering and architectural services. The total value of the EU public procurement market is estimated at €1,000bn. In Ireland in 1998, 43% of all public contracts, many of which relate to services, were awarded to non-domestic suppliers.[53] This provided Ireland with the capacity to meet the increased demand for professional services, in fields such as engineering and architectural services, arising from the recent economic growth in the economy and the ambitious public construction programme in the National Development Plan that could not be met by domestic suppliers alone."

3.90 "However, there is an increasing awareness at EU level that the internal market for services is not operating as efficiently as the market for manufacturing goods. The service sector is still characterised by national markets. The existing levels of cross-border trade in services are relatively modest and there is evidence of price differentials among different EU business services markets.[54] According to the same survey for the EU, only 29% of users and 53% of providers of business services are purchased and/or selling services on a cross-border basis.[55]" (Hurley, 2001, p. 47).

3.91 One of the most comprehensive reviews covering the services sector was the recent study undertaken by London Economics for the European Commission relating in particular to financial and capital markets (London Economics, 2002). This demonstrated significant benefits from the integration of capital markets across the European Union in terms of reducing the cost of equity capital and debt capital and thus of stimulating investment.

3.92 The limited nature of the operation of the single market is becoming the focus of significant attention and the creation of an international market for services has been deemed one of Europe's top priorities, not least because the services sector accounts for two-thirds of total employment and for the vast majority of all new employment growth in the EU.[56]

[53] Department of Finance (2000, p. 43).
[54] Centre for Strategy and Evaluation Studies (2001, p. 84).
[55] Centre for Strategy and Evaluation Studies (2001, p. 107).
[56] Communication from the Commission to the Council (2001, p. 10).

3.93 Hurley (2001, p. 48) points out that "there are a range of policy initiatives and legislative proposals under consideration to overcome this gap in the EU internal market. Two of these are particularly relevant to professional services, namely:

- Proposals to reform the system for mutual recognition of professional qualifications;
- Proposals to remove barriers to trade in business services where the potential for increased intra-EU trade is most significant."

EU Mutual Qualifications Directives

3.94 Among the entry restrictions identified above in the area of professional services are regulations governing the entry of foreign-trained professionals, including recognition of equivalent qualifications awarded in other jurisdictions. "Such restrictions can impose additional costs on non-nationals wishing to provide services in Member States other than the State in which they received their qualification and can create significant barriers to cross-border trade in professional services" (Hurley, 2001, p. 48).

3.95 "The EU has long recognised that the existence of such restrictions impose significant barriers to intra-EU trade and undermine fundamental EU principles such as the freedom of movement of goods and services, the freedom of movement of workers and the right of establishment" (Hurley, 2001, p. 48).

3.96 According to Hurley (2001, p. 48), "to overcome these obstacles, the EU has adopted a number of directives relating to the mutual recognition of professional qualifications with the objective of enabling EU nationals to practise their profession under their original title on the same basis as locally qualified professionals".

3.97 "There are both general and sectoral systems for the recognition of professional qualifications. The general system applies across a wide range of qualifications and does not provide automatic recognition, as a limited test or period of supervised practice can be required as part of the recognition process. Sectoral directives are sector-specific (doctors, dentists, veterinary surgeons, pharmacists, nurses, midwives and architects) and aim to provide a minimum harmonisation of training standards and automatic recognition of title after a certain period of equivalent training" (Hurley, 2001, p. 49).

3.98 As indicated by Hurley (2001, p. 49), "this system of mutual recognition qualifications is not considered to be operating satisfactorily and national rules and regulations continue to act as barriers to professionals' mobility within the EU. Problems exist in the administration of the system as the equivalence of training acquired in another Member States has to be assessed in each individual case by Member States.[57] In 1995/96, Member States processed almost 32,000 cases of recognition of diplomas across a range of professions.[58] There are also numerous EU committees advising the Commission on the application of rules governing professional qualifications. The system, therefore, imposes a significant administrative burden and costs on Member States and the EU."

3.99 "At the Stockholm European Council in March 2001, the Commission committed itself to reforming the present system to introduce a more uniform, transparent, and simplified system for the recognition of professional qualifications, including more automatic recognition. It recently issued a consultative document on the future regime for professional recognition as part of the review of the existing directives on professional recognition.[59]" (Hurley, 2001, p. 49).

3.100 "This demonstrates the difficulties associated with overcoming one type of national regulation governing professional services even in a supposedly single European internal market" (Hurley, 2001, p. 49).

EU Business Services Market

3.101 The EU-commissioned study on the remaining legislative and administrative barriers affecting business services. Sectors included IT consultancy, personnel recruitment, leasing and renting, accountancy and audit, tax services and engineering-related consultancy services.[60]

3.102 The report identified a number of regulatory and non-regulatory barriers to cross-border trade in business services. The particular barriers affecting accounting/auditing and engineering were:

- The lack of mutual recognition of qualifications;
- The inability to operate without a licence from a professional body.
- These barriers were found to be more apparent in the professions (i.e. accounting/auditing and engineering) where professional qualifications are required than in the other business service listed.[61]

[57] Communication from the Commission (1999, p. 6).
[58] Communication from the Commission (1999, Figure 4, p. 15).
[59] European Commission (2001).
[60] Centre of Strategy and Evaluation Services (2001).
[61] Centre of Strategy and Evaluation Services (2001, p. 67).

3.103 As described in Hurley (2001, p. 50), "based on survey results removing the remaining barriers to cross-border trade in services could result in:

- An increase in cross-border trade and greater competition;
- Pressure to reduce prices and improve quality;
- More innovative services;
- Fundamental changes in market structures with medium-sized and general operators benefiting most; and
- Some existing providers going out of business as competition becomes more intense.[62]".

3.104 "The commission published a Communication from the Commission to Council and the European Parliament setting out an Internal Market Strategy for Services in December 2000. The objective of this strategy is to make cross-border activities "as easy as acting within a Member State".[63] The Commission recognises that, in order for this strategy to work, there must be vigorous application of EU competition rules. The Communication accepts that market inefficiencies exist in the EU market for services due to lack of competition and inappropriate regulations. According to the Commission, these inefficiencies are having a greater knock-on effect along the economic chain due to the increasing importance of the services sector. [64] The Communication also recognises the impetus technological developments has given in expanding the potential for community-wide economic growth by removing the need for geographical proximity between service providers and users. Following from this Communication, the Commission is carrying out a wide-ranging analysis of how differences in the regulation and administrative practices between Member States create barriers to cross-border provision of services. It is also intended to introduce a range of actions to remove barriers across the entire service sector, including those that prevail among the regulated professions." (Hurley, 2001, p. 51).

Summary of OECD and EU Competition Policy

3.105 According to Hurley (2001), "It is evident from the OECD reports from 1985, 1997 and 2000 that there has been an evolution of thinking in relation to competition policy to the professions. By 2000, it was generally accepted that competition in the professions is in the public interest and only the minimum level of regulation necessary to guarantee quality of standards should be maintained" (p. 51).

[62] Centre of Strategy and Evaluation Services (2001, p. 105).
[63] European Commission Communication (2000, p. 7).
[64] www.europa.eu.int/comm/internal_market/en/service/servicesfaq.htm.

3.106 "However, it is evident in the national reports contained in OECD (2000) that national competition authorities continue to encounter difficulties in applying national competition laws to the professions where professional regulations are enshrined in law. There appears to be reluctance among Member States to amend legislation governing professions even where national competition authorities call for such restrictions to be removed. National competition authorities have greater success where the regulations are voluntary regulations imposed by self-regulatory bodies on their members" (Hurley, 2001, p. 51).

3.107 Hurley (2001, p. 51) proceeds to state: "EU competition rules do apply to professional associations' regulations but only where intra-EU trade between Member States is adversely affected by professional regulation. It is clear from the limited number of Commission decisions in this area that EU competition rules apply even when the body imposing the regulations is a statutory regulatory body and the rules are enshrined in national law. It has also recently been confirmed by the Court of First Instance that, as EU competition rules are contained in the EU Treaty, they take precedence over other EU laws contained in regulations and directives. The scope of the application of EU competition rules is wider and clearer than Member States' rules in this regard. However, EU rules do not apply where intra-EU trade is not affected".

3.108 Finally, she notes that: "Recent EU policy developments of relevance to professional services markets include proposed reforms to the system of mutual recognition of qualifications and to the business services markets. These developments arise from the lack of an internal market for services and have the intention of increasing trade in services. Lack of trade has lead to a lack of competition between professional service suppliers from different Member States. Regulations governing professions are often cited as one of the remaining barriers to the completion of the EU market in services" (Hurley, 2001, p. 52).

Conclusion: Principles of Regulation

3.109 In line with our survey of the relevant economic and competition policy research and studies undertaken in this and the previous section, it is possible to develop principles for regulation that would help maintain standards but would not damage consumer interests. A summary of six key principles developed by the OECD for high quality regulation of professional services are presented in Table 3.3.

Table 3.3: OECD: Principles for Regulation of Professional Services

- *First, exclusive rights should not be granted where other mechanisms exist which more directly address the market failure with less restriction on competition, such as the collection and publication of information on the quality of professionals, assistance to accreditation or quality-rating agencies or the strengthening of civil liability rules.*
- *Second, where there is no alternative to granting a profession an exclusive right to perform a service, the entrance requirements into that profession should not be disproportionate to what is required to perform the service competently. Where the competencies required for different services differ widely new professions should be created with different entrance requirements.*
- *Third, regulation should focus on the need to protect small consumers. Sophisticated commercial purchasers of professional services (including large corporations and large hospitals) are in a position to assess their own needs and to assess the quality of the services they purchase and should not necessarily be required to use the services of a licensed professional.*
- *Fourth, restrictions on competition between members of a profession should be eliminated. These include agreements to restrict price, to divide markets, to raise entrance requirements or to limit truthful advertising. Recognition of qualifications of professionals from other countries should be promoted. Citizenship and residence requirements should be eliminated.*
- *Fifth, professional associations should not be granted exclusive jurisdiction to make decisions about entrance requirements, mutual recognition, or the boundary of their exclusive rights. At a minimum these decisions should be subject to independent scrutiny, perhaps by an independent regulator. For example, where entrance to a profession is by means of an examination, the professional association should not have exclusive control over the difficulty of the exam and what constitutes a passing standard.*
- *Sixth, competition between professional associations should be encouraged, provided mechanisms are in place to ensure the entrance requirements for entry into the profession do not drop below the standard of competency required to perform the exclusive service. Where two professional associations have similar entrance requirements they should both be allowed to perform the exclusive services of the other."*

3.110 Applying these principles to the four types of regulation cited at the beginning of the study, it is possible to set out 'informal tests of proportionality' in advance of considering the various requirements and restrictions operated by the professions under review. These tests are as follows.

3.111 First, *entry requirements* should aim to provide a minimum quality standard and ensure ethical behaviour by practitioners in their dealings with clients or patients. The requirements to gain admission to a profession must not be used to artificially control the numbers entering the profession. They must not be used to target the 'wished for' numbers in the profession. Entry requirements should be designed to ensure that the supply-side of a given professional services market is responsive as much as possible to changes in the demand-side of the market. We also believe that no single regulatory body should have a monopoly on the provision of the professional education and training necessary to gain admission to a given profession.

3.112 Second, *fee competition* among members of a profession is singularly the most important factor serving to promote competition on the market. Fee schedules are likely to limit price competition.

3.113 Third, *advertising* restrictions should be relaxed as far as possible. Subject to the proviso that advertisements are not in bad taste or do not bring the profession into disrepute or do not exploit the limited information that some consumers may have, there should be no restriction on the type or nature of adverts that practitioners may place. Fee advertising should not in general be restricted; nor should comparative advertising or any advertising that highlights that a practitioner has any specialist expertise knowledge. Further, unsolicited approaches or 'cold-calling' campaigns should not be prohibited.

3.114 Fourth, *demarcation* is a form of indirect entry restriction and should be subject to the same basic tests as that for entry. Where para-professionals are advocated, they should be trained in the particular area to at least the same degree as professionals and should be adequately indemnified to ensure consumer protection.

3.115 Finally, there should be no restriction on the *organisational form* of professional businesses unless there are very good public interest reasons. Professionals should generally be allowed to choose the organisational form most appropriate to their business needs, including the right to establish practices with members of other professionals, trades or occupations. Given their rigorous education and training, a professional's independence of advice and ethical standards are independent of organisational form, so that a consumer's interests are guaranteed irrespective of business structure.

4 Competition and the Solicitors' Profession in Ireland

Introduction

4.1 The structure of this section is as follows. The next part provides an overview of market definition and the services provided by solicitors and also highlights the core values/requirements of the profession. The nature of the services provided and the core values underpin many of the arguments used for regulating the profession and are re-visited in the course of this section.

4.2 The overview of market definition is followed by an empirical analysis of the size and structure of the market in which solicitors operate and of the patterns of demand on the market. We then examine the customers of solicitors and describe the nature of competition, if any, in the market. The empirical analysis is informed using information obtained from the Law Society and new survey data obtained and compiled by Indecon. The Law Society is the principal body responsible for regulating the solicitors' profession in Ireland. Regulation is by way of statute and delegated legislation, principal among which are the Solicitors Acts (1954-2002) and the bye-laws of the Law Society.

4.3 After summarising the results of the empirical analysis of the market, we then examine in detail how the profession is regulated. In addition to taking a closer look at the Law Society as the main regulatory body, the restrictions on entry, conduct, demarcation and organisational form are presented and their statutory or otherwise basis highlighted. Our assessment of the restrictions most likely to affect competition on the market is then undertaken by reference to the Law Society's justifications of them, as detailed in the Law Society's submission and developed in our consultations with that organisation, and our judgement as to whether the restrictions are proportional to achieving the benefits claimed for them. Finally, our conclusions are given.

Market Definition and Services Provided by Solicitors

Market Definition

4.4 In order to examine the degree of competition occurring among members of the solicitors' profession in Ireland, it is useful to consider the relevant market in which solicitors operate. In competition/ antitrust analysis, relevant market definition includes the definition of the relevant product market and of the relevant geographic market. The former refers to those products that compete with each other to a sufficient extent to exercise a competitive constraint and the latter refers to the geographic area in which competition between the relevant products takes place. Thus, the relevant product or service market includes all those products or services viewed as sufficiently interchangeable by consumers (demand substitutability) or suppliers (supply substitutability).

4.5 In considering the issue of delineating the boundary of the relevant market, in general, it is useful to review the objective characteristics of the product or service, the nature of demand and supply and the attitudes of different types of user. Such evidence is used when considering specific individual competition cases to inform the so-called 'hypothetical monopolist test' or SSNIP (small but significant non-transitory increase in price) test, which seeks to frame the relevant antitrust market in order to identify the smallest relevant group of producers or providers capable of exercising a competitive constraint on the market. While this test may be less relevant in a sectoral policy study than in a specific antitrust case (such as a merger investigation) it is useful to consider aspects of relevant market definition in terms of the services provided by solicitors and also in terms of the geographic area in which these services are provided.

4.6 The principal services provided by solicitors relate to advice and representation to clients in all aspects of the law. There is no area of the law in which solicitors cannot give advice, assistance or representation to their clients. Solicitors mostly do office work and represent their clients almost exclusively in the District Court, even though they have a right of audience in the Circuit Court, High Court and Supreme Court under the Courts Act, 1971.[1]

[1] Solicitors often appear in the higher courts by way of assisting counsel.

4.7 The most common areas of work carried out by solicitors include: conveyancing (the drawing up of legal documents for the purpose of transferring real property between buyers and sellers); trust and probate work (advising on and preparing wills, and administering estates and tax liabilities on death); and litigation (which includes arbitration and out-of-court settlements as well as court representation). The provision of personal injury services covers both the office and court components of solicitors' work and anecdotal evidence suggests that personal injury work has grown rapidly in recent years. A range of other legal services and advice is also provided covering criminal and civil issues.

4.8 Table 4.1 is an Indecon adaptation of the results of a survey published by the Law Society in April 2000 and is relevant in providing information on services provided by the solicitors' profession in Ireland.[2] The results show that personal injury and conveyancing constituted the largest practice areas of solicitor firms in Ireland in 1999, accounting for 33% and 31% of fee income respectively. Trust/probate services and criminal/litigation work accounted for a relatively small proportion of the fee income generated in that year, namely 10% and 3% respectively.

4.9 The predominance of personal injury conveyancing and commercial and trust/probate services is evident from data available from the Law Society and presented in Table 4.1 below.

Table 4.1: Fee Income by Solicitor Work Area, Ireland 1999

Area of work	% fee income
Personal injury	33
Conveyancing	31
Commercial	11
Trust and probate	10
Family	4
Criminal and District Courts	3
Other	8
Total	100

Source: Indecon adaptation of Law Society data.

[2] The survey was undertaken and compiled by Insight Statistical Consulting (Trinity College Dublin). In the survey, a 'small' practice is deemed to be one comprising 1-2 solicitors and a 'large' practice comprising 3+ solicitors. Furthermore, the regions defined in the survey are Dublin, 'urban' (the cities of Cork, Galway, Kilkenny, Limerick and Waterford) and 'rural' (all other parts of Ireland).

4.10 In its submission, the Law Society argues that solicitors operate in a wider product market and a wider geographical market than might first be perceived. It submits that the service market is, in many instances (but admittedly not in all instances), one for 'lawyers' generally and not just solicitors. The Law Society also argues that the geographical market is, in many instances, Ireland and not just a local market. Thus, for the purpose of relevant market definition, the Law Society envisages a relatively wide *legal services* market served by other professionals as well as by solicitors.

4.11 In this regard, the Law Society cites the example of one of the 'Big Five' accountancy firms that operates in Ireland. In any assessment of competition in the supply of legal services, the Law Society contends that it is necessary to consider the substitutability between the services offered by such firms, for example in the field of tax law and advice, and those of solicitors. Legal services are also provided by in-house lawyers and by those members of the public willing and/or able to provide a service themselves - for instance, in making a will (self-supply). While not to be regarded as sufficiently close substitutes for the services of solicitors in private practice to be in the same market, the Law Society argues that these sources of supply can exercise some competitive constraint. If solicitors' charges for probate were to increase significantly, for example, an increase in self-supply could be forthcoming, eroding the revenues expected from the price increase.

4.12 In its latest report on competition in professional services, the OECD notes that:

> "Lawyers in nearly all Member States have a monopoly on representing clients in court… Some overlap with other professionals is emerging, though, as accountants enter into areas such as tax law, company law and corporate planning" [OECD (2000, p. 22)].

4.13 The Law Society submits that such a conclusion is even more accurate in the Irish context in some respects. It argues that there are *some* areas of practice where the persons providing advice on various legal matters, to a greater or lesser extent, include the following: solicitors; barristers; law graduates working as in-house lawyers;[3] economists;[4] accountants;[5] tax advisors;[6] trademark attorneys; patent attorneys; accident claims consultants;[7] credit unions;[8] employers' organisations;[9] trade unions;[10] citizens' advice bureaux; free legal aid centres; family mediators; banks;[11] management consultants; operators of web-sites such as those relating to wills; self-supply;[12] and foreign lawyers.[13]

[3] According to the Law Society, it is possible to act as an in-house counsel or legal advisor of a business or organisation in Ireland without being qualified as a solicitor, barrister or otherwise. There is no public register of lawyers working as in-house counsel. The Law Society states that a significant number of such executives are neither solicitors nor barristers.

[4] The Law Society submits that economists advise or comment on, for example, Irish competition law and policy, and Articles 81-82 of the EC Treaty.

[5] According to the Law Society, accountants give tax advice as well as advice on a variety of issues such as employment law, company law, company secretarial matters and so on.

[6] The Law Society states that solicitors, accountants and tax advisors normally compete in terms of tax advice work. While accountants or 'tax advisors' are primarily the ones doing computational work, there is no doubt that solicitors, tax advisors and accountants compete aggressively for tax advice work. Many of these advisors, but not solicitors, are able to incorporate their practices with limited liability.

[7] This is particularly so in the case of personal injury cases, according to the Law Society.

[8] Since the entry into force of Section 78 of the Solicitors (Amendment) Act, 1994, credit unions may, in circumstances prescribed by that Act, provide probate services. It is believed that they have not done so because of the costs of obtaining professional indemnity insurance (the premiums for which are very high) and of operating a compensation fund to protect clients. (As a matter of law, solicitors must obtain such insurance and operate such a compensation fund. These requirements are dealt with later in this section.)

[9] The Law Society points out that the Irish Business and Employers' Confederation (IBEC) has an extensive employment law advisory service. It has several people (including some solicitors) giving advice on employment law matters to around 8,000 member businesses.

[10] According to the Law Society, various trade unions provide employment law advice to their members and, indeed, represent their members before quasi-judicial tribunals e.g. the Labour Court, the Employment Appeals Tribunal etc.

[11] For example, trust services.

[12] It is possible that a lay client may self-supply. According to the Law Society, it happens much more frequently than might be imagined. First, many people write their own wills and often use pre-printed will forms that are available from stationers. Secondly, some people defend themselves in litigation. Thirdly, many people conclude and write their own contracts; indeed, it may be argued that the vast majority of contracts are concluded without legal intervention. Some businesses file their own documents with bodies such as the Companies Registration Office. Many businesses and others will complain to the Competition Authority without legal assistance.

[13] The transfer of lawyers qualified in other jurisdictions is examined in a later part of this section dealing with entry restrictions. Directive 1998/5/EC of 16 February 1998 (the 'Establishment Directive') facilitates the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained and, despite not yet being implemented into Irish law, the Law Society states that it has already admitted a lawyer under the Establishment Directive.

4.14 In terms of the geographic scope of the relevant market, for many if not all legal services, the client will initially choose among solicitors (and any competing providers) based in his/her locality. The Law Society suggests that this does not mean that the market is necessarily a local one. It has therefore been suggested that clients are generally able to substitute the services of solicitors based further away if it becomes economic to do so and solicitors in one part of the country can offer services in another part if it becomes profitable to do so. It has therefore been suggested that solicitors in one area are subject to competitive constraints from solicitors (and any non-solicitor providers of the service) who are based in other locations. If this is accepted, it would suggest that the market for legal services should be considered to be at least national in its geographical scope. The Law Society gives four reasons to support a national definition as follows.

4.15 First, the law is uniform throughout Ireland - there are no federal or regional jurisdictions - and this facilitates a national market. Some foreign jurisdictions are federal in nature and therefore have different laws leading to different actual or potential markets. In federal States, lawyers qualified in one state may not be able to practise in another state. For example, in the US, it is a criminal offence to practise law in a State without a licence from that particular State, even if the lawyer is qualified to do so in other States. In Ireland, solicitors are free to practise in all parts of the State.

4.16 Secondly, the Law Society suggests that many clients will continue to use the same firm irrespective of where the transaction arises or where they now live. For example, it is suggested that the conveyances of many houses in Dublin, Cork or other major population centres are undertaken by solicitors based outside these centres.[14] Similarly, purchases of holiday homes in various parts of Ireland are often handled by solicitors elsewhere in Ireland.

[14] For example, people who move to Dublin may instruct the solicitor used by their families elsewhere in Ireland.

4.17 Third, it is argued that there are several instances of lawyers (who are generally not Irish solicitors) from outside the State providing services in Ireland or to Irish-based clients.[15] The Law Society has noted that English and US law firms regularly advise on various legal matters in Ireland. English and Northern Irish firms also *advise* (but do not *perform*) on conveyances in Ireland. Some Northern Irish firms conduct litigation in Ireland. This international dimension is facilitated by reciprocal arrangements and multilateral measures, which include the Establishment Directive. Ireland facilitates lawyers crossing borders – for example, a Northern Irish solicitor (whose first place of qualification was Northern Ireland) may become an Irish-qualified solicitor and may set up in practice in this jurisdiction without the need to have been in practice for any period of time. A foreign-qualified lawyer may become an Irish solicitor without having to relinquish his or her original foreign qualifications or sit an Irish language examination.

4.18 Finally, the Law Society has suggested that it is perfectly practical for solicitors to serve clients in many instances on a nationwide basis because so much can be achieved by telephone, fax and e-mail.

4.19 Our assessment of these arguments is that while other professionals are free in principle to provide legal advice to clients in many aspects of the law in Ireland (such as barristers and accountants), solicitors continue to have a monopoly on the provision of trust and probate services, and conveyancing. Furthermore, given their specialist training and experience, it is highly unlikely that others could realistically compete with solicitors in the areas of personal injury and litigation. Taken together, these are the main service areas provided by solicitors and the predominant type of service provider is the private solicitor firm.

4.20 Thus, in terms of relevant market definition, it may be possible to delineate six distinct service areas, namely personal injury, conveyancing, commercial, trust and probate, family law and litigation. These are the principal areas identified by the Law Society and practitioners themselves. While the geographic extent of these services may well in principle be the State, in practice the boundary of the relevant product or service market is often likely to be local (the level of the county would probably be applicable in practice). And in this relevant market, the predominant type of competitor is the private solicitor firm.

[15] This issue is addressed in more detail below when we address the restrictions that exist in the provision of conveyancing services in Ireland.

4.21 As will also become clear below, the vast majority of such competitors employ less than five solicitors and offer the range of services referred to above. The fact that key product markets are primarily local in nature is also supported by evidence we have examined showing that, in certain publications, advertising by solicitors tends to be focused on local markets.

Fundamental Requirements of the Solicitor

4.22 As we have seen, solicitors are able to provide advice and representation to their clients in all areas of the law and there is no limitation on the type of client a solicitor may be retained by. Another aspect of the profession relates to the core requirements and values of the solicitors' profession. As required by the self-regulatory body, the Law Society, solicitors need to be *independent*, *ethical* and *trained* in the substance and procedure of the law.

4.23 By 'independent' is meant that the solicitor must be in a position to act for the client and the client only – the solicitor's advice must be free of the interests of any third party. By 'ethical' is meant that the actions and advice of a solicitor must be the embodiment of integrity and above reproach at all times. Clients also need to be able to rely on their solicitor being 'trained' to a high and consistent standard.

4.24 By meeting these fundamental requirements, it is submitted, the solicitor has a duty not only to his or her client, but also an obligation to uphold the status of the profession more generally. In the process, it is argued, the solicitor contributes to the rule of law in society by acting as an intermediary between the State and the individual citizen.

Market Size, Structure and Patterns of Demand

4.25 Our economic analysis of competition in the solicitors' profession given below consists of an empirical examination of various aspects of market size, structure and the pattern of demand. The following information sources underpin the quantitative results presented:

- Data obtained from the Law Society;
- Information on solicitor practices contained in the Law Directory;
- New information from the Indecon Survey of Solicitors (of which there were 381 responses);
- New information from the Indecon Survey of Insurance Companies (of which there were 15 responses); and
- New Information from the Indecon Survey of the Public (sample size of 1,008 adults aged 15+).

4.26 The results yielded by the empirical analysis are relevant in quantifying the economic characteristics of the profession and are used to help inform our assessment of the restrictions and requirements identified later in the section.

Number and Growth in Solicitors

4.27 A useful indicator of the size of the market and one that can be straightforwardly measured is the population of practitioners and its growth over time. Table 4.2 shows the trend in the number of solicitors holding practising certificates between 1991 and 2001. The figures reveal that the number of practising solicitors has grown continuously over the period, with faster growth occurring in 1995 (5.42%), 1996 (5.46%), 1999 (5.67%) and 2001 (6.5%). During the period, the solicitors' profession grew at a cumulative rate of over 62% and at an average annual rate of 4.90%.[16]

4.28 To put these figures in context, the population of Ireland increased by 11% from 3,525,719 to 3,917,336 between 1991 and 2001.[17] However, numbers in the profession have grown less rapidly than the Irish economy, with GDP growing at an average annual rate of 6.95% between 1992-2001.[18]

Table 4.2: Number and Growth of Solicitors holding Practising Certificates 1991-2001

Year	Number	% change
1991	3,642	-
1992	3,808	4.56
1993	3,959	3.97
1994	4,131	4.34
1995	4,355	5.42
1996	4,593	5.46
1997	4,776	3.98
1998	4,975	4.17
1999	5,257	5.67
2000	5,551	5.59
2001	5,912	6.50

Source: Indecon calculations using Law Society data.

[16] Figures on the number of practising solicitors (1960-2001) are given in Annex 2. During this time, the number of practitioners grew at an annual average rate of 3.74% and cumulatively by 342.85%.
[17] Source: CSO data.
[18] Source: ESRI data.

4.29 It is also relevant to see how rapidly the profession has grown relative to indicative measures of demand for certain important solicitors' services. For example, in relation to conveyancing, figures from the Department of the Environment and Local Government show that the number of new house completions increased by 56% between 1996 and 2001 (from 33,725 to 52,602). During this period, the number of solicitors increased by 29%, based on the figures presented in Table 4.2.

Changes in Fee Income of Solicitors

4.30 Table 4.3 reveals that the vast majority (93.4%) of respondents to the Indecon Survey of Solicitors stated that they experienced an increase on an average annual basis in their fee income during the period 1999-2001. Of these, 10.8% stated a doubling or more of fee income on an average annual basis, 60% indicated an increase of between 10 and 49% and 17.3% stated an increase of less than 10%. On the other hand, only 6.6% of solicitor practices that responded to the Indecon Survey of Solicitors stated a fall in average annual fee income between 1999 and 2001. The results indicate buoyant growth in fee income and this occurred during a period (1999–2001) where the number of practicing solicitors also grew over the period (see Table 4.2).

Table 4.3: Indecon Survey of Solicitors - Approximate Average Annual Change in Total Fee Income of Solicitors' Practices 1999-2001

Extent of Increase	% of Responses
Firms stating increase in fee income	93.4
Of which:	
Over 200%	4.4
150-199%	2.0
100-149%	4.4
50-99%	11.9
25-49%	20.0
10-24%	40.0
5-9%	11.9
0-4%	5.4
Firms stating decrease in fee income	6.6

Source: Indecon Survey of Solicitors.

Practice Status of Members of the Law Society

4.31 Virtually every solicitor entitled to practise in Ireland is a member of the Law Society. Data submitted by the Law Society to this Study indicate that 98% of all practising solicitors in Ireland are members of the Law Society.

4.32 The practice status of members of the Law Society at the end of September 2001 is summarised in Table 4.4. The vast majority (5,107 or 83%) of members (total 6,178) were employed in private practice, with 7% or 438 employed in corporate bodies and just 2% (119) employed in the service of the State. Only 8% of the members were not practising as solicitors and less than 1% (47) were working as solicitors in other jurisdictions. The facts therefore reinforce the view stated earlier that the predominant type of supplier in the relevant market for solicitor services in Ireland is the private solicitor firm.

Table 4.4: Practice Status of Law Society Members 2001

Practice status	Number of solicitors	%
Solicitors employed in private practice	5,107	83
Solicitors employed in corporate bodies	438	7
Solicitors employed in the service of the State	119	2
Solicitors working abroad	47	< 1
Solicitors not practising	467	8
Total members	6,178	100

Note: As at 30/9/01.
Source: Indecon calculations using Law Society data.

Numbers of Solicitors Compared to Population

4.33 To investigate further the economic structure of the profession, we use the information on all solicitor firms provided in the Law Directory (2002), which is published by the Law Society. We concentrate in particular on the population of private solicitor firms given in the 2002 Directory, these constituting the vast majority of all entries in the Directory. [19]

4.34 The results presented in Table 4.5 (overleaf) indicate that in 2001 (end of) there were 2,035 (private) solicitor firms in Ireland employing 5,503 solicitors. On average, each firm employed approximately 3 solicitors, with the number ranging from 1 (single proprietorships) to 163 in the case of the largest firm.

4.35 Table 4.5 also reveals that there was 1 solicitor per 712 persons in the State. In England and Wales, the corresponding figure was 547.[20] There is therefore a greater density of solicitors in England and Wales than in Ireland.

4.36 Table 4.5 also shows the extent of variation by county in the number of solicitor firms and in the number of solicitors in private practice. By far the greatest density of solicitors is found in Dublin, where there was 1 solicitor per 409 persons at the end of 2001. By contrast, there was 1 solicitor per 1,546 persons in County Laois.

4.37 Careful examination of the first and last columns of Table 4.5 shows that the greatest densities of solicitors occur in those counties with the largest urban areas, namely Dublin (with population/solicitor ratio of 409), Cork (771), Limerick (770) and Galway (885).

[19] Not included are 'employed solicitors' (public or private sectors) or legal aid boards.

[20] MIAB Report, paragraph C.156. However, it is important to remember that the population/solicitor ratio just quoted (712) relates to the solicitors operating in private practice as set out in the Law Directory (2002). Taking all practising solicitors in Ireland at the end of 2001 (c. 6,000) would mean that there is about 1 solicitor for every 650 persons in the State, which is still below the figure for England and Wales.

Table 4.5: Summary Statistics on the Structure of the Solicitors' Profession in Ireland in 2001

County	Total firms	Number of solicitors					Pop (2002)	Pop/sol
		Total	Mean	Min	Max	St. Dev.		
Carlow	17	45	2.65	1	6	1.50	45,845	1,019
Cavan	32	55	1.72	1	4	0.99	56,416	1,026
Clare	43	92	2.14	1	12	1.91	103,333	1,123
Cork	219	581	2.65	1	28	2.95	448,181	771
Donegal	48	104	2.17	1	14	2.10	137,383	1,321
Dublin	840	2,742	3.26	1	163	10.10	1,122,600	409
Galway	98	236	2.41	1	10	1.40	208,826	885
Kerry	58	122	2.10	1	8	1.48	132,424	1,085
Kildare	64	127	1.98	1	8	1.40	163,995	1,291
Kilkenny	26	58	2.23	1	8	1.66	80,421	1,387
Laois	17	38	2.24	1	6	1.44	58,732	1,546
Leitrim	14	29	2.07	1	6	1.49	25,815	890
Limerick	82	228	2.78	1	19	3.01	175,529	770
Longford	15	39	2.60	1	6	1.59	31,127	798
Louth	52	109	2.10	1	6	1.21	101,802	934
Mayo	51	111	2.18	1	6	1.31	117,428	1,058
Meath	47	100	2.13	1	8	1.62	133,936	1,339
Monaghan	19	38	2.00	1	3	0.82	52,772	1,389
Offaly	24	50	2.08	1	6	1.28	63,702	1,274
Roscommon	27	52	1.93	1	6	1.21	53,803	1,035
Sligo	27	55	2.04	1	7	1.40	58,178	1,058
Tipperary	66	154	2.33	1	7	1.52	140,281	911
Waterford	31	88	2.84	1	13	2.77	101,518	1,154
Westmeath	27	77	2.85	1	10	2.44	72,027	935
Wexford	38	79	2.08	1	9	1.71	116,543	1,475
Wicklow	53	94	1.77	1	9	1.38	114,719	1,220
Total	2,035	5,503	2.71	1	163	6.69	3,917,336	712

Source: Indecon calculations using Law Directory (2002) data. Population figures Census 2002 Preliminary Release.

The Size Distribution of Solicitor Firms and Aggregate Concentration

4.38 Of the 2,035 solicitor firms identified in the previous table, Table 4.6 below shows that 947 or 47% were single-solicitor businesses or sole proprietorships. The remaining 53% of solicitor firms were either principals (i.e. practices consisting of a principal solicitor employing 1 or more assistant/associate solicitors) or partnerships involving two or more solicitors.

4.39 The first three columns of Table 4.6 together indicate that the aggregate size distribution of solicitor firms is positively skewed, with very few firms employing more than 10 solicitors.

4.40 The fourth and fifth columns of Table 4.6 reveal the level of aggregate concentration in the profession. The 100-firm concentration ratio (C100) gives the cumulative share of the largest 100 solicitor firms and is the most popular statistical measure of aggregate concentration. Measuring size by the number of solicitors per firm, C100 = 31.67%, meaning that the 100 largest solicitor firms account for approximately 32% of all solicitors working in private practice.

4.41 The second measure of aggregate concentration reported in Table 4.6 is the Herfindahl-Hirschman index (HHI) using all 2,035 firms of solicitors.[21] Using the same size variable as before, the HHI figure that emerges, namely 35, suggests a very low level of aggregate concentration across the profession as a whole (remembering that the HHI ranges in value from 0 to 10,000).

Table 4.6: The Size Distribution and Level of Aggregate Concentration Amongst Solicitor Firms in Ireland in 2001

Number of solicitors in firm	Number of firms	%	Aggregate concentration	
			C100 (%)	HHI
1	947	47		
2	504	25		
3	266	13		
4	120	6		
5	61	3	31.67	35
6 – 10	94	5		
11 – 15	24	1		
16 – 20	3	0		
20+	16	1		
Total	2,035	100		

Note: C100 and HHI were calculated using the ungrouped (market share) data compiled by Indecon from the Law Directory. The C100 aggregates the shares of the largest 100 firms across the country, while the HHI is the sum of the shares of all 2,035 firms across the country.
Source: Indecon calculations using Law Directory (2002) data.

[21] Remembering that the HHI is an index of concentration designed for the complete size distribution and not just the top 100 firms as in the case of C100.

4.42 Turning to concentration at a more geographically disaggregated level, the findings of an analysis of the market shares of the smallest and largest solicitor firms by county together with the HHI values are presented in Annex 2. The results are again based on measuring size by the number of solicitors per firm and are likely to imply lower levels of concentration than turnover-based figures, which are not available.

4.43 The HHI figures in Annex 2 indicate significant inter-county variation in the level of concentration, with concentration highest in Leitrim (HHI = 1,058) and lowest in Cork (102). The variation notwithstanding, in none of the counties could the solicitors' profession be described as 'highly concentrated' as the term is conventionally understood in competition analysis (i.e. HHI ≥ 1,800). Indecon's concentration results echo those of Shinnick (1996).[22]

Customers of Solicitors and their Characteristics

4.44 We have already noted (Table 4.1 above) that, in terms of solicitors' fee income, personal injury and conveyancing constitute the two largest areas of services provided by solicitors. By comparison, trust and probate services account for a relatively small proportion of solicitor services. What we would now like to know is how the users of solicitors break down between personal and business customers. We would also like to investigate the frequency of these groups' purchases and their views about their ability to assess the quality of services provided by solicitors. The answers to these questions will inform us not only about the characteristics of consumers but also about how informed personal and business users are and thus the extent of information asymmetry in the market. As indicated in Section 2, which outlines the theoretical framework for our analysis, this is an important issue in considering the justification for specific regulations/restrictions on competition.

[22] On the other hand, an earlier study by Stephen *et al.* (1989) using data drawn from the Scottish Law Directory in 1965 and 1985, concluded that the Scottish market for legal services was highly concentrated and described the profession as a 'tight oligopoly' in that jurisdiction.

Breakdown of Business and Personal Customers

4.45 According to our survey results, at least one-quarter of all solicitors' fee income is derived from corporate/institutional clients. On the other hand, between two-thirds and three-quarters of solicitors' fee income is derived from personal clients, namely members of the general public (see Table 4.7).

Table 4.7: Indecon Survey of Solicitors - Percentage of Fee Income of Solicitor Practices from Business and Personal Clients

Statistics	% of Fee Income - Business, Corporate and Institutional Clients	% of Fee Income – General Public
Mean	33.2	66.8
Median	25.0	75.0
Standard deviation	26.4	24.0
St. dev. as a % of mean	79.4	33.7
Min	0	1
Max	100	100

Source: Indecon Survey of Solicitors.

Frequency of Usage and Quality of Information among Business and Personal Users

4.46 The issue of who are the consumers of solicitors' services and what percentage are corporate/business users versus members of the general public is relevant because of the beliefs that different groups are more or less frequent users of such services. Table 4.8 on the next page shows a contrast between business and personal customers in their use of solicitors' services. While insurance companies (who are among the largest corporate customers) are very frequent users, members of the general public are observed to engage solicitors less frequently. The results, however, also show that members of the public could be described as frequent users.

Table 4.8: Frequency of use of the Services of Solicitors in the Past Five Years?

	Not in past 5 years	Less than 5 times in last 5 years	1 – 5 times per year	6 – 10 times per year	11 – 20 times per year	More than 20 times per year	Don't know
Usage by General Public	51%	33%	12%	2%	1%	-	-
Usage by Insurance Companies	7.7%	-	15.4%	7.7%	-	69.2%	-

Source: Indecon Commissioned Survey of Representative National Sample of 1,008 Adults and Indecon Survey of Insurance Companies.

4.47 The difference in the frequency of usage of solicitors' services between the general public and corporate users is also reflected in different views regarding their ability to assess the quality of solicitors services. The results presented in the next table (Table 4.9) overleaf suggest that corporate consumers may need little assistance to assess the quality of solicitors' services. Interestingly, however, a significant minority (33%) of personal customers among the general public feel that they would be 'well able to' or 'very well able to' assess quality and the same percentage state that they would be able to 'assess quality to some extent'.

4.48 What these survey results reveal is that information asymmetry on the dimension of quality is unlikely to be significant for corporate users and may not be overly significant for some more frequent users among the general public. Later in the section, we address the issue of information asymmetry in relation to price and whether customers know in advance what they would be required to pay for solicitors' services.

Table 4.9: Views on their Ability to Assess the Quality of Services Provided by Solicitors in Ireland

	Not Able to Assess Quality	Able to Assess Quality to Some Extent	Well Able to Assess Quality	Very Well Able to Assess Quality	Don't Know
Views of General Public	21%	33%	23%	10%	13%
Views of Insurance Companies	8.3%	25%	50%	16.7%	-

Source: Indecon Commissioned Survey of Representative National Sample of 1,008 Adults and Indecon Survey of Insurance Companies.

Nature of Competition, if any, on the Market

4.49 Having looked at the relevant market and its structure, it is now necessary to evaluate the nature of competition, if any, on the market. Central to this issue are the roles that price and non-price instruments play in the marketplace. In what follows, we examine the role of price competition by reference to new evidence on fee levels and the extent, if any, of price competition occurring among members of the profession. We then examine the provision of fee information by solicitors to their clients before investigating the nature and degree of advertising and innovation, these being instruments of non-price competition. We then investigate the dynamics of competition in the form of entry and exit patterns over time and finally gauge competition as it exists in terms of recruiting new solicitors.

Solicitors' Fees

4.50 In the Indecon Survey of Solicitors, we asked practitioners the professional fees they would currently charge in providing conveyancing services on the *sale* of a house valued at €300,000 and also the fees for handling a typical preparation of a will. The results are presented in the second column of Table 4.10 overleaf.

Table 4.10: Indecon Survey of Solicitors - Professional Fees Currently Charged by Solicitors' Practices for Conveyancing and Will-Making Services

Statistics	Fees charged for conveyancing on sale of house with value of €300,000 - €*	Fees for handling a typical preparation of a will - €*
Mean	2,235	57
Median	2,250	50
Standard Deviation	692	44
Standard Deviation - % of Mean	31.0	77.1

Source: Indecon Survey of Solicitors
* Excluding VAT, stamp duty, registration and search fees.

4.51 The first thing to note about the results on the fees charged for conveyancing is the symmetry in the distribution of fees quoted by solicitors in our survey. This is reflected in the fact that the mean fee level (€2,235) is almost the same as the median (€2,250). Furthermore, the fact that the standard-deviation-as-a-percentage-of-the-mean (31%) is less than 50% means that there is likely to be little departure from the average level. Our results reveal a low level of dispersion in conveyancing fees. The second point of note about the results given in our survey is that the average conveyancing fee (€2,235-2,250) is lower than the level implied by the former recommended fee for the sale of a house, namely €3,127 (i.e. equivalent to 1% of the sale price plus IR£100). However, this does not rule out the possibility that the former recommended fee offers a 'focal point' against which solicitors discount.

4.52 We also asked solicitors to indicate the professional fee they would currently charge to handle the preparation of a typical will for a private individual. For this particular legal service, the distribution of fees is more skewed than for conveyancing, implying that the median fee level (€50) is likely to be the more reliable measure of central tendency (i.e. average fee level) in this instance. Comparing the standard deviation-as-a-percentage-of-the-mean values for the two legal services shows more variation in will/trust fees (77.1%) than in conveyancing fees (31%). It would appear that significantly more price dispersion exists in will making.

4.53 The relatively low level of fees indicated for the preparation of a typical will - €50, using the median measure of central tendency – suggests it may be used as a loss leader. It may be the case that solicitors as a rule do not charge much for preparing a will because the more substantial income lies in the administration of the testator's estate (i.e. probate). In certain cases it may pay the solicitor to charge low rates for will preparation in order to retain the (more lucrative) business later on in administering the client's estate.

Extent of Price Competition

4.54 The results presented in Table 4.11 summarise the views of solicitors, insurance companies (among the main corporate users of solicitors' services) and members of the general public on the extent to which they believe there is price competition in the market for solicitors' services. While 47% of solicitors suggest there is 'significant' competition only 26.2% believe that there is 'extensive' price competition. Also of interest is the fact that a significant minority (23%) of solicitors believe there is only 'limited' price competition. On the other hand, most insurance companies (66.7%) believe there is 'virtually no' or 'very little' price competition. A total of 91.7% of insurance companies surveyed therefore suggested that 'limited', 'very little' or 'virtually no' pre competition exists among the solicitors profession in Ireland. This group of consumers are likely to be particularly well informed as they are frequent users of solicitors' services. There are some differences in views concerning members of the public on the extent of price competition with 51% feeling that there is 'limited', 'very little' or 'virtually no' price competition, 14% indicating 'significant' price competition and 25% believing there is 'extensive' price competition. The views of the frequent (insurance company) users that there is limited price competition is supported to some extent by the degree of clustering of prices referred to previously as well as the absence of price advertising which is discussed later in this section.

Table 4.11: Practitioner and Consumer Views on Extent of Price Competition among Solicitors in Ireland

	Virtually no price competition	Very little price competition	Limited price competition	Significant price competition	Extensive price competition
Views of Solicitors	1.1%	2.7%	23%	47.0%	26.2%
Views of Insurance Companies	50%	16.7%	25%	8.3%	-
Views of General Public	18%	20%	23%	14%	25%

Source: Indecon Survey of Solicitors, Indecon Survey of Insurance Companies and Indecon Commissioned Survey of Representative National Sample of 1,008 Adults

4.55 Our research indicates a marked difference in perceptions among solicitors and certain key categories of consumer concerning the extent of price competition in the profession.

Provision of Price/Fee Information to Consumers

4.56 Pursuant to Section 68 of the Solicitors (Amendment) Act, 1994, solicitors are required to provide advance notice of their legal charges to their clients.

4.57 Our survey of solicitors indicated that the vast majority of solicitors (87.9%) indicated they provided information in advance to clients regarding fees, with only 1.4% stating that they do not provide advance notice of charges and 10.7% stating that it is not possible to know fees in advance. Also of relevance is that most but not all solicitors indicated they provide a breakdown of their expenses following the provision of legal services to their clients.

4.58 The lack of public information on likely legal fees is a noteworthy feature of the market. Our research with consumers revealed that only a minority (19%) of the general public believe that they know in advance what they are required to pay when engaging the services of solicitors in Ireland.

4.59 Given the deficit in public knowledge of likely legal fees it is not surprising that Table 4.12 reveals that most (71%) of consumers would favour the provision of more information on fees/prices charged by solicitors in Ireland. An even higher percentage of insurance companies believe more information on fees is needed. This points to the role of enhanced consumer information and, in particular, to advertising of fees. While fee advertising is not restricted among the solicitors' profession in Ireland, our research suggests that prices are rarely, if ever, advertised.

Table 4.12: The Public's and Insurance Companies' Views on Whether More Information on Solicitors' Fees and Charges in Ireland is Needed

	General Public	Insurance Companies
Percentage who believe that more information on fees and charges is needed	71%	91.7%

Source: Indecon Commissioned Survey of Representative National Sample of 1,008 Adults.

Extent of Innovation Among Solicitors

4.60 Table 4.13 reveals the views of insurance companies on the extent to which they believe there is innovation- and quality-based competition among solicitors in Ireland. The vast majority of insurance companies (83.3%) believe that 'limited' or 'very little' innovation/quality-based competition exists among solicitors. Just 16.7% of insurance companies believe that there is 'significant' innovation/quality-based competition. This suggests that there is little competition between solicitors in the form of innovation.

Table 4.13: Indecon Survey of Insurance Companies - Insurance Companies' Views on the Extent to which there is Innovation and Quality-of-Service Competition among Solicitors

Virtually no innovation or quality competition	Very little innovation or quality competition	Limited innovation or quality competition	Significant innovation or quality competition	Extensive innovation or quality competition
-	58.3%	25%	16.7%	-

Source: Indecon Survey of Insurance Companies.

Extent of Advertising and Availability of Information

4.61 As part of our survey of solicitors we obtained information on the extent of advertising by solicitors. Annual expenditure on advertising by solicitors' practices in Ireland is highly positively skewed, with mean annual expenditure of approximately €3,539 compared with €1,000 for the median, which is likely to be the more reliable indicator of the average in this case.

4.62 Our survey results also indicate that the standard deviation-as-a-percentage-of-the-mean value of 310.2% is exceedingly high (i.e. greater than 100%) and indicates significant variation across solicitor firms in their advertising budgets. One of the frequently used vehicles for advertising used by solicitors is the Golden Pages. The nature and scale of solicitor advertising in the Golden Pages directories is worth examining in more detail to gain an impression of the extent to which firms compete on this basis.

4.63 Of the 2,035 private solicitor firms identified by Indecon in the Law Directory (2002), 1,564 or 77% of the total placed a 'listings' (the most basic type of advertisement) or other types of advertisement in the Golden Pages in that year.

4.64 In addition, an analysis was undertaken on the types of Golden Pages advertisements taken out by the 1,564 solicitor firms identified in the previous table[23] and this is presented in a separate table in Annex 2. This shows the majority of firms (67%) simply placed listings adverts. These advertisements did not include any price references and indeed the absence of advertisements highlighting prices is a feature of the sector. The results also show that 21% placed informational adverts, display adverts (10%) and in-column display adverts (7%). Interestingly, very few firms (1%) chose to advertise in Golden Pages regions other than their own. This would tend to highlight the largely local nature of the market although we accept that the existence of solicitors in other regions can act as a competitive constraint on the sector.

4.65 Table 4.14 identifies the legal services advertised by those 155 solicitor firms placing display adverts in the Golden Pages in 2002. We focus on display adverts because they allow the most information to be conveyed of the various types of adverts (they include, for example, whole one-page adverts). Echoing the fact that personal injuries and conveyancing constitute the main areas of work for solicitors (as indicated in Table 4.1), most of the information conveyed in display adverts relates to either or both of these legal services.

[23] The costs of the various types of GP adverts are given in the notes to the table.

Table 4.14: Nature of *Display* Advertisements taken out by Solicitor Firms in Golden Pages – Types of Services cited in Adverts – 2001-2002

Types of services cited in adverts	No. firms with display ads	No. citing services by type	%
Personal injury services	155	124	80
Conveyancing	155	103	66
Wills and probate services	155	81	52
Litigation services	155	31	20
Services other than above (e.g. family law and divorce)	155	103	66

Source: Indecon calculations using data from the Law Directory (2002) and the Golden Pages (2001-2002).

Entry and Exit of Solicitor Firms

4.66 In considering the level of competition in the market it is also important to consider patterns of entry and exit as in a competitive market entry of new firms and exit of inefficient firms occurs rapidly in response to changing market conditions.

4.67 There are no restrictions on an Irish qualified solicitor setting up a new practice as a sole trader in Ireland, although as indicated later in this section there are restrictions on normal competitive behaviour and on normal commercial organisational form (there are also some restrictions on newly qualified solicitors from EU Member States establishing in Ireland). In Ireland, a newly qualified solicitor may establish a sole practice on the first day of qualification.

4.68 Table 4.15 provides details on the numbers of newly established solicitor firms in Ireland during 1994-2001. Greenfield entry peaked in 1996 (with 95 new practices established). Given that there are roughly 2,000 private solicitor firms in Ireland at the present time, the approximate rate of new firm formation in the solicitors' profession is 3-4% per annum, suggesting a low-moderate gross entry rate.

Table 4.15: Number of Greenfield Solicitor Firms established in Ireland 1994-2001

Type	2001	2000	1999	1998	1997	1996	1995	1994
Sole practitioners	50	55	37	26	36	48	38	48
Principals	7	6	10	14	12	17	16	16
Partnerships	15	10	15	12	13	30	16	13
All greenfield entrants	**72**	**71**	**62**	**52**	**61**	**95**	**70**	**77**

Note: A principal firm is a practice with 1 partner and a number of assistant solicitors.
Source: Indecon adaptation of Law Society Data.

4.69 A detailed breakdown of the number of partners in the new solicitor firms is provided in Table 4.16, where it can be seen that most new partnerships begin life as two-solicitor partnerships.

Table 4.16: Number of Partners in Greenfield Solicitor Firms in Ireland 1994-2001

Type	2001	2000	1999	1998	1997	1996	1995	1994
2-partners	12	6	12	8	11	20	11	11
3-partners	2	3	2	2	2	3	3	1
4-partners	1			2		4		
5-partners		1				2		
6-partners			1			1		
7-partners							1	
8-partners								1
22-partners							1	
Total Greenfield partnerships	**15**	**10**	**15**	**12**	**13**	**30**	**16**	**13**

Source: Indecon adaptation of Law Society Data.

4.70 Table 4.17 shows the trend in the number of solicitor firms closing in Ireland during 1994-2001. The implied gross exit rate is significantly less than the gross entry rate already quoted and reveals a pattern of net entry of solicitor firms since 1994.

Table 4.17: Number of Complete Shutdowns of Solicitor Firms in Ireland 1994-2001

Type	2001	2000	1999	1998	1997	1996	1995	1994
Complete shutdowns	9	18	19	14	23	28	14	17

Source: Indecon adaptation of Law Society Data.

4.71 Entry of new solicitors has been modest in Ireland in comparison to the growth in demand and there are even fewer instances of practices closing down. Annual entry exceeds exit implying a low rate of net entry of new practices each year.

Recruitment of Solicitors

4.72 One of the characteristics of a competitive market is that the supply of factors of production is highly elastic, meaning that the supply of entrants to the profession responds rapidly to changing market conditions.

4.73 Table 4.18 presents new results on recruitment using data obtained from the Indecon Survey of Solicitors. The results reveal that over the past three years recruitment was more difficult than not, with 60% of the respondents stating that they had 'difficulty' in recruiting solicitors during the past three years. In particular, 38.4% of the respondents stated that they experienced 'difficulty', 14.6% found recruitment 'very difficult' and 7.4% found recruitment 'extremely difficult'.

4.74 Our survey findings highlight the difficulties that the profession has had in recruiting solicitors to meet demand for legal services. The ability of the profession to secure an adequate supply of qualified personnel is an important issue for the ongoing development of a competitive market for legal services.

Table 4.18: Indecon Survey of Solicitors - Views of Extent of Difficulties in Recruiting Solicitors over the Past 3 Years

Level of difficulty	% of responses
Extremely difficult	7.4
Very difficult	14.6
Difficult	38.4
No Difficulty	39.6

Source: Indecon Survey of Solicitors.

Summary of Empirical Analysis of the Market

4.75 We now draw together the salient points arising from the last four sub-sections.

4.76 Solicitors' services comprise several distinct areas (e.g. conveyancing, personal injury, trust and probate), differentiated on the basis of objective characteristics and price, for which the geographical scope is likely to be local. However, it is appropriate in a sectoral policy study to adopt a more general definition of the relevant market, incorporating the range of services provided by solicitors the geographic scope of which is the State. In this environment, the predominant type of supplier is the private solicitor firm, with others (employed solicitors, legal aid boards, self-suppliers etc.) providing only a marginal competitive constraint. Indeed, if we remove solicitors not practising and solicitors working abroad from the Law Society's membership, we would find that over 90% of all solicitors entitled to practise in Ireland work in private practice.

4.77 There are over 2,000 private solicitor firms employing almost 6,000 practitioners at the present time. Almost half of these firms are located in the major urban centres, namely Dublin, Cork, Galway and Limerick. Relative to the population, there is one privately practising solicitor for every 700 people in the country. The corresponding figure in England and Wales is about 1 solicitor per 600 persons. Most solicitor practices are small, employing on average 3 solicitors (including principals or partners). Since 1992, the population of practising solicitors has grown at an average annual rate of approximately 5%. This rate of growth has been less than that for the economy (7%) and, in relation to certain services, namely conveyancing, our results suggest that the number of solicitors may not have kept pace with latent demand.

4.78 That growth in the number of solicitors may not have kept pace with demand is reflected in fee income growth. According to our new survey evidence, almost all solicitor firms experienced a significant increase in fee income during 1999-2001. Accepting this was a period of exceptional growth in the economy, the average annual growth in firms' fee income in nearly all cases exceeded any measure of national product. In particular, among the 93.4% of firms that stated an increase in fee income, 82.7% stated an increase of 10% or more on an average annual basis.

4.79 In terms of who generates solicitors' fee income, members of the general public constitute most (at least two-thirds) of solicitors' clients and this proportion increases towards 100% in rural parts of the country. On the other hand, insurance companies are among the most frequent business users of solicitors' services and it is likely that they contribute disproportionately to the value of transactions involving solicitors.

4.80 Turning to the nature of competition on the market, our analysis of professional fees for conveyancing services indicates a low level of price dispersion and the fees quoted to us are lower than the fees formerly recommended by the Law Society for this particular legal service. However, the figures do not rule out the possibility that the once recommended fee for the sale of a residential property (1% of the sale price plus IR£100) provides a 'focal point' against which solicitors discount. We advanced the view that the fees for preparing wills might be used by solicitors as a loss leader, in order to retain the more lucrative business of probate (administration of estates on death).

4.81 Another vehicle of competition available to solicitors is advertising and our analysis of Golden Pages entries and of practitioners' responses to our survey indicated that the solicitors' profession is one in which advertising is used quite extensively (although the level of personal injury advertising is set to fall following the Solicitors (Advertising) Regulations, 2002). On the other hand, we found little evidence that solicitors compete on the basis of quality of service and innovation is not a feature of the market.

4.82 Finally, in terms of market dynamics, most new (greenfield) practices are two-solicitor partnerships. Entry has dominated exit since 1994 (the earliest year for which data are available from the Law Society), meaning that there has been net entry of solicitor practices since that time. However, the rate of net entry has been modest, in comparison with demand growth, and the relevant market could not be described as one in which entry and exit occur rapidly in response to changing market conditions, as is the case with a competitive market. It is also relevant to note that practitioners (whether in new or established offices) have reported difficultly in recruiting solicitors over the past three years. This is not consistent with effective competition and also reflects the restrictions imposed by the Law Society on foreign-qualified lawyers practising in Ireland (see below).

Examination of the Restrictions in the Solicitors' Profession

Introduction

4.83 In our examination and assessment of the restrictions and requirements governing the solicitors' profession, we firstly identify the restrictions governing entry, conduct, demarcation and organisational form before concentrating on those restrictions that we believe are most likely to restrict or hinder competition on the market. In concentrating on the key restrictions, we examine their justification and then evaluate whether or not they are proportional to achieving their intended objectives.

4.84 Prior to undertaking these tasks, it is first necessary to consider in more detail the principal organisation responsible for regulating the profession in Ireland, namely the Law Society. We also examine its procedures in relation to complaints, discipline and enforcement.

Regulation of the Profession

4.85 Regulation of the solicitors' profession is the responsibility of the Law Society of Ireland,[24] the High Court (in particular, the President of the High Court) (and the Supreme Court on appeal) and the Minister for Justice, Equality and Law Reform. The Law Society is the principal body responsible for the regulation of the profession on a day-to-day basis. Regulation is by way of by statute and delegated legislation, principal among which are the Solicitors Acts, 1954 to 2002, and the Bye-Laws of the Law Society.

4.86 The Law Society traces its foundation to the granting of a Charter from Queen Victoria in 1852 (supplemented in 1888) and is concerned primarily with the education and training of solicitors and the continuing education of established solicitors. The Law Society is also responsible for the regulation of solicitors' conduct, including solicitors' accounts and clients' monies, plus the Compensation Fund, which aims to ensure that a client who suffers loss as a consequence of the dishonesty or fraud of a solicitor (to whom the client has entrusted money) is compensated by the profession as a whole. The Fund complements solicitors' professional indemnity insurance, which is a pre-requisite for practising as a solicitor in Ireland.

[24] The Law Society of Ireland was called the 'Incorporated Law Society of Ireland' until November 1994 when the name was changed under section 4(1) of the Solicitors (Amendment) Act, 1994.

4.87 The Law Society is empowered to investigate complaints about solicitors and to monitor solicitors. Since the establishment in 1997 of the Office of Independent Adjudicator of the Law Society, a member of the public who is dissatisfied with the way in which his or her complaint has been dealt with by the Law Society may apply to the Adjudicator for independent examination. The Independent Adjudicator may then direct the Law Society to re-examine the complaint or make an application to the Disciplinary Tribunal of the High Court, which may lead to the disciplining of a solicitor.

4.88 While there is no requirement for a solicitor to be a member of the Law Society in order to practise, the vast majority of practising solicitors are members. As of 31 December 2001, of the 6,030 practising solicitors in Ireland, 5,912 (98%) were members of the Law Society. As well as being part of a national network, the benefits of membership include various financial services schemes, pensions, venues for meetings and accommodation facilities. The Law Society's journal, the *Gazette*, is provided free to all members, who can also avail of the services of the Law Society's library.

4.89 The Law Society also provides technical information to its members, which, the Law Society submits, is ultimately to the benefits of clients of solicitors. The Law Society gives information on conveyancing, in the form of the *Conveyancing Handbook*, litigation and commercial matters. The Law Society publishes a variety of booklets and pamphlets on particular legal topics.[25]

4.90 The governing body of the Law Society is the Council, which is provided for in the Charters of 1852 and 1888 and in section 3(1) of the Solicitors Act, 1954. Section 4 of the 1954 Act provides that the functions vested in the Law Society by the Solicitors Acts, 1954 to 1994 be performed by the Council. Section 5 of the 1954 Act gives the Council the power to make regulations in relation to any matter referred to in the Solicitors Acts. Every regulation made under this provision must be laid before each of the Houses of the Oireachtas. Thus, through the Council, the Law Society can initiate statutory change to the way in which the profession is regulated.

[25] From the beginning of July 2003, the Law Society will introduce a system of mandatory continuing professional development (CPD) under the Solicitors (Continuing Professional Development) Regulations, 2002. Solicitors will be required to undertake 20 hours CPD during a 'CPD cycle'. The first cycle will consist of 2 years and 6 months; cycles thereafter will consist of two-year periods. At least 15 hours are to be devoted to group study and up to five hours to private study. The system will be one of self-certification and will be a condition to renewing practising certificates of existing solicitors. As a continuing requirement to practise as a solicitor, we believe the new system ought to enhance the quality of solicitor services in Ireland. We do not believe that it will be restrictive of competition on the market.

Complaints, Discipline and Enforcement

4.91 There are a wide range of complaints, discipline and enforcement procedures that apply to all practising solicitors in Ireland, regardless of whether they are members of the Law Society or not. These include the handling of complaints from clients of solicitors and members of the general public by the Complaints Department and the Registrars' Committee of the Law Society, and the work of the Disciplinary Tribunal and the Office of the Independent Adjudicator, which operate independently from the Law Society. All operate within the Solicitors Acts and their function is to enforce the rules, regulations and professional code governing the profession. We have examined the complaints, discipline and enforcement procedures in detail and have found no evidence that they are in any way used to institute any anti-competitive practices or damage consumer interests. It appears to us that the enforcement procedures are logically structured, fair and open. Indeed, we believe that they are appropriately designed to protect consumer interests and to maintain high standards in the profession.

Restrictions/Requirements on Entry

The Law Society as the Sole Provider of Education and Training

4.92 Pursuant to the Solicitors Acts, the Law Society has exclusive responsibility for the admission, training and qualification of solicitors in Ireland. It is open to the Law Society, while retaining its overall jurisdiction over the content of courses and examinations, to 'license' other educational institutions to provide courses and examinations leading to qualification as a solicitor in Ireland.

4.93 The Society's Education Policy Review Group Report considered this issue in 1998 and concluded that the Law Society should continue as the direct and exclusive provider of professional training courses and should retain its direct jurisdiction over examinations for apprentices. As exclusive rights are generally perceived as hindering competition, it is important to carefully consider the Law Society's current monopoly on the provision of the professional practice courses. This we do below under the sub-section headed Key Restrictions on Competition.

Educational and Training Requirements

4.94 A person intending to qualify as a solicitor must fulfil the following statutory requirements:

- Pass the Preliminary Examination or receive an exemption from it;
- Pass the First Irish examination;
- Pass the Final Examination–First Part (Entrance Examination/FE-1);
- Secure an apprenticeship with a practising solicitor (known as a 'training solicitor') and obtain the Law Society's consent to become apprenticed;
- Attend the Professional Practice Course I (PPC I) and pass the course examinations (the Final Examination–Second Part or FE-2);
- Spend a period of 12 months as a trainee solicitor in the training solicitor's office;
- Attend the Professional Practice Course II (PPC II) and pass the course examinations (the Final Examination–Third Part or FE-3);
- Pass the Second Irish Examination; and
- Serve the remainder of the two-year term of apprenticeship following completion of the PPC II.

4.95 In our view, high quality education and training is fundamental in the formation of a solicitor and is of the utmost importance in ensuring protection of consumer interests. Apart from the restriction on other institutions providing the professional education and training of solicitors, we believe the current educational and training requirements are not disproportionate to achieving their intended goals of ensuring minimum standards of competence and professionalism among newly qualified solicitors. Nor do we have any evidence that the educational and training requirements are used to restrict or damage competition on the market.

4.96 It is relevant to examine how practitioners themselves feel about the educational and training requirements for entry to the profession. The results of the Indecon Survey of Solicitors on this matter indicate that the vast majority (88.5%) of the solicitors who responded to our survey said they supported the existing educational and training requirements. We also asked the same question to insurance companies, who are important users of solicitors' services. The results reveal that a significant majority (84.6%) of insurance companies support the existing educational and training requirements.

Other Entry Requirements

4.97 The other requirements for entry into the solicitors' profession relate to character and age, and exist in order to provide further protection to clients and members of the general public. Such requirements are common across the professions under review in this study. We believe that they are reasonable and appropriate to ensuring minimum standards of professionalism and ethical behaviour and are not used to control artificially the numbers admitted to the profession.

Transfer requirements

4.98 Details on the number of foreign qualified lawyers and barristers transferring to the solicitors' profession in Ireland are provided in Annex 2. The evidence shows that a relatively small proportion of new solicitors admitted to the Roll of Solicitors each year are foreign qualified lawyers and there are even fewer instances of transfers from the (Irish) barristers' profession.

4.99 Qualified lawyers from the following jurisdictions may apply to go on the Roll of Solicitors in Ireland without further examination:

(i) A person whose first place of qualification as a solicitor is England and Wales (if the applicant was formerly called to the Bar, he or she must have three years post-qualification experience in England and Wales to avail of the direct reciprocity ruling);

(ii) A person whose first place of qualification as a solicitor is Northern Ireland (if the applicant was formerly called to the Bar, they must have three years post-qualification experience in Northern Ireland to avail of the direct reciprocity ruling);

(iii) A person whose subsequent place of qualification as a solicitor is England and Wales and has three years post-qualification experience in England and Wales; and

(iv) A person whose subsequent place of qualification as a solicitor is Northern Ireland and has three years post qualification experience in Northern Ireland.

4.100 The process takes approximately eight weeks and if all documents are in order, the Law Society will issue a Certificate of Admission to the applicant.

4.101 According to the requirements, solicitors whose *second or subsequent* place of qualification is England and Wales or Northern Ireland may apply to go on the Roll without further examination, but require three years post-qualification experience in the jurisdiction in which qualification was (subsequently) obtained. This transfer restriction has, in our view, the impact of restricting entry into the solicitors' profession in Ireland and therefore partially impacts on competition. It therefore merits further examination below.

4.102 Pursuant to the Solicitors Acts, lawyers from certain other jurisdictions (including those outside the EU) are required to sit the Qualified Lawyers Transfer Test (QLTT) (or parts thereof depending on their previous experience) before they can be admitted as solicitors in Ireland. Before sitting the QLTT, applicants must first obtain a Certificate of Eligibility from the Law Society's Education Committee (which includes a check that the applicant is 'fit and proper' to practise in Ireland).

4.103 As well as other EU Member States, lawyers qualified in New York, Norway, Pennsylvania (must have five years post-qualification experience in that State), Switzerland and New Zealand are eligible to apply to sit the QLTT. Applicants must pass any or all of seven subjects.[26] The Law Society has discretion to exempt applicants from all or any part of the QLTT. Details of the requirements and the procedures involved are available from the Law Society's website. The Law Society states in its submission that it "is very open to entering into other reciprocal arrangements with *bona fide* societies and other bodies worldwide.[27]

4.104 A barrister who wishes to transfer to the solicitors' profession is required to have practised in Ireland for a period of three years and must sit the FE-2 and FE-3 plus the Second Irish Examination, but will not be re-examined in any subject of substantive law which he or she may have passed or is deemed to have passed as part of the qualifying examinations for the degree of Barrister-at-Law. No apprenticeship is required, but the barrister may be required to spend up to 6 months in a solicitor's office.

4.105 The three years post-qualification experience requirement facing barristers wishing to transfer as solicitors acts, in our view, as an entry barrier to the solicitors' profession and thus merits closer review below.

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[26] The subjects are: Professional Conduct of Solicitors (oral examination); Constitutional Law and either Criminal or Contract Law; Law of Contract and Law of Tort; Land Law and Conveyancing; Probate and Taxation Law; Solicitor's Accounts; and European Union Law (EU qualified lawyers are given an automatic exemption from this particular examination).

[27] Law Society response to Question 32 of Competition Authority Questionnaire. The restrictions placed on lawyers qualified in another EU Member State offering legal services in Ireland are treated in more detail below.

Restrictions on Conduct

Professional Fees

4.106 We understand that the Law Society does not involve itself with the level or structure of charges levied by solicitors (irrespective of whether or not they are members of the Law Society).

4.107 Furthermore, the Law Society has informed us that it does not know or keep any record of the charges imposed by solicitors. In the past, the Law Society did involve itself with the level or structure of charges but has not done so following the entry into force of the Competition Acts, 1991-96.

4.108 One issue that is, however, relevant to professional fees is the charging of contingency or percentage fees by solicitors. Under Section 68(2) of the Solicitors (Amendment) Act, 1994, solicitors are prohibited from charging their clients fees calculated as a proportion or percentage of any damages or other moneys that may be payable to the client in contentious business only. It is, however, possible to enter into what is termed a *pactum de quota litis* in respect of non-contentious work, where the level of the fee will be contingent on the value of the result. Pursuant to Section 68(1) of the 1994 Act, the agreement must be made at the time when instructions are outlined or as soon as practicable thereafter. Thus, the current position is that the contingency contracts/fees are permitted in the area of non-contentious work only.

4.109 Despite these rules, which we believe are unlikely to adversely affect competition on the market for solicitors' services, it has recently come to light that some solicitors may double-charge their clients on settlements arising in contentious cases (notably personal injury awards). Note that this is not because of the Law Society regulations on percentage fees; rather it is the result of unscrupulous solicitors taking advantage of the fact that some of their clients might not be well informed about the way in which the solicitors' fees are structured.

4.110 The Taxing Master has recently described (in Flynn, 2002) how successful litigants are paid 'party-and-party' costs, in which the losing party in a contentious case pays the winning party's legal costs. However, we understand a limited number of solicitors may also have charged their clients percentage fees (of the amount awarded) and passed the component off as part of their 'solicitor-and-client' fees.

4.111 The Law Society believes that such double charging is very rare and it is doing everything in its power to eradicate the problem. Owing to the illegal nature of the practice, there are no facts for which we can tell how widespread the problem is. However, the MIAB report states that double charging by solicitors was leading to a situation where some people were seeking higher compensation awards to cover additional fees being demanded by solicitors.

4.112 Our view is that the practice of double charging arises as the result of information asymmetry between solicitor and client in relation to how fees are drawn up in contentious cases and the low level of price competition in the sector. As we have seen in the empirical analysis part of this section, most members of the general public believe that they would not be able to tell in advance the level of a solicitor's fee in respect of a particular service and stated that more information on fees should be provided. A clarification/simplification of solicitors' fee systems would, in our view, be of benefit to consumer welfare and thus to competition. Among other things, it would also draw attention to the fact that double charging by solicitors is illegal.

Advertising and publicity of services

4.113 The Solicitors (Advertising) Regulations, 2002 set down the conditions that solicitors must adhere to in any advertisement. Their introduction follows the passing of the Solicitors (Amendment) Act, 2002 and they replace the Solicitors (Advertising) Regulations, 1996. The latest regulations provide that an advertisement shall not:

- Be likely to bring the solicitors' profession into disrepute;
- Be in bad taste;
- Reflect unfavourably on other solicitors;
- Contain an express or implied assertion by a solicitor that he/she has specialist knowledge in any area of law or practice superior to that of other solicitors;
- Be false or misleading in any respect;
- Be contrary to public policy.

4.114 The Regulations also prohibit solicitors from making unsolicited approaches to any person with a view to obtaining instructions in any legal matter.

4.115 The main impact of the 2002 Regulations, compared with the previous (1996) provisions, is to restrict advertising by solicitors in the areas of personal injury claims. Such advertising, it is argued by the Law Society, has the potential to encourage 'ambulance chasing', which could be distressing to members of the public who find themselves in a vulnerable position. Accordingly, the restrictions contain a list of inappropriate locations (including hospital, clinic, doctor's surgery, funeral home, cemetery, crematorium or other location of a similar character) and prohibit inappropriate advertising (claims or possible claims for damages for personal injuries, the possible outcome of claims for damages for personal injuries, the provision of legal services by the solicitor in connection with personal injuries claims, and soliciting class actions in relation to personal injuries claims).

4.116 The Law Society submits that the above restrictions constitute very limited advertising restrictions and are necessary and proportionate for the protection of the public. However, the new regulations on solicitor advertising are more restrictive of competition than the 1996 regulations and in our view require closer scrutiny in the key restrictions section below.

Other Restrictions on Conduct

4.117 The 1988 Law Society Guide to Professional Conduct of Solicitors in Ireland and the Solicitors Acts contain various other behavioural restrictions designed to protect the public interest, to minimise the risk of conflicts of interests, to ensure the confidentiality of clients' secrets and the independence and integrity of the profession as a whole.

4.118 Our assessment of these restrictions is that, in general, they are designed to maintain standards and ethics among members of the profession and in doing so serve the public interest. Insofar as they constitute standards to which all practitioners must comply, they are unlikely to have any material effect on entry or competition and so we do not see any problem with them. However, some specific restrictions may need to be adjusted to reflect other initiatives aimed at enhancing competition in the profession (see below). For instance, the restriction on solicitors not sharing office accommodation or staff with non-solicitors would need to be adjusted in the event of multidisciplinary practices being developed.

Restrictions on Demarcation

4.119 Section 58 of the Solicitors Act, 1954, restricts the preparation of legal documents for reward for conveyancing and trust/probate services to solicitors. Furthermore, section 55 of the 1954 Act, as amended by section 63 of the Solicitors (Amendment) Act, 1994, provides that an unqualified person shall not act as a solicitor and that a person who contravenes this provision shall be liable to criminal prosecution. Section 56 of the 1954 Act, as amended by section 64 of the Solicitors (Amendment) Act, 1994, provides a prohibition on any person pretending to be a solicitor, and section 57 of the 1954 Act protects the public from having to pay an unqualified person who may be intending to sue for fees in respect of work that they were not entitled to undertake.

4.120 The traditional restrictions on the provision of conveyancing and trust/probate services to solicitors have been relaxed in recent legislation but not in practice. In particular, section 31 of the Building Societies Act, 1989 potentially allows building societies to carry out conveyancing work, while section 78 of the Solicitors (Amendment) Act, 1994 allows credit unions to carry out trust and probate work.

4.121 However, both sections of the legislation require the Minister for Justice, Equality and Law Reform to make regulations authorising the institutions to provide the respective services, after consultation with the Minister for Enterprise, Trade and Employment. To date, no such regulations have been made.

4.122 Furthermore, while lawyers based in other Member States of the EU are able to provide legal *advice* to personal and business clients in Ireland, they are not permitted to compete with Irish solicitors in the preparation of legal documents for conveyancing, trust and probate services in Ireland.[28]

4.123 In short, Irish solicitors continue to enjoy a national based monopoly on the preparation of legal documents for these services. This naturally merits closer scrutiny below.

[28] Pursuant to the European Communities (Freedom to Provide Services) (Lawyers) Regulations,1979 (SI No. 58/1979, as amended by SI No. 197/1981, SI No. 226/1986 and SI No. 132/1999) which implement Directive 77/249/EEC of 22/3/1977 on the provision of services by lawyers qualified in another EU Member State.

Restrictions on Organisational Form

Restriction on Forming Limited Liability Businesses

4.124 Pursuant to section 64 of the Solicitors Act, 1954, a solicitor may only practise as a sole practitioner or in partnership with another solicitor or solicitors. Solicitors also practice as principals, in which a solicitor employs one or more assistant or associate solicitors.

4.125 Under Irish law, and in particular the Partnership Act, 1980, partnerships in Ireland are confined to unlimited liability partnerships, in which each partner is fully liable for all debts and obligations of the business, including the acts of negligent partners.

4.126 The restriction on forming limited liability businesses acts as a barrier to competition in that it may hinder certain forms of new entry and may prevent existing practices from expanding and securing the capital necessary to permit greater specialisation or more intensive competition. We examine the restriction on limited liability businesses as part of our assessment of the key restrictions below.

Restrictions on Multidisciplinary Practices

4.127 Sections 59 and 64 of the 1954 Act prohibit the formation of multidisciplinary practices (MDPs). Solicitors may only form partnerships with other solicitors and may not engage in partnerships, or any other form of business organisation, with members of any other profession, trade or occupation.

4.128 However, Section 71 of the 1994 (Amendment) Act permits the Law Society to allow fee-sharing between solicitors and other professions provided that the Minister for Justice and, in the event of regulations being postponed, the Minister for Enterprise, Trade and Employment have consented. To date, no regulations have been made and so solicitors continue to be prohibited from establishing MDPs or from engaging in fee sharing arrangements. The restriction on MDPs needs to be examined more closely below.

Key Restrictions on Competition

Overview

4.129 We have identified the restrictions on entry, conduct, demarcation and organisational form that exist in the solicitors' profession and our analysis suggests that the following eight restrictions merit closer assessment. The key restrictions of potential concern are as follows:

- **Law Society's monopoly on the provision of professional education and training;**
- **Restrictions on the transfer of solicitors from other countries entering the Irish profession;**
- **Restrictions governing the transfer of Irish barristers to the solicitors' profession in Ireland;**
- **Selected restrictions on advertising;**
- **Restrictions on demarcation serving to give solicitors a monopoly in conveyancing and trust/probate services;**
- **Restrictions on lawyers based in other EU Member States competing with Irish solicitors in providing conveyancing, trust and probate services in Ireland;**
- **Restrictions on solicitors forming limited liability businesses; and**
- **Restrictions on solicitors forming multidisciplinary practices with other professionals.**

4.130 In what follows, we assess each of the eight restrictions by reference to its justification and our evaluation of the justification(s) given.

Law Society's Monopoly on the Provision of Professional Education and Training

Justification

4.131 The Law Society's current monopoly on the provision of professional education and training courses represents a restriction on competition in this area and also could potentially impact on entry to the profession and thus on the overall level of competition between solicitors in Ireland. It is therefore important to consider the justifications that have been suggested for the present situation.

4.132 The Law Society has submitted a number of arguments in support of the conclusion supporting its monopoly status drawn in its internal 1998 report by the Educational Policy Review Group.

4.133 Firstly, it is argued by the Law Society that exclusive provision of the education and training of persons seeking to be admitted as solicitors at one location ensures consistency in the training standards of the profession in Ireland.

4.134 Secondly, by virtue of its resources (e.g. the Law Society library) and the fact that it is able to assemble upwards of 500 practitioners willing to contribute to the Law School, the Law Society believes it is best placed to achieve the economies of scale that characterise the education and training of solicitors in what is a relatively small jurisdiction. In this regard, the Law Society also points to the opening in October 2000 of its new €6.35 million Education Centre, which doubled the capacity of lecturing provision and introduced state-of-the-art IT and audiovisual equipment in the process.

4.135 Thirdly, as a non-profit organisation, the Law Society argues that it is in a position to provide professional education at a considerably lower cost than any other institution could do for a similar system. The 1998 report highlighted the issue of fees as relevant both directly for those who have to pay the course fees and indirectly in terms of ensuring that persons seeking to be admitted as solicitors are not prevented from doing so for purely financial reasons.

4.136 Fourthly, the Law Society points to the experience in England and Wales, where there are several law schools in which, it suggests, resources are replicated and fees are several times higher than in Ireland. Moreover, the Law Society points out, the level of teaching contact in England and Wales is approximately one-third less than in Ireland, the law schools are the subject of constant reviews and there are many disappointed candidates (estimated to be as many as 2,000 according to the Law Society) who have sat the commercially run courses and have no place to take up in a legal firm for training.

Evaluation

4.137 The Law Society has suggested that exclusive provision of education and training ensures consistency in standards and we agree that it does indeed achieve this. However, it is our view that there are other ways of ensuring the key requirement of consistency of standards - for example, through the operation of a standard examination. Many other professions, such as medical practitioners, also require consistency in training but this does not necessitate training by one institution and at one location.

4.138 It has also been argued that the Law Society is best able to achieve economies of scale. We accept that there may be economies of scale in the provision of professional courses but the extent and significance of such economies is not clear. Much would also depend on the level of demand for places at the Law School. In other words, the scale economies argument has less strength where the level of demand for places (i.e. the market for professional training) is high, which we understand is the case currently. Facilities could potentially be developed elsewhere, but no other educational body is permitted to educate trainee solicitors.

4.139 The Law Society has argued that, as a non-profit organisation, it is in a position to provide education at considerably lower cost than any other institution. In Indecon's view the issue of what fees other organisations would charge is difficult to identify in advance. If other institutions were not able to offer competitive fees, it is difficult to envisage that they would be able to compete with the Law Society. However, other non-profit educational bodies, such as universities as well as private colleges, may wish to provide training for solicitors.

4.140 The Law Society refers to the number of disappointed candidates (approximately 2,000) in England and Wales who have taken up places in commercially run courses but then fail to secure a place in a legal firm for apprenticeship/training. Such a situation, whether it is accurate or not (see next paragraph), would not happen in Ireland, because securing an apprenticeship is part of the entry process to the Law School at Blackhall Place. A person can only enrol at the Law School if he/she has fulfilled the entrance requirements stipulated in the Solicitors Acts, the most important component of which is the Final Examination-First Part or FE-1, and has secured an apprenticeship, which is also provided for in the legislation. In Ireland, one cannot sit the FE-1 and subsequently seek a law firm to obtain the required practical training.

4.141 The Office of Fair Trading Report (OFT 2001) into competition in the solicitors' profession in England and Wales noted that the provision of professional education and training is decentralised to the extent that it is provided by the College of Law and over 20 universities. The (England and Wales) Law Society's Legal Practice Course Board is responsible for overall accreditation and grading of courses and students tend to be self-financing. The OFT did not express any concerns about maintaining the level of consistency across the various providers and, on the matter of training places, the report found that "figures released this year (2000) show that the supply of training contracts now exceeds the number of people passing the Legal Practice Course".[29]

[29] *Ibid.*, paragraph 156.

4.142 While we understand the views expressed by the Law Society, on balance, we do not feel its justifications are sufficient to defend its current monopoly position. Accordingly, we believe that it would be welfare improving if the Law Society's present monopoly status was relaxed to allow competition in the market for the professional education of trainee solicitors.

4.143 Present circumstances dictate that a person seeking to become a solicitor must successfully complete the two professional practices courses (the Professional Practice Courses I and II) in Dublin, at the Law School of the Law Society.[30] We believe that it ought to be possible to undertake all stages of the education and training process outside of Dublin, as well as in the capital, perhaps under a carefully constructed system in which the PPC I and II would be licensed to independent institutions (e.g. universities and private educational institutions).[31] Under such a system, the Law Society would retain control over the standard of the entrance examinations, the content of the curriculum and the content, holding and the marking of the examinations (in such a way that its standard would be applied fairly under the licensing system). The essential difference between such a system and the current situation would be the possibility for other institutions, as well as the Law Society, to provide the teaching of the two professional practices courses.

4.144 Such a system would in our view have three significant advantages over the present system. First, it could allow for the education of a greater number of trainee solicitors and this in turn would increase entry to the profession. Secondly, the possibility of qualifying as a solicitor at a decentralised law school as well as at Blackhall Place would, in our view, reduce the cost of qualification (including living expenses incurred in the process). Third, it would facilitate a more regionally based system of training provision. While Indecon do not doubt the quality of education presently being provided by the Law Society, the removal of the current restriction on others providing training would allow for greater flexibility and would reduce the barriers to entry to the profession. We believe this could contribute to easing the recruitment difficulties experienced by solicitors' practices and would enhance competition on the market. Because of the quality of the Law Society's training, most trainees might continue to choose the Law Society unless other providers offer advantages in terms of number of places, location of training, more competitive fees etc.

[30] The apprenticeship period need not take place in Dublin.

[31] At page 124 of its submission, the Law Society states that "The Law School Courses do not repeat the academic legal courses taught at university, but instead concentrate on the practical aspects of various subjects". Indecon would point out that the practical nature of the professional practice courses ought not to rule out universities from providing these courses. A significant proportion of university teaching these days is allocated to non-traditional and practical education.

Restrictions on the Transfer of Solicitors from Other Countries Entering the Irish profession

Justification

4.145 The current regulations serve to restrict solicitors whose second or subsequent place of qualification is either Northern Ireland or England and Wales from practising as solicitors in Ireland unless they have had three years post qualification experience in the jurisdiction in which qualification was (subsequently) obtained. This transfer restriction has the impact of restricting entry to the solicitors' profession in Ireland and thereby potentially impacts in a negative manner on competition on the market for solicitors' services.

4.146 The main justifications for this restriction are as follows:

- It is in line with EU requirements and is consistent with reciprocity rules;
- It is suggested that permitting solicitors qualified in these other jurisdictions to practise without having received further experience could damage standards in the Irish profession.

Evaluation

4.147 We accept that restricting entry to the Irish profession to solicitors trained in EU countries for three years after qualification is consistent with the 'Establishment Directive' (Directive 1998/5/EC of 16/2/98), which requires lawyers qualified in one EU Member State to be admitted to the profession of another Member State after three years establishment and effective practice of the law of the State to which entry is sought. We are, however, concerned with the impact the three years post-qualification experience requirement has on the potential supply of solicitors in Ireland and thereby on competition. We believe that compliance with the minimum levels specified in EU directives is important but, from a competition perspective, there is no need to confine Irish policy to such restrictions if there are benefits in terms of enhancing competition (i.e. enhancing potential supply and increasing the likelihood of entry).

4.148 We find the argument that permitting solicitors trained in other jurisdictions to practise in Ireland without having received further experience in those jurisdictions could damage standards in the Irish profession somewhat more convincing, although we would also point out that requiring them to practise for three years in the other jurisdictions will not enhance their knowledge of Irish law. (It is noteworthy that an exemption to this restriction is given to solicitors whose *first* place of qualification is Northern Ireland or England and Wales but this is not provided for solicitors whose *second* or *subsequent* place of qualification is either of these places.)

4.149 We therefore accept that there may be a case for restricting solicitors whose second or subsequent place of qualification is in Northern Ireland or England and Wales from becoming sole practitioners in Ireland until they have served three years practice as solicitors in Ireland. We do not believe, however, that this should apply if they seek to work in established practices in Ireland.

4.150 Thus, on competition and public interest grounds, we believe that solicitors whose second or subsequent place of qualification is Northern Ireland or England and Wales should be allowed to practise as solicitors in Ireland without having three years post-qualification experience in the jurisdiction in which their qualification was subsequently obtained provided they do not begin their careers in Ireland as sole practitioners. After a sufficient period of time (3 years), during which they will have acquired experience of Irish law, they should be permitted to open their own practices in Ireland.

4.151 The principal effect of this proposal would be to make it easier for solicitors qualifying in other countries to transfer to the solicitors' profession in Ireland. It would also serve to overcome recruitment difficulties experienced by solicitors' practices in Ireland and would serve to enhance competition.

Restrictions Governing the Transfer of Irish Barristers to the Solicitors' Profession in Ireland

Justification

4.152 The key restriction on Irish barristers wishing to transfer to the solicitors' profession is the requirement to have practised as a barrister in Ireland for a period of at least three years. Owing to differences between the formation of barristers and solicitors, barristers contemplating transferring to the solicitors' profession must also sit the examinations corresponding to the PPC I and II, namely the Final Examination-Second Part (FE-2) and Final Examination-Third Part (FE-3) and take the Second Irish Examination. No apprenticeship is required, but the barrister may be required to spend up to six months in a solicitor's office for practical training purposes.

Evaluation

4.153 Owing to the differences in the training experiences between barristers and solicitors, we accept the need for barristers to take the requisite examinations and to spend a period of training in a solicitor's office. However, we believe the three years experience requirement has little or no justification. We believe it could hinder more rapid transfer of newly qualified barristers to the solicitors' profession, and thereby acts as an inappropriate restriction on entry.

Selected Restrictions on Advertising

Justification

4.154 The Solicitors (Advertising) Regulations, 2002 contain a range of restrictions that specifically include a restriction on solicitors highlighting particular superior specialist knowledge in any area of the law and restrictions on making unsolicited approaches to members of the general public on legal matters. The various restrictions achieve, in the Law Society's view, an acceptable balance between commercial freedom, and therefore competition, and the need to restrain more aggressive, persuasive advertising in a field where consumers are not always able to judge quality and hence could easily be misled, sometimes with costly consequences. According to the Law Society, solicitors have considerable freedom to advertise and it is difficult to see how competition could be promoted any further without some risk to standards.

Evaluation

4.155 Indecon accepts that the restrictions on advertising are limited and that many of the general restrictions on advertising may be appropriate in order to protect the public, including the restriction that advertisements should not bring the solicitors' profession into disrepute or be in bad taste. We also note that advertising is common in the profession, based on our own survey information and on our analysis of solicitor advertising in the Golden Pages. However, we would support more active advertising where it would enhance competition or improve consumer information. In particular, we do not believe that the restrictions preventing solicitors from highlighting superior specialist knowledge or making unsolicited approaches to clients or members of the general public are justified (with the exception of personal injury services, where we believe the public policy objective of minimising the risk of fraudulent claims in the insurance industry is appropriate).

4.156 Our view stems from the survey of the economic evidence presented in Section 2, which showed that neither comparative advertising nor truthful unsolicited approaches to clients or members of the public are detrimental to competition or professional and ethical standards. With the exception of personal injury services, such advertising restrictions are likely to restrict competition on the market.

4.157 The 2002 Regulations do not take effect until 2003 and so we asked individual practitioners and insurance companies their views on the less restrictive 1996 Regulations. The survey findings show that a significant majority (72.1%) of the solicitors who responded to our survey supported the 1996 restrictions on advertising that currently operate, although interestingly, 24.3% do not support the restrictions. While most (53.8%) insurance companies also support the current restrictions, a significant percentage (38.5%) do not support these restrictions on advertising.

Restrictions on Demarcation serving to give Solicitors a Monopoly in Conveyancing and Trust/Probate Services

Justification

4.158 There are two main demarcation restrictions that effectively provide a monopoly for the solicitors' profession in conveyancing and trust/probate services. These are the restrictions on specialised licensed conveyancers competing with solicitors and the restriction on banks/building societies and other institutions providing these services. The Law Society has advanced arguments to justify these restrictions. They are based on the need to protect the public interest through providing the services at a high and consistent quality.

4.159 The first argument is that the solicitors' monopoly is not actually effective owing to the large number of solicitor firms in competition with each other. At the national level, there are over 2,000 private firms from which the consumer may choose. At the more localised level, it is submitted, consumers also have the choice of an appreciable number of providers.

4.160 Secondly, the Law Society submits that conveyancing, trust and probate services are particularly difficult areas of the law and involve many caveats, such as, for example, the recent introduction of divorce in Ireland, which they suggest can complicate these transactions. The Law Society also argues that the provision of conveyancing services is more complex in Ireland compared with England and Wales due to the fact that not all land in Ireland is registered and title is sometimes difficult to establish. In the Law Society's view, this is not made any easier by the fact that the Land Registry does not provide electronic searches for all of the counties in Ireland. The Law Society has suggested that a radical reform of property law in Ireland would first be required before expanding the list of those permitted to perform conveyancing transactions.

4.161 It is also argued that if conveyancing services were opened up to banks and building societies, there could arise the competition problems of conditional selling or 'tying' by these institutions in that provision of a mortgage might be conditional on engaging the institutions' own legal teams.

4.162 Further, it is argued that such financial institutions might attempt to cross-subsidise the provision of legal services in relation to conveyancing, which in turn would give rise to competition concerns.

4.163 The Law Society also submits that such legal services (which most, if not all, people will require at some stage in their lives) should not be provided unless those providing them are adequately regulated in terms of having the requisite professional indemnity insurance.

4.164 Finally, it is argued, in order to provide these services, the financial institutions would have to employ solicitors of their own. However, it is suggested that this would give rise to a conflict of interests in the sense that the solicitor so employed could not serve two masters at the same time, namely the financial institution and its clients.[32] It is suggested that the core independence requirement of the profession would be severely compromised.

[32] Under section 59 of the Solicitors Act, 1954, solicitors are prohibited from acting for the clients of their (non-solicitor) employers.

Evaluation

4.165 We understand and accept some of the arguments referred to above, but nevertheless believe that competition in the areas of conveyancing, trust and probate should be improved. While we accept the argument that there is, to differing degrees, competition among solicitors at a local level, we believe that, other things being equal, the restriction on the provision of conveyancing and trust/probate services to solicitors results in higher prices compared to the situation that would occur if these services were provided more competitively. Nevertheless, we accept the need to address the issues inherent in the Law Society's arguments.

4.166 We accept that conveyancing and trust/probate services are sometimes complex and that it is essential that the providers of such services have sufficient expertise. However, we are not convinced that these services are so special to the extent that they ought to be confined to solicitors. For instance, we doubt whether standards would fall if the market was open to specialised licensed conveyancers, provided they were trained to a high and consistent standard. In this respect, we would point to the training required by solicitors in this area. That is, the training required of such service providers should be as high as that required for solicitors in the area of conveyancing. Such a system was introduced in England and Wales in 1987, following the passing of the Administration of Justice Act, 1985. We note that the market share that such licensed conveyancers may obtain may be limited due to the existing reputation for quality provided by solicitors and the likely competitive responses by solicitors to new entrants. In this regard, it is interesting to note that some estimates suggest that, in England and Wales, solicitors retain a market share of the order of 95% for conveyancing services. We would also point to evidence from New South Wales in Australia, where it was reported that allowing licensed conveyancers to compete with solicitors, while relaxing restrictions on fee advertising,[33] resulted in a 17% decrease (1994-96) in the average fees charged by small firms for conveyancing, yielding an estimated annual savings to consumers of the equivalent of US$86 million (Barker, 1996).[34] The resultant provision of extra choice in the market would, in our view, enhance consumer welfare and competition.

4.167 The results presented in Table 4.19 below show that a majority of those members of the general public surveyed by Indecon were 'in favour' of conveyancing services being provided by specialists other than independent solicitors.

[33] Fee advertising is permitted by solicitors in Ireland.
[34] Cited in Van Siclen (2002, p. 55).

Table 4.19: Consumers' Views on Conveyancing Services being Provided by Specialists other than Independent Solicitors

Very Much in Favour	In Favour of	Against	Very Much Against	Don't Know
20%	55%	14%	2%	9%

Source: Indecon Commissioned Survey of Representative National Sample of 1,008 Adults.

4.168 The issue in relation to banks and building societies is, in our view, more complex. Given the range of products and services provided by these institutions, the argument that allowing them to compete with solicitors in the area of conveyancing could result in conditional selling or tying, or even in cross-subsidisation, merits careful consideration. Such a possibility would probably require detailed regulation and careful monitoring to ensure that such practices would not occur. The possibility of prohibiting banks/building societies from supplying conveyancing services to consumers to whom they are also providing mortgages might be considered as a possible solution.

Restriction on Lawyers based in other EU Member States Competing with Irish Solicitors in providing conveyancing, Trust and Probate services in Ireland

Justification

4.169 Solicitors based in other Member States of the EU are able to provide legal *advice* to personal and business clients in Ireland but are not permitted to compete with Irish solicitors in the preparation of legal documents for conveyancing, trust and probate services in Ireland. The arguments advanced to justify this restriction relate to the need to protect consumers, particularly given the importance of these legal services and their complexity in the specific case of Ireland (for example, as referred to previously, the Land Registry does not provide electronic searches for all counties in Ireland).

Evaluation

4.170 We accept the fact that those providing conveyancing, trust and probate services need to take account of the complexity of the Irish market and also of the need to ensure that consumers (particularly non-business customers who may be only occasional users of these services) are protected and that those who are providing such services to the general public have the required expertise and knowledge. In many areas, however, cross-border provision of extremely complex services are provided and we do not accept the argument that the complexity of, for example, conveyancing in Ireland should necessarily mean that high quality services could not be supplied in the Irish market from lawyers in other EU Member States. The unprecedented growth in the Irish economy in recent years has seen a thriving property market develop and the scale of the conveyancing business has grown accordingly. Solicitors based in Northern Ireland and England and Wales, as well as lawyers entitled to practise in the rest of the EU, should not be prevented from directly selling their services in the Irish market if they have the required expertise and if they believe they could compete with their Irish-based counterparts in these areas. However, we accept that, for some members of the general public, there may be difficulty in ascertaining whether overseas-based providers have the requisite knowledge of the Irish legal environment. Where such practices do not employ Irish-trained solicitors, we would be inclined to conclude that the freedom to supply services in these areas should be initially restricted to services for business/corporate sectors (e.g. conveyancing of commercial property). Where overseas-based law firms employ Irish-trained solicitors, no restrictions should be placed on the sale of their services in Ireland. We also believe that any such overseas-based providers operating in Ireland should be required to contribute to the Compensation Fund to provide redress for the client in the event of professional negligence. It might be argued that allowing overseas-based lawyers to provide conveyancing services in Ireland would complicate what is already perceived to be a complex process, in that mortgage lenders in Ireland send the cheque directly to the acting solicitor. This might not be possible where the solicitor is based outside the country. Our view is that financial developments in the euro-zone will reduce this problem over the next few years and in the longer term completion of electronic clearing will enable conveyancing services to be provided on a cross-border basis.

Restrictions on Solicitors Forming Limited Liability Businesses

Justification

4.171 The traditional argument advanced for this restriction among the solicitors' profession is that it signals that practitioners are trustworthy and cannot hide behind the veil of limited liability.

Evaluation

4.172 We do not believe that the current restriction on forming limited liability businesses is an effective way of protecting consumers and we believe it hinders normal competitive behaviour. We believe that, given the requirement for practising solicitors to have professional indemnity insurance and to contribute to the Compensation Fund (which currently has reserves of €27.5 million and additional insurance of €20 million), the prohibition on limited liability business structures is no longer necessary.

4.173 Under limited liability partnership (LLP), which is now possible in the UK,[35] the limited liability solicitor business would be separate from the partners and it, not the individual partners, would be liable for the debts and obligations of the partnership.

4.174 Table 4.20 shows the extent to which limited liability of lawyers is available in a variety of other European countries, including the UK, where LLP was introduced in 2000. With the exception of Spain and Italy in addition to Ireland, all the jurisdictions listed permit the formation of limited liability businesses, with most allowing the formation of limited liability companies.

[35] Under the Limited Liability Partnership Act, 2000.

Table 4.20: The Profile of Limited Liability for Lawyers in European Countries

Country	Limited liability	Mechanism for limited liability
Austria	Yes	Limited company
Belgium	Yes	Acting as advisor via a limited company
Denmark	Yes	Limited company
Finland	Yes	Limited company
France	Yes	Limited company
Germany	Yes	Limited company
Greece	Yes	Specific legislation
Ireland	No	
Italy	No	
Netherlands	Yes	Limited company
Norway	Yes	Acting as advisor via a limited company
Portugal	Yes	Bilateral contracts
Spain	No	
Sweden	Yes	Contract
Switzerland	Yes	Acting as advisor via a limited company
United kingdom	Yes	Limited liability partnership

Source: Indecon adaptation of Law Society information.

4.175 We believe that the absence of limited liability business structures puts Irish law firms at a competitive disadvantage *vis-à-vis* their mainland European, US and UK counterparts, some of which are present in Ireland.

4.176 Solicitors' own views on the issue of limited liability businesses are presented in Table 4.21. The figures reveal that the majority (58.3%) of practitioners do not support the restriction against solicitors forming limited liability businesses.

Table 4.21: Indecon Survey of Solicitors - Views on Organisational Requirements for the Solicitors' Profession in Ireland

	% of Responses		
Organisational Restriction	**Support Requirements**	**Do Not Support Requirements**	**Don't Know**
Restriction of formation of limited companies for Solicitors	32.2	58.3	9.5

Source: Indecon Survey of Solicitors.

4.177 The introduction of limited liability businesses would allow greater specialisation of solicitor practice areas and would enhance competition. In the specific case of limited companies, this would enhance new forms of market entry and allow existing practices to develop and expand their range of services. We believe, however, that the precise organisational form should be left to the judgement of individual professionals and feel that many solicitors may continue to operate as sole traders or in unlimited partnerships.

Restrictions on Solicitors forming Multidisciplinary Practices with Other Professionals

Justification

4.178 The Law Society has submitted a number of arguments for this particular restriction based on:

- The independence of advice of solicitors;
- Avoidance of conflicts of interests (i.e. the duty of loyalty towards the client); and
- The duty of confidentiality.

4.179 The Law Society is particularly concerned about solicitors entering into partnerships with other professionals (e.g. accountants) if this was to impact on the above values.

4.180 The Law Society also points to the *NOVA/Wouters* case,[36] in which the European Court of Justice decided that rules prohibiting MDPs between lawyers and accountants in the Netherlands are not incompatible with EC competition legislation. The Netherlands Bar refused to allow two lawyers enrolled at the Amsterdam and Rotterdam Bars to enter into partnership with two accountancy firms, namely Arthur Anderson and Price Waterhouse, established in the Netherlands. The Netherlands Bar based its rejection on a regulation of the Bar (the '1993 Regulation') that provides that "members of the Bar shall not be authorised to enter into or maintain any professional partnership unless the primary purpose of each partner's respective professions is the practice of the law".

4.181 The significance of this judgement in the context of the present study is that rules similar to those contained in sections 59 and 64 of the Solicitors Act, 1954, which prohibit the formation of MDPs in Ireland, may be justified in certain circumstances.

Evaluation

4.182 For reasons not dissimilar to those advanced for relaxing the restrictions on the organisational form of solicitor businesses, we believe there are strong grounds for permitting solicitors to form MDPs in Ireland. In this regard, we would point to the realisation of economies of scope and reduction in transactions costs for clients, particularly for larger users who might want the benefits of accessing a range of legal and financial services in a one-stop shop environment. We do not accept the argument that solicitors would not be able to function ethically with other professionals and believe that MDPs could be required to accept appropriate regulations and guidelines as rigorous as those for solicitors. Indecon would, however, be very concerned if MDPs did impact on independence, avoidance of conflicts of interests or client confidentiality but we do not believe that MDPs necessarily imply any dilution of these requirements. The issue of independence and avoidance of conflicts of interests requires that the solicitor must be in a position to act for the client and the client alone and must be free of the interests of any third party. We would expect that, were MDPs permitted, rigorous regulation of individual solicitors practising in MDPs and of the overall practice would be introduced with appropriate penalties for non-compliance to ensure that there was no impact on independence or avoidance of conflicts of interests. We do not see MDPs as being necessarily in conflict with the core values of the solicitors' profession. We also have confidence that solicitors in MDPs would continue to act to required ethical standards to the same extent as exists at present and that existing regulations would apply in full to such MDPs.

[36] Case C-309/99.

4.183 On the issue of the *NOVA* case, our understanding of the decision is that while the prohibition on the formation of MDPs may be justified in certain circumstances, this does not rule out the option for Member States to relax existing rules so as to facilitate the introduction of these forms of businesses.

4.184 It is relevant to consider the views of individual practitioners in the solicitors' profession on the issue of MDPs. The figures presented in Table 4.22 show that more practitioners are not in favour of the current ban on MDPs than those who support the prohibition (45.1% opposed versus 44.3% in support of the *status quo*). An interesting comparative consumer perspective is provided from the views of insurance companies in the same table. The evidence shows that the majority (61.5%) of those who responded to our survey do not support the restrictions that presently exist on solicitors forming MDPs with non-solicitors.

Table 4.22: Views on Organisational Requirements for the Solicitors' Profession in Ireland

	% of Responses		
Organisational Restriction	**Support Requirements**	**Do Not Support Requirements**	**Don't Know**
Views of Solicitors on ban on multidisciplinary practices	44.3	45.1	10.7
Views of Insurance Companies on ban on multidisciplinary practices	15.4	61.5	23.1

Source: Indecon Survey of Solicitors and Indecon Survey of Insurance Companies

Summary of Main Conclusions

4.185 We present, in Table 4.23, a summary of our main conclusions in relation to the restrictions on competition in the solicitors' profession in Ireland. Our analysis suggests that there are significant restrictions and we believe these have an appreciable effect on competition. We do not believe that any potential benefits of these restrictions outweigh the adverse implications for competition in the market.

Table 4.23: Summary of Main Conclusions for the Solicitors' Profession

Entry Restrictions

1. THE LAW SOCIETY'S MONOPOLY ON THE PROVISION OF THE PROFESSIONAL PRACTICE COURSES FOR TRAINEE SOLICITORS IS LIKELY TO RESTRICT THE NUMBER OF ENTRANTS TO THE PROFESSION.
2. THE REQUIREMENT THAT SOLICITORS WHOSE SECOND OR SUBSEQUENT PLACE OF QUALIFICATION IS NORTHERN IRELAND OR ENGLAND AND WALES HAVE 3 YEARS POST-QUALIFICATION EXPERIENCE IN THE JURISDICTION IN WHICH THEIR QUALIFICATION WAS SUBSEQUENTLY OBTAINED BEFORE ENTERING THE ROLL OF SOLICITORS IN IRELAND MAY ACT AS AN ENTRY BARRIER TO THE IRISH PROFESSION.
3. THE REQUIREMENT THAT BARRISTERS HAVE THREE YEARS POST-QUALIFICATION EXPERIENCE IN ORDER TO TRANSFER TO PRACTISE AS SOLICITORS IS LIKELY TO ACT AS A BARRIER TO ENTRY TO THE SOLICITOR'S PROFESSION.

Restrictions on Conduct

4. WITH THE EXCEPTION OF PERSONAL INJURY SERVICES, THE RESTRICTIONS ON COMPARATIVE ADVERTISING AND THE PROHIBITION ON SOLICITORS MAKING UNSOLICITED APPROACHES TO CLIENTS OR MEMBERS OF THE PUBLIC IN ANY AREA OF THE LAW IS LIKELY TO RESTRICT NORMAL COMPETITIVE BEHAVIOUR ON THE MARKET FOR SOLICITORS' SERVICES.

Restrictions on Demarcation

5. THE RESTRICTIONS ON SOLICITORS BASED IN NORTHERN IRELAND AND ENGLAND & WALES, TOGETHER WITH LAWYERS FROM OTHER EU MEMBER STATES, PROVIDING CONVEYANCING, TRUST AND PROBATE SERVICES IN IRELAND, IN THE SAME WAY THEY CAN PROVIDE OTHER LEGAL SERVICES IN IRELAND, ARE LIKELY TO RESTRICT COMPETITION ON THE MARKET FOR THESE PARTICULAR SERVICES IN IRELAND.
6. THE ABSENCE OF A SYSTEM OF LICENSED CONVEYANCERS REDUCES COMPETITION ON THIS SEGMENT OF THE MARKET.

Restrictions on Organisational Form

7. THE PROHIBITION ON SOLICITORS FORMING LIMITED LIABILITY PARTNERSHIPS AND LIMITED LIABILITY COMPANIES HINDERS THE PROFESSION IN COMPETING INTERNATIONALLY AND MAY REDUCE ECONOMIC EFFICIENCY.
8. THE PROHIBITION ON SOLICITORS PRACTISING WITH MEMBERS OF OTHER PROFESSIONS IS LIKELY TO REDUCE COMPETITION AND DYNAMIC EFFICIENCY (INNOVATION IN LEGAL AND FINANCIAL SERVICES).

5 Competition and the Barristers' Profession in Ireland

Introduction

5.1 The structure of this section is as follows. The next part provides an overview of market definition and the services provided by barristers, and also highlights the core values/principles of the profession. Many of the arguments advanced to justify regulation of the profession are underpinned by the nature of the services provided by barristers.

5.2 The overview of market definition is followed by an empirical analysis of the size and structure of the market in which barristers operate and of the patterns of demand in the market. We then examine the customers of barristers and describe the nature of competition, if any, on the market. The empirical analysis is informed using information obtained from the Honourable Society of King's Inns or 'the Society', the General Council of the Bar of Ireland or 'the Bar Council' and new survey data obtained and compiled by Indecon. The Society regulates the education of barristers, leading to their call to the Bar by the Chief Justice of Ireland. The Society also has a disciplinary role retained by the Benchers of the Society to disbar. All other regulatory functions (including training requirements after call to the Bar) are the responsibility of the Bar Council. The Bar Council is also responsible for administration of the Law Library, the central location of practice of the barristers' profession in Ireland.

5.3 After summarising the results of the empirical analysis of the market, we proceed to examine in detail how the profession is regulated. In addition to taking a closer look at the Society and the Bar Council, the restrictions on entry, conduct, demarcation and organisational form are presented and their basis highlighted. In contrast to the solicitors' profession, where regulation is by statute and delegated legislation, regulation of the barristers' profession has little or no statutory basis. Rather regulation derives from the General Rules and the Education Rules of the Society, the Code of Conduct of the Bar Council and the Membership Rules of the Law Library. Our assessment of the restrictions most likely to affect competition on the market is then undertaken by reference to the justifications made for them by the Society and the Bar Council, as detailed in their submissions and developed in our consultations, and our judgement as to whether the restrictions are proportional to achieving the benefits claimed for them. Finally, our conclusions are presented.

Market Definition and Services Provided by Barristers

Market Definition

5.4 In order to examine the degree of competition occurring among members of the barristers' profession in Ireland, it is useful to consider the relevant market in which barristers operate. In competition/antitrust analysis, relevant market definition includes the definition of the relevant product market and of the relevant geographic market. The former refers to those products that compete with each other to a sufficient extent to exercise a competitive constraint and the latter to the geographic area in which competition between the relevant products takes place. Thus, the relevant product or service market includes all those products or services viewed as sufficiently interchangeable by consumers (demand substitutability) or suppliers (supply substitutability).

5.5 In considering the issue of delineating the boundary of the relevant market, in general, it is useful to review the objective characteristics of the product or service, the nature of demand and supply and the attitudes of different types of user. Such evidence is used when considering specific individual competition cases to inform the so-called 'hypothetical monopolist test' or SSNIP (small but significant non-transitory increase in price) test, which seeks to frame the relevant antitrust market in order to identify the smallest relevant group of producers or providers capable of exercising a competitive constraint on the market. While this test may be less relevant in a sectoral policy study than in a specific antitrust case (such as a merger investigation) it is useful to consider aspects of relevant market definition in terms of the services provided by barristers and also in terms of the geographic area in which these services are provided.

5.6 In the common law system,[1] a barrister or barrister-at-law is traditionally defined as a lawyer qualified to plead in the higher courts. This is the norm in Ireland, where few solicitors take cases in the superior courts, namely the High Court and Supreme Court, even though they are entitled to do so in principle (under the Courts Act, 1971).

5.7 The distinction in the two branches of the legal profession is the result largely of tradition and has little or no statutory basis. The Bar Council is supportive of the distinction and points to its occurrence in many countries other than the common law group, where there are 'sitting-down' and 'standing-up' lawyers.

[1] The common law countries are England and Wales, Ireland, the US (except Louisiana), Canada (except Quebec), India, parts of Africa, Australia and New Zealand.

5.8 The principal economic argument advanced in support of an independent referral bar derives from the notion of specialisation of labour. The solicitor is often a generalist and is the first port of call for the client seeking legal representation in court. The solicitor defines the problem on behalf of the client and recommends the barrister, who in turn provides a specialist opinion for the solicitor. (This does not mean that solicitors are not specialists. Within the larger solicitor firms, specialists are commonplace.)

5.9 The solicitor administers the case, which includes the initial preparation of the paperwork (e.g. doctor's report, engineer's report), while the barrister, who does not have the office support that the solicitor has, concentrates on pleading. The barrister is also responsible for the drafting of the legal documents for the case. With very limited exceptions, the client does not have direct access to the barrister.

5.10 The key skill of the barrister is advocacy. As Lord Lyndhurst, a former Lord Chancellor, once remarked: 'What is wanted for success at the Bar is a clear head, a good memory, strong common sense and an aptitude for analysis and arrangement. Before these combined qualities, the difficulties of law vanish like the morning mist before the sun'.[2] This is not to underestimate the important specialist legal expertise of barristers.

5.11 When pleading in any case, the advocate is bound by strict rules of conduct not to state his/her own view. Rather the function of the barrister is to present one side of the case with all the skills he/she possesses, so that the judge, or the judge and the jury, can compare his/her presentation with that of the counsel on the other side and then decide after full investigation where the truth lies.

5.12 The central place of practice of barristers in Ireland is the Law Library, which is housed at the Four Courts in Dublin. All practising barristers are required to be sole practitioners and accept work on the basis of the 'taxi-rank rule', which imposes an obligation on each barrister to act for a client where he or she is requested to do so. The rule often involves barristers acting in cases for unpopular clients or causes.

5.13 The profession also sometimes operates according to the 'no foal no fee principle', which, it is claimed, provides all members of society with access to the superior courts, particularly, it is claimed by the Bar Council, in the context of there being no adequate civil legal aid scheme in Ireland.

[2] Birkett (1961, p. 42).

5.14 According to Bar Council figures, as of April 2002, there were 1,366 practising barristers in Ireland, of which 1,128 or 83% were Junior Counsel and the remainder (17% or 238) were Senior Counsel. Junior Counsel include 'devils' or 'pupils' (members of the Bar under training). Members of both ranks of the profession can provide the same services. However, the Government-regulated Criminal Legal Aid scheme only applies to members of the Bar with more than six months practice, which is a requirement of the Code of Conduct of the Bar Council. The Government is responsible for granting patents of precedence to barristers whereby they can then describe themselves as Senior Counsel (SC). It is a matter of choice for a barrister to decide to apply to the Government for a patent of precedence; such applications are typically made after ten or more years of practice as a barrister.

5.15 Apart from the distinction between Senior and Junior Counsel, there are no distinctions within the Bar, owing to the fact that each member is a self-employed sole practitioner. Each member is entitled to pursue his or her profession freely within any area of the law, throughout the country and abroad (subject to local regulations while practising abroad).

5.16 While the country, by statute, is divided into circuits for the purpose of the administration of justice, there are no restrictions on barristers appearing in court or advising solicitors/clients in any of the circuits.

5.17 Consideration of these facts leads us to conclude that the scope of the relevant product market for barristers' services is likely to be the State and that barristers typically supply a range of legal services almost exclusively in the Circuit, High and Supreme Courts, although this is not to deny that some barristers specialise in certain areas (criminal law, taxation, commercial law, competition law) and base their practice areas in one circuit.[3] Reference will be made through the rest of the section to the various services provided by barristers and the functions they provide in the legal system more generally.

Fundamental Requirements of the Barrister

5.18 Finally, barristers are shaped by the same core values as apply to members of the solicitors' profession, namely independence (a barrister's advice to the client/solicitor must be free from the interests of any third parties so that there is no possibility of a conflict of interests), high ethical standards and client confidentiality (the common law principle of legal professional privilege applies to barristers as well as solicitors).

[3] While the High Court sits in circuit as well as in Dublin, the Supreme Court sits only in Dublin.

Market Size, Structure and Patterns of Demand

5.19 Our economic analysis of competition in the barristers' profession given below consists of an empirical examination of various aspects of market size, structure and the pattern of demand.

5.20 The following information sources underpin the quantitative results presented:

- Data obtained from the Bar Council;
- New information from the Indecon Survey of Barristers (of which there were 283 responses);
- New information from the Indecon Survey of Insurance Companies (of which there were 15 responses); and
- New Information from the Indecon Survey of the Public (sample size of 1,008 adults aged 15+).

5.21 The results furnished by the empirical analysis are relevant in quantifying the economic characteristics of the profession and are used to help inform our assessment of the various restrictions and requirements identified later in the section.

Number and Growth of Barristers

5.22 The number and growth of practitioners is particularly important to consider in the context of the barristers' profession, owing to the fact that, as we shall see later, barristers-at-law are restricted to operating as sole practitioners. Thus, the number of barristers and the rate of growth in the number over time inform us not only about trends but also about the market structure of the profession and its evolution over time.

5.23 Table 5.1 shows how the numbers of Junior and Senior Counsel has developed over the period 1990-2001. In 2001, there were 1,311 members of the Bar, 1,096 or 84% of which were Junior Counsel and 215 or 16% of which were Senior Counsel. During 1990-2001, the number of barristers grew at a cumulative rate of 75% or 5.23% on an average annual basis. During this time, the population of seniors grew by more than double (105%) and at an average annual rate of 6.77%, while the population of juniors grew at an average annual rate of 4.96% or 70% cumulatively. Over the whole period, the proportion of SCs to all barristers has been in the range 13-16%. According to figures available from the Lord Chancellor's Department, there are currently 10,334 barristers in England and Wales, of which 1,191 or 11.5% are Queen's Counsel (QC). For the past 10 years, the number of QCs has remained at roughly 10% of the total number of barristers per annum, although there is no limit on the number of QCs that can be appointed in any one year, as is also the case with SCs in Ireland.

Table 5.1: Number and Composition of Barristers in Ireland 1990-2001

Year	Junior Counsel	% *change*	Senior Counsel	% *change*	Total Barristers	% *change*
1990	644	-	105	-	749	-
1991	661	*2.64*	110	*4.76*	771	*2.94*
1992	693	*4.84*	116	*5.45*	809	*4.93*
1993	745	*7.50*	121	*4.31*	866	*7.05*
1994	776	*4.16*	125	*3.31*	901	*4.04*
1995	825	*6.31*	130	*4.00*	955	*5.99*
1996	861	*4.36*	137	*5.38*	998	*4.50*
1997	903	*4.88*	148	*8.03*	1,051	*5.31*
1998	946	*4.76*	166	*12.16*	1,112	*5.80*
1999	999	*5.60*	178	*7.23*	1,177	*5.85*
2000	1,041	*4.20*	192	*7.87*	1,233	*4.76*
2001	1,096	*5.28*	215	*11.98*	1,311	*6.33*

Source: Indecon Calculations using Bar Council data.

Changes in Fee Income of Barristers

5.24 The figures presented in Table 5.2 show that, despite the increase in the number of barristers, the level of demand was such that the vast majority (93.4%) of practitioners who responded to the Indecon Survey of Barristers stated an increase in average annual fee income during 1999-2001. Of these, 9.8% stated a doubling or more of fee income on an average annual basis, 53.5% stated an increase of between 10 and 49% and 36.7% stated an increase of less than 10%. In terms of the specific categories provided for in our survey, the modal or most frequent rate of increase in average annual fee income occurred in the range 10-24%. On the other hand, only 6.6% of the respondents to the Indecon Survey of Barristers stated a fall in average annual fee income during the period.[4]

Table 5.2: Indecon Survey of Barristers - Approximate Average Annual Change in Total Fee Income - 1999-2001 – Respondents Indicating Increase in Fee Income

% Increase	% of Responses
Barristers stating increase in fee income	93.4
Of which:	
Over 200%	4.0
150-199%	2.7
100-149%	3.1
50-99%	9.7
25-49%	14.6
10-24%	29.2
5-9%	17.7
0-4%	19.0
Barristers stating increase in fee income	6.6

Source: Indecon Survey of Barristers.

[4] Details of the results relating to those respondents who reported a decrease in fee income are provided in Annex 3.

Structure of the Barristers' Profession

5.25 All practising barristers in Ireland are required to operate as sole practitioners so that that the structure of the profession constitutes a fragmented sector comprising approximately 1,300 individual barristers. In practice, Junior Counsel work with Senior Counsel on particular cases but the non-concentrated nature of the profession is self-evident.

Customers of Barristers and their Characteristics

5.26 In considering the final customers of the barristers' profession it is useful to examine what percentage of the market is accounted for by corporate/business clients compared with members of the general public. This is important from a competition perspective as the alleged asymmetric information between practitioner and client, particularly where the client is an infrequent user of the professional's services, is commonly the reason promulgated to support certain regulation in professional services.

5.27 Table 5.3 provides summary statistics relating to the proportion of barristers' fee income arising from business, corporate and institutional clients (including work undertaken on behalf of the Government) as well as the percentage arising from members of the general public. As revealed by the minimum and maximum figures, some barristers focus exclusively on corporate or government work, while others focus on clients who are members of the general public.

Table 5.3: Indecon Survey Of Barristers - Approximate % of Fee Income from Business/Corporate and Government/Institutional and from General Public

Statistics	% of fee income - business/corporate and government/ institutional clients	% of fee income – members of the general public
Mean	48.1	51.9
Median	50.0	50.0
Standard deviation	32.3	32.3
Std dev as % of mean	67.3	61.8
Min	0	0.0
Max	100	100.0

Source: Indecon Survey of Barristers.

Frequency of Usage and Quality of Information among Business and Personal Users

5.28 The question of who are the consumers of barristers' services is important because of the belief that different groups are more or less frequent users of such services. Perhaps for the first time new empirical evidence on this issue is provided by research undertaken by Indecon and presented below. Table 5.4 provides information on how often members of the general public and insurance companies have used the services of barristers (through solicitors) in the past five years. The results show very little engagement of barristers by the public, with 90% stating that they have not used the services of barristers in the past five years. Just 2% of respondents to our survey stated that they have engaged the services of barristers between 1 and 5 times per year in the past five years. In sharp contrast, insurance companies are relatively intensive users of barristers, with almost 54% of these corporate users reporting that they have engaged the services of external barristers more than 50 times per year during the past five years.

Table 5.4: Frequency of use of the Services of Barristers in the Past Five Years?

	Not in past 5 years	Less than 5 times in last 5 years	1 – 5 times per year	6 – 10 times per year	11 – 20 times per year	More than 20 times per year	Don't know
Usage by General Public	90%	8%	2%	-	-	-	-
Usage by Insurance Companies	15.4%	23.1%	7.7%	-	7.7%	46.2%	-

Source: Indecon Commissioned Survey of Representative National Sample of 1,008 Adults and Indecon Survey of Insurance Companies.

5.29 The difference in the frequency of usage of barristers' services between the general public and corporate users is also reflected in different views regarding their ability to assess the quality of barristers' services. According to our survey results presented in Table 5.5, almost half (48%) of members of the general public believe they would be able to assess, at least to some extent, the quality of services provided by barristers. On the other hand, 25% of the public respondents stated that they would 'not be able to assess quality' and only 7% indicated they would be 'very well able to access quality'.

Table 5.5: Views on their Ability to Assess the Quality of Services Provided by Barristers in Ireland

	Not Able to Assess Quality	Able to Assess Quality to Some Extent	Well Able to Assess Quality	Very Well Able to Assess Quality	Don't Know
Views of General Public	25%	25%	16%	7%	27%
Views of Insurance Companies	9.1%	27.3%	36.4%	27.3%	-

Source: Indecon Commissioned Survey of Representative National Sample of 1,008 Adults and Indecon Survey of Insurance Companies.

5.30 Furthermore, the vast majority of insurance companies (91%) believe that they and other business users are able to assess the quality of external barristers' services (Table 5.5). In particular, 27.3% of respondents to the Indecon Survey stated that they were 'very well able to assess quality', 36.4% were 'able to assess quality' and 27.3% were 'able to assess quality to some extent'.

Nature of Competition, if any, on the Market

Extent of Price Competition

5.31 The absence of price competition in the barristers' profession is very evident. Significant price competition would be surprising in the profession given the restrictions on entry and on barristers' ability to advertise their services and other restrictions that are discussed later in this section. That significant price competition is absent in the profession is also evident from the results of our survey of practitioners presented in Table 5.6.

5.32 According to the results, a significant majority (almost 80%) of barristers believe that 'limited', 'very little' or 'virtually no' price competition exists among members of the profession in Ireland. While 16.2% believe there is 'significant' price competition and just 4.3% of practitioners believe that price competition is 'extensive', it is very notable that the majority of barristers believe there is limited or no price competition.

5.33 The absence of 'extensive' price competition among barristers is also evident from our survey of solicitors (Table 5.6). According to the survey results most solicitors (60.4%) believe there is 'virtually no' price competition among barristers and 24% believe that there is 'very limited' price competition at the Bar. Again, only tiny percentages believe there is 'extensive' price competition.

Table 5.6: Practitioner and Consumer Views on Extent of Price Competition Among Barristers in Ireland

	Virtually No Price Competition	Very Little Price Competition	Limited Price Competition	Significant Price Competition	Extensive Price Competition	Don't know
Views of Barristers	14.4%	17.3%	47.8%	16.2%	4.3%	-
Views of Solicitors	60.4%	24.0%	11.8%	2.4%	1.5%	-
Views of Insurance Companies	66.7%	33.3%	-	-	-	-
Views of Public	20%	14%	11%	10%	-	46%

Source: Indecon Survey of Barristers, Indecon Survey of Solicitors, Indecon Survey of Insurance Companies and Indecon Commissioned Survey of Representative National Sample of 1,008 Adults.

5.34 The absence of price competition among members of the barristers' profession is also very evident from our survey of insurance companies (Table 5.6). From our survey it can be seen that all insurance companies believe there is 'very little' or 'virtually no' price competition among the barristers' profession in Ireland. Public opinion on the extent of price competition among barristers is somewhat less decided compared with that just revealed among solicitors and insurance companies (Table 5.6). This reflects the fact that most members of the public only use the services of barristers on an infrequent basis. Nevertheless, while the figures presented show a sizeable 'don't know' response to our survey, some 34% also stated that they believe there is 'very little' or 'virtually no' price competition in the profession.

5.35 The exceptionally low level of price competition in the market for barristers' services in Ireland is related to the restrictions on direct access to the profession by consumers, the ban on advertising and other restrictions on competition. It is also influenced by the way in which some of the work of barristers is funded in Ireland. For work funded by various organs of the State, non market mechanisms have been established to determine the fees paid to barristers, notably the following:

- Civil Legal Aid fees;
- Criminal Legal Aid fees; and
- Criminal prosecution fees.

5.36 Other types of work provided by barristers for the State (e.g. judicial review work) have agreed scales and some methods have been established to deal with disputes. Where there is a particularly complicated case, for example, higher fees may be negotiated.

5.37 In personal injury work, fees for barristers acting for plaintiffs are limited and controlled by the system of taxation of fees (the Taxing Master at the level of the High Court) and it is claimed by practitioners that this system almost invariably results in some of the work carried out by barristers not being paid at all. Defence fees are usually funded by insurance companies, which employ their own scales in that area. Similarly, Circuit Court fees are typically constrained by the taxation system (by the County Registrar). Counsel retained by the Attorney General on behalf of the State have their fees marked by the AG's Office.

5.38 Another reason for the lack of price competition in the profession as referred to above relates to the reasons governing a solicitor's choice of barrister, remembering that it is the solicitor, not the client, who makes the choice, owing to the lack of direct access in Ireland. According to qualitative comments submitted by practitioners as part of the Indecon Survey of Barristers, degree of specialisation and previous relationship with a solicitor are the most important factors in a solicitor's choice of barrister. Reputation is also important. However, price is regarded as an unimportant consideration in the choice of counsel.

Extent of Advertising and Availability of Information

5.39 Together with the lack of price competition, the restriction on barristers taking instructions directly from clients and the prohibition on barristers advertising their services (and the prices of their services) results in limited information being made available to consumers in the marketplace. An example of this relates to providing advance information on fees to clients. Our survey of barristers shows that a significant minority of barristers (32.1%) state that it is not possible to know, and therefore to state, the level of fees in advance due to the fact that circumstances often change in the course of a case. A further 17.5% do not provide such information.

5.40 According to the survey results, the vast majority (90.7%) of barristers provide a breakdown of expenses following provision of their services to clients. In this case, the breakdown is compiled for solicitors who are than obliged to pass the information on to their clients.

5.41 Our survey results also reveal that most (67%) members of the public believe that more information on fees/prices is needed on barristers' fees and charges. When the same question was posed to insurance companies, the vast majority (91.7%) of respondents stated that barristers should provide more information on prices/fees.

Extent Of Innovation

5.42 It is also worth examining the extent to which another form of non-price competition occurs among members of the Bar, namely innovation/quality-based competition. The views of insurance companies on the extent to which this form of competition prevails among the profession is presented in Table 5.7.

Table 5.7: Insurance Companies' Views on the Extent to Which There is Innovation and Quality-of-Service Competition Among Barristers

Virtually no innovation or quality competition	Very little innovation or quality competition	Limited innovation or quality competition	Significant innovation or quality competition	Extensive innovation or quality competition
45.5%	45.5%	9.1%	0	0

Source: Indecon Survey of Insurance Companies.

5.43 The results show that the vast majority of insurance companies (91%) believe there is 'very limited' or 'virtually no' innovation/quality competition among the profession, with 9.1% stating that innovation or quality competition is 'limited' in extent.

Summary of Empirical Analysis of the Market

5.44 We now draw together the salient points arising from the last four sub-sections.

5.45 Barristers supply a range of legal/advocacy services almost exclusively in the Circuit, High and Supreme Courts. While the country, by statute, is divided into circuits for the purpose of the administration of justice, there are no restrictions on barristers appearing in court or advising solicitors/clients in any of the circuits. The relevant market therefore comprises the range of services provided by barristers and its geographic scope is the State.

5.46 There are over 1,300 barristers currently practising in Ireland. Over 80% are Junior Counsel and the remainder are Senior Counsel or members of the Inner Bar. All practising barristers are required to be members of the Law Library and must operate as sole practitioners. This implies a fragmented market structure, although if we measure size by fee income there would likely be significant inequality among junior and senior members of the profession (the Bar Council informed us that it does not know the income of any individual member of the Law Library and has no right to obtain such information from its members). Since 1991, the population of practising barristers has grown at an average annual rate of over 5%. Within the profession, seniors have grown more rapidly than juniors, with average annual growth rates of 7% and 5% respectively. Since the same time, the proportion of SCs to all barristers has been 13-16%, which slightly exceeds the corresponding figure in England and Wales (namely 12%), according to figures available from the Lord Chancellor's Department. The barristers' profession has grown at about the same rate as the solicitors' profession during the past decade, which, as noted earlier, has been less than the growth of the economy.

5.47 Like solicitors, barristers have enjoyed significant growth in fee income in recent years, with most (63.3%) practitioners who responded to our survey quoting an increase of at least 10% on an average annual basis during 1999-2001. In terms of the sources of barristers' fee income, our results reveal an even split between clients who are members of the general public and business/government clients. However, these two types of client differ significantly in the frequency of their usage of barristers' services. Whereas personal clients who retain barristers tend to do so only once or twice in their lifetimes, corporate users, such as insurance companies, and public sector users, such as Government Departments, are intensive users of barristers.

5.48 Significantly, business/Government users are likely to account for a significant percentage of transactions (in terms of value as well as by volume) associated with barristers. This implies that restrictions designed to protect the interests of the infrequent users (i.e. members of the public) will have a disproportionate effect on the majority of the transactions conducted by the well-informed purchasers of barristers' services. This observation applies to other professions as well as barristers, but what underscores the point in the context of counsel is the fact that the well-informed clients are prohibited from using their own (in-house) barristers to represent them in court.[5]

5.49 There is very little evidence of price competition among barristers. This is not surprising given that barristers are prohibited from advertising their fees and clients can only retain counsel through their solicitors (prohibition on direct access). The way in which barristers' work is funded (through taxation and State-funded work) may also impact on the absence of price competition in the profession. Non-price competition, in the form of advertising and innovation, is also extremely limited in the market.

5.50 The facts point towards a profession in which normal competitive behaviour is lacking or absent altogether.

Examination of the Restrictions in the Barristers' Profession

Introduction

5.51 In our examination and assessment of the restrictions and requirements governing the barristers' profession, we firstly identify the restrictions governing entry, conduct, demarcation and organisational form before concentrating on those restrictions that we believe are most likely to hinder competition on the market. In concentrating on the key restrictions, we examine their justification and then evaluate whether or not they are proportional to achieving their intended objectives.

5.52 Prior to undertaking these tasks, it is first necessary to consider in more detail the principal organisations responsible for regulating the profession in Ireland, namely the Bar Council and King's Inns or the Society.

[5] As we shall see below in relation to the restrictions imposed on employed barristers.

Regulation of the Profession

5.53 Founded in 1541 during the reign of Henry VIII, the Society or King's Inns is the oldest institution of legal education in Ireland. Its principal activity is the education of new barristers, which is governed by the Education Rules of the Society. It is important to note that the Society is composed of members of the judiciary as well as members of the Bar. The governing body of the Society – the Council – has the power to change the rules governing the educational process and thus entry to the profession.

5.54 The Bar Council (founded in 1815) governs the training ('pupillage/devilling') requirements of the qualification process. It also governs membership of the Law Library, the central location of practice of barristers in Ireland. Through the Code of Conduct for the Bar of Ireland, the Bar Council has responsibility for regulating the conduct of practitioners and for the way in which practice is organised. However, barristers employed outside the Law Library (by private companies or the State) are not members of the Law Library and therefore are not subject to its rules. As we shall see below, because they are not members of the Law Library, employed barristers (who are fully qualified) do not have the same rights of practice as practising barristers or members of the Law Library. Finally, the Bar Council is responsible for handling complaints about barristers by other barristers and others (e.g. solicitors) and has various disciplinary powers, although not the power to disbar, which rests with the Society.

5.55 In sum, the Bar Council is a self-governing regulatory body that is not governed by statute. It can, and does, modify the rules and codes under which the barristers' profession is regulated and governed.

Complaints, Discipline and Enforcement

5.56 The Bar Council's Professional Practices Committee considers complaints of misconduct by a barrister made by another barrister; the Professional Conduct Tribunal of the Bar Council considers such complaints made by anyone else (including solicitors). We have reviewed the procedures and believe they are designed to protect consumer interests and high standards in the profession. We do not believe they restrict or distort competition on the market.

5.57 The Society's power to disbar derives from the common law and the Society's submission states that it has "not disbarred any person for disciplinary reasons in living memory".[6]

[6] King's Inns response to Question 67 of Competition Authority Questionnaire.

Restrictions/Requirements on Entry

Introduction

5.58 There are two main stages in qualifying as a (practising) barrister in Ireland. First, there are the educational and training requirements leading to a person being called to the Bar of Ireland by the Chief Justice and second are the requirements governing membership of the Law Library, which is the central place of practice for members of the profession. The latter include the requirements governing 'pupillage' or the period in which new barristers act as 'devils' to their more experienced masters. We examine the entry requirements to the profession under the following headings:

- Educational and training requirements;
- Membership of the Law Library;
- 'Memorial', which relates to membership of the Law Library;
- Requirements governing pupillage;
- Other entry requirements;
- Continuing requirements; and
- Transfer requirements (from the solicitors' profession and barristers/lawyers qualified in other jurisdictions)

5.59 We finally examine the way in which Senior Counsel are appointed.

Educational and Training Requirements

5.60 The principal educational requirement to qualify as a barrister in Ireland is to successfully complete the Society's Barrister-at-Law degree course, which runs for two years.[7] Admission to the BL course is determined by merit in the Society's Annual Entrance Examination, which must be taken by all persons intending to become barristers.[8] To be eligible to sit the Annual Entrance Examination, applicants must either have successfully completed an approved law degree from an approved university or successfully completed the Society's Diploma in Legal Studies.

5.61 According to the Society's Education Rules, an 'approved degree' means any full-time degree in the Law of Ireland or in the Law of Northern Ireland from a university approved by the Society and conferred on a student who has been examined and passed on five core subjects, which are: Land Law (including Law of Succession), Law of Contracts, Law of Torts, Law of Equity and Law of the European Union. An approved degree can also mean such other degrees that are awarded by any university in which the Law of Ireland or of Northern Ireland is a principal or dominant element and conferred on a student who has been examined and passed on the five core subjects. Approved degree can also mean the degree specified in the schedule to the Education Rules and conferred on a student who has been examined and passed on the five core subjects. The Accreditation Board of the Society is responsible for approving degrees and this is carried out on an annual basis.

[7] As we shall below, the BL degree is primarily practical or vocational rather than academic in nature. According to the Educational Rules of King's Inns (2002), the content of the course is as follows. In the first year, the subjects are Court Practice and Procedure, Civil and Criminal; Commercial and Insolvency Law; Taxation; Administration and Planning Law; Conveyancing; and Competition Law. In the second year, the subjects are Court Practice and Procedure, Civil and Criminal; Employment Law; Advocacy, Legal Drafting and Negotiation; Law of Landlord and Tenant; Law of Evidence; and Law of Arbitration. A limited number of lectures may also be given on other branches of the law in either or both years. The Society makes available to students and barristers an optional advanced advocacy and legal drafting course through the medium of Irish. The content of the course may be modified subject to decision by the Education Committee of the Society.

[8] The Annual Entrance Examination consists of the following five subjects: Company Law, Criminal Law, Irish Constitutional Law, Jurisprudence and Law of Evidence. It was introduced in 2002. Prior to its introduction, the Society operated specific quotas for law graduates and holders of the Society's Diploma in Legal Studies course (see below). Law graduates were ranked on the basis of their degree obtained. Now, all candidates who successfully pass the Annual Entrance Examination are ranked on the basis of their results and allocated a place on the degree course accordingly.

5.62 The Diploma in Legal Studies is a (two-year) conversion course for graduates without approved law degrees and others (minimum age 25 years). Under Rule 3(a) of the Education Rules, the Diploma examination is of a similar standard to that of the approved degrees in law. Part 1 of the Diploma comprises the following subjects: Introduction to the Legal System, Irish Constitutional Law, Criminal Law, Land Law, Law of Contracts, Law of Torts. Part 2 consists of the following subjects: Irish Constitutional Law, Jurisprudence, Criminal Law, Family Law, Introduction to Company Law and Evidence.

5.63 King's Inns or the Society is the only educational body allowed to provide the Diploma in Legal Studies. Owing to the fact that this course constitutes a conversion course for non-law graduates and others (minimum age 25 years) intending to be admitted as barristers in Ireland, and could in principle be offered by other educational institutions with legal faculty, we believe the Society's monopoly on the Diploma course acts as a barrier to entry to the profession and therefore merits closer examination below. This we do below under the sub-section headed Key Restrictions on Competition.

5.64 The Society is also the sole provider of the BL degree course, in which the number of places is limited to 120 per year, under Rule 12(a) of the Education Rules. We believe these restrictions are also likely to hinder or restrict the number of entrants to the market and so also merit closer scrutiny in our examination of the key restrictions below.

5.65 In our survey of barristers, we asked practitioners whether they support the current level of educational requirements to gain entry to the profession. Given the self-regulatory nature of the profession, it is not surprising to find that a significant proportion (90.1%) of practitioners support the level of educational requirements.

5.66 We also asked the same question to insurance companies, which comprise one of the main types of corporate user of the services provided by barristers. Our evidence indicates a similar degree of support (84.6%) for the level of educational requirements among insurance companies as that among barristers.

5.67 It would thus appear that the BL degree course, which constitutes the principal component of the educational requirements for entry to the barristers' profession, has a strong level of support from both practitioners and business users alike. However, the issue of the level of support is separate from the question of King's Inns monopoly on the provision of the Diploma in Legal Studies and the BL course examined below.

Membership of the Law Library

5.68 In order to become a member of the Law Library, which is situated within the Four Courts and is the central place of practice of the barristers' profession in Ireland, prospective applicants (having being called to the Bar of Ireland) must complete a standard application form and attend an introductory meeting in advance of entry. They must also undertake to undergo the period of pupil training (typically of one year's duration) with an experienced barrister approved by the Bar Council. This part of the assessment concentrates on the application form and the introductory meeting in advance of entry; the pupillage requirements are treated below.

5.69 According to the Bar Council, completion of the application form and attendance at the introductory meeting in advance of joining the Law Library have significant advantages in terms of good administration and the mutual exchange of information between the Bar Council and the barrister intending to enter the Law Library. The application form is the barrister's CV and provides the Bar Council with background information on the applicant, including details of when he or she was called to the Bar, career history prior to joining the Library, the name of the master with whom he/she intends to devil etc. The Bar Council submits that it is essential for it to have this information for administrative reasons.

5.70 On the other hand, it is submitted by the Bar Council, the introductory meeting is aimed at assisting the new barrister and providing him or her with information concerning the Library. At the meeting, the new barrister is familiarised with the Library, the facilities available to him or her, the Code of Conduct for the Bar of Ireland and the operations of the Law Library in general. The interview, the Bar Council submits, also provides the new barrister with an opportunity of raising with the Bar Council any issues of concern to him or her. If it transpires in relation to a particular barrister that he or she has been engaged in any occupation that involved giving legal advice or if he or she was previously a solicitor then such a barrister must (according to paragraph 8.11 of the Code of Conduct):

- Cease such occupation or practice, at least three months prior to the date of admission to the Law Library; and
- Undertake not at any time to accept any work upon which the applicant may have been engaged whilst occupied or practising; and
- Undertake for a period of two years not to accept work from any solicitor's office in which the applicant acted in the five years prior to admission to the Law Library; and
- Undertake for a period of two years not to accept work from any person, body, former employer or any related organisation with whom the applicant had been engaged in any occupation in the five years prior to admission to the Law Library.

5.71 According to the Bar Council, the purpose of these undertakings is that the new barrister in practice will operate independently and will provide independent advice.

5.72 While some of the above rules and requirements may be designed to ensure the core values of independence and avoidance of conflicts of interests, others appear likely to have a negative effect on competition on the market. We do not see any justification for preventing barristers from accepting work on which they were previously practising as solicitors providing they do not act for the opposing side and provided the client has no objection. This also applies in relation to accepting work from solicitors' offices where the barrister may have worked as a previous employee. We would, however, accept the merits of new barristers not accepting work in cases taken *against* previous employers for a period but see no reason why they could not otherwise act for their previous employers.

Memorial

5.73 The requirement for each person being called to the Bar of Ireland to give an undertaking to the Chief Justice that he or she will become a member of the Law Library and to submit to the disciplinary jurisdiction of the Bar Council is known as 'the memorial' and is provided for in Rule 19 of the Education Rules of King's Inns. The Bar Council understands that the purpose of the memorial is to provide an assurance to the solicitor and his/her client that they are engaging the services of a barrister who is practising law full-time and is subject to the Code of Conduct, complaints and appeal mechanisms, and other disciplinary processes set down by the Bar Council. The justification of the requirement is, the Bar Council submits, one of protection of the public interest and quality assurance to those availing of the services of a barrister and to the courts before which such barristers practise.

5.74 As with the previous heading, we have no concerns that the memorial adversely affects entry and thus competition on the market for barristers' services.

Requirements governing Pupillage

5.75 The Membership Rules of the Law Library and the Code of Conduct for the Bar of Ireland provide for the training of newly qualified barristers under the pupillage/devilling system. Training is carried on typically for one year after being called to the Bar; 'masters' or supervisors of pupils/devils must have at least 7 years experience as a practising barrister and must also be Dublin-based. Pupils must also attend a mandatory lecture series over the course of their first year of practice. Furthermore, the period in which a barrister serves as a pupil is not remunerated.

5.76 We believe the requirements governing pupillage, particularly the absence of remuneration for pupils, which is unique among the eight professions under review, may act as a barrier to entry to the profession in that they serve to increase significantly the cost of becoming a barrister, especially given the fact that the period of pupillage is confined to Dublin, which commands a higher cost of living than elsewhere in the country. For these reasons, we believe that the pupillage requirements require closer scrutiny and this we undertake in the key restrictions part below.

Other Entry Requirements

5.77 The other requirements for entry to the barristers' profession have their basis in the Education Rules of the Society and the Membership Rules of the Law Library. In particular, according to Rule 18 of the Education Rules, prospective members of the Bar of Ireland must satisfy the 'Terms' or dining requirements of the Society. Furthermore, every person called to the Bar must be a 'fit and proper person'. Finally, new members of the Law Library must pay an entrance fee (currently not more than one-third of the full Junior Counsel subscription – max €1,390) and pay the subscription rate for the year in which membership is sought. This entitles the new practitioner to the facilities of the Law Library (including telephone, fax and seating) plus access to, and a right to participate in, continuing legal education (CLE) and conferences on legal topics.

5.78 We do not have any difficulty with these requirements, which appear to be designed to ensure standards of professionalism and ethical behaviour and in our view are unlikely to have any adverse effects on competition on the market for barristers' services.

Continuing Requirements

5.79 All members of the Law Library – practising barristers - are required to hold an up-to-date policy of professional indemnity insurance. The objective of this requirement is to ensure financial protection of members of the public.

Transfer Requirements

5.80 The Education Rules of the Society (Rules 21-25) provide for the transfer of barristers and lawyers from other jurisdictions as well as of solicitors practising in Ireland who wish to transfer to the Bar. These are summarised and assessed in the following paragraphs. As noted below, while the transfer arrangements cover a potentially large range of other jurisdictions, the only reciprocal arrangement currently in place is with Northern Ireland.

5.81 First, Northern Ireland barristers who have been in practice for at least 3 years may be admitted without any examinations or dining requirements. Such barristers must authenticate their qualifications, must provide evidence that they are of a fit and proper character to practise in Ireland, must complete the memorial for admission as barrister in Ireland and must pay the fee for admission to the Barrister-at-Law degree (currently €500).

5.82 Second, English and Welsh barristers who have been in practice for at least 4 years may be admitted without any examinations provided reciprocal arrangements are in place. (Reciprocal arrangements are currently not in place.) Such barristers must authenticate their qualifications, must provide evidence that they are of a fit and proper character to practise in Ireland, must complete the memorial for admission as barrister in Ireland and must pay the fee for admission to the Barrister-at-Law degree (currently €500).

5.83 Third, reciprocating country barristers from common law jurisdictions who have been in practice for at least three years may be admitted without any examinations or dining requirements. Such barristers must authenticate their qualifications, must provide evidence that they are of a fit and proper character to practise in Ireland, must complete the memorial for admission as barrister in Ireland and must pay the fee for admission to the Barrister-at-Law degree (currently €500).

5.84 Fourth, reciprocating country barristers from non-common law jurisdictions who have been in practice for at least three years may be admitted without any examinations or dining requirements, but must successfully complete an examination in local law. Such barristers must prove their qualifications, must provide evidence that they are of a fit and proper character to practise in Ireland, must complete the memorial for admission as barrister in Ireland and must pay the fee for admission to the Barrister-at-Law degree (currently €500).

5.85 Fifth, solicitors intending to become barristers must have been in practice for at least three years in the State; must pass such subjects of the Barrister-at-Law degree as determined by the Education Committee of the Society, must cease to practise as a solicitor and have name removed from the Roll of Solicitors, must complete the memorial and pay the fee for admission to the Barrister-at-Law degree (currently €500).

5.86 And finally, qualified lawyers from other EU Member States are governed by Directive 89/48/EC. Application must be made to the Society. The applicant may be required to pass an 'aptitude test' consisting of papers in Irish law, an oral examination and satisfy certain dining requirements. The applicant must also complete the memorial and pay the fee for admission to the Barrister-at-Law degree (currently €500).

5.87 According to the Society's submission to the study, the transfer requirements set out in the Education Rules provide for a call to the Bar in respect of barristers entitled to practise in any jurisdiction maintaining reciprocal arrangements with the Bar of Ireland. Traditionally, it is pointed out in the submission, such arrangements have been in place from time to time with many other common law jurisdictions, such as Northern Ireland, England and Wales and certain of the states of Australia that maintain separate professions for barristers and solicitors. However, the Society proceeds to note that, due to the actions taken outside of Ireland, the only reciprocal arrangement in place at present is with the Bar of Northern Ireland. The Society points out that it is willing and anxious to further such reciprocal arrangements but is not currently in a position to do so by virtue, it states, of the views taken by those in other jurisdictions.

5.88 According to figures provided by King's Inns to the study, some 14 candidates were admitted to the Bar of Ireland who were previously qualified as barristers in Northern Ireland in 2001. The corresponding figures for 2000, 1999, 1998 and 1997 were 10, 6, 13 and 10 respectively. In 1996, 37 such candidates were admitted to the Bar. However, these figures mask the number of candidates admitted to the Law Library, the central place of practice for barristers in Ireland. Of the 14 candidates admitted to the Bar in 2001, none were admitted to the Law Library and none were admitted in 2000. Of the 37 admissions from Northern Ireland in 1996, just 1 was admitted to the Law Library. In interpreting these figures, it is important to bear in mind that the number of admissions to the Law Library is a matter of choice for the new member of the Bar of Ireland. It appears to be the case that the majority of new entrants to the Bar from Northern Ireland choose either not to become members of the Law Library or else delay their decision to join the Library.

5.89 As regards transfers from the solicitors' profession, in each of the years 2001, 2000 and 1999, there were 3 candidates admitted to the Bar of Ireland who were previously qualified as solicitors in Ireland. In every case, the new members of the Bar were also admitted to the Law Library.

5.90 Finally, in 2001, 2000 and 1999, there were 4, 3 and 2 candidates admitted to the Bar of Ireland who were previously qualified as barristers/lawyers in another EU Member State (not including England and Wales). However, there was no instance of an admission to the Law Library.

5.91 The facts show relatively few transfers to the Bar of Ireland from barristers or lawyers qualified in other jurisdictions and the same applies to transfers from the solicitors' profession in Ireland. More significantly, there are even fewer cases of transfers to the Law Library and thus to the practising profession in Ireland.

5.92 The transfer requirements given in the Society's Education Rules might be construed as misleading in that they do not make clear that the only reciprocal agreement presently in place is with the Bar of Northern Ireland. Further, the requirements for 'reciprocating' country barristers from common and non-common jurisdictions are not currently applicable because there are no reciprocal agreements in place with these jurisdictions.

Appointment of Senior Counsel

5.93 As already mentioned in paragraph 5.14, it is the Government that grants patents of precedence to barristers as Senior Counsel. As stated in the Guidelines for applicants seeking a call to the Inner Bar, prospective SCs must have achieved a special standing in recognition as advocates and lawyers by virtue of their years of practice, expertise and experience. The Bar Council submits that the title of Senior Counsel is a mark of quality accorded by the Government to advocates of exceptional ability and serves the public interest by identifying a particular level of skill. The Bar Council proceeds to state that the existence of the title promotes high standards and competition both at the junior and senior Bar. Juniors compete to establish large successful practices, exhibiting high standards, with a view, it is believed, to achieving the goal of appointment as Senior Counsel. Senior Counsel in turn compete to acquire and attain successful practices and to justify the quality mark associated with practising as Senior Counsel. The Bar Council finally states that if the Government did not award such recognition of distinction, it is probable that it would.

5.94 In our empirical analysis of the size and structure of the market for barristers' services, we noted that the proportion of SCs to the total number of practising barristers in Ireland has been in the range of 13-16% during the past decade, which has tended to exceed the corresponding proportion in England and Wales (10-12%, according to the OFT report on the professions and recent figures produced by the Lord Chancellor's Department quoted above). According to figures submitted by the Bar Counsel, the number of new entrants to the Inner Bar has increased in recent years. In 2001, there were 78 'movements' to the rank of SC, compared with 56 in the previous year. In the earliest year for which figures are available, namely 1991, there were 22 elevations to the Inner Bar.

5.95 In our view, the arguments submitted by the Bar Counsel in support of the existence of a senior rank within the barristers' profession are justified on competition grounds. As well as providing a signal of high quality to solicitors and clients, the title also provides a career structure to more junior members (in the same way as hospital consultant does in the medical profession or university professor does in the academic world) and this acts to increase the level of competition on the market, other things being equal.

Restrictions on Conduct

Restrictions on Fees/Prices

5.96 The Bar Council does not generally involve itself with the level or structure of charges levied by practising barristers for their services. It is for each barrister to determine the appropriate charge for his or her service. However, in the case of work done by barristers for the Director of Public Prosecutions (DPP), the DPP sets the fee for each relevant service. There is parity between the level of fee paid to prosecuting counsel by the DPP and to defence counsel by the Department of Justice, Equality and Law Reform under the Criminal Legal Aid scheme. The Bar Council, acting on behalf of its members, does make representations to the DPP as to the appropriate fee for each relevant service provided by barristers for the DPP. However, the DPP may accept or reject the representations made by the Bar Council and is free to set the relevant fees. In relation to work done for other public bodies such as, for example, the Office of the Attorney General, the fees are often set by the public body concerned without reference to, and without any agreement with, either the Bar Council or individual barristers.

5.97 Furthermore, clients not satisfied with their barrister can have the fees assessed independently, by the Taxing Master for High Court work and by the County Registrar in the case of the Circuit Court.

5.98 Pursuant to paragraph 11.1(a) of the Code, a barrister is entitled and obliged to mark a proper and reasonable fee in respect of each item of work for which instructions are accepted, taking account of the complexity of the issue or subject matter, the amount or value of any claim or subject matter in issue, the time within which the work required is to be undertaken and any other special feature of the case.

5.99 Under paragraph 11 of the Code, a barrister has no right to sue a solicitor or a client for fees. The barrister's fee is deemed to be a gift from the solicitor. This rule reflects the tradition of the distinction between barristers and solicitors whereby the solicitor, who carries out the administration of the case and deals directly with the client, pays the barrister, who concentrates on drafting of pleadings and advocacy in court. A parallel between GPs and hospital consultants is sometimes drawn in describing the relationship between solicitors and barristers. However, closer reflection shows little similarity in relation to fees. While the GP refers the patient to the consultant, the consultant will treat the patient and bill the patient/health insurer accordingly, without reference to the GP. Under the Code of Conduct for the Bar of Ireland, barristers cannot do the same. Rather the barrister is reliant on payment from the solicitor, who collects the money from the client. The rule may prevent more junior members of the Bar from growing their practices as they may feel under complement to more experienced solicitors whose actions determine their remuneration. While we do not see this as a key restriction on competition, we believe the rule preventing barristers from suing solicitors for fees merits further consideration and we are not convinced of the merits of retaining the rule.

Restrictions on Advertising

5.100 Pursuant to paragraphs 6.1, 6.2, 6.3, 6.14 and 6.15 of the Code of Conduct, barristers are prevented from advertising or 'touting' for business. The Bar Council has informed us that the restrictions preventing barristers from advertising are under review and state that barristers may (indirectly) advertise by placing prescribed information about themselves on the Bar Council's website. Professional details about practising barristers are also included in the Law Directory, which is published by the Law Society of Ireland, the principal body responsible for regulating the solicitors' profession.

5.101 One of the principal conclusions to emerge from the reviews of economic and competition policy evidence in Sections 2 and 3 is that the maintenance of restrictions on advertising by professional associations have little or no economic basis and should be relaxed as far as possible, subject to the generally accepted conditions that advertising should not be in bad taste, should not bring the profession into disrepute and should not exploit the limited information that some consumers may have in relation to professional services. The highly restrictive nature of advertising in the barristers' profession demands closer attention below.

Direct Access

5.102 The Code precludes direct access for members of the public who wish to instruct a barrister in relation to, in particular, litigation. There are some minor exceptions that arise in a social context, for example drafting of a will. The Bar Council's Direct Professional Access Scheme (introduced in 1990) enables recognised organisations to seek advice from barristers in the context of non-contentious matters. In such circumstances a person who is a member of a professional or other body, recognized for the purposes of the Direct Professional Access Scheme, may directly engage the services of a barrister for such non-contentious matters. The Bar Council provides a list of those organisations approved under the DPA scheme (e.g. accountants, RIAI architects, chartered engineers) and also provides instruction on how to use the scheme.

5.103 However, the majority of a barrister's work relates to contentious matters in the courts and that can only be accessed through a solicitor. We believe the restriction on direct access may have significant adverse effects for competition on the market. It is also linked with the restrictions on advertising, which we have decided merit closer scrutiny. For these reasons, the absence of direct access in contentious cases is treated as a key restriction and further examined in the next part of the section.

Number of Counsel Briefed

5.104 There is a perception that, in superior court litigation, it is necessary to have a Junior Counsel briefed with a Senior Counsel. However, paragraph 10.3 of the Code of Conduct states that "a litigant is never required to retain the service of a Senior Counsel". According to the same provision, "it is for the instructing solicitor to decide whether it is necessary or desirable in the interests of his client to brief Senior Counsel and the number of counsel to be retained in a case".

5.105 The instructing solicitor therefore decides whether the exigencies of a particular case require such services in the interests of the client. The decision on the number of counsel to retain is, in principle, entirely a matter for the solicitor.

Primary Occupation Requirement

5.106 Under paragraph 2.3 of the Code, the practice of barrister must be/his primary occupation.

5.107 The general duty of barristers is to ensure that they make themselves available to accept, on the basis of the taxi-rank rule, all briefs and instructions offered to them in an area of law in which they practise. The essential requirement of this rule is that a barrister be available so that he or she may be retained. We accept that the obligation to accept a brief or instructions – on behalf of any client – is important. However, common sense dictates that if a barrister is committed on other client work, it may not be feasible for a barrister to be available, at all material times, for the purpose of accepting such instructions.

5.108 Indecon's survey evidence indicates that the majority of practising barristers agree with this requirement. In particular, 78.3% of the practitioners who responded to our survey supported the requirement and 19.2% said that they did not support it. This provision may, however, restrict the number of barristers in practice and could therefore negatively impact on competition. Our judgement on this particular restriction is that any effect it is likely to have will likely be lessened in view of our conclusions on the other restrictions.

Restrictions on Demarcation

5.109 There are no areas of service provided by members of the Bar that are reserved to any particular section thereof. As a sole practitioner, each member of the Bar is entitled to practise, without limitation, in all areas of law and in all courts.

5.110 There are however two important areas of demarcation: that between the solicitors' and barristers' professions and the distinction between practising barristers and employed barristers. The solicitor-barrister distinction has no statutory basis and the division of the legal profession has evolved through custom and tradition. In our view, the division has a potentially significant effect on competition on the barristers' market and thus requires closer examination in the next part of the section. For the same reason, the distinction between practising and employed barristers also requires further analysis.

Restrictions on Organisational Form

Restriction to Sole Practitioners

5.111 Under the Code, barristers operate as self-employed sole-traders bound by the taxi-rank rule and independent of the solicitors' profession. Partnerships or incorporated practices are prohibited. As highlighted in Section 2, the economic evidence on competition in professional services points to the view that there should be no restriction on the organisational form of professional businesses, unless it can be demonstrated that there are very good public interest reasons. In view of this, our judgement is that the requirement that barristers operate solely as sole traders should be more closely examined and this we undertake below.

Prohibition on Forming Multidisciplinary Practices

5.112 The Bar Council opposes the formation of MDPs for similar reasons to those given for opposing the formation of partnerships between barristers. For reasons similar to those given in the previous paragraph, we believe the prohibition on MDPs requires fuller analysis in the next part of the section.

Key Restrictions on Competition

Overview

5.113 We have identified the restrictions on entry, conduct, demarcation and organisational form that exist in the barristers' profession and our analysis suggests that the following nine restrictions merit closer assessment. The key restrictions are as follows:

- **The King's Inns monopoly on the provision of the Diploma in Legal Studies course, which is a conversion course for non-law graduates and others (minimum age 25 years) wishing to be admitted to train as barristers;**
- **The King's Inns monopoly on the provision of the Barrister-at-Law (BL) degree course, which is the principal educational requirement to qualify as a barrister in Ireland;**
- **The pupillage requirements for new barristers, particularly the absence of remuneration for pupils;**
- **The prohibition on advertising by barristers;**
- **The prohibition on direct access to barristers by clients in contentious work;**
- **The solicitor-barrister distinction and solicitor-advocacy in the superior courts;**
- **The restrictions on barristers in employment from practising;**
- **The requirement that barristers operate only as sole practitioners;**
- **The prohibition on barristers forming multidisciplinary practices with other professionals.**

5.114 In what follows, we assess each of the nine restrictions by reference to its justification and our evaluation of the justification(s) given.

King's Inns Monopoly on the Provision of the Diploma in Legal Studies Course

Justification

5.115 In its submission to the study, the Society states that practice at the Bar involves, among other things, obligations, not just to the client concerned, but also to the courts and to the administration of justice. Indeed, it is stated, a barrister's duty to the courts takes precedence of his or her duty to the client. Owing to a barrister's central role in the administration of justice, it is argued that a high level of competence in the theory and practice of the law is necessary to gain admission to the profession. For these reasons, it is believed that a qualification of degree standard in law – whether by virtue of a primary degree or equivalent conversion course (namely the Diploma) – provides the necessary and appropriate minimum level of knowledge of the law for entry to the profession. The requirement to have this minimum level of knowledge of the law helps to ensure that clients and the public will have access to competent and independent legal advice and representation, where required, and that the administration of justice will continue to operate effectively.

Evaluation

5.116 We do not doubt the requirement that a minimum level of knowledge in the theory and practice of the law is necessary to gain admission to train as a barrister and that this requirement may be fulfilled either through gaining a primary university degree in law or by completing a conversion course in law equivalent to the core requirements of such a primary degree. However, the Society's arguments do not directly address the issue of its monopoly over the conversion course, namely the Diploma in Legal Studies. Given that the Diploma is precisely a conversion course, there are in our view no valid economic arguments as to why other educational institutions with legal faculty should be prevented from offering courses equivalent to the Diploma to candidates without approved law degrees hoping to begin the process of becoming a barrister. Relaxation of the Society's monopoly would improve efficiency in a number of ways. First, competition between providers may result in more competitive fees for the conversion course resulting in a reduction in the overall cost of the qualification process. Second, extended provision could provide greater entry possibilities for non-law graduates and others hoping to be admitted as barristers.

5.117 Owing to the quality of the present provision by King's Inns, we believe that most non-law graduates intending to qualify as barristers may continue to opt for the Diploma course unless new providers offer advantages in terms of the number of places (currently the number of places on the Diploma is 60), location of course, fees, teaching materials etc.

King's Inns Monopoly on the Provision of the Barrister-at-Law (BL) Degree course

Justification

5.118 The Society has defended the quantitative restriction on the number of places on the BL degree course on the grounds that the course is vocational rather than academic in nature and it is essential that the practising profession and the judiciary play a significant role not only in devising but also in implementing the course. In this regard, the Society cites the example of hands-on training in advocacy by experienced practitioners as an essential part of the second year of the course. The training is also restricted to Dublin. Given that there are no permanent superior court (High Court and Supreme Court) sittings outside Dublin, it is argued that it is inevitable that the vast majority of experienced and senior members of the profession centre their practices in Dublin. Similarly, most of the senior judges are based in Dublin. In those circumstances, the Society believes, it is not possible to provide the course other than in Dublin and in such numbers as can, in practice, be given appropriate training by senior members of the profession. Therefore, the Society considers that it is not possible to provide education for more than 120 persons in each year.

5.119 The Society proceeds to state that if present standards were lessened by significantly diluting the involvement of experienced practitioners, the standard of the BL course would be diminished and this in turn would significantly reduce the quality of service provided by barristers to solicitors and clients. It is argued that the proper administration of justice would also be impaired. The Society suggests that the quantitative limit on the number of places on the BL degree, together with the confinement of the course to Dublin, is necessary to ensure that new entrants to the profession have adequate education and training in all relevant matters to enable them to achieve and assist clients and to enable them to play their part in the effective functioning of the justice system.

Evaluation

5.120 The Society's justification of the current state of the BL degree course focuses entirely on the quantitative limit on the number of places available and on its confinement to Dublin. Its monopoly on the provision of the course is not addressed in its submission nor is this feature of the education and training process defended or mentioned in the Bar Council's submission.

5.121 The first thing to observe about the monopoly provision is that the actual number of places on the BL degree has consistently been less than the stipulated 120 places during the past decade according to data submitted by King's Inns. More specifically, for each year between 1997 and 2001, the number of entrants to the degree course has been 100 and between 1990 and 1996 the numbers varied between 90 and 98. From the Society's justification of the cap, the capacity level appears to be dictated by resources at King's Inns and by the availability of practitioner teachers, including members of the judiciary.

5.122 The principal effect of the cap on the number of places available and the apparent limit on the actual number of entrants to the BL degree is a consequence of the Society's monopoly on the course and serves to artificially restrict the numbers being called to the Bar and so the number of new practitioners each year (members of the Law Library).[9] A more competitive market structure in the provision of the principal professional practice course would, in our view, address this concern, subject to the proviso of a sufficient number of practitioners available to provide instruction, which we accept is an essential requirement owing to the practical or vocational orientation of the degree. By way of implementing the more competitive scenario, we would envisage a new system in which the Society would license provision of the BL degree to independent institutions in a manner that would allow the Society to retain control of the curriculum and of the content, holding and marking of the examinations comprising the course (including the Annual Entrance Examination). This change would facilitate an expansion of the number of places on the BL degree and would provide competition in the provision of the education of barristers with resultant benefits in terms of competitive fees and possible teaching innovations.

[9] According to the Junior Counsel figures presented in Table 5.1, on average, there have been less than fifty new entrants to the barristers' profession per year during 1990-2001.

Pupillage Requirements for New Barristers, Particularly the Absence of Remuneration for Pupils

Justification

5.123 The arguments in defence of the pupillage system are treated with reference to (i) the absence of remuneration for pupils, (ii) the requirement that the master be based in Dublin, (iii) the duration of the pupillage period and (iv) the mandatory lecture series that pupils must undertake.

5.124 According to the Bar Council, in contrast to the situation in England and Wales, a barrister who joins the Law Library is a full member with full rights, including the right to accept work from the outset. A new barrister may therefore begin to earn his or her living immediately and engage in any work that the new barrister feels in a position to do.

5.125 Accordingly, while a new barrister is required to devil (regardless of whether they join the Law Library immediately after being called to the Bar or at a later date), there is no prohibition on the barrister working on his or her own right from the commencement of their profession. Devilling is designed to provide the pupil with on-the-job free training by experienced members of the Law Library. (The Bar Council maintains a list of approved masters.) This is intended to supplement, on a practical level, the legal training that the new barrister would have acquired at university or through the conversion course (namely the Society's Diploma in Legal Studies) and the more practical education gained as a result of successfully completing the Barrister-at-Law degree course.

5.126 In particular, the purpose of the devilling period is to provide a facility for the new barrister to study the practical aspects of a barrister's work, including the requirements of successful advocacy. Insofar as the practical aspects are concerned, the master spends time with the new barrister explaining pleadings, correcting pleadings prepared by the pupil and assisting him or her in relation to the preparation of opinions and other paper work. The master also provides assistance to the pupil in respect of work that the devil undertakes on his or her own behalf.

5.127 In the context of advocacy, the pupil has the opportunity of accompanying the master to court, watching in detail how cases are conducted, receiving explanations before and after the court from the master as to the issues in the case, how it is intended to run the case or how issues developed during the case. This enables new barristers to ask questions and seek advice in relation to particular aspects of advocacy, a facility that, the Bar Council maintains, would not be readily available without the formal pupillage system.

5.128 The Bar Council points out that there is no obligation on the devil to perform work for the master. Pupils are free to identify the work that they will perform and will make that decision in the context of the other demands on them. In view of this, it is submitted, the pupillage system is weighted heavily in favour of the new barrister and is designed to provide the pupil with a period of free training. The master does not employ the devil and accordingly it is submitted that no payment of the pupil by the master arises. According to the Bar Council, in most cases the master devotes a considerable amount of his or her own professional time in assisting the devil.

5.129 The Bar Council states that the requirement for a pupil to devil with a Dublin-based master is imposed because the range of work in Dublin is much broader and encompasses work in all of the State's courts. On circuit, the vast majority of work is confined to the Circuit Court and possibly (but much less frequently) to the District Court. The High Court only sits for a short period each term on circuit and then the vast majority of High Court work on circuit relates to personal injury cases. The remainder of the work relates to circuit appeals. The Supreme Court does not sit in circuit. It is believed that it is essential that a new barrister in their first year is exposed to work at all of the court levels to give them an opportunity of deciding the area, if any, in which they wish to specialise and to provide them with a broad training.

5.130 The pupillage period is specified as being 'not less than one year' so as to give devils, if they so choose, the opportunity to engage in further devilling. There is, however, no requirement, so far as the Bar Council is concerned, for any new barrister to devil for more than one year. Many new barristers, however, find it helpful to devil for a second year with an experienced master in a different area of specialisation.

5.131 The argument advanced by the Bar Council for pupils having to attend the mandatory lecture series during the first year of practice is to provide an enhanced knowledge of practice and procedure matters.

Evaluation

5.132 Given the characteristics of barristers' work and their central role in the administration of justice, we believe the arguments used to justify the pupillage system generally, and in particular the duration of the period of pupillage (usually one year), are not disproportionate to ensuring that the benefits claimed for them are realised. We also believe that the requirement for pupils to attend the mandatory lecture series run by the Bar Council during their first year of practice is not disproportionate to ensuring an enhanced knowledge of procedure and practice matters, especially regarding new developments in the law. Taken together, these requirements serve to enhance the quality of new entrants to the profession and thus play a part in the proper administration of the justice system.

5.133 However, we are less convinced by the arguments advanced for the absence of any remuneration for pupils. The absence of any remuneration for pupils serves to increase significantly the overall financial cost of becoming a barrister and for this reason we believe that it acts as an entry barrier to the profession. We believe that this source of entry barrier may be particularly pronounced for pupils from lower income groups or those who have no familial tradition of legal practice. There is a widespread perception among practitioners (and the Bar Council, as stated in its submission to the study) that there is a high rate of attrition among newly qualified barristers. We believe the cost of the qualification process, which we feel is significantly underscored by the absence of remuneration for devils, contributes to the perceived high exit rate among new or recent members to the profession.

5.134 To investigate this issue further, the Indecon team requested data from the Bar Council on the level of attrition among newly or recently qualified barristers. We received data from the Bar Council on the rate of exit in relation to members who joined between 1997 and 2000 and who have since left the Law Library. The Bar Council stated that they do not have a record of the reasons why the members in question left the Library but it said that return to further study or the taking up of alternative employment would probably constitute the main reasons for leaving practice.

5.135 According to the figures provided by the Bar Council, of the entrants to the practising profession in 1997, 6 had left by 2002; of the entrants in 1998, 9 had left by 2002; and of the 1999 cohort, 6 had left by 2002. To put these figures in perspective, it is relevant to note the change in the population of Junior Counsel from year to year. Based on the figures presented above in Table 5.1, during the past decade, the average annual increase in the number of JCs has been approximately 41; during the past five years (1997-2001), the average annual increase has been slightly higher at 47. According to our calculations, between 15 and 20% of a given cohort of new entrants to the Law Library will leave the practising profession in a period of less than five years from entry. This in our view is a significant rate of attrition in view of the investment (both financial and in terms of time) involved in entering the profession in the first place.

5.136 We believe there would be merit in the Bar Council initiating a system that encourages masters to remunerate their devils during the period of pupillage and to also take steps to encourage sponsorship and award systems to facilitate lower income groups to have the potential to become barristers. This could have social as well as competition benefits. We would finally point out that payment for trainees is a normal feature of numerous other professions.

Prohibition on Advertising by Barristers

Justification

5.137 The main argument advanced to justify the restriction on advertising is that consumers of barristers' services are well informed because of the agency of their solicitors. Furthermore, it is argued, there are other ways by which the services of barristers may be brought to the attention of the public: the outcome of barristers' work – the conduct of cases in the courts – is free for all to see in an objective and non-partial way.

Evaluation

5.138 However, we have already pointed out in Section 2 that economic evidence shows that advertising can serve to improve welfare by facilitating and reducing price without inhibiting quality of service. On the basis of the theoretical and empirical economic evidence relating to the role of advertising in professional services (including the legal profession), we would view advertising as a potentially important way of helping newly qualified barristers build their practices. Permitting advertising, including comparative advertising and fee advertising, would introduce price competition and would, in our opinion, address the high rate of attrition in the profession, improve competition among seniors and juniors and consequently enhance consumer welfare.

5.139 We believe the restriction on advertising and the prohibition on 'touting' for business are evidence of the lack of normal competitive behaviour in the barristers' profession, although our survey results show that most (80.6%) practitioners support the current situation. We have no doubt that the restriction damages competition on the market. It is interesting to recall that there is very limited price competition in the profession and this, in our view, is related to the barriers to entry and the restriction on normal competitive behaviour.

5.140 This is reflected in the fact that corporate insurance company consumers of the services of barristers show less support for the advertising restrictions among barristers. This is indeed the case in relation to insurance companies, which constitute a key corporate user of the profession. The majority (61.5%) of insurance companies that responded to our survey stated that they do not support the prohibition on advertising in the profession.

Prohibition on Direct Access to Barristers by Clients in Contentious Work

Justification

5.141 The main justification for the restriction on direct access is the necessity, in the public interest it is claimed, to maintain a separate profession of barrister from that of solicitor. Both the Bar Council and individual counsel argue that direct access by 'lay' people would create inefficiencies in the administration of justice. Instructions taken from members of the public would be inadequately put together and would make the work of barristers less efficient. As stated in our examination of market definition, one of the key skills or requirements of a barrister is to devise a litigation strategy/answer to an already-defined problem/question (by the solicitor). Were instructions to be taken directly from non-solicitors, it is alleged that either too much or too little information would be provided and the problem or question would not be properly identified.

5.142 Following from this point, if direct access was introduced, it is argued, the top barristers would become unattainable to members of the general public and it is suggested that they would do work for mostly business clients.

5.143 It is also argued by barristers that if the public were permitted direct access to members of the Bar, this would require a fundamental change in the profession. It is suggested that barristers would need to become more like solicitors: in particular, they would need to take charge of administering cases and the overheads that that would involve. They would need to have assistants and offices. It is alleged that because of the burdens of administration and running their own offices, barristers would no longer be able to specialise.

Evaluation

5.144 As stated by both the Bar Council and individual practitioners, the principal defence of the rule against direct access in contentious work relates to the need to maintain a division in the legal profession between solicitors, as generalists and administrators, and barristers, as specialists and advocates. On competition grounds, there is, however, likely to be advantages in reducing the demarcation within the legal profession.

5.145 A fundamental problem, from a competition perspective, of the absence of direct access by clients is that it ignores differences in the degree of information asymmetry across users of barristers' services. There are well-informed lay clients as well as uninformed (first-time) lay clients and the intermediation of the solicitor may be less relevant for the former. The current arrangements do not adequately account for this fact because there is no self-selecting mechanism whereby lay clients would have the option of either direct access or access through a solicitor. (The Direct Professional Access Scheme is limited to institutional users.)

5.146 We are not in any case convinced by the argument that direct access would entail a fundamental change in the profession, where barristers would have to become more like solicitors in that they would carry greater administrative burdens, which would detract from specialising and concentrating on advocacy. Administration is an essential part of running any professional practice and as to the argument that barristers would have to employ assistants and secretaries it is relevant to note that there are no rules preventing barristers from having such assistance as part of their practices at the present time.

5.147 We believe that clients should have the choice of directly accessing the services of barristers in all areas of work (including contentious work) or approaching a solicitor first. We believe the absence of such choice impedes the operation of price and non-price competition in the market in that where the client is well informed the direct access route might be the lower cost option than the solicitor-barrister route. The likely cost savings are presently lost to society through the present arrangements. Finally, it is relevant to note that direct access in contentious matters is now permitted in Australia and in England and Wales.

5.148 Our survey results show that, while the majority (68.7%) of barristers support the restriction on direct access by members of the public, a small but sizeable percentage (27.2%) indicated that they do not support this restriction. Of importance is to consider the views of consumers. The results in Table 5.8 show that insurance companies, who are important corporate consumers of barristers' services, have a very different view of the direct access restriction. The majority (69.2%) indicated to us that they do not support it.

Table 5.8: Indecon Survey of Insurance Companies - Insurance Companies' Views on Direct Access Requirements in Barristers' Profession

	% of responses		
Conduct Restrictions	**Support requirements**	**Do not support requirements**	**Don't know**
Restrictions on direct access to barristers by members of the public	15.4	69.2	15.4

Source: Indecon Survey of Insurance Companies.

The Solicitor-Barrister Distinction and Solicitor Advocacy in the Superior Courts

Justification

5.149 The work of members of the Bar typically involves advisory work, drafting pleadings, affidavits and providing advocacy services. On the other hand, members of the solicitors' profession provide legal services requiring administrative backup through their offices. Such services include conveyancing and the administration of estates. These transactions involve the maintenance of accounts and the administration, as a trustee, of the funds of clients or third parties. Furthermore, the solicitors' profession is involved in the conduct of litigation through the issuing of proceedings, the collection of evidence and the taking of statements of witnesses.

Evaluation

5.150 While there are valid arguments to support generalists and specialists in any profession, especially where the nature of practice is changing rapidly through new developments, the distinction between barristers and solicitors in some areas is a matter of custom and tradition, and, in our view, may hinder competition and efficiency. That is, the absence of supply substitutability between the two branches of the legal profession may inhibit competition in certain areas.

5.151 The clearest manifestation of the (informal) demarcation between the solicitors' and barristers' professions occurs in advocacy work in the superior courts, namely the High Court and Supreme Court. Pursuant to the Courts Act, 1971, solicitors have a right of audience in all of the Irish courts, yet very few practitioners have chosen to take advantage of this provision through the years. In England and Wales, barristers' monopoly on advocacy in the higher courts was taken away following the Courts and Legal Services Act, 1990. However, this legislation by itself has had little impact, as noted in the Office of Fair Trading Report into competition in the professions in the UK (paragraph 253).

5.152 The Bar Council states that the absence of what might be described as 'solicitor-advocates' is proof enough that the two branches are different to the extent of warranting separation in the manner they presently are. However, the absence of solicitor-advocates in Ireland may in part be explained by the rules and customs (e.g. rules of precedence) of the superior courts. Virtually all of the justices in these courts are drawn from the barristers' profession and are familiar with the methods of advocacy employed by barristers. That said, there are welcome signs that the customs may change in the future. The recent passing of the Courts and Officers Act, 2002 and the appointment of a former solicitor to the bench of the High Court may facilitate future developments in this area. Also relevant is the continuing appointment of solicitors as judges in the Circuit Court, where there have also been few solicitors-advocates in the past.

5.153 As part of our research, we examined the extent to which solicitors' right of audience in all of the courts in Ireland are supported by members of the Bar and by corporate consumers as represented by insurance companies. Our survey results reveal that the majority (74.2%) of barristers support solicitors' right of audience in all of the courts.

5.154 A majority (53.8%) of insurance companies also supported solicitors' right of audience in the courts as against only 15.4% who stated they did not support the right.

Restrictions on Employed Barristers

Justification

5.155 While the Bar Council has not furnished any formal arguments in support of the prohibition on barristers employed in the service of the State or in private institutions from representing, as barristers, their employers in court, it is likely that the main justification for this restriction relates to the 'independence' required of members of the profession. Also relevant is the issue of the availability of top barristers to members of the public. The effect of the current Code of Conduct is that employed barristers may not appear with or directly brief practising barristers (i.e. members of the Law Library). This in turn means that, to take a hypothetical example, a company having a barrister in its employment must first engage the services of a solicitor in order to access a practising barrister for the purpose of taking a case in, for example, the High Court. Apart from acting as an in-house legal adviser, the employed barrister is redundant in the litigation and advocacy services taken by his/her employer. Curiously, where a (practising) solicitor and barrister have the same employer, the solicitor is entitled, by virtue of the Courts Act, 1971, to represent the employer in court, but the barrister is not – even in circumstances where the barrister may have had a prior career at the Bar.

Evaluation

5.156 To understand the competition implications, it is first necessary to realise that a proportion of employed barristers, while having satisfied the educational requirements laid down by the Society (as outlined above), may not have undergone the training (i.e. pupillage) requirements of the Bar Council, which are required for membership of the Law Library. However, the effect of the Code also applies to employed barristers that are fully qualified barristers in the sense that they have satisfied both the educational and pupillage requirements of the profession.

5.157 The latter – fully qualified barristers now in employment – are in effect prevented from competing with practising barristers (members of the Law Library) in the areas of work traditionally done by practising barristers. This is a very obvious restriction on competition in favour of practising barristers. It could also, in some cases, represent an inefficient use of scarce talent – the skills of the barrister in employment.

5.158 We can see no valid reasons as to why fully qualified barristers (i.e. those have successfully completed the education requirements of the Society and the pupillage requirements of the Bar Council) in employment should not be able to provide the same services to their employers as those provided by practising barristers.

5.159 The benefits of relaxing the restrictions on employed barristers are, in our view, significant. The core principle of independence would not be compromised because the employed barrister would be acting for his or her client (i.e. the employer) alone and the services provided would be independent of the interests of any third party. Independence would also be assured by virtue of the professional education and training undergone by the employed barrister, which would require the barrister to concentrate on presenting the facts of the case with due skill. In such a scenario, employed barristers would have an incentive to compete openly with practising barristers at the Law Library. It might be argued that relaxation of the restrictions would result in the best counsel being hired by large corporations and that there would be insufficient talent to advise and represent small clients. Experience in other professions, where no such restrictions exist, would not support this contention and in any case it is clear that some barristers do little or any public work and primarily act for particular corporate clients. Indeed, if in-house corporate barristers practised at the Bar, this could release some of the leading counsel to provide services to members of the general public.

Requirement that Barristers Operate only as Sole Practitioners

Justification

5.160 The Bar Council submits a number of arguments in support of the restriction against partnerships and other professional associations among counsel.

5.161 First, it is a fundamental contention of the Bar that maintenance of barrister as a sole trader is central to the proper functioning of the legal system in Ireland. It is suggested that the fact that a barrister is a sole trader means that he or she is available to act (on the basis of the taxi-rank rule) in any given case in which it is sought to retain his or her services. The rule imposes an obligation on each barrister to act for any client where he or she is so requested to act. That duty arises regardless of the personal or political views of a barrister towards a particular client. The Bar Council points out that this frequently involves barristers acting in cases for the unpopular cause or the unpopular client.

5.162 Secondly, if barristers were allowed to form partnerships then the number of barristers available to act would be reduced and there would be less choice for clients. The top barristers would, in the opinion of the Bar Council, gravitate towards the larger law firms or associate with barristers specialising in similar areas of the law. The Bar Council argues that the structure of the profession would become more concentrated. Furthermore, the Bar Council have suggested that barristers in partnership would be prevented from acting against each other and this would have the consequence of certain groups of barristers acting almost exclusively either for plaintiffs or defendants.

5.163 Fourthly, the Bar Council has suggested that partnerships would give rise to multiple conflicts of interests among partners. This, in turn, would reduce the available pool of barristers available to act and so would present serious difficulties for the consumer in obtaining independent advice.

5.164 Fifthly, the Bar Council alludes to the possibility that if barristers were allowed to form partnerships among themselves, they might in turn form relationships with, for example, insurance companies and major defendants. This could then mean that such partnerships or barristers would be precluded from advising plaintiffs who wish to bring significant personal injuries claims against the insurance companies.

Evaluation

5.165 Taking the justifications in turn, the implication of the first argument is that if the restrictions on organisational form were relaxed, a barrister might be pressurised (by his or her partner or employer barrister) into not accepting a particular brief on the grounds of unpopularity or because accepting to take on the case would invite a certain stigma to be placed on the partnership or firm. Our judgement is that the rule obliging barristers to act when requested to act would not be compromised under this business structure by virtue of the professional standards and integrity of barristers. Furthermore, the special vocational nature of a barrister's work ought to guarantee that counsel would continue to act in cases deemed to be unpopular.

5.166 We are not convinced by the argument that high concentration would result in the profession if barristers were allowed to form partnerships. Given the fragmented nature of the profession at present, it would take a considerable amount of consolidation to make the market structure even moderately concentrated. Furthermore, given barristers' professional education and training and other rules of conduct, we would not envisage that coalitions of barristers would act only for either plaintiffs or defendants. Owing to the nature of the profession, we believe that there would continue to be incentives for barristers to act for various types of client on either side of cases.

5.167 We are not convinced by the fourth argument that multiple conflicts of interest would arise if barristers were permitted to form partnerships. It is relevant to note that independence is a core requirement of the solicitors' profession, where partnerships are allowed.

5.168 On the issue raised by the Bar Council that barristers in partnership would form business relationships with insurers or others that would restrict their activities in relation to litigation, the extent to which this would happen is not clear. Similarly, the impact of such a development on competition is not certain. It is again relevant to note that this problem does not appear to have arisen in the solicitors' profession, where partnerships are permitted.

5.169 On balance, if the requirement to act as a sole trader was relaxed, it would still be a matter of choice for the barrister as to whether to enter into partnership/other business structure or not. We would expect that many barristers would, in the short term at least, continue to operate as sole practitioners. The major effect of relaxing the present restrictions is that it would introduce flexibility and choice into the organisational form of business adopted by counsel.

5.170 Interestingly the results of our survey of barristers shows that while a majority (57.7%) of practicing barristers support the restrictions against forming partnerships or other professional associations, a not insignificant minority (33.8%) do not support the restrictions. In the various comments that we received from barristers, some made the point that a chambers system, such as exists in England and Wales, or other organisational form if introduced in Ireland, could enhance the training of newly qualified barristers and could allow them to better build their practices, thus helping to reduce the high rate of attrition in the profession and enhance competition and client service.

5.171 Our survey evidence also suggests that most barristers support the restriction implied by the Code on incorporation of businesses, with 64.2% of practitioners expressing support for the requirements. However, it is interesting to note that 25.9% of practicing barristers who responded to our survey were opposed to the restriction on incorporation.

5.172 The results given in Table 5.9 reveal that a greater proportion of insurance companies do not support the restriction against forming limited liability companies than those that do: 46.2% as opposed to 38.5%.

Table 5.9: Indecon Survey of Insurance Companies - Insurance Companies' Views on Organisational Restrictions in for Barristers' Profession

	% of responses		
Organisational Restrictions	**Support**	**Do not support**	**Don't know**
Restriction against forming limited liability companies	38.5	46.2	15.4

Source: Indecon Survey of Insurance Companies.

5.173 Finally, it is relevant to note that if barristers were allowed to form partnerships/companies with other barristers, then the practice whereby barristers are not permitted to draft pleadings or opinions for other barristers may have to be relaxed. According to the Bar Council, this custom exists so as to afford to junior barristers opportunities to advance their careers in advocacy (that they do not become drafters for more senior members of the Bar). In a less restrictive environment, a barrister, as a rational decision maker, would have choice over the mix of drafting/advocacy work in the formative stage of his/her career.

Prohibition on Barristers Forming Multidisciplinary Practices with Other Professionals

Justification

5.174 The Bar Council opposes the formation of MDPs for similar reasons to partnerships between barristers. It also indicates that barristers might form alliances with the larger law (i.e. solicitor) firms, and indeed the big accounting firms, and suggests that this could cause a further loss of access to barristers' services by smaller clients particularly.

Evaluation

5.175 It is our judgement that the preceding evaluation of the Bar Council's arguments against partnerships and other business structures among barristers apply *mutatis mutandis* in the case of MDPs involving barristers. If anything, MDPs would expand, rather than contract, the ability of users to access the services of barristers, particularly if fully qualified employed barristers are allowed to compete with members of the Law Library.

5.176 It is our opinion that the current restriction on MDPs prevents the realisation of economies of scale and scope, and of the introduction of innovative ways of combining legal and related services in the market. We would anticipate, however, that most barristers may wish not to join/form such partnerships but the removal of the restriction will potentially enhance consumer choice.

Summary of Main Conclusions

5.177 In Table 5.10 we present a summary of our main conclusions regarding the restrictions on competition in the barristers' profession. Our research suggests that there is very little price competition in the barristers' profession in Ireland and that the extensive restrictions outlined below have a significant and adverse impact on competition.

Table 5.10: Summary of Main Conclusions for the Barrister's Profession

Entry Restrictions

1. THE KING'S INNS MONOPOLY ON THE PROVISION OF THE DIPLOMA IN LEGAL STUDIES COURSE, A CONVERSION COURSE FOR NON-LAW GRADUATES AND OTHERS (MINIMUM AGE 25 YEARS) SEEKING ADMISSION TO TRAIN AS BARRISTERS, IS LIKELY TO RESTRICT THE NUMBER OF ENTRANTS TO THE PROFESSION.

2. THE KING'S INNS MONOPOLY ON THE PROVISION OF THE BARRISTER-AT-LAW (BL) DEGREE COURSE IS LIKELY TO RESTRICT THE NUMBER OF ENTRANTS TO THE PROFESSION.

3. THE ABSENCE OF REMUNERATION OF DEVILS DURING THEIR PERIOD OF PUPILLAGE IS LIKELY TO ACT AS AN ENTRY BARRIER TO THE PROFESSION.

Restrictions on Conduct

4. THE RULES PREVENTING BARRISTERS FROM ADVERTISING ARE LIKELY TO RESTRICT THE OPERATION OF COMPETITION BETWEEN BARRISTERS.

5. THE PROHIBITION ON CLIENTS DIRECTLY ACCESSING THE SERVICES OF BARRISTERS IN ALL AREAS OF WORK (INCLUDING CONTENTIOUS WORK) IS LIKELY TO RESTRICT COMPETITION BETWEEN BARRISTERS.

Restrictions on Demarcation

6. THE CUSTOMS AND TRADITIONS SERVING TO MINIMISE THE NUMBER OF 'SOLICITOR ADVOCATES' IN THE SUPERIOR COURTS LIMIT THE SUPPLY-SUBSTITUTABILITY BETWEEN THE TWO BRANCHES OF THE LEGAL PROFESSION AND THEREFORE ARE LIKELY TO RESTRICT COMPETITION ON THE MARKET FOR BARRISTERS' SERVICES.

7. THE PROHIBITION ON FULLY QUALIFIED EMPLOYED BARRISTERS (HAVING FULFILLED THE PUPILLAGE REQUIREMENTS AS WELL AS BEING CALLED TO THE BAR) COMPETING WITH PRACTISING BARRISTERS (MEMBERS OF THE LAW LIBRARY) IS LIKELY TO RESTRICT COMPETITION ON THE MARKET FOR BARRISTERS' SERVICES.

Restrictions on Organisational Form

8. THE REQUIREMENT THAT BARRISTERS OPERATE ONLY AS SOLE PRACTITIONERS AND THE PROHIBITION ON BARRISTERS FORMING MULTIDISCIPLINARY PRACTICES WITH OTHER PROFESSIONALS ARE LIKELY TO RESTRICT COMPETITION ON THE MARKET FOR BARRISTERS' SERVICES.

6 Competition and the Engineers' Profession in Ireland

Introduction

6.1 The structure of this section is as follows. The next part provides an overview of market definition and the services provided by engineers in Ireland and also highlights the core values/requirements of the profession. The nature of the services provided and the skills required of a professional engineer underpin many of the arguments used for regulating the profession and are re-visited in the course of this section.

6.2 The overview of market definition is followed by an empirical analysis of the size and structure of the market in which engineers operate and of the patterns of demand in the market. We then examine the users of engineers and describe the nature of competition, if any, in the market. The empirical analysis is informed using information obtained from the two principal organisations responsible for regulation of the engineers' profession in Ireland, namely the Institution of Engineers of Ireland (the IEI or 'Institution') and the Association of Consulting Engineers of Ireland (the ACEI or 'Association')). The IEI is invested with statutory protection of the title of chartered engineer, which in turn is one of the requirements to become a member of the ACEI. Together the Institution and the Association are responsible for the publication of conditions of engagement for the appointment of practitioners for various engineering works for public and private clients. While the IEI and the ACEI constitute the representative bodies of the profession in Ireland, it is recognised that significant numbers of appropriately qualified engineers choose not to affiliate themselves with either organisation. In this way, the coverage of self-regulation among engineers is less than among the other professions examined in this study, with the possible exception of architects.

6.3 After summarising the results of the empirical analysis of the market, we then examine in detail how the profession is regulated. In addition to taking a closer look at the Institution and the Association as the main regulatory bodies, the restrictions on entry, conduct, demarcation and organisational form are presented and their statutory or otherwise basis highlighted. Our assessment of the restrictions most likely to affect competition on the market is then undertaken by reference to the justifications made for them by the IEI and the ACEI, as detailed in their submissions and developed in our consultations with both organisations, and our judgement as to whether the restrictions are proportional to achieving the benefits claimed for them. Finally, our conclusions are presented.

Market Definition and Services Provided by Engineers

Market Definition

6.4 In order to examine the degree of competition occurring among members of the engineers' profession in Ireland, it is useful to consider the relevant market in which engineers operate. In competition/antitrust analysis, relevant market definition includes definition of the relevant product market and of the relevant geographic market. The former refers to those products that compete with each other to a sufficient extent to exercise a competitive constraint and the latter to the geographic area in which competition between the relevant products takes place. Thus, the relevant product or service market includes all those products or services viewed as sufficiently interchangeable by consumers (demand substitutability) or suppliers (supply substitutability).

6.5 In considering the issue of delineating the boundary of the relevant market, in general, it is useful to review the objective characteristics of the product or service, the nature of demand and supply and the attitudes of different types of user. Such evidence is used when considering specific individual competition cases to inform the so-called 'hypothetical monopolist test' or SSNIP (small but significant non-transitory increase in price) test, which seeks to frame the relevant antitrust market in order to identify the smallest relevant group of producers or providers capable of exercising a competitive constraint on the market. While this test may be less relevant in a sectoral policy study than in a specific antitrust case (such as a merger investigation) it is useful to consider aspects of relevant market definition in terms of the services provided by engineers and also in terms of the geographic area in which these services are provided.

6.6 According to Mc Rae, Devine and Lakey (1991), the engineering profession is made up of "persons employed in technical work for which normal qualification is a degree in science, maths or engineering" (p. 7). The role of the engineer lies in making accessible to society the benefits of science and technology through the design, construction and maintenance of myriad man-made phenomena, such as engines, cars and machines (in the case of mechanical engineering), buildings, bridges and roads (civil engineering), electrical machines and communications systems (electrical engineering) and chemical plant and machinery (chemical engineering). There are many other branches of the profession besides those just mentioned, including structural engineering, agricultural engineering, bio-medical engineering, software engineering and traffic engineering.

6.7 Some engineers become researchers and academics, but the majority are engaged in the social applications of research findings and new technologies. Many engineers are employees of industrial organisations and central and local government, while the rest are engaged in a professional or consulting capacity whereby public and private sector clients retain their services. The latter type of engineer, working alone or with other engineers and/or related professionals, constitutes the predominant type of supplier in the relevant market under review.

6.8 Owing to the fact that it is not a requirement to register with any regulatory body in order to practise as a professional engineer in Ireland, as is the case with the other professions under review, with the exception of the architects' profession, it is not known how many practitioners are engaged in private practice. The IEI estimates that there are over 50,000 persons describing themselves as engineers or technicians in Ireland, and it alone has a membership of 20,000 engineers and technicians, of which about 3,500 are chartered engineers. On the other hand, approximately 200 consulting engineers are registered with the ACEI, which lists among its membership the major consulting engineering firms in Ireland. In fact, according to its submission, the Association estimates that between 60 and 70% of the profession offering independent consulting engineering services are members of the organisation.

6.9 Table 6.1 below provides details of the composition of engineering work undertaken by registered (ACEI) consulting engineers and engineering firms. Member firms typically practise in more than one field.[1]

Table 6.1: Composition of Engineering Disciplines

Engineering discipline	Components
Civil	Arterial drainage; bridge and dam construction; land reclamation; road and highways; sewage treatment and disposal; site investigation and developments; water treatment storage and supply; industrial effluent and pollution control; irrigation systems; environmental studies.
Electrical	Electrical generating plant, main and emergency supply systems, HT and LT distribution and sub-stations, internal distribution systems, illumination engineering, power systems and supply, instrumentation, street and area lighting, hoists, escalators and lifts, communication systems; fire detection and alarm systems; time recording and display systems; public address, personnel – location and call systems; radio and television installation; central distation systems; lighting protection systems.
HVAC	Heat generators; heating installations; hot and cold water storage and distribution; refrigeration and cold storage; air-conditioning installations; ventilation systems; thermal insulation.
Marine	Sea and river dredging; sea walls and erosion protection; jetties, wharves and harbours; marine structures.
Mechanical	Steam boiler plants and distribution systems; calorifies plants; water treatment and filtration; dust extraction and collection; fire protection and prevention; compressed air and vacuum systems; pneumatic conveyors; hospital services; laboratory services; fuel oil storage and distribution; gas fuel supply and distribution; piping systems; cooking and catering equipment; laundry equipment; sterilising equipment and systems; conveyor systems and mechanical handling plant; refuse collection and disposal systems; vibration control; sound insulation and control; acoustical design and treatment; piped waste and soil systems; industrial effluent and flue gas treatment.
Structural	Foundations; building and structural frames.
Traffic	Traffic studies; transport systems.

Note:
1. HVAC denotes heating, ventilating and air-conditioning.
2. Project management is not a distinct discipline but rather occurs across the different disciplines of engineering.
Source: Indecon adaptation of ACEI Annual Review and Directory of Members 2001.

[1] The following set of tables exploits information requested of the Association by Indecon and thus relates to the population of registered consulting engineers. The IEI informed us that it does not maintain information on engineering practice areas.

6.10 Table 6.2 shows that the main practice areas of registered (ACEI) consulting engineers (in terms of the number of engineers involved) are civil engineering, structural engineering and project management, accounting for 78%, 77% and 67% of all members engineers in 2001 respectively. Project management is not defined by the ACEI but involves overlap between civil and structural engineering and also involves other professionals, namely architects and quantity surveyors. Indeed, we understand that architectural practices compete to some extent with engineering firms in this area.

Table 6.2: ACEI Member Engineers by Field(s) of Engineering - 2001

Field	No. of ACEI members	%
Civil	139	78
Structural	138	77
Project management	120	67
Traffic	63	35
Electrical	59	33
Marine	58	32
Mechanical	50	28
HVAC	28	16
Total ACEI member engineers	179	100

Notes:
1. ACEI members can be involved in more than one field of engineering.
2. HVAC denotes heating, ventilating and air-conditioning.

Source: Indecon calculations using ACEI Annual Review and Directory of Members 2001.

6.11 Table 6.3 below reinforces the picture gained in Table 6.2 by showing the predominance of civil engineering, structural engineering and project management as the main practice areas of ACEI consulting engineering firms. According to its Directory of Members 2001, the Association had 103 members firms in that year. As the figures indicate, the proportions of member firms engaged in civil engineering, structural engineering and project management were 74%, 74% and 57% respectively, these figures being some way ahead of the other branches of engineering listed, namely marine, traffic, electrical, mechanical and heating, ventilating and air conditioning engineering.

Table 6.3: ACEI Member Firms by Field(s) of Engineering - 2001

Engineering	Number of firms	%
Civil	77	74
Structural	77	74
Project management	59	57
Marine	27	26
Traffic	26	25
Electrical	26	25
Mechanical	22	21
HVAC	16	16
Total ACEI member firms	103	100

Notes:
1. ACEI member firms can be involved in more than one field of engineering.
2. HVAC denotes heating, ventilating and air-conditioning.

Source: Indecon calculations using ACEI Annual Review and Directory of Members 2001.

6.12 Further emphasis that civil engineering, structural engineering and project management are the main practice areas of ACEI consulting engineering firms is provided by Table 6.4, which shows the total numbers of staff involved in each of the practice areas. According to the figures, member firms employed over 3,000 staff in 2001, of which 86%, 83% and 81% were engaged in structural, civil and project management respectively. As in the previous two tables, the proportion relating to these three areas are significantly greater than those pertaining to the other fields identified by the ACEI.

Table 6.4: ACEI Member Firms by Total Staff Employed (Including ACEI Members) - 2001

Field	Total staff	%
Structural	2,635	86
Civil	2,540	83
Project management	2,480	81
Traffic	1,472	48
Marine	1,445	47
Electrical	1,340	44
Mechanical	1,076	35
HVAC	297	10
Total staff employed	3,063	100

Notes:
1. ACEI member firms can be involved in more than one field of engineering.
2. HVAC denotes heating, ventilating and air-conditioning.

Source: Indecon calculations using ACEI Annual Review and Directory of Members 2001.

6.13 In our consultation with the ACEI, we were informed that the geographic boundary of the relevant market for consulting engineering services is likely to be national in scope. However, it is important to bear in mind that member firms are on average large compared with independent (i.e. non-member) engineering practices, for which the relevant market may be more localised in extent. We return to differences between member and non-member firms in the next part of our economic analysis of the profession.

6.14 In terms of the geographic scope of the relevant market, Table 6.5 indicates that a significant majority (89%) of the ACEI member firms in 2001 were located in the main urban centres, namely Dublin (63%), Cork (14%), Galway (7%) and Limerick (5%). No doubt the figures reflect the locations where demand in the main areas of civil engineering, structural engineering and project management was greatest at that time.

Table 6.5: ACEI Member Firms in 2001 by County

County	Number of firms	%
Dublin	65	63
Cork	15	14
Galway	7	7
Limerick	5	5
Mayo	2	2
Sligo	2	2
Clare	1	1
Kildare	1	1
Meath	1	1
Monaghan	1	1
Waterford	1	1
Westmeath	1	1
Wicklow	1	1
Total	103	100

Source: Indecon calculations using ACEI Annual Review and Directory of Members 2001.

6.15 On the basis of the evidence presented above, it is possible to delineate three predominant product or service areas provided by professional engineers, namely civil engineering, structural engineering and project management. The latter area overlaps with civil and structural engineering and involves the contribution of other construction professionals as well as engineers, namely architects and quantity surveyors. These other professionals tend to either work alongside their engineering colleagues or to compete with them in providing project management skills.

6.16 A number of other engineering product or service areas can also be identified, such as mechanical, electrical and marine engineering. In all the areas identified, there are registered and non-registered suppliers – by 'registered' is meant that the firm is a member of the ACEI.

6.17 Finally, it is our belief that the geographic extent of each of the main product areas identified is mostly national for registered suppliers and the larger non-registered operators, while more localised in scope for the majority of the non-member firms.

Key Skills of the Engineer

6.18 Central to the formation of a professional engineer is education in the physical and mathematical sciences and the practitioner is often required to have knowledge of areas beyond his or her immediate sphere of expertise, such as law, economics and accounting.

6.19 Noteworthy in the context of the present investigation is the fact that engineers involved in the design and/or supervision of construction of large reservoirs, bridges, building works, chemical plants etc. carry responsibilities in terms of public health and safety. They along with architects are the only members of a design team to carry such responsibilities.

6.20 It is primarily on the basis of public health and safety that regulation of the profession is motivated by the IEI and ACEI. Furthermore, it is argued, maintaining standards of professionalism bears on cost and quality. Both the Institution and the Association submit that the role of competition in the profession is to promote best value for money and they suggest that this can only be achieved through high standards of entry and conduct, and is not necessarily indicated by price alone.

Market Size, Structure and Patterns of Demand

6.21 Our economic analysis of competition in the engineers' profession provided below consists of an empirical examination of various aspects of market size, structure and the pattern of demand.

6.22 The following sources of information underpin the quantitative results presented:

- Data obtained from the IEI and ACEI;
- New information from the Indecon Survey of Engineers (of which there were 150 responses); and
- New Information from the Indecon Survey of the Public (sample size of 1,008 adults aged 15+).

6.23 The results produced by our empirical analysis are relevant in quantifying the economic characteristics of the engineers' profession and are employed to help inform our examination of the various requirements and restrictions identified later in the section.

Number and Growth of Engineers

6.24 In order to obtain a comprehensive picture of trends, it is relevant to consider the number and recent growth of the professions under three sub-headings, namely chartered engineers, registered consulting engineers and registered consulting engineering firms. The IEI is responsible for admitting chartered engineers, while registered consulting engineers and consulting engineering firms are the responsibility of the ACEI. To repeat from earlier, to become a member of the Association, it is a requirement to first satisfy the conditions for gaining the title of chartered engineer (CEng MIEI), which is the only professional title of engineer that is statutorily protected in Ireland. The entry requirements of both the IEI and the ACEI are examined later in the section.

6.25 There are no systematic data for non-IEI engineers and non-ACEI consulting engineers and engineering firms in Ireland. Thus, it is difficult to construct a complete picture of the whole profession in view of this fact. Data provided by the CSO (Occupations) provides the best possibility of tracking the trend in the number of all professional engineers (regulated and non-regulated). The latest data relate to 1996 and suggest a total membership of the profession of 13,177, of which 12,007 or 91% were male and 1,170 were female. In 1991, there were 8,285 professional engineers, of which 7,601 (91%) were male and 684 were female. Thus, between 1991 and 1996, the number of professional engineers grew at a rate of 59%. In what follows, it will be useful to cast the growth rates observed among the regulated profession against these figures.

Chartered Engineers

6.26 Table 6.6 shows that the population of chartered engineers grew at a cumulative rate of 43% during 1991-2001. Between 1991 and 1996, the chartered engineering profession grew by 24%, which is significantly less than the growth rate observed among the regulated and non-regulated profession together (59% as reported in the previous paragraph).[2]

6.27 To give the figures presented in Table 6.6 some more perspective, between 1992 and 2001, the populating of engineers with chartered status grew at an average annual rate of 3.66%, compared with 6.95% for Ireland's GDP over the same period.[3] Although tentatively suggested, this comparison might imply that the number of chartered engineers has not kept pace with latent demand in the economy.

Table 6.6: Number and Growth of Chartered Engineers - 1991-2001

Year	Number	% change
1991	2,390	
1992	2,518	5.36
1993	2,567	1.95
1994	2,626	2.30
1995	2,854	8.68
1996	2,957	3.61
1997	3,014	1.93
1998	3,085	2.36
1999	3,074	-0.36
2000	3,184	3.58
2001	3,412	7.16

Source: Indecon calculations using IEI Annual Reports.

[2] Further tables relating to other IEI member engineers are provided in Annex 4.
[3] Source: ESRI data

Registered Consulting Engineers

6.28 Table 6.7 shows the number and growth in registered consulting engineers during 1978-2002, using data obtained from the ACEI. The number of such consulting engineers grew by 43% during this time, by 12% during 1991-2001 and by 6% between 1991 and 1996. Thus, the population of registered consulting engineers has grown by substantially less than the population of chartered engineers during the past and thus less than the general population of professional engineers (regulated and unregulated).[4]

6.29 The cumulative rates of growth among ACEI members for 1999-2001 and 1999-2001 are less than the corresponding growth rates of GDP, namely 18.5% between 1999-2001 and 107% between 1991 and 2001.

Table 6.7: Number and Growth of Individual Members of the ACEI 1978-2002

Year	Number of member engineers	% change
1978	127	-
1979	137	7.87
1980	142	3.65
1981	147	3.52
1982	159	8.16
1983	163	2.52
1984	165	1.23
1985	171	3.64
1986	170	-0.58
1987	159	-6.47
1988	154	-3.14
1989	138	-10.39
1990	158	14.49
1991	160	1.27
1992	175	9.38
1993	174	-0.57
1994	169	-2.87
1995	169	0.00
1996	170	0.59
1997	180	5.88
1998	177	-1.67
1999	170	-3.95
2000	174	2.35
2001	179	2.87
2002	182	1.68

Source: Indecon calculations using ACEI data.

[4] Further tables relating to ACEI member engineers are presented in Annex 4.

Registered Consulting Engineering Firms

6.30 Table 6.8 illustrates the number and growth of member firms of the ACEI during 1978-2002. The number of such consulting engineering firms grew by 74% during this time, by 12% during 1991-2001 and by 15% between 1991 and 1996. The population declined by 3% more recently, namely between 1999 and 2001.[5]

6.31 The cumulative growth rates for 1999-2001 and 1991-2001 are less than the corresponding rates for Ireland's GDP, namely 18.5% between 1999-2001 and 107% between 1991 and 2001. We would tentatively suggest from these figures that the number of registered firms might not have kept pace with demand in the economy.

Table 6.8: Number and Growth of Member Firms of the ACEI 1978-2002

Year	Number of member firms	% change
1978	61	-
1979	63	3.28
1980	64	1.59
1981	65	1.56
1982	72	10.77
1983	77	6.94
1984	77	0.00
1985	76	-1.30
1986	73	-3.95
1987	84	15.07
1988	86	2.38
1989	86	0.00
1990	89	3.49
1991	92	3.37
1992	102	10.87
1993	104	1.96
1994	104	0.00
1995	106	1.92
1996	106	0.00
1997	104	-1.89
1998	105	0.96
1999	106	0.95
2000	106	0.00
2001	103	-2.83
2002	106	2.91

Source: Indecon calculations using ACEI data.

[5] Further tables relating to ACEI member engineering firms are presented in Annex 4.

Changes in Fee Income among Engineers

6.32 Table 6.9 shows that the vast majority (95.1%) of engineering practices that responded to the Indecon Survey of Engineers (which relates to regulated and unregulated practitioners) stated an increase in average annual fee income between 1999 and 2001.[6] The most frequent rate of increase in fee income on this basis occurred in the 10-24% range (31.6% of respondents), followed by the 25-49% category (17.6%). Furthermore, 20.6% of practices reported a doubling or more of average annual fee income, while 19.9% stated an increase of between 0 and 9%. The facts reveal a buoyant trend in fee income reflecting the growth in the economy and in investment in infrastructure.[7]

Table 6.9: Indecon Survey of Engineers - Approximate Average Annual Change in Total Fee Income of Engineering Practices - 1999-2001

Extent of increase	% of responses
Firms stating increase in fee income	95.1
Of which:	
Over 200%	3.7
150-199%	5.9
100-149%	11.0
50-99%	10.3
25-49%	17.6
10-24%	31.6
5-9%	10.3
0-4%	9.6
Firms stating decrease in fee income	4.9

Source: Indecon Survey of Engineers.

[6] The corresponding figures for those respondents stating a decrease in fee income are presented in Annex 4.

[7] According to the ACEI, demand in the past few years has been particularly buoyant in the main areas of civil and structural engineering and in project management, owing to the construction boom in Ireland.

Size Distribution and Concentration among Engineers

Aggregate Concentration

6.33 Table 6.10 presents statistical information on the size distribution of engineering practices (member and non-member firms of the ACEI) for each of the years 1999-2001. The figures indicate that the size distribution of consulting engineering firms is highly positively skewed, with the mean number of engineers (12-17) per practice significantly greater than the median (2-3) in each of the three years. Owing to the shape of the size distribution, the median is the more likely indicator of average size and the vast majority of practices are clustered around this particular measure of central tendency. Thus, most firms are relatively small and employ two engineers, and that level of size has tended to remain constant over the period.

Table 6.10: Indecon Survey of Engineers - Survey Statistics on Practice Size

	Number of engineers per practice		
Statistics	**1999**	**2000**	**2001**
Mean number of engineers per practice	12	15	17
Median	2	2	3
Standard deviation	43	49	55
Standard deviation - % of mean	357	335	328
Min	1	1	1
Max	390	420	400

Source: Indecon Survey of Engineers.

6.34 The diversity in size is also illustrated by the difference between the largest and smallest practices in Table 6.10 and by the magnitude of the standard deviation-as-a-percentage-of-the-mean statistic, which exceeds 100% in each of the three years. The size distribution is indicative of a dual structure across the profession, in which there are small firms and very large businesses.

6.35 Concentrating on ACEI member (i.e. regulated) consulting engineering firms, in Table 6.11 we group the 103 registered firms in 2001 by value of the most significant projects completed in the past seven years. The results indicate that member firms are involved in large (i.e. multi-million euro) projects.

Table 6.11: ACEI Member Firms by Value of Most Significant Projects in Past 7 Years

Value code	Number of firms	%
C	1	1
D	4	4
G	27	26
H	15	15
I	27	26
J	15	15
Unknown	14	13
Total	103	100

Note: ACEI value codes are as follows:

1. A = below £50,000
2. B = £50,000-100,000
3. C=£100,000-£500,000
4. D=£500,000-£1,000,000
5. G=£1,000,000-£5,000,000
6. H=£5,000,000-£10,000,000
7. I=£10,000,000-£20,000,000
8. J=exceeding £20,000,000.

Source: Indecon calculations using ACEI Annual Review and Directory of Members 2001.

6.36 On the basis of the evidence presented in the previous tables, which relates to unregulated and regulated firms, it is quite likely in our view that the consulting engineering profession in Ireland is characterised by a dual structure, where non-registered firms compete in mainly localised markets and typically are very small in size, while registered firms view their markets are national in scope and operate at a significant larger scale. The ACEI informed us at our consultation that many non-registered businesses are one-person operations employing relatively low levels of capital equipment (which may be appropriate to their needs). Further, it was pointed out, some university lecturers and other employed engineers sometimes offer their services in a private consulting capacity.

Market Concentration

6.37 Using information provided in the ACEI Directory of Members, it is possible to estimate the market shares of the largest and smallest (registered) firms and the level of concentration (using the Herfindahl-Hirschman index). The size variable used in this case is total employment per firm. The results for 2001 are given in Annex 4.

6.38 The figures presented show that the least concentrated practice areas are those in which most member firms practice, namely civil, structural and project management. The level of concentration in each of these fields is 'low' (HHI < 1,000), while electrical engineering and mechanical engineering are 'moderately' concentrated (with a HHI of between 1,000-1,800).

6.39 The market share of the largest registered firm is greatest in mechanical engineering (30.11%), followed by electrical engineering (24.18%). Next is marine engineering (22.42), traffic engineering (22.01) and heating, ventilating and air-conditioning (19.19). (Considering all engineering fields together, the largest firm would have had a market share of 10.58% in 2001.) The share figures are large when it is remembered that size has been measured by employment. Had size been gauged by turnover (data not available), the market shares of the largest firms in the various fields may have been higher in the more concentrated practice areas.[8]

6.40 In order to investigate if the patterns of shares and concentration have changed much over the years, we also examined the figures for 1986. The results are also reported in Annex 4.

6.41 The results reveal a similar picture, with civil, structural and project management again being the least concentrated activities in 1986. Furthermore, the shares of the largest firms and the level of concentration have grown in both electrical and mechanical engineering, although the identities of the top firms in each case have changed.

[8] It is important to also note that there are a number of international consulting engineering firms operating in Ireland that compete with ACEI member firms for projects. Most originate from Britain and Northern Ireland and tend to be, on average, larger than the typical ACEI member firm.

Customers of Engineers and their Characteristics

Breakdown of Business and Personal Users

6.42 The figures presented in Table 6.12 below reveal that the majority of (regulated and unregulated) engineering fee income derives from business, corporate, institutional, government clients. The distribution of fee income derived in this way is negatively skewed (mean 79% and median 90%), meaning that the median rather than the mean is a more reliable measure of central tendency. Accordingly, approximately 90% of fee income is derived from business/corporate clients.

6.43 Conversely, the distribution of fee income derived from members of the general public is positively skewed (mean 21% and median 10%). This also means that the median is the more reliable indicator of central tendency. The evidence therefore indicates that about 90% of fee income is derived group users and 10% from members of the general public.

Table 6.12: Indecon Survey of Engineers - Percentage of Fee Income of Engineering Practices from Business/Corporate/Institutional (including Government) Clients and Personal Clients

Statistics	% of Fee Income - Business, Corporate and Institutional Clients	% of Fee Income – General Public
Mean	79	21
Median	90	10
Standard deviation	24	24
St. dev. as a % of mean	30.6	112.7
Min	0	0
Max	100	100

Source: Indecon Survey of Engineers.

6.44 The ACEI informed us that a very small proportion of its member firms' turnover comes from abroad (generally less than 5%). They pointed that in supplying services aboard, firms tend to establish links with other firms located in the foreign market and these tend to involve only the very largest home operators. These views reinforce the national scope of the geographic market for engineers' services.[9]

[9] Furthermore, the ACEI informs us, the extent of import competition in services is low in Ireland. Most such competition originates from firms based in Northern Ireland and to a lesser extent in the UK.

Frequency of Usage and Quality of Information among Personal Customers

6.45 Because personal or individual users are likely to be the least informed segment of buyers in the relevant market for professional engineering services, we focus in this part of the analysis on precisely this type of customer. Our survey results show that members of the general public tend to purchase the services of engineers infrequently. A significant majority (84%) of respondents to our Survey of the Public stated that they had not engaged the services of engineers in the past five years. However, 3% of the public indicated that they had employed engineers between 1 and 5 times per year in the past five years.

6.46 It is also notable that 8% of the public believe they would be 'very well able to assess' the quality of services provided by engineers, while 21% felt they would be 'well able to assess quality' and a further 26% indicated that they were to some extent able to assess the quality of services provided by engineers. However, despite the fact that consumers are not frequent purchasers of engineering services, many believe they are able at least to some extent to assess the quality of engineering services.

Nature of Competition, if any, on the Market

6.47 Having looked at the relevant market and its structure, it is relevant to evaluate the nature of competition, if any, on the market for engineering services. Central to this issue are the roles that price and non-price instruments play in the marketplace. In what follows, we examine the role of price competition by reference to new evidence on fee levels and the extent, if any, of price competition occurring among members of the profession. We then examine the provision of fee information by engineers to their users before investigating the nature and degree of advertising, this being a key instrument of non-price competition. We finally gauge the level of competition as it exists in terms of recruitment of new engineers.

Engineers' fees

6.48 Table 6.13 presents information relating to the distribution of daily fee rates quoted by respondents to Indecon's Survey of Engineers (which relates to regulated and unregulated engineers). While there is significant variance in daily fee rates, with €1,600 the most expensive of those surveyed, the distribution of rates is reasonably symmetric, with the mean almost coinciding with the median, meaning that most rates are concentrated on the average value of approximately €520/ day.

Table 6.13: Indecon Survey of Engineers – Approximate Daily Fee Rates (Excluding Vat)	
Statistics	**€**
Mean daily fee rate	521
Median	518
Standard deviation	289
Std deviation as % of mean	55.5
Source: Indecon Survey of Engineers.	

Extent of Price Competition

6.49 According to our survey findings, a majority (51.6%) of the respondents to the Indecon Survey of Engineers (pertaining to regulated and non-regulated members of the profession) believe that there is either 'significant' or 'extensive' price competition among the profession. On the other hand, 37.1% believe there is 'limited' price competition and 11.2% believe that 'very little' or 'virtually no' price competition exists among engineers in Ireland (see Table 6.14).

6.50 Turning to the public, while over 49% of members of the public indicated they did not know the extent to which price competition exists in the profession, 28% believed there was 'significant' or 'moderate' competition in price among engineers.

Table 6.14: Practitioner Views on Extent of Price Competition among Engineers in Ireland					
	Virtually no price competition	Very little price competition	Limited price competition	Significant or Extensive price competition	Don't Know
Views of Engineers	1.3%	9.9%	37.1%	51.6%	-
Source: Indecon Survey of Engineers.					

Provision of Price/Fee Information to Consumers

6.51 According to our survey evidence, only a minority of members of the public (16%) believe that they know in advance what they would be required to pay in accessing the services of engineers.

6.52 Given the deficit in public knowledge of likely fee levels, it is not surprising that most (63%) members of the public also believe that more information on fees/prices is required from engineers in Ireland. This points to the role of enhanced consumer information and, in particular, to advertising of fees. While fee advertising is not restricted among the regulated part of the profession in Ireland, our research suggests that prices are rarely, if ever, advertised.

Degree Of Advertising

6.53 As part of our survey of engineers we obtained information on the extent of advertising by engineers (including unregulated as well as regulated engineers) in Ireland. The results indicate that annual expenditure on advertising by engineering practices surveyed is extremely skewed, with mean annual expenditure of over €28,000 as opposed to €2,000 for the median. It is our view that the degree of skewness observed in advertising expenditure reflects the possible dual structure in the profession mentioned earlier, where possibly larger registered consulting engineering firms run large budgets in contrast to the likely much lower level of spending incurred by smaller non-registered suppliers.

6.54 As in the case of the other professions under review in this study, we undertook an analysis of engineers' advertising as evidenced by entries placed in the Golden Pages. However, in our consultations with both the IEI and ACEI, it was pointed that Golden Pages advertising is probably irrelevant to engineering customers, most of which are relatively informed users, as shown above. Business, corporate and government (central and local) users are more likely to source services through trade journals, referrals and word of mouth as well as past experience. For these reasons, the Golden Pages results are given in Annex 4.

Recruitment of Engineers

6.55 One of the features of a competitive market is that the availability of factors of production is highly elastic, meaning that the process of hiring new labour in response to changing market conditions should not be a difficult task.

6.56 The figures in Table 6.15 reveal that the vast majority (91.2%) of engineers we surveyed (regulated and unregulated) found it difficult to hire engineers in Ireland during the past three years. In particular, 44.6% of respondents stated that they experienced 'difficulty' in recruitment, 24.3% found recruitment 'very difficult' and 22.3% found recruitment 'extremely difficult'.

Table 6.15: Indecon Survey of Engineers - Views on Extent of Difficulty in Recruiting Engineers in Ireland over the Last 3 Years

Level of difficulty	% of Responses
Extremely difficult	22.3
Very difficult	24.3
Difficult	44.6
No difficulty	8.8

Source: Indecon Survey of Engineers.

6.57 Our survey findings highlight the difficulties faced by the engineers' profession in recent years in relation to recruitment of staff to meet the increased demand for engineering services. The ability of the profession to secure an adequate supply of qualified personnel is an important issue for the ongoing development of a competitive market for the provision of engineering services in Ireland.

Summary of Empirical Analysis of the Market

6.58 We now draw together the salient points arising from the last four sub-sections.

6.59 There is no requirement to register with any regulatory body in order to practise as an engineer in Ireland. Regulated engineers – namely chartered engineers, who are regulated by the IEI, and registered consultant engineers (who must be chartered engineers), who are overseen by the ACEI – compete with independent engineers. A proportion of the independent practitioners hold qualifications approved by the Institution and therefore may be eligible for chartered membership (CEng MIEI), although the IEI has no precise estimate of the number.

6.60 Engineers (whether registered or not) tend to specialise in a given field of engineering and three areas predominate: civil engineering, structural engineering and project management. Other areas of practice include mechanical, electrical and marine engineering. The geographic extent of these service areas is mostly national for larger practices, while more localised in scope for smaller operators, which we believe includes the majority of non-regulated engineering firms.

6.61 Regarding the size and structure of the relevant market, we considered the number and growth of engineers under the following four categories: all (regulated and unregulated) engineers; chartered engineers; registered consulting engineers (i.e. individual members of the ACEI); and registered consulting engineering firms (i.e. firm members of the ACEI). According to the CSO, in 1996 (the latest year for which data are available), there were 13,177 'professional engineers' in Ireland. At the end of 2001, there were 3,412 engineers of chartered status and at the close of the following year there were 182 registered consulting engineers and 106 registered consulting engineering firms. The number of all engineers grew at a cumulative rate of 59% between 1991 and 1996. During the same period, the population of chartered engineers grew significantly less rapidly (24%), as did the population of registered consulting engineers (6%) and registered consulting engineering firms (15%). Taking a longer view of growth, the population of chartered engineers and of registered consulting engineers may not have kept pace with latent demand in the economy since the beginning of the 1990s.

6.62 That growth in the number of engineers may not have kept pace with demand is reflected in fee income growth. According to our new survey evidence, most (regulated and unregulated) engineering firms experienced significant growth in fee income during 1999-2001. Accepting this was a period of exceptional growth in the economy, the average annual rate of growth in engineering fee income in nearly all cases exceeded any measure of national product. In particular, among the 95.1% of practices that stated an increase in fee income during the period, 80.1% stated an increase of 10% or more on an average annual basis.

6.63 About 90% of engineers' fee income is derived from business, corporate, institutional or government clients, with the remainder coming from members of the public. Where the latter engage the services of engineers, they do so infrequently and are likely to be characterised by an information deficit. Indeed, given that regulation is not a prerequisite for practising in Ireland, we doubt whether members of the public could tell the difference between a chartered and non-chartered engineer.

6.64 Turning to the nature of competition, the distribution of daily fee rates among engineers (regulated and unregulated) is approximately normal (i.e. bell-shaped) with not insignificant variation around the average (c. €520). Advertising in popular media, such as the Golden Pages, is likely to be less important to engineers than other types of professional more frequently retained by members of the public. Rather, the main users of engineers, namely businesses and Government (central and local), are more likely to source services through trade journals and referrals. Past experience is also likely to be an important factor in this type of client's choice of engineer.

6.65 Finally, there has been difficulty in recruiting engineers in the past three years and this, in our opinion, is consistent with the view that the supply of engineering services has lagged behind demand.

Examination of the Restrictions in the Engineers' Profession

Introduction

6.66 In our examination and assessment of the restrictions and requirements governing the engineers' profession, we firstly identify the restrictions governing entry, conduct, demarcation and organisational form before concentrating on those restrictions that we believe are most likely to hinder competition on the market. In concentrating on the key restrictions, we examine their justification and then evaluate whether or not they are proportional to achieving their intended objectives.

6.67 Prior to undertaking these tasks, it is first necessary to consider in more detail the principal organisations responsible for regulating the profession in Ireland, namely the IEI and the ACEI.

Regulation of the Profession

6.68 As noted earlier, regulation of the engineers' profession by the Institution and the Association is not complete in that a significant proportion (on our reckoning, over half) of engineers engaged in professional practice are not members of either organisation.

The Institution of Engineers of Ireland

6.69 Founded in 1835, the Institution is the largest body of engineers in Ireland with over 20,000 members. It represents all branches of the profession and categories of engineer in Ireland. It is a learned society and when it received its Royal Charter in 1877 it became one of the first chartered professional bodies in the British Isles.

6.70 The aims of the Institution are:

- To promote knowledge of engineering and engineering science;
- To establish and maintain standards of engineering education and training;
- To promote and provide opportunities for continuing professional development for engineers;
- To maintain standards of professional ethics and conduct;
- To ensure that the registered professional titles of the Institution are assigned only to appropriately qualified engineers and technicians.

6.71 The chief regulatory function of the Institution in the context of this study is to define and protect the use of the title of chartered engineer under the Institution of Civil Engineers of Ireland (Charter Amendment) Act, 1969. According to section 7 of the 1969 Act:

> "Chartered members of the Institution shall be known as 'Chartered Engineers' and shall have the right so to describe themselves and to use after their names the abbreviation 'CEng'. Such right shall be confined to such Chartered Members and to persons within the State in respect of whom the Council is satisfied that they are authorised to describe themselves as Chartered Engineer by a professional body recognised by the Council in that behalf".

6.72 The governing body of the Institution is the Council, which delegates all applications for the title of chartered engineer (CEng MIEI) to the Board of Examiners. All decisions made by the Board of Examiners in relation to the reward of this title are final.

The Association of Consulting Engineers

6.73 The ACEI is the representative body in Ireland for professional consulting engineers operating in the private sector.

6.74 The Association was founded in 1938 and incorporated in 1957. As indicated in the previous part of this section, the ACEI today has approximately 200 member engineers and 106 member firms, employing in excess of 3,000 staff (based on 2001 information). Most of the major independent consulting engineering firms in Ireland are represented in the ACEI. The ACEI estimates that approximately 60-70% of the profession offering independent consulting engineering services are members of the organisation.

6.75 The objectives of the Association are to encourage the practice of engineering as a profession, promote ethical principles and procedures, advance the interests of all engineers in all branches of the profession (but particularly those of consulting engineers), to increase the usefulness of the profession to the general public and to safeguard the trust reposed in its members by clients. The ACEI promotes quality-based selection as the most appropriate procedure for the appointment of consulting engineers and the settlement of their fees.

6.76 The Executive Committee is the governing body of the ACEI. The Executive is elected by members at the AGM each year and is responsible for managing and directing the affairs of the organisation in accordance with the Articles and Rules of the Association. This includes the admission of consulting engineers and consulting engineering firms, for which there is no statutory basis at the present time.

Assessment of Discipline, Complaints and Enforcement

6.77 As part of our research, we examined the discipline, complaints and enforcement procedures of both the IEI and ACEI. Our assessment of the procedures is that they are fair and open, and serve to maintain the professional standards and ethical principles agreed to by all of its members. It is most unlikely that the rules could be employed to engage in any anti-competitive practices.

Restrictions on Entry

Requirements to become a Chartered Engineer (IEI)

6.78 We first identify the process by which a candidate becomes a chartered engineer before assessing the process on competition principles.

6.79 All of the requirements to become a chartered engineer (CEng MIEI) are given in the Bye-Laws of the IEI and take their authority from the 1969 Act.[10] There are three stages as follows:

- An academic stage;
- A stage in which professional engineering training and experience are required; and
- An assessment stage conducted by the Institution.

6.80 The academic stage typically involves completion of a primary degree in engineering from a university or engineering college approved by the Council of the IEI.

6.81 The Institution has been accrediting engineering degree courses since 1982. The accreditation process is designed to ensure that the standards and quality of engineering degree courses provide an appropriate foundation and preparation for those entering the profession. Each accredited course is evaluated in accordance with a set of criteria that include course philosophy, entry standards (minimum grade C in Higher Level Mathematics at Leaving Certificate or equivalent), content, duration, level, assessment and evaluation, and resources.

[10] The Institution publishes a brochure entitled Regulations for the Title of Chartered Engineer (CEng MIEI).

6.82 Universities and institutes of technology (ITs) wishing to have their engineering degree courses accredited must apply to do so by submitting a completed Application Form to the Registrar of the IEI.

6.83 All degree courses accredited by the Institution are internationally recognised through the Washington Accord. This means that degree programmes accredited by the IEI are acceptable in the host countries of the Accord signatories on the same basis as the academic requirements of its own graduates. The current signatory countries to the Accord are Australia, Canada, Ireland, Hong Kong, New Zealand, South Africa, the United Kingdom and the United States.

6.84 The IEI currently approves over 50 engineering degree courses. These are offered at Athlone Institute of Technology (1 programme), Cork Institute of Technology (4), Dublin City University (4), Dublin Institute of Technology (6), University College Cork (4), University College Dublin (5), Trinity College Dublin (10), National University of Ireland Galway (5) and University of Limerick (11).

6.85 The IEI has no control over the entry requirements to these courses. Rather the entry requirements for a given course are the result of the number of places available and the level of demand for the particular course. Demand for engineering degree courses closely follows the cyclical pattern of the economy, with points varying (often widely) from year to year. For example, the CAO points required to enter courses in industrial, mechanical and electrical engineering have generally fallen during the 1990s, while the requirements for courses in computer engineering have gone up in line with the technology boom in the economy.

6.86 According to the latest data available from the CAO, there were 60,370 applicants for engineering degree courses in Ireland in 2001, of which there were 9,460 first preferences. This level of demand was the third highest after arts/social science degree courses and administration/business degree courses. Of the 9,460 first preference applications, 3,080 or 33% of the total were accepted to engineering degree courses.[11]

6.87 Data obtained by Indecon from the Higher Education Authority (HEA) show that for its constituent colleges (UCD, UCC, NUIG, TCD, DCU and UL), the number of graduates of full-time undergraduate engineering courses was 1,251 in 2000, 1,200 in 1998, 1,142 in 1996, 1,158 in 1994 and 1,033 in 1992. Thus, between 1992-2000, the number of (full-time) graduates of engineering degree courses from HEA institutions increased by 21%. The HEA has informed us that the main constraint on growth is the number of places that the universities are able to fund.

[11] Note that these figures refer to new entrants to degree courses and not to repeating students nor to students transferring from other courses in the Irish third-level system.

6.88 After graduation, candidates for the title of chartered engineer are entitled to apply to the IEI for 'ordinary membership' of the Institution (candidates must also be at least 21 years of age at the time of application). Ordinary membership of the Institution allows candidates to put the abbreviation of MIEI after their name and academic qualification(s) BE/BEng/BAI/BSc etc. To be clear, there is no requirement to acquire the title of MIEI in order to become a chartered engineer.

6.89 There are alternative routes by which candidates can fulfil the academic requirements of the title of chartered engineer. These are set out below.

6.90 Applicants who hold an appropriate honours level related degree, for example in physics, technology or computer science, and have gained knowledge and understanding of engineering theory and practice over a period of at least three years after graduation, can apply on an individual case basis to the IEI for ordinary membership (MIEI) and hence eventually for the title of chartered engineer.

6.91 Applicants who may not hold formal engineering qualifications but are over 35 years of age, have a knowledge and understanding of engineering theory and practice and have a track record of functioning at a professional engineering level for at least five years, as confirmed by four supporters who are senior chartered engineers, may apply for ordinary membership through a specially designed mature route procedure.

6.92 Applicants who successfully complete the Institution's Examination in Engineering at the Postgraduate Diploma level are eligible to apply for ordinary membership of the IEI. The Examination is based on a part-time course of study, which is offered from time to time in a number of institutes of technology.

6.93 Under the Washington Accord, the Institution accepts accredited engineering degree programmes undertaken in Australia, Canada, Hong Kong, New Zealand, South Africa, the UK and the US as meeting its academic requirements for ordinary and chartered membership.

6.94 Furthermore, the IEI is a member of FEANI (which translates as the European Federation of National Engineering Associations), which publishes an index/database of schools/courses accepted for the Eur Ing (European Engineer) title. The Institution accepts engineering degree programmes, which are of 4 years or more in duration, listed on this index/database, as meeting its academic requirements for the title of chartered engineer.

6.95 In relation to the last two paragraphs, it is relevant to note from Evetts and Buchner-Jeziorska (1997):

> "Professional engineers have been internationally mobile for a long time and, in the past, colonial powers have exported engineering education and monitored engineering licensing arrangements across the world. Currently a great deal of effort is going into mutual recognition procedures and engineers are well ahead of other professions in developing a multilateral approach (e.g. their Washington Agreement) and mutual recognition of licensing arrangements" (p. 241).

6.96 The same authors also note that the profession of engineering is also well advanced in respect of the development of international professional federation, where reference is made to FEANI as well as others such as EFCA (European Federation of Engineering Consultancy Associations), EurEta (European Higher Engineering and Technical Professional Association), the Commonwealth Engineering Council, FIDIC (International Federation of Consulting Engineers) and WFEO (World Federation of Engineering Organisations), through which engineers have been developing contexts for the negotiation of international regulatory agreements.

6.97 The final point of note on the academic stage of the qualification process is that there are indirect ways of obtaining an engineering degree from IEI accredited institutions. For example, persons having insufficient points to enter their preferred degree course may begin on a national certificate or national diploma course at an institute of technology and work their way up to degree level. The Institution currently approves a large number of national diplomas offered by ITs as leading to associate membership or AMIEI (these are recognised internationally under the Sydney Accord).

6.98 The second stage in the formation process of chartered engineer requires the candidate to undertake professional engineering practice of at least four years duration, which may include training (work carried out under supervision) of up to two years. Training is widely defined in order to accommodate the different fields of engineering and the varying nature of work involved. Furthermore, credit is given where candidates have undertaken further study, in the form of a master degree in engineering by research (1 year credit) or a PhD in engineering (2 years credit). Credit is also given for lecturing work at third level after graduation and for any research work of an engineering nature that has been published or is due to be published.

6.99 The third and final stage of the formation process involves a professional review conducted by the IEI. This comprises four components as follows:

- An engineering practice report and two essays;
- Responses of the candidate's supporters;
- Assessment of the engineering practice report and essays; and
- An interview.

6.100 The purpose of the engineering practice report (3,000-4,000 words in length) is to provide a comprehensive and clear account of the candidate's engineering training and experience. It is also an important opportunity for candidates to demonstrate their ability to communicate clearly in writing. The report must also show the extent and character of the personal contribution and level of responsibility exercised by the candidate and, where possible, include some quantified measure of impact, such as budget, level of risk, loss implications etc. This is intended to assist the members of the interview panel in making an assessment of the candidate and reaching a judgement of the level of competence and personal responsibility exercised.

6.101 The two essays must each be no more than 500 words in length. There is choice of topic for the first essay: either some aspect of professional ethics based on the Institution's Standards of Professional Conduct or the impact of engineering on the environment, which may be related to the candidate's own experience. The second essay is selected from a list of topics given to candidates at the time of application.

6.102 Candidates are required to have their application supported by four chartered engineers familiar with all or part of their career as a professional engineer and their engineering experience and ability. In exceptional circumstances, the Institution will consider alternative arrangements, where, because of the nature of a candidate's employment, he/she cannot provide supporters who are chartered engineers (see below for our view on this aspect of the requirements).

6.103 The professional interview panel comprises three senior members of the IEI who are chartered engineers considered competent by the Board of Examiners to make sound judgements on the suitability of candidates for the title of chartered engineer and whose knowledge and experience are as close as practicable to those of the candidate.

6.104 The interview lasts for approximately one hour and includes an initial period of not more than ten minutes for the candidate to give an uninterrupted verbal summary of his/her career, illustrating highlights of his/her experience and responsibility.

6.105 In addition to demonstrating technical and professional knowledge arising from his/her experience, the candidate is also required to demonstrate an appreciation and knowledge of the following during the interview:

- The Institution's Code of Ethics;
- The impact of engineering on the environment;
- Current legislation on health and safety; and
- Economic, financial and legislative aspects of engineering.

6.106 There is no limit to how many attempts a candidate can take to complete the process, which almost invariably means passing the professional assessment stage. There are no limits or quotas on the numbers passing this stage and the IEI informed us in our consultation that as few as 5% of candidates fail to complete the requirements at any given attempt. All candidates must be aged 25 years or more at the time of application.

6.107 Following acquisition of chartered membership of the Institution, the Code of Ethics (paragraph 3.7) requires that "members maintain and strive to develop their professional knowledge, skill and expertise throughout their careers", which constitutes the principal continuing requirement for membership at this level.

6.108 In assessing the above requirements, we should firstly be aware that many appropriately qualified engineers choose not to become chartered engineers. There is no legal requirement to do so although the IEI would like to encourage more of these engineers to apply to become chartered engineers so as to signal quality and commitment to the profession and to clients.

6.109 We believe the academic stage of the formation process is fair and open and there are numerous alternative routes by which it may be fulfilled. Beyond approving degree courses, under the Washington Accord, and diploma courses, under the Sydney Accord, the IEI has no direct control over the entry and performance of students on the academic stage of the process. The Institution cannot exploit the academic stage to control artificially the number of engineering graduates and thus the number of potential candidates to the CEng MIEI title.

6.110 The results of the Indecon Survey of Engineers show the extent to which practising engineers (chartered and non-chartered) agree/disagree with the level of educational (i.e. academic) requirements for entry to the profession in Ireland. A significant majority (80.3%) of practitioners support the educational requirements, which typically consist of the successful completion of an IEI approved degree in engineering or related discipline.

6.111 We also believe that the other two stages of the formation process outlined are not unduly restrictive of entry to the title of chartered engineer, apart from the requirement (stated in paragraph 6.102) that candidates have their application supported by four chartered engineers familiar with all or part of their career as a professional engineer and their engineering experience and ability. Given the environment in which engineers compete in Ireland, the IEI should be flexible to the extent of considering alternative arrangements, where, because of the nature of a candidate's employment, they cannot provide four supporters who are chartered engineers.[12] The need for greater flexibility in this area also follows from the IEI's desire, as indicated to us in our consultation with the Institution, to register as many suitably qualified engineers as possible as chartered engineers. It is our view that the four-chartered-engineers requirement could potentially detract from the objectivity of the professional review process in that an applicant is required to get four incumbents to 'support' his/her application to compete with them.

The Formation of a Registered Consulting Engineer (ACEI)

6.112 A person seeking to become a member of the Association of Consulting Engineers of Ireland must, firstly, be a chartered engineer, having fulfilled the requirements of the IEI as outlined above.

6.113 In addition, the applicant will have not less than seven years professional engineering experience as approved by the Association.

6.114 Furthermore, the applicant will either (a) have been practising as a consulting engineer for a period of not less than three years immediately prior to his/her application for membership of the Association or (b) will be a partner or proprietary director in a firm of consulting engineers, other partners or proprietary directors of which are members of the ACEI.

6.115 The person seeking to become a member of the Association will be engaged wholly or mainly in practice as a consulting engineer either individually or as a partner or proprietary director in a firm of consulting engineers (not necessarily member firms of the ACEI).

6.116 Finally, the application must be proposed and supported by two others, each an existing member of the ACEI.

6.117 In justifying these requirements, the ACEI argues that, in the absence of any legal requirement for those setting themselves up as consulting engineers in Ireland, the Association, by setting standards for the profession, establishes a quality assurance benchmark against which clients can make judgements when selecting a consulting engineer.

[12] The IEI was unable to furnish the precise number of cases where 'alternative arrangements' have been made for candidates who cannot provide 'supporters' other than to say that in the vast majority of cases there is no need for candidates to make the alternative arrangements.

6.118 The principal effects of the ACEI entry requirements are, the Association submits, (a) to ensure minimum qualifications for practising as a registered consulting engineer in Ireland and (b) to maintain high standards of integrity and quality within the profession, which are in the interests of both clients and members of the public.

6.119 In Indecon's view, these requirements appear reasonable and as membership of the ACEI is not required to practise as a consulting engineer we do not believe they significantly damage competition in the profession. However, we are somewhat concerned with the requirement that the applicant for membership must obtain suitable supporters, each of which must be a member of the Association. Perhaps a more general requirement entailing experienced supporters (regardless of ACEI membership) would suffice instead to make the condition more reasonable. Also, it could be argued that the requirement that the person seeking membership of the Association will be engaged wholly or mainly in practice as a consulting engineer constitutes a barrier to multidisciplinary practice, which in turn could limit the efficiency of member firms and the range of services provided in the market.

Requirements for Membership as an ACEI Member Firm

6.120 In relation to the requirements for firm-level membership of the ACEI, first, the organisation must have been in business as a consulting engineering firm for at least 3 years immediately prior to application for membership. Second, either all or a majority of the partners or all or a majority of the directors of the firm are ACEI registered consulting engineers or the control and management decisions of the business are made by persons who are qualified to become, and who have applied for registration as, ACEI registered consulting engineers. Third, the firm must undertake to maintain appropriate professional indemnity insurance cover for its activities and finally must abide by the rules of the Association. To remain on the register of member companies, member firms must undertake continuing professional development (CPD) programmes for their staff and abide by the ACEI Code of Conduct.

6.121 Our comments in relation to individual membership of the Association apply equally in the case of membership as a firm/practice (see paragraph 6.119). We do not think that the requirement for member companies to abide by the Code of Conduct is likely to restrict entry or competition on the market. Abiding by codes of conduct is a standard requirement across the professions under review and, as a long as the code itself is not anti-competitive, we see nothing sinister in this particular requirement. What remains is to examine the ACEI Code, among other things.

Restrictions on Conduct

Professional Fees

6.122 The IEI states that a fully open market scenario exists among all ranks of its member engineers: there is no scale of charges in operation by the Institution and it does not involve itself in any way in setting charges levied by its members. Neither does the IEI undertake any surveys of its members on charges levied for their services. The same applies to the ACEI.

6.123 However, this is not quite the full picture. We are very concerned that the ACEI (not the IEI) continues to publish historical fee scales on its website. This information could well be used to fix prices not just by members but also by unregulated practices. Publication of fee scales is recognised as the most serious restrain on competition in professional services and for this reason the actions of the ACEI require further treatment in later in this section in the Key Restrictions on Competition.

Restrictions on Advertising (IEI)

6.124 Chartered members of the IEI may publish or authorise the publication of advertisements. The Code of Practice for Advertising is aimed at "maintaining a proper standard of professional ethics and conduct", as mandated in the 1969 Act (section 3(d)).

6.125 According the Code, which is decided by the Council of the IEI, advertisements should be discreet and moderate in tone and content. Members or partnerships may allow their names to be placed on panels or lists maintained by local authorities. Signboards or plates may be placed on members' premises or on works sites with the proviso that they be discreet and moderate in tone and commemorative tablets or inscriptions bearing members' names may be placed on completed works. Finally, advertisements or announcements in the press will generally not occupy a space exceeding 15,000mm^2 – equivalent to approximately one-quarter of an A4 sheet.

6.126 In view of our review of the key issues in relation to advertising in Section 2 these requirements appear overly restrictive of advertising competition on the market and so merit closer scrutiny below.

Restrictions on Advertising (ACEI)

6.127 These are set out in the ACEI Rules for Members at paragraph 2.15 and state that advertisements (publications and expressions of opinion) should be "moderate and discreet in tone and content, factual and capable of verification or if not so capable of verification then clearly made as expressions of interest".

6.128 The same paragraph also provides that members will not criticise either explicitly or by implication the work or competence of other engineers; and that statements shall not be self-laudatory or in any way bring discredit to the Association or the profession.

6.129 Finally, as in the case of the IEI, signboards or plates may be placed on members' premises or on work sites and commemorative tablets or inscriptions bearing members' names may be placed on completed works.

6.130 In view of our review of the key issues in relation to advertising in Section 2 both sets of requirements appear to be restrictive of advertising competition on the market and so merit closer scrutiny below.

Assessment of the Restrictions on Demarcation

6.131 The IEI and the ACEI submit that there are no areas of engineering work that are reserved to chartered engineers and/or members of the Association. The public are free to employ engineers and others who are not members of either regulatory organisation to carry out design and engineering work.

6.132 However, the IEI states that it is concerned that there is no legal requirement or statutory protection for the public in relation to the professional competence of those allowed to design and construct buildings and other engineering works that involve public health and safety.[13]

6.133 Similarly, the ACEI "strongly believes that for the protection of the environment and in the interests of public health and safety the provision of consulting engineering *design* services should be restricted to persons with the necessary qualifications and experience to undertake the work [italics added]".[14]

[13] IEI submission, paragraph 59. This point is also made in an IEI position paper on the Building Control Regulations submitted to the Minister for the Environment and Local Government in May 2001.
[14] ACEI submission, p. 13.

6.134 In our analysis of the individual submissions made to the study, the issue of the restriction of certain work to chartered engineers (and architects) was raised. Under the Nursing Homes (Care and Welfare) (Amendment) Regulations, 1993, and the Child Care (Standards in Children's Residential Centres) Regulations, 1996, only a chartered engineer or a 'suitably qualified architect' is permitted to certify compliance for fire safety in nursing homes and children's residential centres.

6.135 We believe it is important that suitably qualified professionals provide such certificates of compliance for fire safety. While some individuals who are not engineers or architects may have the required expertise in general, we do not believe the regulations are unduly restrictive of competition and we feel they are designed to protect public health and safety rather than to restrict competition. Whether there is potential for widening the range of professionals that could be used without risking safety should, however, be considered by the relevant government departments.

Assessment of the Restrictions on Organisational Form

6.136 There are no rules restricting organisational form in the Bye-Laws of the IEI or in the Rules of the ACEI. Members of either organisation are free to organise their practices as sole proprietorships, partnerships or limited liability companies.

6.137 Furthermore, there are no rules directly prohibiting the formation of multidisciplinary practices involving engineers. We noted earlier that the requirement that a person seeking to become a member of the Association will be engaged wholly or mainly in practice as a consulting engineer either individually or as a partner or proprietary director in a firm of consulting engineers (not necessarily member firms of the ACEI) might act as a barrier to forming MDPs, which, as the empirical evidence reviewed in Section 2 showed, are beneficial to competition. Against this concern, it is relevant to note that the larger consulting engineering firms employ a range of other professionals (e.g. quantity surveyors, architects). Nevertheless, we feel that it should be fully clarified by the ACEI that there is no restriction on members forming MDPs.

Key Restrictions on Competition

6.138 We have identified the restrictions on entry, conduct, demarcation and organisational form that exist in the engineers' profession and our analysis suggests that the following two restrictions merit closer assessment. The key restrictions of potential concern are as follows:

- **The ACEI's continued publication of historic fee scales on its website;**
- **The advertising codes of the IEI and ACEI.**

6.139 In what follows, we assess each of the two restrictions by reference to their justification and our evaluation of the justification(s) submitted.

The ACEI's Continued Publication of Historic Fee Scales on its Website

Justification

6.140 In the mid-1960s, the ACEI, in association with the IEI, began to operate fee scales for various types of engineering work. These fee scales were included in a series of conditions of engagement (COE) that the two organisations drew up for the appointment of consulting engineers in various types of engineering work.

6.141 Following the enactment of the Competition Act in 1991, the ACEI/IEI reviewed the fee scales contained in the COE on the basis that they could be deemed to be anti-competitive by the Competition Authority. In September 1992, the ACEI/IEI made a submission to the Authority for a licence for their COE.

6.142 After a series of correspondence between the ACEI/IEI and the Authority, the ACEI/IEI decided to withdraw the licence application and new COE (without any mention of fee scales) were introduced in October 2000. The Council of the IEI and the Executive Committee of the ACEI had approved the new COE in April of that year.

6.143 However, despite the fact that the fee scales no longer appear in the COE, they can still be accessed on the ACEI's website (not the IEI's website).

6.144 The ACEI informed us at our consultation that the old fee scales were made available in response to numerous requests from clients and potential clients for price information in their engagement of consulting engineers.

Evaluation

6.145 We understand that the historic fee scales instituted by the ACEI and IEI may have been motivated primarily by a need to protect the incomes of engineers during periods of high inflation and, to a lesser extent, on the basis of providing clients with information about prices in a field where they have less information than suppliers.

6.146 However, the latter argument is unlikely to hold in general owing to the fact that many clients of professional engineers are business or government clients and are likely to be relatively well informed and have more buyer power than personal customers. The first argument is largely irrelevant in the present environment owing to the relative stability in consumer price inflation achieved in recent years and in any case would not be acceptable on competition grounds.

6.147 Fee scales reduce price competition between competing firms and can be used as vehicles for tacit collusion. Furthermore, their existence could discourage an efficient firm from pricing significantly below the level implied by the fees on the basis of relatively low costs.

6.148 We do not accept the ACEI's argument that the historical fee scales provide valuable information to clients. Clients' best interests are served by obtaining quotes from competing practitioners, members and non-members of the ACEI.

6.149 In our opinion, the historical fees should be removed from the ACEI website and the ACEI should not provide information to firms or clients on fees.

The Advertising Codes of the IEI and ACEI

Justification

6.150 As stated in its submission, the IEI has the objective of ensuring that all its members will act in an ethical and professional manner in all their dealings with their employers, clients, colleagues and the general public. It submits that the IEI Code of Ethics and Code of Practice for Advertising are aimed at providing comfort to the general public in this regard.

6.151 On the other hand, the ACEI submission does not directly deal with its advertising restrictions. However, the Association argues that its Code of Conduct more generally is appropriate because its objectives are to ensure professionalism for the client, to ensure that members act in an ethical way in all their dealings with their clients and members of the public, and to ensure that members at all times provide an impartial service of high quality to clients.

Evaluation

6.152 Both sets of advertising rules are similar in content and in general have the objective of imparting factual information. Further, there are no bans on price advertising in either the IEI's Code or the ACEI's Rules, although advertising of fees or prices is rarely, if ever, undertaken in practice. However, we believe that it is inappropriate for the codes to specify the size of advertisements or that the statements should be confined to being discrete and moderate in tone. In our opinion, the codes should be adjusted to provide more flexibility to firms to undertake normal competitive advertising, including that of a comparative nature, providing it is truthful.

6.153 Our conclusions follow from our earlier review of key issues in which we concluded that:

> "Subject to the proviso that advertisements are not in bad taste or do not bring the profession into disrepute or do not exploit the limited information that some consumers may have, there should be no restriction on the type or nature of adverts that practitioners may place. Fee advertising should not be restricted; nor should comparative advertising or any advertising that highlights that a practitioner has any specialist expertise knowledge. Further, unsolicited approaches or 'cold-calling' campaigns should not be prohibited."

Summary of Main Conclusions

6.154 In Table 6.16, we present a summary of our main conclusions in relation to the restrictions on competition in the engineers' profession. In general, we believe there are very few restrictions on competition in the engineers' profession in Ireland. The two areas outlined below, however, represent potential restrictions that we believe should be addressed. We also believe that, in considering applicants for the title of chartered engineer (CEng MIEI), which is statutorily protected, the IEI should be as flexible as possible in the requirement that candidates must have their application 'supported' by four chartered engineers. The requirement is tantamount to existing competitors deciding whether to accept a new competitor on board. The need for flexibility in this regard arises partly because of the low number of chartered engineers compared with the general population of engineers.

Table 6.16: Summary of Main Conclusions regarding the Engineer's Profession

Restrictions on Conduct

1. THE CONTINUED PUBLICATION OF THE HISTORICAL ACEI/IEI FEE SCALES (ON THE ACEI'S WEBSITE) COULD RESTRICT OR DISTORT COMPETITION AMONG REGISTERED AND UNREGISTERED CONSULTING ENGINEERS.

2. THE ADVERTISING CODES OF THE ACEI AND THE IEI ACT AS A BARRIER TO ENTRY FOR NEW PRACTICES AND COULD RESTRICT NORMAL COMPETITIVE BEHAVIOUR AMONG FIRMS.

7 Competition and the Architects' Profession in Ireland

Introduction

7.1 The structure of this section is as follows. The next part provides an overview of market definition and the services provided by architects and also highlights the core skills/requirements of the profession. The nature of the services provided and the key requirements underpin many of the arguments used for regulating the profession and are re-visited in the course of the section.

7.2 The overview of market definition is followed by an empirical analysis of the size and structure of the market in which architects operate in Ireland and of the patterns of demand in the market. We then examine the customers of architects and describe the nature of competition, if any, on the market. The empirical analysis is informed using information obtained from the Royal Institute of the Architects of Ireland (the RIAI or 'Institute') and new survey data obtained and compiled by Indecon. The Institute is the largest and most influential body responsible for regulating architects in Ireland. The distinctive feature about the architects' profession among those under review is that there is no protection of the title of architect in Ireland.[1] Literally anyone can adopt the title of architect and advertise him/herself as offering architectural, design and related services. Indeed, many self-trained architects run successful practices throughout the country. However, the present situation is set to change under the provisions of the Building Control Bill, the Heads of which were approved by the Government in December 2001. We understand that the Bill will propose to introduce statutory protection of the title (but not function) of architect and to institute a national register of architects in Ireland. The Bill will also propose that the regulatory model of the RIAI will form the basis by which the profession will be regulated in the future. It is against this background that we concentrate on the RIAI in this section of the report.

[1] While it could be said that there is generally no protection of title among engineers, there is statutory protection of the title of chartered engineer.

7.3 After summarising the results of the empirical analysis of the market, we proceed to examine in detail how the profession is regulated by the RIAI. In addition to taking a closer look at the Institute itself, the restrictions on entry, conduct, demarcation and organisational form are presented and their statutory or otherwise basis highlighted. Our assessment of the restrictions most likely to affect competition in the market is then undertaken by reference to the Institute's justifications of them, as detailed in the RIAI submission and developed in our consultation with that organisation, and our judgement as to whether the restrictions are proportional to achieving the benefits claimed for them. Finally, our conclusions are given.

Market Definition and Services Provided by Architects

Market Definition

7.4 In order to examine the degree of competition occurring among members of the architects' profession in Ireland, it is useful to consider the relevant market in which architects operate. In competition/ antitrust analysis, relevant market definition includes definition of the relevant product market and of the relevant geographic market. The former refers to those products that compete with each other to a sufficient extent to exercise a competitive constraint and the latter refers to the geographic area in which competition between the relevant products takes place. Thus, the relevant product or service market includes all those products or services viewed as sufficiently interchangeable by consumers (demand substitutability) or suppliers (supply substitutability).

7.5 In considering the issue of delineating the boundary of the relevant market, in general, it is useful to review the objective characteristics of the product or service, the nature of demand and supply and the attitudes of different types of user. Such evidence is used when considering specific individual competition cases to inform the so-called 'hypothetical monopolist test' or SSNIP (small but significant non-transitory increase in price) test, which seeks to frame the relevant antitrust market in order to identify the smallest relevant group of producers or providers capable of exercising a competitive constraint on the market. While this test may be less relevant in a sectoral policy study than in a specific antitrust case (such as a merger investigation) it is useful to consider aspects of relevant market definition in terms of the services provided by architects and also in terms of the geographic area in which these services are provided.

7.6 While some architects are employed by universities and other tertiary educational institutions and in the public sector, the vast majority of regulated (i.e. RIAI members and members of smaller regulatory organisations, which are referred to in our assessment of the restrictions below) and unregulated architects are engaged in a professional or consultative role whereby public and private sector clients retain their services. It is the privately practising architect that constitutes the predominant supplier in the relevant market under review.

7.7 Owing to the fact that it is not a requirement to register with any professional body in order to practise as an architect in Ireland, as is the case with the other professions under review, apart from the engineering profession, it is not known precisely how many practitioners are involved in the Irish market. The RIAI currently has a membership of over 2,000 architects[2] and estimates that between 200 and 300 non-member architects presently practising may be eligible for membership, while a further 200-400 people calling themselves architects and offering architectural and planning services would not be eligible for membership of the Institute. Accordingly, the population of professional architects in Ireland is currently estimated to be about 2,500.

7.8 The principal services provided by architects relate to the design of buildings and often the supervision of their erection. Advice on various aspects of planning (including planning applications) and costing of building erection (including procurement of building materials) are also services that architects offer in the market. But the main activity is design - more specifically, design-for-function advice and assistance to clients.[3]

7.9 Designing a building involves many steps: visiting and surveying the site; discussing with clients what kind of building they want; developing a preliminary design for the building and refining it to ensure that it meets the clients' needs and budget and that the design complies with the regulations; obtaining quotes from builders; administering the contract between the client and the builder and checking that the building is being constructed in accordance with the drawings; and making sure that the payments to the builder are in order.

[2] Details of the number and growth of RIAI architects between 1991 and 2001 are provided below.

[3] According to the Forum for the Construction Industry (FCI) (2001), "an architect is a professional trained not only to design buildings but also to advise on all matters relating to buildings. By education, training and experience, the architect is qualified to assist the client in all stages of a building project and to administer the building contract between the employer and the contractor" (p. 21).

7.10 The design and erection of buildings involves other professionals as well as the architect – engineers, quantity surveyors and planning consultants, plus less directly the client's legal and financial advisers. There may also be consultations with fire, health and safety, environmental and other authorities, depending on the type of building involved, and discussions with the manufacturers and suppliers of building materials and components. When the design is completed and the building works start, the architect is required to deal with the main building contractor and a team of specialist sub-contractors on-site.

7.11 In its submission to the study, the RIAI states that the architects' profession is not divided into distinct or quasi-distinct elements. Architects generally provide a similar range of services to clients. Where specialisations develop, they do so from particular interests or commercial necessity. The design of apartments constitutes an example. Due to tax breaks, increasing urbanisation and lifestyle changes, the market for apartments has expanded rapidly in Ireland in the past decade and this has seen the development of expertise in apartment design among architects. For similar reasons, coupled with Government support, there has been increasing involvement by architects in the area of higher density housing. However, in the opinion of the Institute, the majority of architectural practices would supply services to the widest possible range of clients and building types. Saying this, it is our understanding that the larger practices concentrate on major projects and often on designing for commercial/business/institutional purposes.

7.12 According to the RIAI, another important factor characterising the relevant market for architectural services is that there have been significant changes in the regulatory framework for the planning system and building generally. In 1992, the Government introduced the National Building Regulations and the Fire Safety Certificate Application system. These regulations have been revised and added to since that time. In this regard, the Institute points to what it believes have been significant changes relating to disabled access and proposed changes to standards of insulation. In its view, the Building Regulations, which are intended to improve construction standards and protect public safety, have had the effect of making the task of integrating technical and design requirements more complex.

7.13 As part of the Planning Act, 2000, the Government also introduced new legislation to protect historic structures generally referred to as 'protected structures'. According to the RIAI, architectural practice in this particular area is relatively complex and typically requires considerable professional expertise. In the opinion of the Institute, the introduction of environmental legislation together with regulations accompanying the Planning Act have served to make to make the planning application system more complex (even though the purpose of the legislation is to standardise the requirements) and this in turn has seen greater professional involvement of architects in the planning process.

7.14 In 1995, new safety, health and welfare at work regulations for construction sites were introduced, which, according to the RIAI's submission, has imposed new duties and obligations on architects and other members of the design and construction team.

7.15 In addition to the obvious impact of the economy and changes to the regulatory framework, the Institute also points to what it terms 'soft' factors, which it believes are relevant as factors shaping the relevant market. These include a growing awareness of the added value of design (e.g. in commercial office developments), greater emphasis on design in the workplace, a demand for higher quality domestic work and an increasing demand for higher quality architectural and design services.

7.16 As regards the geographic scope of the relevant market,[4] the RIAI submits that, in the past, architectural practice was likely to have been local in extent. However, with the rapid growth in demand for architectural services in recent years and the impact of the EU Public Procurement Directive, the Institute submits that there has been a significant expansion of the geographic scope of architectural services beyond the local to the national, with many regulated and unregulated architects now working throughout the country. According to the RIAI, the Public Procurement Directive is a significant limitation on geographic market segmentation as all publicly funded or grant-aided projects, above certain thresholds of the order of €200,000 of fees paid to any one service provider, must be advertised in the Official Journal of the European Union and interviews held on a competitive basis. It is also significant to note that since the Directive is intended to make building projects above a certain size open to architects throughout the EU, there is in principle no barrier to architects from other Member States providing services in Ireland.

[4] Details on the number of architectural practices registered with the RIAI by county during 1989-2002 are provided below.

7.17 In its submission, the Institute points to examples where architects from outside Ireland have carried out a number of significant projects in Dublin and Cork. In Dublin, these include the new Millennium Wing for the National Gallery by Benson and Forsyth, the Spire in O'Connell Street by Ian Ritchie, the Dublin Dental Hospital by Ahernds Burton Koralek. In addition, a number of UK practices have established branch offices in Dublin, including Ahrends Burton Koralek and Building Design Partnership. A number of architects in Belfast have either established branch offices in Dublin or are carrying out work in the city, including Consarc Design Group, the John Neil Partnership and Barry Todd Associates. In Cork, the RIAI mentions that an extension to the Cork Gallery was carried out by Eric Von Egerhaat from the Netherlands and the renovation of Patrick Street in Grande Parade is being carried out by Beth Galli of Barcelona.

7.18 In addition to services being provided from abroad or through branch offices of non-Irish architectural practices, the Institute claims that a substantial number of architects from the EU are working in Ireland. In addition, the RIAI submits, the Government work visa programme has been successful in attracting architects particularly from South Africa and New Zealand. However, the Institute does not provide any precise figures on the numbers in each case.[5]

7.19 On the basis of the evidence presented, it is our view that the predominant type of supplier in the relevant market for architectural services in Ireland is the private architectural firm, the majority of which are regulated by the RIAI and smaller organisations. Nevertheless, we believe a significant minority of unregulated architects provide services in the market and these suppliers often have no formal education or training in architecture (which does not imply that they do not provide a professionally competent and ethical level of service to customers). In the main, regulated and unregulated firms supply a range of services, although we believe that regulated firms are more likely to supply solutions to more complex design problems to larger clients. However, for the purpose of analysing the level of competition on the market, we believe it is relevant to consider regulated and unregulated firms competing together in all parts of the overall market. Finally, we believe the geographic scope of the relevant market is likely to be national with more localised elements for smaller practices. Thus, we consider the relevant market to be primarily national and comprising the full range of architectural services, although for more basic services local markets are relevant.

[5] Indirectly, in its submission, the RIAI states that in 2001 admissions to registered membership of the Institution were 114, 37% (or 42) of which consisted of transfers of qualified architects from Europe and other overseas countries.

Key Requirements and Skills of the Architect

7.20 As remarked above, design is the central activity of the architect and the ability to make judgements on appropriate solutions and the exercise of visual awareness are extremely important skills for practitioners in the market.

7.21 Buildings are of profound importance to our lives, our communities and our culture. They help to provide the means by which we define ourselves not only in space but also in time – the buildings we construct for ourselves today will mostly outlive us and will become our legacy for future generations. Good buildings can bring us benefits and be of value in a great number of ways. It is the purpose of architecture, through good design, to realise these values and benefits, and to do so in ways that make buildings memorable and enjoyable places in which to work and live.

7.22 It is on the basis of these considerations (which embody the concept of a positive externality – the benefits of good design are enjoyed not only be those who pay for them), as well as on the need to ensure the highest standards of public health and safety in the built environment, that regulation of the profession is motivated. We shall return to the specific arguments advanced by the RIAI for the proposed statutory protection of architect when we begin our assessment of the restrictions on entry, conduct, demarcation and organisational form below.

Market Size, Structure and Patterns of Demand

7.23 Our economic analysis of competition in the architects' profession provided below consists of an empirical examination of various aspects of market size, structure and the pattern of demand.

7.24 The following information sources underpin the quantitative results presented:

- Information obtained from the RIAI;
- New information from the Indecon Survey of Architects (of which there were 225 responses from regulated and unregulated practitioners); and
- New Information from the Indecon Survey of the Public (sample size of 1,008 adults aged 15+).

7.25 The results yielded by our analysis are relevant in quantifying the economic characteristics of the profession and are used to help inform the assessment of the various restrictions and requirements.

Number and Growth of Architects

7.26 Table 7.1 shows the number and growth in the number of RIAI architects between 1991 and 2001. During the period, the population of registered architects increased by 52%. The average annual rate of growth in the number of these architects during 1992-2001 has been 4.23%.

7.27 To put these figures in context, the population of Ireland increased by 11% from 3,525,719 to 3,917,336 between 1991 and 2001.[6] However, numbers in the profession have grown less rapidly than the Irish economy, with GDP growing at an average annual rate of 6.95% between 1992-2001.[7] In relation to new housing, figures from the Department of the Environment and Local Government show that the number of new house completions increased by 56% between 1996 and 2001 (from 33,725 to 52,602). By comparison, during this period, the number of Royal Institute architects increased by 25%. The figures suggest that the number of RIAI architects may not have kept pace with the level of latent demand in the economy in recent times.

Table 7.1: Number and Growth of RIAI Architects - 1991-2001

Year	Number	% change
1991	1,356	-
1992	1,415	4.35
1993	1,465	3.53
1994	1,522	3.89
1995	1,578	3.68
1996	1,649	4.50
1997	1,720	4.31
1998	1,809	5.17
1999	1,872	3.48
2000	1,955	4.43
2001	2,060	5.37

Source: Indecon calculations using RIAI data.

[6] Source: CSO data.
[7] Source: ESRI data.

7.28 The RIAI does not have precise figures on the number of non-member architects practising in Ireland. It estimates, however, that 200-300 non-member architects currently practising may be eligible for membership, while a further 200-400 people offering architectural services would not be eligible for membership. Accordingly, the total number of regulated and unregulated architects in Ireland is estimated to be in the region of 2,500 at the present time.

7.29 Table 7.2 gives a detailed breakdown by county of the number of member practices of the RIAI between 1989 and 2002. For the country as a whole, the population of RIAI firms more than doubled (106% growth) during the period. Over 60% of all RIAI practices are currently located in the Dublin region and the population of firms in that part of the country has grown by 142% since 1989.

Table 7.2: Number of RIAI Member Practices by County - 1989-2002

	Year and number				
County	2001/02	1998/99	1995/96	1992	1989
Carlow	1	1	0	0	1
Cavan	5	2	2	1	0
Clare	5	3	4	3	3
Cork	23	18	18	26	19
Donegal	2	1	1	2	1
Dublin	245	203	155	139	101
Galway	12	8	7	8	8
Kerry	7	6	7	5	5
Kildare	8	7	4	3	4
Kilkenny	4	3	2	3	3
Laois	2	3	3	3	2
Leitrim	0	0	0	0	0
Limerick	15	15	12	11	10
Longford	0	0	0	0	0
Louth	10	7	4	5	4
Mayo	7	6	3	2	2
Meath	2	2	2	2	3
Monaghan	2	2	0	0	0
Offaly	2	1	0	1	1
Roscommon	1	1	0	0	0
Sligo	5	3	4	3	4
Tipperary	9	6	3	2	4
Waterford	5	3	3	2	5
Westmeath	4	3	4	2	4
Wexford	6	5	6	2	0
Wicklow	13	13	9	8	8
State	395	322	253	233	192

Source: Indecon calculations using RIAI Annual Reports.

Changes in Fee Income of Architects

7.30 Table 7.3 shows that the vast majority (90.8%) of architectural practices that responded to the Indecon Survey of Architects (which includes unregulated and regulated firms) stated an increase in their fee income on an average annual basis during the period 1999-2001. On the other hand, only 9.2% of respondents stated a fall in their fee income on average during the period. [8] The most frequent rate of increase in fee income on this basis occurred in the 25-29% category (24.5% of respondents), followed closely by the 20-24% range (23.9%). Furthermore, 13.4% of practices reported a doubling or more of fee income, while 25% stated an increase of less than 10% on an average annual basis between 1999 and 2001.

Table 7.3: Indecon Survey of Architects - Approximate Average Annual Change In Total Fee Income of Architectural Practices - 1999-2001

Extent of increase	**% of responses**
Firms stating increase in fee income	90.8
Of which:	
Over 200%	4.3
150-199%	4.3
100-149%	4.8
50-99%	13.3
25-49%	24.5
10-24%	23.9
5-9%	14.9
0-4%	10.1
Firms stating decrease in fee income	9.2

Source: Indecon Survey of Architects.

[8] The details are given in Annex 5.

Size Distribution of Architects' Firms

7.31 Table 7.4 provides statistical information on the size distribution of architectural practices (regulated and unregulated) for each of the years 1999-2001. Taken together, the figures reveal a firm size distribution that is positively skewed, meaning that most practices are relatively small, with the median a more reliable indicator of average practice size than the mean. According to the results, the typical architectural practice has maintained its employment of two practitioners over the period, while the largest practice has increased the number of its architects from 58 to 70, representing a growth rate of 21% during the period. The size distribution of practices is such that there is significant variation between the smallest and largest practices.

Table 7.4: Indecon Survey of Architects - Survey Statistics on Practice Size

	Number of architects per practice		
Statistics	**1999**	**2000**	**2001**
Mean number of architects per practice	3	4	4
Median	2	2	2
Standard deviation	6	7	7
Standard deviation - % of mean	178.6	182.8	186.2
Min	1	1	1
Max	58	66	70

Source: Indecon Survey of Architects.

Customers of Architects and their Characteristics

7.32 According to the RIAI's submission, information problems that consumers may face in the market for building design and related services are typical of the information deficiencies found in markets for services where the provider also acts as adviser and agent. That is, consumers may know broadly what they want when seeking a provider of building services; for example, the renovation of a house. However, they may not know how it should be done or who is best qualified to provide it.[9] In addition, the Institute contends, it may be difficult for consumers to identify faults until long after the work has been completed and, indeed, other parties (for example, subsequent owners) may bear these costs.

7.33 According to the RIAI, the degree of 'information asymmetry' in the market is likely to differ according to the type of consumer. Consumers in the commercial and government sectors are more likely to be frequent users of the services and have the resources and knowledge to research and evaluate the merits of building design providers. On the other hand, the Institute submits, inexperienced and uninformed consumers/clients are likely to be more prevalent in the residential and lower value commercial sectors of the market. The RIAI believes that only a relatively small group of individual consumers/clients who directly hire providers of building design and related services in the residential sector are likely to have the time and incentive, given the size and importance of the purchase, to investigate the capabilities and credentials of potential service providers. In particular, the reputation of providers is likely to play an important role and in this way, the Institutes states, service providers 'inform' consumers/clients by developing and advertising their reputation, possibly bolstered by membership of a professional association that itself establishes a reputation and credible certification procedures.

[9] According to supplementary information (in the form of an RIAI survey Attitudes to Architects) submitted as part of the Institute's submission, the majority of the public believe that the word 'architect' implies or is likely to imply academic or professional qualifications. The RIAI believes that the range of complaints received by it about persons not having qualifications indicates that this position has not changed significantly since the time of the survey (1994) and, in the Institute's view, this raises the question about information differences.

7.34 To investigate the market further, what we would now like to know is how the users of architects break down between personal and business customers. We would also like to consider the frequency of personal users' purchases of architectural services and their views about their ability to assess the quality of services provided by architects. The answers to these questions will inform us not only about the characteristics of consumers but also about how informed personal users, in particular, are and thus the extent of information asymmetry in the market. As indicated earlier in the review of key issues section, this is an important issue in considering the justification for specific regulations/restrictions on competition.

Breakdown of Business and Personal Customers

7.35 Table 7.5 shows how the fee income of architectural practices breaks down between business, institutional, government clients, on the one hand, and members of the general public or personal users, on the other hand. The basis of the results is the Indecon Survey of Architects (which includes regulated and unregulated architects). According to the new evidence, a significant majority of architectural fee income comes from business users. In particular, between two-thirds and three-quarters of architectural fee income is derived from business clients and the remainder (between 25% and 33% depending on the median or mean measure used) arises from members of the general public.

Table 7.5: Indecon Survey of Architects - Percentage of Fee Income of Architectural Practices from Business and Personal Clients

Statistics	% of fee income - business, corporate and institutional clients	% of Fee Income – General Public
Mean	66.7	33.3
Median	75.0	25.0
Standard deviation	26.9	29.1
St. dev. as a % of mean	40.4	79.7
Min	0.0	0.0
Max	100.0	100.0

Source: Indecon Survey of Architects.

7.36 Interestingly, comparison of the standard-deviation-as-a-percentage-of-the-mean figures reveals that more variation exists among architects in fee income derived from personal users (79.7%) than from business clients (40.4%). It is our belief that the significantly lower level of variation in fee income among architects from business clients can be explained by two principal factors: first, the fact these clients are better informed than personal users and, secondly, because some business clients (i.e. government clients) often employ fee schedules in accessing the services of architects.

Frequency of Usage and Quality of Information among Personal Users

7.37 Personal users are likely to be less well informed about the nature and cost of architectural services than business clients. In particular, our survey results show that members of the general public are indeed infrequent users of the services provided by architects. The vast majority (87%) of respondents to the our survey of the public stated that they had not engaged the services of an architect in the past five years. However, 2% of respondents indicated that they had employed architects between 1 and 5 times per year in the past five years and a further 10% had employed an architect in the previous 5 years.

7.38 It is notable that the majority (55%) of consumers among the general public believe that they would be able to assess the quality of services provided by architects, with 31% stating that they would be 'well able to' or 'very able to' to assess quality (Table 7.6). Only 17% of respondents said that they would not be in a position to assess the quality or architectural services.

Table 7.6: Indecon Survey of the Public – the Public's Views on Their Ability to Assess the Quality of Services Provided by Architects in Ireland

Not Able to Assess Quality	Able to Assess Quality to Some Extent	Well Able to Assess Quality	Very Well Able to Assess Quality	Don't Know
17%	24%	22%	9%	27%

Source: Indecon Commissioned Survey of Representative National Sample of 1,008 Adults.

Nature of Competition, if any, on the Market

7.39 Having looked at the relevant market and its structure, it is now necessary to evaluate the nature of competition, if any, on the market. Central to this issue are the roles that price and non-price instruments play in the marketplace. In what follows, we examine the role of price competition by reference to new evidence on fee levels and the extent, if any, of price competition occurring among members of the profession. We then examine the provision of fee information by architects to their clients before investigating the nature and degree of advertising, this being a key instrument of non-price competition. We finally investigate competition by reference to the ability of existing architectural firms to recruit new practitioners.

Architects' fees

7.40 In our survey of (regulated and unregulated) architects, we asked practitioners to indicate the approximate professional fee they would currently charge for handling the design and supervision of a new house with a construction value of €300,000. The results are presented in the second column of Table 7.7 below.

Table 7.7: Indecon Survey of Architects - Professional Fees Currently Charged by Architects' Practices for Design/Supervision and Compliance Certification Services

Statistics	Fees for design and supervision of new house with construction value of €300,000 - €*	Fees for handling typical certificate of compliance for extension to residential house - €*
Mean	22,959	386
Median	24,000	250
Standard Deviation	11,474	423
Standard Deviation - % of Mean	50.0	109.4

Source: Indecon Survey of Architects.
* Excluding VAT, stamp duty, registration and search fees.

7.41 It can be seen from the survey figures that the distribution of fees is negatively skewed, meaning that the median is likely to be a more reliable indicator of the average level of fees (€22,959). It is also noteworthy that the fee rate indicated is approximately 8% of the value of the house and is not dissimilar to the sliding fee scale formerly recommended by the RIAI.

7.42 In the third column of Table 7.7 we present our survey findings in relation to the approximate professional fee an architect would charge for handling a certificate of compliance for an extension to a residential house. The distribution of fees is positively skewed, with the median the more reliable indicator of the average fee level in this particular case (€250). Comparison of the standard-deviation-as-a-percentage-of-the-mean figures indicates greater variation among compliance fees than design fees.

Extent of Price Competition

7.43 It is also instructive to summarise the views of architects (regulated and unregulated) and members of the general public on the extent to which they believe there is price competition in the market for architects' services (see Table 7.8).

Table 7.8: Practitioner and Consumer Views on Extent of Price Competition among Architects in Ireland

	Virtually no price competition	Very little price competition	Limited price competition	Significant or Extensive price competition	Don't know
Views of Architects	2.8%	10.6%	35.2%	51.4%	-
Views of General Public	11%	12%	17%	13%	46%

Source: Indecon Survey of Architects Indecon and Indecon Commissioned Survey of Representative National Sample of 1,008 Adults.

7.44 The majority (51.4%) of the respondents to the Indecon Survey of Architects believes that 'significant' or 'extensive' price competition exists, while 35.2% believe there is 'limited' price competition and 13.4% believe that 'very little' or 'virtually no' price competition exists among architects in Ireland. On the other hand, members of the general public appear to be divided on the extent to which they believe price competition prevails among members of the profession, as the results in the same table indicate. Whereas 23% stated that 'virtually no' or 'very little' price competition exists, 30% believe there exists 'moderate' or 'significant' price competition.[10]

Provision of Information to Consumers

7.45 The lack of public information on likely architectural fees is also a noteworthy feature of the market. Our survey research reveals that only a minority (17%) of the general public believe they would typically know in advance what they would be required to pay for services offered by architects in Ireland.

7.46 Given the deficit in public knowledge of likely fee levels, it is not surprising that our survey research also reveals that most (62%) consumers would favour more information on fees/prices charged by architects in Ireland. This in turn points to the role of enhanced consumer information and, in particular, to advertising of fees. While fee advertising is not restricted among the architects' profession in Ireland, our research suggests that prices are rarely, if ever, advertised. We examine the extent of advertising by architects below.

Extent of Advertising and Availability of Information

7.47 An issue in assessing the competitive environment within the architects' profession is the extent to which practitioners can compete on the basis of advertising.

7.48 As part of our survey of architects we obtained information on the extent of advertising by architectural practices (regulated and unregulated) in Ireland. Our survey results indicate that annual expenditure on advertising is very highly skewed, with mean annual expenditure of over €4,300 compared with just €218 for the median, which, because of the nature of the distribution, is likely to be a more reliable indicator of the extent of advertising on average. The high variation in advertising spending may have a size dimension, with larger practices devoting more money to promoting their services.[11]

[10] Accepting, of course, that a significant minority (46%) stated 'don't know'.

[11] Nevertheless, we cannot rule out the possibility that advertising expenditure as a proportion of annual turnover/sales revenue is approximately constant across firms of different sizes.

7.49 Table 7.9 shows the extent to which architect firms and architectural technician firms advertise in the Golden Pages, which is a popular outlet for promoting professional services in Ireland.

Table 7.9: Extent of Advertising by Architect Firms in Golden Pages

Area	No. architect firms advertising	No. architectural technician firms advertising	Total
01	381	2	383
02	106	7	113
04	112	0	112
05	117	14	131
06	106	2	108
07/09	95	5	100
Total	917	30	947

Note: 01 covers the Greater Dublin area; 02 Cork City and most of County Cork; 04 the North East and most of Counties Kildare and Wicklow; 05 the Midlands and South East; 06 the Mid-West; and 07/09 the West and North West.

Source: Indecon calculations using data from the Golden Pages 2002.

7.50 It is also instructive to consider the nature of advertisements placed by architect firms in the Golden Pages, as this provides both an indication of the intensity of advertising and the level of expenditure incurred on advertising using this particular platform. In Annex 5, we present a number of tables which examine the extent of advertising by both types of firms under the following headings:

- Listings advertisements;
- Informational advertisements;
- In-column display advertisements; and
- Display advertisements.

7.51 According to our analysis of current Golden Pages advertisements placed by architectural firms, the numbers of adverts placed in the 2002 directories under each of the above headings are as follows (noting that firms may place more than one type of advert in a given directory):

- Listings advertisements – 691;
- Informational advertisements – 217;
- In-column display advertisements – 8; and
- Display advertisements – 10.

Recruitment of Architects

7.52 Finally, one of the characteristics of a competitive market is that the supply of factors of production is highly elastic, meaning that the supply of entrants to the profession should respond rapidly to changing market conditions.

7.53 Table 7.10 empirically evaluates this feature of competition by presenting new survey evidence relating to the difficulty or otherwise experienced in recruiting architects by established practices (regulated and unregulated). The figures reveal that a significant majority (82.5%) of architects have found it difficult to hire architects during the past three years. In particular, 43.9% of respondents stated that they experienced 'difficulty' in recruitment, 26.4% found recruitment 'very difficult' and 12.3% found recruitment 'extremely difficult'.

Table 7.10: Indecon Survey of Architects - Views on Extent of Difficulty in Recruiting Architects in Ireland Over the Last 3 Years

Level of difficulty	% of responses
Extremely difficult	12.3
Very difficult	26.4
Difficult	43.9
No difficulty	17.5

Source: Indecon Survey of Architects.

7.54 Our survey findings highlight the difficulties that the profession has encountered in recruiting architects to meet demand for planning, design and related services. The ability of the profession to secure an adequate supply of qualified personnel is an important issue for the ongoing development of a competitive market for architectural services. Access to the profession is examined in the next sub-section, in the context of the high points required for third-level architectural education in Ireland and the RIAI's professional requirements.

Summary of Empirical Analysis of the Market

7.55 We now draw together the salient points arising from the last four sub-sections.

7.56 As with engineering, there is no requirement to register with any regulatory body in order to practise as an architect in Ireland. In fact, the architects' profession is unique among the eight under review in that the law currently affords no protection of title to architects. The predominant type of supplier in the relevant market is the private architectural firm and, despite the absence of protection of title, most firms are members of the RIAI. Firms generally supply a range of services and the geographical scope of the market is likely to be national with more localised elements for smaller practices.

7.57 At the end of 2001, there were 2,060 RIAI architects and 395 member practices. The Institutes estimates that 200-300 non-member architects may be eligible for membership, while a further 200-400 people offering architectural services would not be eligible for membership. The number of RIAI architects grew at an annual average rate of 4.23% during 1992-2001. In the context of economic growth and new house building, the number of member architects may not have kept pace with demand during the period.

7.58 That growth in the number of architects may not have kept pace with demand is reflected in fee income growth. According to our new survey evidence, most practitioners experienced significant growth in fee income during 1999-2001. Accepting this was a period of exceptional growth in the economy, the average annual growth rate in architects' fee income in nearly all cases exceeded any measure of national product. In particular, of the 90.8% of practices that stated an increase in fee income during the period, 75.1% stated an increase of at least 10% on an average annual basis.

7.59 About three-quarters of architects' fee income is derived from business, corporate, institutional or government clients, with the remainder coming from members of the public. The latter tend to engage the services of architects infrequently and are likely to be characterised by an information deficit.

7.60 We examined unique survey information on architects' fees for design and compliance services. Noteworthy about the former was that the average fee was not dissimilar to the sliding scale formerly recommended by the RIAI, while much more variation existed among compliance fees. We noted that lack of public information on likely architectural fees is also a salient feature of the market – fees are never quoted in advertisements. Finally, there has been significant difficulty in recruiting architects in the past three years and this fact is consistent with the view that the supply of architectural services has lagged behind demand.

Examination of the Restrictions in the Architects' Profession

Introduction

7.61 In our examination and assessment of the restrictions and requirements governing the architects' profession, we firstly identify the restrictions on entry, conduct, demarcation and organisational form before concentrating on those restrictions that we believe are most likely to hinder competition on the market. In concentrating on the key restrictions, we examine their justification (by the RIAI) and then evaluate whether or not they are proportional to achieving their intended objectives.

7.62 Prior to undertaking these tasks, it is first necessary to consider in more detail the principal organisation responsible for regulating the profession in Ireland, namely the RIAI, and the background to the proposal to protect in law the title architect in Ireland under the Building Control Bill.

Building Control Bill

Scope and Motivation

7.63 It is against the background of the Building Control Bill, [12] the Heads of which were approved by the Government in December 2001, that regulation of the architects' profession in Ireland is examined in this part of the section.

7.64 The proposal will be to protect the title of architect and to establish a national register of architects in Ireland. The objective is to achieve a consistent level of quality across the profession by setting a standard that must be fulfilled before a person can assume the title of architect. The establishment of such a standard, it is argued, will serve to protect the interests of consumers in the face of asymmetric information, particularly personal users of architects' services. We understand from our consultation with the RIAI that the Bill will not propose to reserve function to (registered) architects. Thus, under protection of title only, customers of all types (business, government and personal) would continue to have choice as to whether to commission the services of a registered architect or another provider in the market.

[12] We understand that the Bill will also propose a system of registration for quantity surveyors and building surveyors as well as architects.

7.65 The effect of reservation of title would be to provide a recognisable minimum level of competence in the profession. We have no difficulty with this proposal on competition grounds. On the contrary, we believe that demarcating title could enhance consumer welfare, provided customers are not prevented from also exercising choice over the same range of services offered by unregistered suppliers. (Protection of title and reservation of function would however likely result in diminished competition on the market with consequent negative effects on consumer welfare.)

7.66 We understand that the Bill has the support of the Forum for the Construction Industry, which represents Government, contractors, professional bodies, clients, unions and suppliers in the construction industry in Ireland.

7.67 The Bill will also aim to align the architects' profession in Ireland more closely with its counterparts in the EU. In most EU Member States, either the use of the title of architect is restricted to persons formally qualified as architects or the design of particular types of building is restricted to formally trained architects or both. For example, the title of architect is protected in the Netherlands by the Architect's Title Act (*Wet op de Architectentiel*). Individuals have to register with the SBA (*Strchting Bureau Architectenregister*) in order to obtain title. Only individuals who satisfy the educational requirements determined by the government can receive the title; others are not allowed to call themselves architects but they can compete openly with registered providers (i.e. there is no protection of function).

7.68 The RIAI motivates and supports the proposed new registration of architects in Ireland by highlighting its view that, although the market for architectural services may operate effectively for many transactions, in some cases the potential harm generated by the occasional inadvertent selection by a consumer of an incompetent or unethical provider may be considered unacceptably high by the community. For a number of reasons, the Institute states, this may warrant intervention of some form. It proceeds to outline three possibilities.

7.69 First, structural and other building defects can cause catastrophic damage and injury and, in extreme cases, even death. More generally, they are likely to require expensive repairs. Even if such occurrences in an unregulated market were likely to be infrequent, the community may not be prepared to tolerate even a low level of risk. Second, the purchase of building design and related services usually involves a relatively large financial investment. Any significant delays or cost overruns in construction can have serious financial ramifications for consumers/clients.

7.70 Finally, the cost of poor design aesthetics and functionality may also be significant for consumers, both financially – if adjustments need to be made after initial construction, for example – and in non-financial terms – living with an 'imperfect' design (an example of a negative externality). However, the RIAI concedes that information problems in relation to these aspects of design are likely to be less severe.

7.71 While customers/clients may find it difficult to assess the quality of construction, they usually know what they like in design and will search for a provider whose design style suits their tastes and needs. Nonetheless, it concludes, it is feasible that regulation could improve the availability and quality of information about the technical competence of designers, and thus reduce consumer risks further.

Operation of the New Registration System

7.72 It is proposed that the RIAI will administer the new register of architects envisaged under the Bill, the admission to which will be broadly equivalent to that presently required for membership of the Institute. Only registered members will be allowed to use the term architect (under protection of title), however other suppliers will not be prevented from offering architectural services (because we understand the Bill will not propose reservation of function).

7.73 In the transition process to the new register, all RIAI members will be automatically transferred to the register. In addition, members of the architectural organisations comprising the 'Minister's List' will also be allowed to transfer to the new register. The four organisations on the Minister's List are the Group of Independent Architects in Ireland, the Irish Architects Society, the Architects and Surveyors Institute and the Incorporated Association of Architects and Surveyors. A panel of independent architects will be convened to assess membership of *some* of the members of the GIAI. Depending upon on training and professional experience, the assessment will include either an interview with the panel, some of whose members will be drawn from abroad, or an interview and written examination. In each case, a portfolio of the candidate's drawings will supplement the interview part of the assessment.

7.74 At the present time, there is no additional information on the criteria (beyond vaguely stating training and professional experience) that will be used to distinguish whether a GIAI member will have to undergo either a panel interview or a panel interview and written examination. If such criteria are not clarified for potential applicants in advance of application for registration, the criteria could hardly be described as transparent. In the absence of clarification, we would be concerned that the requirements might potentially be used to artificially control the number of entrants to the new register.

7.75 We understand that the contribution of these four organisations is likely to lead to approximately 170 members gaining entry to the register in addition to the RIAI architects, of which there are over 2,000 (as shown in Table 7.1).

7.76 The Bill will also make allowance for architects who are not members of the five architectural organisations in the form of a 'grandfather clause'. Independent or self-taught architects with 10 or more years experience in Ireland will be permitted to gain entry to the new register subject to the same form of assessment that will apply to those members of the GIAI for which assessment for entry will be deemed necessary. Our competition concerns over how some GIAI members might be treated also applies to 'grandfathers'.

7.77 On the issue of the RIAI administering the new register of architects, we note that there will be independent representation to assess the entry of some members of the GIAI and grandfather architects that have hitherto operated independently. In the longer term, it would be sensible on competition grounds to have independent representation with regard to all admissions and to professional conduct. Consumer representation in the new system would in our view further strengthen competition and the possibility of third party regulation by an independent State body would be relevant.

Regulation of the Profession

7.78 Founded in 1839, the objectives of the RIAI are the advancement of architecture and the arts and sciences associated with architecture; the promotion of high standards of professional conduct and practice; and the protection of the interests of architectural training and education.

7.79 The Institute acts as regulatory body only in the context of its own members and these activities relate to admission and professional conduct (see below).

7.80 The governing body of the RIAI is the Council, whose officers consist of the President, two Vice Presidents, the Honorary Secretary and the Treasurer. Together with the Director and the Assistant Director, the Council officers constitute the Executive Board of the Institute. Any changes to the way in which the RIAI regulates its members are initiated by the Executive Board and are in turn considered by Council for approval. Thus, in terms of its own membership, the RIAI is a self-regulatory organisation.

Assessment of RIAI Complaints, Discipline, and Enforcement Procedures

7.81 The RIAI considers that personal or one-off users of architects are entitled to a timely and effective complaints procedure. Many complaints made to the RIAI arise from minor differences between clients and their architects that can be resolved at an informal level without recourse to the necessary complex and lengthy procedures of a professional conduct complaint. An example might be an architect who the consumer believes is not giving an adequate inspection service at site stage. What is important to the consumer, at this time, is the provision of a proper service to ensure that the building contract is completed and the works inspected. We have reviewed the RIAI's discipline, complaints and enforcements procedures and believe they are designed to protect consumer interests and standards, and are not designed to restrict competition in the context of a voluntary self-regulatory organisation. We understand that the new Bill will propose to use the RIAI's procedures going forward. Subject to our analysis of, and conclusions on, the restrictions below, we feel the procedures are reasonable, from a competition point of view, in the context of a model for the new register.

Restrictions/Requirements on Entry

Educational and Training Requirements

7.82 The RIAI Entry Regulations, the RIAI Statement of Policy on Architectural Education (sections 3.4 to 3.4.3) and the Bye-Laws of the RIAI (section 1) provide the regulatory basis for becoming a member of the Institute (registered architect). None of the requirements have a statutory basis and, to reiterate from above, it is not necessary to be a member of the RIAI (signalled by the affix 'MRIAI') to practise as an architect in Ireland.

7.83 The process of becoming a registered architect (MRIAI) takes 7-9 years and consists of the following three stages:

- Obtain a degree or diploma from a recognised school of architecture;
- Complete two years of approved practical experience; and
- Take an examination in professional practice.

7.84 The three stages are described further in the subsequent paragraphs.

7.85 There are two schools of architecture in Ireland, namely those at University College, Dublin and Dublin Institute of Technology. The UCD school awards the Bachelor in Architecture degree (B. Arch) and the DIT school awards the Diploma in Architecture (Dip. Arch). Places on both courses are limited to less than 100 per year and demand for the limited number of places is so high as to make the CAO points needed to enter each course to be at least 500. Admission to the DIT course also involves a 'suitability test' and an interview, and DIT allocates extra points for these components. After three years at UCD, students obtain a Bachelor of Science degree (B.Sc.) in architectural science. This qualification is not awarded at DIT.

7.86 According to latest data available from the CAO, there were 1,612 applicants for the two architectural courses in 2001, of which there were 643 first preferences. Of the first preference applications, 111 or 17% of the total were issued with offers and the number of acceptances was 84, representing 13% of all first choice preferences and 5% of all applicants.[13] [14]

7.87 Graduates from each school are eligible to become 'associate members' of the RIAI. An associate member is regarded as an architect in training. However, the RIAI informed us that few graduates become associates members and instead concentrate on completing the process and gaining full registered status.

7.88 The RIAI maintains representation on the examination boards of both schools and so has some say in the numbers of students satisfying the academic stage of the qualification process.[15] However, we doubt whether the RIAI could use its external representation to control artificially the numbers satisfying the academic stage. Nor has the Institute any say in the entry requirements to the degree and diploma courses. Rather the number of places available and the level of demand for third-level architectural education determines the level of points required to gain admission to either course. On the supply side, course capacity is a function of university resources and Higher Education Association (HEA) funding and is independent of any views the RIAI or any other regulatory architectural body might have on academic training. On the demand side, the fact that the points level for either course has remained historically high indicates a consistently high demand for third-level courses in architecture among school leavers.

[13] Note that these figures refer to new entrants to degree courses and not to repeating students nor to students transferring from other courses in the Irish third-level system.

[14] The shortage of places in the two schools of architects needs to be seen in the context of the high entry of foreign qualified architects to the Irish market, which we address below under Transfer Requirements.

[15] We understand that there are no other architects on these examination boards (i.e. other than RIAI members).

7.89 In the 1980s, the RIAI, in association with DIT, ran a transfer system whereby architectural technicians could train to satisfy the academic requirements for full registration of the Institute. The system, however, was suspended for two reasons. First, it had a very low success rate: out of approximately 30 applicants, sixteen were admitted (after assessment) and only two finally made their way through the system to become registered members of the Institute. Secondly, the DIT withdrew from the initiative because it lacked the resources to continue its involvement. The transfer system has not been reactivated since its suspension.

7.90 In the context of the proposed new registration system, we believe that more laddering/transfer opportunities are needed. There is a need in particular for the development of alternative routes to qualification as an architect that would provide more places and greater flexibility in terms of access and progression. In this regard, we believe the arrangements in place regarding the engineering profession might provide a useful template for architectural education to aim for. For example, there are numerous alternative routes by which candidates can fulfil the academic requirements of the registered title of chartered engineer in Ireland. These relate to non-engineering graduates and to applicants not in possession of any formal technical or scientific qualifications. Furthermore, there are indirect ways of obtaining degrees or diplomas in engineering approved by the Institution of Engineers of Ireland, the largest and principal regulatory body responsible for shaping engineering education in Ireland. For example, a school leaver with insufficient points to enter his or her preferred degree in engineering may begin on a national certificate course at an institute of technology and work his/her way up to achieving an approved academic qualification, which would make them eligible for chartered status. We understand that similar routes do not presently prevail among architectural education in Ireland.

7.91 It is our belief that such routes should be introduced as soon as is practicable for architectural education. This includes the possibility of a third school of architecture in Ireland, which the RIAI supports. Such a development would be consistent with the spirit of the Building Control Bill, which is to enhance and maintain quality in the design and construction of the built environment. To achieve that, the academic stage of the qualification process needs to become more flexible and capable of providing greater access to the title of architect, which will be protected by law.

7.92 We have considered how practitioners themselves (members and non-members of the RIAI) view the educational requirements for entry to the profession. Our survey evidence indicates that the majority (73%) of practitioners support the current level of educational requirements.

7.93 The second stage in the registration process is to gain practical experience in an architect's office. To be recognised by the Institute as 'approved experience', the practical experience must be done under the supervision of a RIAI member or under another architect who, in the opinion of the Institute, is equally competent to supervise the work of an architect. The approved experience need not be gained in Ireland; however, at least one of the two years must be gained in Ireland or another EU Member State.

7.94 Once the practical experience requirement has been satisfied, the prospective architect is eligible to sit the RIAI/NUI Examination in Professional Practice,[16] which consists of three components as follows:

- Case study (30%);
- Written examination (40%); and
- Oral examination (30%).

7.95 The case study is based on a completed building project on which the candidate has worked. The topic must be approved by the RIAI in advance.

7.96 The written examination consists of a four-hour paper based on a prescribed syllabus and drawing on the candidate's practical experience. It is an open-book examination and the reference material to be used during the examination is at the candidate's discretion.

7.97 The oral examination is held in the week following the written examination. Candidates may be examined on matters covered by the prescribed syllabus, their case study and their practical experience.

7.98 When the Examination has been successfully completed,[17] the candidate is eligible to apply for registered membership of the RIAI.

7.99 Candidates for RIAI membership are traditionally proposed and seconded by different individuals. This requirement is set out in the Institute's Bye-Laws as a mechanism to ensure that candidates are persons of 'good character'. In the case of applicants who are not already 'known' to a member of the RIAI, the Institute arranges for the necessary signatures.

[16] In preparation for this examination, candidates may attend a short course in professional practice run jointly by UCD and the RIAI (September-November each year). The examination may be sat at the RIAI or UCD.

[17] The RIAI submits that the failure rate on the professional practice examination at any given sitting is less than 20%. Furthermore, the RIAI states that it does not set any limits on pass rates in this examination.

7.100 We generally have no difficulty with the second and third stage of the qualification process – while the RIAI has a certain degree of control at each stage, we do not believe the level of control could be exploited to artificially set numbers being admitted to the profession. However, we believe it might be judicious to modify the requirements in the wider context of the new registration system, where a larger number of candidates to the title of architect will have to be assessed. In other words, just because the RIAI's current entry requirements generally comply with competition principles does not imply they should necessarily continue in the context of the new registration system. For example, we doubt whether the proposing and seconding of new members is relevant in a statutory registration system. Further, we wonder whether it is really necessary for the statutory registrars to interview and examine candidates for registration if they already have an approved qualification and experience.

Continuing Requirements

7.101 The Code of Conduct requires that members maintain a level of professional indemnity insurance appropriate to the nature and scale of the practice. Continuing profession development (CPD) requirements were introduced in 1998. RIAI members must attend a refresher course every five years and 9 hours formal CDP per year. Certificates of attendance are issued. CDP courses do not have to be run by the RIAI. The requirements are set out in the RIAI Members' Guide to CPD.

Transfer Requirements

7.102 Candidates for membership who have passed examinations in professional practice in other jurisdictions may apply to the RIAI for exemptions from the case study and written sections of the Professional Practice Examination outlined above. Assessment of such architects is by way of CV and interview.

7.103 We believe that this requirement is not unduly restrictive of architects qualified in other jurisdictions from establishing themselves in Ireland. Figures submitted by the RIAI show that of the 114 new members registered in 2001, 42 or 37% of the total were first qualified abroad, with the majority (81%) of these qualified in Britain and other Member States of the EU. This reflects the 'Architects' Directive' (Directive 85/384/EEC) under which graduates holding a qualification in architecture listed in the Directive have the right to practise as an architect in any of the EU Member States.

7.104 Like the engineering profession, we are satisfied that potential entry from appropriately qualified architects in other jurisdictions is broadly adequate under the Architects' Directive.

7.105 The RIAI also points to the presence of a number of foreign practices currently operating in the Irish market. Furthermore, a number of overseas architects have recently won architectural competitions in Ireland (which, it states, have or will result in commissions).

Restrictions on Conduct

Restrictions on Fees/Prices

7.106 The RIAI does not have recommended, mandatory or minimum scales of charges. The RIAI does, however, publish information on levels of charges based on surveys and market rates. This information is published, it is submitted, as a consumer information system for the purposes and negotiations between the architect and the client related to both charge and scope of services. As already remarked in our review of key issues section, the publication of any fee information by a regulatory organisation is likely to result in a significant easing of price competition on the market and thus serves to diminish consumer welfare. The current practice of the RIAI merits closer scrutiny in our analysis of key restrictions on competition below.

Restrictions on Advertising

7.107 With regard to corporate advertising, the Institute subscribes to the Golden Pages each year. The advertisement (one per region) contains a list of practices under a banner heading, with the aim of highlighting the difference between RIAI and non-RIAI architects. The advertisement has, in the Institute's opinion, the objective of encouraging the public to question the qualifications of the architects they are selecting. Only registered practices are eligible for inclusion. Note that practice membership of the Institute is voluntary. Members of the Institute whose practices are not practice members may place adverts of their in the Golden Pages and frequently do so, as our analysis of adverts has revealed.

7.108 We have seen in our economic analysis of the profession that advertising is used extensively by practitioners to compete in the marketplace. There is no explicit restriction on advertising fees, although throughout our analysis of the various types of adverts placed by architects in the Golden Pages we did not find any instances of prices or fees being advertised.

7.109 More generally in relation to advertising, the RIAI is concerned that:

- The profession would not be brought into disrepute;
- Advertising would not be false or misleading in any way;
- Advertising would not be in bad taste;
- Advertising would not reflect unfavourably on other persons in the profession;
- Advertising should not add to the overall cost of running a practice; and
- Consumer interests should be protected by using factual information only.

7.110 We believe that the RIAI's rules on advertising, as reflected in the Code of Professional Conduct (Rule A4), are generally proportionate to ensuring that clients are given sufficient factual information on the range of services available. The only change to the Code we believe is required relates to the requirement that advertising should not add to the overall cost of running a practice. This should be left to the judgment of the individual practice.

7.111 However, the RIAI restricts marketing and promotion in two other areas, which are not explicit in the Code but are outlined in its submission to the study.[18] First, articles written in newspapers/periodicals must be commissioned on an independent basis[19] and secondly the RIAI does not permit paid, print media advertising except where print media coverage is given to the architect's own work. We believe these restrictions on competition on the market merit closer scrutiny below under Key Restrictions.

Restrictions on Demarcation

7.112 In its submission to the Study, the RIAI states that there are no functions reserved for the architectural profession.

7.113 We understand that the new registration system under the Building Control Bill will propose to protect the title and not the function of architect. We do not believe this will be unduly restrictive of competition on the market. While we are aware of some very poor designs by non-qualified 'architects', we do not believe that poor designs are confined to such individuals. We are very supportive of measures that would serve to protect the quality of the built environment and support the proposed protection of the title of architect. We are not, however, in favour of restricting activities to registered architects and believe that the quality of design should be protected by the planning laws.

[18] RIAI response to Question 48 of Competition Authority Questionnaire.
[19] Presumably for objectivity.

Restrictions on Organisational Form

7.114 The RIAI Code of Professional Conduct does not contain any restrictions relating to the organisational form of its members and member practices. Nor are there any restrictions against members forming multidisciplinary practices (MDPs) with other professionals.

7.115 Virtually all the practices listed in the Institute's Directory of Practice Members are either sole traders, principals (practices in which the owner architect employs assistant or associate architects) and partnerships.

7.116 For practices eligible for inclusion in the RIAI Practice Register, which is voluntary, the majority interest (i.e. at least 51%) of the practice must be held by a member/s of the RIAI. We believe that in the case of multidisciplinary practices, the 51% should apply only to the architectural element of the practice.

7.117 The Code also stipulates that where a member practises in association with a non-member, the agreement controlling such association must abide by the Code.

7.118 The RIAI submits that the objective of these requirements is "to ensure that the consumer is not misled by practice titles indicating that all partners are qualified architects".[20] We do not believe this, in general, has a negative impact on competition.

[20] RIAI submission response to Question 60 (Organisational Issues) of Competition Authority Questionnaire.

Key Restrictions on Competition

7.119 We have identified the restrictions on entry, conduct, demarcation and organisational form that exist in the architects' profession and our analysis suggests that the following three restrictions merit closer assessment. The key restrictions of potential concern are as follows:

- **The criteria for assessing *some* members of the GIAI and independent (i.e. unregulated) architects with at least 10 years experience of practice in Ireland ('grandfathers') for admission to the new register of architects in Ireland;**
- **The RIAI practice of publishing fee/price information in the market for architectural services;**
- **The RIAI's restrictions on print media advertising by member architects not detailed in the Code of Conduct.**

7.120 We have treated the first of the key restrictions/requirements in our discussion of the operation of the proposed new register of architects above (namely the Building Control Bill). To re-state our position, the way in which independent 'grandfather' practitioners and *some* members of the Group of Independent Architects in Ireland (GIAI) will be assessed for entry to the proposed new register of architects could act as a barrier to entry to the profession going forward in that it may deter members of the present stock of non-registered architects from applying to join the register at a future date.

The RIAI Practice of Publishing Fee/Price Information in the Market for Architectural Services

Justification

7.121 The RIAI submits that the fee information that it publishes helps clients (particularly less informed personal users) to make judgments about selecting architects on the basis of value for money (in the form of price-value ratios). The Institute contends that the published charges are 'non-binding' fee scales, are established under fair and equal participation of all interests involved and are consistent with the system of fee regulation employed by the Government (Department of Finance Circular of 11/87).

7.122 On the matter of non-binding fee scales, the Institute points to a recent decision of the European Court of Justice, namely *Conte/Rossi*.[21] In this judgement, the ECJ stated that non-binding fees do not affect competition and, consequently, should not be forbidden by European competition law. The RIAI argues that, when professional fees are non-binding, there are no effects on competition or the effects are insignificant and the ECJ has decided that this kind of professional decision should not be judged with the scope of Article 81 of the Treaty.

7.123 According to the Institute, fee scales provide information about "the situation of the average supply function of the average service provider. This information gives the possibility of assessing at least the average amount of value combined with an average price".[22] The RIAI proceeds to state that the average customer purchasing architectural planning services has no specific skills and/or expertise to carry out the service him/herself. He needs the skills and the knowledge of the expert he/she is seeking. As he/she is not able to carry out the services on his own, he also lacks the necessary expertise to evaluate the quantity and quality of the service offered to him. This, the Institute submits, is especially true if the customer has to compare different offers. Indeed, the RIAI goes on to quote from writers of the Neo-Austrian tradition of political economy and concludes that "one can describe a fee scale as acting in an entrepreneurial role in the Kirznerian sense, i.e. to provide information in order to reduce the 'information gap'. The amount of the benefit share that each side can realise, depends on the way and the representation of the interests involved in the creation of a fee scale" [23] and in this regard the Institute claims that the fee scale is established under fair and equal participation of all interests involved.

7.124 Finally, the RIAI submits: "the State [even as a large and relatively well informed type of consumer in the market for architectural services] has found the entirely non-binding RIAI fee information system useful for its own purposes in managing competitive interviews".[24]

[21] Case C-221/99 of 29 November 2001.
[22] RIAI submission response to Question 45 (Professional Fees) of Competition Authority Questionnaire.
[23] *Ibid.*
[24] *Ibid.*

Evaluation

7.125 In the view of the RIAI, the need to address market failure in the form of consumer information deficit also warrants publication of fee levels. What must therefore be considered is whether market conditions are such as to warrant publication of fee information. We believe there are no *a priori* grounds for such practice (the traditional justification that publication of fee information provides valuable information to users has been seriously challenged in the economic analysis of competition in professional services), but it is also worth considering the empirical facts.

7.126 It emerged from our empirical analysis that the majority (approximately two-thirds) of an architect's fee income is derived from corporate/institutional clients, which consist mainly of government (central and local) users. This means that information asymmetry is generally unlikely to be present in the market. On balance we are not convinced that published fee information provides valuable information to any consumer in this market. The presence of published fee information could potentially prevent an efficient firm from charging fees below the published levels, thus restricting effective competition and indeed inhibiting potential entry of new cost-oriented competitors. Both types of competitor are central to the competition.[25] The most efficient way for price information to be conveyed in the market is either by obtaining quotations from competing suppliers or through advertising of fee information.

7.127 We conclude that the RIAI's fee information is not necessary for the operation of competition on the market for all architectural services in Ireland. The fee information has the potential to restrict competition is and not necessary: consumers could obtain the necessary price information through normal market channels (e.g. by obtaining quotes from competing practitioners) and this would enhance competition on the market.

[25] See for example, Reid (1987) and Davies and Lyons (1991) for treatments of the Austrian and Neo-Austrian schools.

RIAI Restrictions on Print Media Advertising by Member Architects Not Detailed in the Code of Conduct

Justification

7.128 To recap from above, the RIAI restricts marketing and promotion of its members' activities in two areas. First, articles written in newspapers/periodicals must be commissioned on an independent basis and secondly the RIAI does not permit paid, print media advertising except where print media coverage is given to the architect's own work. The Institute considers the first restriction to be in the interest of the consumer as such a process is "far more likely to encourage factual or balanced reports".[26]

7.129 In defence of the second restriction, the RIAI states that "print media advertising could result in the dominance of the market by a small number of large architectural practices which the Institute believes would not be in the long term interest of the consumer or the quality of the built environment, and would prevent and restrict new entrants to the profession".[27]

Evaluation

7.130 As to the argument in support of the first type of advertising restriction, it is relevant to note that the RIAI is not a consumer body and we do not see any reason why practitioners would write untruthful, unbalanced or poor reports in newspapers, periodicals or journals. In our view, the market would decide. As things presently stand, a recently qualified member would first have to obtain approval in order to publish his or her article, which might not only be of benefit to him/herself, but also may be of use to the market more generally by providing valuable new information.

7.131 In relation to the second restriction, we are not convinced of its validity. On the contrary, advertising ought to encourage new entry and innovative methods, as well as informing consumers.

[26] RIAI submission response to Question 48 (Advertising and Publicity of Services) of Competition Authority Questionnaire.
[27] *Ibid.*

Summary of Main Conclusions

7.132 We present, in Table 7.11, a summary of our main conclusions in relation to the restrictions on competition in the architects' profession in Ireland. Our analysis suggests there are very few restrictions on competition in the architects' profession. While we support the proposed new register of architects we believe that it is important to ensure that this is not implemented in a manner that acts as a barrier to entry or gives the RIAI disproportionate control of the process. Given the present structure of the profession, in which a diverse range of practitioners operate, we would be concerned, on competition grounds, if just one of the present regulatory organisations was to have responsibility for governing the proposed register. We also believe that the issue of the publication of fees and restrictions on advertising should be addressed.

Table 7.11: Summary of Main Conclusions regarding the Architect's Profession

Entry Restrictions

1. THE WAY IN WHICH 'GRANDFATHER' INDEPENDENT ARCHITECTS AND *SOME* MEMBERS OF THE GROUP OF INDEPENDENT ARCHITECTS IN IRELAND (GIAI) WILL BE ASSESSED FOR ENTRY TO THE PROPOSED NEW REGISTER OF ARCHITECTS COULD ACT AS A BARRIER TO ENTRY TO THE PROFESSION GOING FORWARD.

Restrictions on Conduct

2. THE RIAI DOES NOT HAVE RECOMMENDED, MANDATORY OR MINIMUM SCALES OF CHARGES. IT DOES, HOWEVER, PUBLISH INFORMATION ON THE LEVELS OF CHARGES BASED ON SURVEYS AND MARKET RATES AS A WAY OF INFORMING CONSUMERS/CLIENTS. WE BELIEVE THIS PRACTICE IS LIKELY TO RESTRICT COMPETITION ON THE MARKET.

3. THE RIAI'S RESTRICTIONS ON PAID AND PRINT MEDIA ADVERTISING BY ITS MEMBER ARCHITECTS, WHICH ARE NOT GIVEN IN THE CODE OF CONDUCT, ARE LIKELY TO RESTRICT COMPETITION ON THE MARKET FOR ARCHITECTURAL SERVICES IN IRELAND.