STUDY OF COMPETITION IN LEGAL SERVICES

Submission of the Council of the Bar of Ireland in response to the Preliminary Report of the Competition Authority dated 24 February 2005

July 2005

1. SUMMARY OF THE POSITION OF THE BAR COUNCIL

(i) Introduction

1.1 On 24 February 2005, the Competition Authority of Ireland ("*the Competition Authority*") published a Preliminary Report on competition in legal services in the State ("*the Report"*). This submission is the response of the Council of the Bar of Ireland ("*the Bar Council"*) to that Report.

1.2 The Bar Council welcomes the recognition by the Competition Authority of the importance of an independent referral Bar and of the crucial and fundamental role which an independent Bar plays in the administration of justice in this country. The Bar Council further welcomes the recognition by the Competition Authority of the importance of maintaining professional standards and integrity in the administration of justice.

1.3 The services offered by an independent referral Bar can be defined by reference to the core ethical values to which barristers adhere, namely:

(i) Absolute individual and personal responsibility for their own conduct and for their professional work.

(ii) Absolute independence and freedom from all other influences especially those that arise from their personal interest or external pressure.

(iii) An overriding duty to the Court to act with independence in the interests of justice and to ensure in the public interest that the proper and efficient administration of justice is achieved.

(iv) Subject only to the above duty to the Court, barristers have a duty to promote and protect fearlessly and by all proper and lawful means the best interests of their lay client and to do it without regard to their own interest or to any consequence to themselves or to any other person.

(v) A barrister is bound to accept instructions in any case in the field of which he or she professes to practice at a proper professional fee irrespective of any opinion which the barrister may have formed as to the character, reputation, cause, conduct, guilt or innocence of the person.

1.4 These rules essentially define the particular professional service offered by barristers. The rules are self-evidently for the public benefit and impose very onerous obligations on a barrister in the practice of his or her profession. They are rules to which a barrister must conform, irrespective of the personal or financial consequences and they impose on the barrister a duty that is additional to the normal duty owed by any professional person to their client. They are rules which play a crucial role in the administration of justice in this country. The public interest requires the continuing adherence of barristers to these core ethical values.

1.5 The Bar Council recognises the importance of achieving improvements in the efficiency, cost-effectiveness and quality of the services that barristers offer to the public. In recent years, the Bar, independently of the Competition Authority, has been examining its Rules with a view to achieving such improvements. The Bar, as a body, wishes to improve its services to the public. It is in that context that the Bar readily embraces many of the recommendations of the Competition Authority even if it does not agree with the Competition Authority's approach to some of these matters. The Bar differs from the Competition Authority in some respects with regard to how the objectives can be achieved but is nevertheless determined to achieve these objectives in a manner consistent with the maintenance of its core ethical values.

1.6 The Bar Council is committed to the objectives of guaranteeing as far as possible the independence of barristers, improving the quality and value for money of barristers' services and promoting competition between barristers, while continuing to maintain the overriding objective that the quality of the administration of justice in the State must not be damaged but, rather, enhanced at every opportunity. Accordingly, the Bar Council has itself determined to recommend Rule changes which will significantly improve the manner in which the barristers' profession operates and which will result in substantial benefits for the users of barristers' services. In addition, the Bar Council will propose the creation of an Ombudsman as part of a reformed complaints procedure and will support changes in the manner

in which barristers are appointed to the rank of Senior Counsel by the Government.

(ii) Principal changes which the Bar Council will recommend to its members

1.7 The main changes which the Bar Council proposes to recommend to its members comprise the following:

(A) REGULATION

Ensuring modern regulatory structures is an objective that the Bar Council wholly endorses. Regulation should be transparent and should promote the interests of the administration of justice and clients.

At present, the Bar Council operates a system of professional discipline in which non-lawyers are centrally involved. It is intended that the involvement of non-lawyers in professional discipline will be expanded and that, henceforth, the Barristers Professional Conduct Tribunal will sit with a majority of non-lawyer members. Similarly, the Appeals Board will also sit with a majority of lay members. The Bar Council endorses the European Commission Green Paper on consumer protection which recognises the importance of effective self-regulation that contains clearly voluntary binding commitments towards consumers and which is also properly enforced. The Bar Council intends to seek amendments to its Rules to implement this philosophy. The Bar Council will also propose the creation of an Ombudsman to deal with appeals from the disciplinary procedures, to monitor the effectiveness of the complaint procedures and to make specific recommendations in that regard. The intention is that any person who is dissatisfied with the decision of the Appeal Board will have an automatic right of referral of their complaint to an Ombudsman.

(B) LEGAL FEES AND TAXATION

The Bar Council fully supports transparency of price and competition between barristers in respect of fees to the widest extent possible. The position of the Bar Council is to foster competition and price transparency to the benefit of clients and in this regard it proposes to recommend to members further positive measures to

achieve those objectives to a greater extent, including the giving of fee estimates in advance of engagement and increased scope for advertising fees. The Bar Council advocates and encourages those who use the services of barristers, including both clients and solicitors, to seek competitive quotes in advance of employing counsel.

The Bar Council further proposes a number of reforms in respect of the system of legal fees and taxation of costs. These proposals include the creation of one agency in the State responsible for taxing legal fees, with provision to allow Taxing Officers to travel around the country to facilitate country practitioners. It is also recommended by the Bar Council that fees be calculated by reference to the value to the client of the work done and that Junior Counsel fees be calculated without reference to Senior Counsel fees.

(C) EXPANSION OF DIRECT PROFESSIONAL ACCESS

The Bar Council intends to initiate a consultation process with a view to improving the existing direct professional access scheme in a manner that is consistent with the maintenance of an independent referral Bar. It is intended that the reformed scheme will expand the range of persons entitled to use the services of barristers' and to engage barristers directly in respect of a considerably expanded range of work.

(D) ADVERTISING

Advertising may permit greater transparency, assist barristers to establish their practices and promote price competition. These are objectives which the Bar Council seeks to promote.

It is intended to make significant revisions to the existing advertising code to permit barristers to engage in advertising consisting of the provision of adequate and balanced information on the services they provide, on their experience and expertise and on the fees which they charge for their services.

The Bar Council is totally committed to competition between barristers, particularly in relation to fees. Solicitors and clients should be able, and are encouraged, to seek quotations from members of the profession to secure the most

competitive service. The Bar Council will put in place proposals to facilitate transparency and competition in respect of fees.

(E) SWITCHING PROFESSIONS

Freedom for qualified lawyers to provide, and specialise in, advocacy services is of great benefit to society as a whole. It ensures the existence of quality advocates to the benefit of the administration of justice and the community at large.

Any Rule which restricts in any way the ability of a solicitor to switch to the barristers' profession will be amended. This includes removing the Rule which would prevent a solicitor who has switched profession taking work from any solicitor's firm with which that solicitor was previously associated.

(F) ASSISTING NEW BARRISTERS TO GET ESTABLISHED

Ensuring and assisting newly qualified barristers to establish their practices and to develop as specialised advocates has always been a priority of the Bar Council.

The Bar Council will propose to its members an amendment of the Rules to enhance the opportunities for those entering the barristers' profession to establish themselves quickly and successfully in that profession. In particular, it is the view of the Bar Council that persons entering the profession should be free to take work from former employers as and from the date of entry; should be free to take on remunerated work for other barristers including research work in relation to opinions and specific cases; should be entitled to participate in an expanded direct professional access scheme; should be permitted significant freedom in advertising their fees, expertise and availability, should be permitted to engage in a significantly increased range of part-time occupations; and the existing practice whereby barristers share expenses so as to achieve economies of scale should be formalised. In addition, the Bar Council will make readily available to all persons who wish to enter the profession full details of the existing system whereby new barristers are provided with highly subsidised services and facilities to enable them operate as barristers.

(G) ENTITLEMENT OF BARRISTERS TO DO WORK FOR OTHER BARRISTERS

Permitting barristers to do work for other barristers would assist newly qualified barristers gain experience and finance their practice in their early years.

The Bar Council will propose to its members an amendment of the Rules to enable barristers engage other barristers on a remunerated basis to do work for them, including research work in relation to opinions and specific cases. It is also intended that this amendment will assist new barristers in getting established and, in particular, will help them to acquire experience and to develop a reputation.

(H) SHARING OF FACILITIES AND EXPENSES BY BARRISTERS

Sharing facilities allows barristers to gain economies of scale and reduce costs to the ultimate benefit of clients.

The existing practice whereby barristers share office, secretarial, legal services and other facilities and expenses in relation to the operation of their profession should be formalised and explicitly sanctioned by the Rules. The Bar Council will be recommending such changes to its members. Further, the Bar Council is continually expanding the services that are available to barristers and it uses its purchasing power to achieve significant cost savings for barristers.

(I) EXPANSION OF BARRISTERS' ENTITLEMENT TO PURSUE PART-TIME OCCUPATIONS

Permitting barristers to pursue part-time occupations would assist newly qualified barristers to finance the development of their practice in the early years.

The Bar Council will propose to its members an amendment of the Rules to expand the category of part-time occupations in which barristers may engage but in a manner that is consistent with the professional obligations and standards to which they must adhere as members of an independent referral Bar.

(J) APPOINTMENT OF SENIOR COUNSEL

The title of Senior Counsel is a quality mark which identifies particular expertise to buyers of legal services and to clients.

The Bar Council will support the establishment of clear and transparent criteria for the appointment of barristers on merit to the rank of Senior Counsel.

1.8 The foregoing constitute the main changes to the existing Rules which the Bar Council intends to recommend to its members with the objective of introducing the changes in the near future. These changes will bring about very significant improvements in the quality of service offered by barristers to users of their services and will enhance access to the profession and advancement within the profession. These changes are designed to meet the needs of users and will deliver significant efficiencies and services, while maintaining existing professional standards and the integrity of the system of the administration of justice. It is believed that these proposals, when implemented, will meet any justifiable concerns expressed by the Competition Authority.

1.9 The Bar Council will expand on the above proposals in the following chapters. Where the Bar Council agrees with the proposals made by the Competition Authority or aspects of those proposals, it will not address the Competition Authority's reasoning or analysis even where it disagrees with same. What is important is achieving the result in terms of improvements to the services offered to clients and, in the view of the Bar Council, it is not necessary in this paper to engage in any unnecessary disputes. Where the Bar Council fundamentally disagrees with proposals made by the Competition Authority, it sets out its reasons for doing so. A fundamental difference between the position of the Competition Authority and that of the Bar Council is that the Competition Authority has suggested permitting barristers adopt a number of different business structures for the carrying out of their professional obligations. The Bar Council believes such structures are neither desirable nor necessary. In particular, the Bar Council believes that a number of the alterations in business structure which the Competition Authority have advocated would be likely to result in substantial restrictions of competition by, amongst other things, significantly limiting the availability of barrister services to existing users (especially small solicitor firms)

and creating concentrated markets, particularly among leading barristers. At a more fundamental level, the Bar Council believes that a number of the structures which the Competition Authority proposes are inimical to the role of barristers in the administration of justice and are unnecessary, particularly in circumstances where the Rules of the profession contain no restrictions on solicitors switching to the barristers' profession or on barristers switching to the solicitors' profession and where solicitors are allowed to offer the full range of services that are currently being offered by the barristers' profession.

1.10 In Appendix I to this submission, the Bar Council addresses the analysis and methodology underpinning the proposals set out in the Report of the Competition Authority. The Bar Council takes issue with the analysis and methodology of the Competition Authority which is deficient and incompatible with the approach taken in these matters by the European Court of Justice and the European Court of First Instance. The main points can be summarised as follows:

(i) The Report of the Competition Authority does not sufficiently take into account the core ethics of the Bar and its analysis does not sufficiently address the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability which are required to ensure that the ultimate users of legal services and the integrity of the administration of justice are provided with the necessary guarantees of independence, probity, experience and skill. Some of its recommendations would have the effect of reducing the choice of counsel available to a client and increasing the costs of advocacy services.

(ii) The Report does not afford sufficient recognition to a fundamental feature of the Irish system, namely, that solicitors have a full right of audience in all courts of the State since 1971. This is a basic fact of economic significance which distinguishes the Irish system from most other common law jurisdictions, including, the English system, upon which the Competition Authority has based some of its recommendations. The Competition Authority also fails to take sufficient account of the fact that approximately 83% of solicitors' firms have less than 3 solicitors[1] and that, accordingly, the existence of an independent referral Bar is vital to their ability to

[1] *Law Society Annual Report 2003*.

compete with larger firms and to offer a full range of advocacy services to their clients and to the community as a whole.

(iii) The criticism of the Competition Authority of some of the assumed restrictions of competition is unsupported by the necessary economic evidence or analysis required by the European Court of Justice and the European Court of First Instance. There is a dearth of detailed economic investigation and appraisal and a failure to appreciate or evaluate significant aspects of the system of administration of justice in this country.

(iv) The Competition Authority puts forward proposals without any attempt to measure their likely impact. For example, a Legal Services Commission is recommended without any attempt to assess its cost implications and the consequent potential effect for clients of what is likely to be the significant additional costs of such a system.

(v) The Competition Authority has failed to conduct a Regulatory Impact Analysis / Assessment ("RIA") of its proposals in accordance with the Better Regulation Programme of the Government and in accordance with European and International best practice.

(iii) Summary

1.11 In summary, the Bar Council is determined to improve the efficiency, cost-effectiveness and quality of the services which it offers to the public. It is equally determined to maintain the core ethical values imposed on barristers for the benefit of the public. It proposes to recommend to its members very significant changes to its existing Rules. It is believed that these changes will address any justifiable criticism of the Competition Authority and will result in substantial and lasting benefits for the public.

2. THE INDEPENDENT REFERRAL BAR IN IRELAND

(i) Introduction

2.1 Any analysis of the regulatory framework within which legal services are provided in this jurisdiction must have particular regard to the paramount importance in our constitutional democracy and administration of justice system of an independent referral Bar. It is necessary, therefore, in the context of this response to the Report of the Competition Authority to explain the concept of an independent referral Bar as it operates in this State and, in particular, to outline the nature and effect of the obligations of the practising barristers who comprise it and the positive benefits that accrue to society from such obligations.

(ii) The Independent Referral Bar explained

2.2 The provision of legal services in Ireland has two formally distinct branches: the Bar of Ireland (which comprises barristers) and the Law Society of Ireland (which comprises solicitors).[2] The regulatory basis for the distinction between the professions derives largely from the Code of Conduct adopted by the Bar of Ireland. The Code of Conduct is designed to maintain a separate and independent referral Bar which operates partly in parallel to the direct access provision of services by solicitors but, also, as a complement to the services that solicitors provide.

2.3 There are a number of core duties which define the independent referral Bar in this jurisdiction. It is appropriate at the outset to consider the nature and effect of these duties.

[2] The existence of a legal services sector with separate providers of some functions is not confined to the subset of common law countries which operate a separated system of service provision involving barristers and solicitors. France, Italy and Scotland, for example, are civil code countries with professional demarcation supported by legislation and/or regulation between lawyers in terms of the types of services supplied to end users. Indeed, within the OECD, legal structures based on a single, fused profession are in fact the exception rather than the rule.

(a) Duty to the Court

2.4 Barristers have an overriding duty to the Court to act with independence in the interests of justice and to ensure in the public interest that the proper and efficient administration of justice is achieved. There are a number of aspects to this duty. Manifestly, it precludes a barrister from deceiving or knowingly misleading the Court, for example, by putting a client in the witness box knowing that he or she intends to give false evidence. It also extends, however, to bringing matters to the attention of the Court which may be contrary to the interests of the client including, for example, legal authorities that do not support the client's claim or procedural irregularities which may occur during the course of the trial. It also requires a barrister to conduct proceedings in a manner which is economical and conducive to the effective and efficient discharge by the Court of its duty to administer justice in accordance with the Constitution and the laws of the State.

2.5 In criminal cases, this duty to the Court to act with independence is often starkly illustrated. There is a clear public interest in the prosecution of criminal offences. This public interest does not give a free hand however to counsel to seek a conviction at any cost. "*The prosecutor has a duty to act honestly, fairly, impartially and objectively*."[3] Similarly counsel who act on behalf of accused persons are mindful that their role is not to seek an acquittal at any cost. The role of defence counsel was summarised by the Chairman of the English Bar in 1976 when he said:

> *"It is the duty of counsel when defending an accused on a criminal charge to present to the court, fearlessly and without regard to his personal interests, the defence of the accused. It is not his function to determine the truth or falsity of that defence, nor should he permit his personal opinion of that defence to influence his conduct of it. No counsel may refuse to defend because of his opinion of the character of the accused nor of the crime charged. That is a cardinal rule of the Bar, and it would be a grave matter in any free society were it not. Counsel also has a duty to the court and to the public. This duty includes the clear presentation of the issues and the*

[3] *Statement of General Guidelines for Prosecutors, Office of the Director of Public Prosecutions* (October 2001).

avoidance of waste of time, repetition and prolixity. In the conduct of every case counsel should be mindful of this public responsibility."[4]

2.6 Thus, counsel on both sides of a criminal trial are bound, while representing the interests of their respective clients, to have regard to their public and court responsibilities when ensuring the protection of the constitutional right to a fair trial in "*due course of law*".[5] It is extremely important, where the liberty and good name of the citizen are at stake, the judiciary can have confidence that the barristers appearing before them are conscious of their responsibilities and are acting in accordance with their respective obligations.

2.7 The duty that barristers owe to the Court is a critical consideration in any regulatory analysis of the profession but, in particular, in the context of a competition law analysis. As the Law Council of Australia has observed:

> *"Lawyers' obligations are of a different nature to those of other professionals. Those obligations derive directly from the rule of law and the requirements of a properly functioning judicial system in a constitutional democracy. The provision of legal services is not analogous to the provision of the vast majority of market based services. While other professions are subject to fiduciary duties to their clients, the legal profession's fiduciary duty to clients is overridden by his or her duty to the court. The lawyer's commitment to the legal system, and thus to the community itself, must come first. These considerations, which form the essence of the legal profession, must always be taken into account in policy development, particularly in the context of competition policy reviews and proposals generally to deregulate the profession."*[6]

2.8 The foregoing observations apply with particular force to the members of the Bar of Ireland. By virtue of their obligation to provide the Court with an independent, accurate and complete assessment of the facts and the law relative to their clients'

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[4] Reproduced, 62 Cr. App. R. 193 – 194.

[5] Article 38.1 of the Constitution provides that *"[n]o person shall be tried on any criminal charge save in due course of law."*

[6] Law Council of Australia, 2010: *A Discussion Paper - Challenges for the Legal Profession* (September 2001).

cases, barristers are in a unique position to assist the Court in administering justice and a vital relationship of trust is created between the barrister and the Court. The importance of this relationship cannot be overstated. It is fundamental to the administration of justice in our constitutional democracy. As noted by Walsh J., a member of the Supreme Court of Ireland from 1961 until 1990 and one of the most distinguished Irish jurists of the twentieth century,[7] *"a judge does not select the materials with which he works": "[h]e must be moved by the action and the advocate."*[8] The importance of the relationship between the advocate and the judge is brought very sharply into focus when it is considered in the light of the fundamental role of the Judiciary in the constitutional democracy of the State[9] and, in particular, the responsibility of the Judiciary to uphold the Constitution and to act as a check on the exercise of power by the legislative and executive organs of government,[10] if necessary by invalidating their acts.[11]

2.9 In this context, the duty of the Courts to protect and vindicate citizens' constitutionally guaranteed rights merits particular emphasis. This duty also encompasses a solemn responsibility to declare the personal rights of the citizen which are *impliedly* guaranteed by the Constitution and to protect and vindicate such rights. "*Moved by the action and the advocate*", the Courts have declared and enforced a significant number of fundamental rights pursuant to Article 40.3.1 of the Constitution[12] – a process which has been essential in the evolution of democratic

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[7] A fact which is acknowledged in the Book of Essays written in his honour: see O'Reilly, (ed.), *Human Rights and Constitutional Law – Essays in honour of Brian Walsh* (Round Hall, 1992). Walsh J. was a Judge of the High Court from 1959 to 1961, a Judge of the Supreme Court from 1960 to 1990, the Senior Ordinary Judge of that Court from 1969 to 1990, a member of the European Court of Human Rights from 1980 until 2001 and the author of a vast range of seminal judgments, particularly in the area of constitutional law.

[8] Foreword to McMahon & Binchy, *The Law of Torts* (Butterworths, 1981).

[9] In this regard, see generally Articles 6, 34, 35 and 40 – 44 of the Constitution and the jurisprudence thereunder.

[10] In this context, see, e.g., Buckley v. Attorney General [1950] IR 67 (in respect of the Legislature) and Crotty v. An Taoiseach [1987] IR 713 (in respect of the Executive).

[11] *Ibid*. The power to invalidate laws enacted by the Legislature is expressly conferred on the High Court and the Supreme Court by Articles 34.3.2 and 34.4.4 of the Constitution. In addition, the Supreme Court has jurisdiction to determine whether Bills passed by the Houses of the Oireachtas are repugnant to the Constitution on a reference by the President pursuant to Article 26 of the Constitution.

[12] Article 40.3.1 of the Constitution provides that *"[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."*

and civil society in Ireland – including the right to bodily integrity,[13] the right to disassociate,[14] the right of access to the courts,[15] the right to earn a livelihood,[16] the right to marital privacy,[17] the right to legal representation on criminal charges,[18] the right not to be tortured or ill treated,[19] the right to travel outside the State,[20] the right to fair procedures in decision-making,[21] the right to individual privacy,[22] the right to communicate,[23] the right to marry and found a family,[24] the right to dignity[25] and the right of a child to know the identity of his or her natural parents.[26] The importance of the relationship between the advocate and the judge is also underpinned by the recent incorporation of the European Convention of Human Rights and Fundamental Freedoms into Irish law.[27]

2.10 It is also instructive to consider the relationship of assistance and trust which exists between a Judge and a barrister from the perspective of a legal system in which such a relationship does not exist. In this regard, the following observations in relation to the functions of an English barrister by a highly respected U.S. Federal Court Judge (Richard Posner) are insightful:

> *"Above all the barristers marshal the facts and the legal authorities for decision, which is half the work of a judge. The judges can trust the barristers to play straight with them concerning the facts and the cases and*

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[13] See, e.g., Ryan v. Attorney General [1965] IR 294; *In re* a Ward of Court (No. 2) [1996] 2 IR 79.

[14] See Educational Co. of Ireland v. Fitzpatrick [1961] IR 345;

[15] See Macauley v. Minister for Posts and Telegraphs [1966] IR 345;

[16] See, e.g., Murtagh Properties v. Cleary [1972] IR 330; Parsons v. Kavanagh [1990] ILRM 560; Cox v. Ireland [1992] 2 IR 503; Shanley v. Galway Corporation [1995] 1 IR 396; Lovett v. Gogan [1995] 3 IR 132.

[17] McGee v Attorney General [1974] IR 284.

[18] See State (Healy) v. Donoghue [1976] IR 325).

[19] See State (C) v. Frawley [1976] IR 365.

[20] See State (M) v. Attorney General [1979] IR 73.

[21] See, e.g., McDonald v. Bord na gCon [1965] IR 217; *In re* Haughey [1971] IR 217; Garvey v. Ireland [1981] IR 75.

[22] See, e.g., Kennedy v. Ireland [1987] IR 587.

[23] See, e.g., Attorney General v. Paperlink Ltd. [1984] ILRM 373; Murphy v. I.R.T.C. [1999] 1 IR 12.

[24] See Murray v. Ireland [1991] ILRM 465.

[25] See *In re* a Ward of Court (No. 2) [1996] 2 IR 79.

[26] I'OT. V. B. [1998] 2 IR 321.

[27] In this context, see Plowden, Advocacy and Human Rights – Using the Convention in Courts and Tribunals (Cavendish, 2002).

the other materials for judgment. It is the general belief of students of the English legal system, and it is also what the judges I spoke to in England told me and what my own observations of appellate argument in the Court of Appeal confirm …. As a result of these things, English judges are able to function without law clerks, who play an essential role in the American system with its effectively open bar dominated by lawyers whom the judges do not trust".

2.11 The foregoing observations in respect of the English Bar apply equally to the Irish Bar. In particular, they highlight the relationship of trust which exists between Irish judges and barristers, the function of barristers in marshalling the facts, authorities and submissions which form the basis of a judge's decision and the significance of the overriding duty which a barrister owes to the Courts in the constitutional democracy of the State.

(b) Duty to promote the client's interests fearlessly

2.12 Subject only to their paramount duty to the Court, barristers must promote and protect fearlessly and by all proper and lawful means the best interests of their lay client and do so without regard to their own interests or to any consequences for themselves or any other person. This point merits emphasis. The manner in which a barrister conducts the client's case may displease powerful interests or other important potential clients. It may bring the barrister personal or professional unpopularity. Such considerations are quite irrelevant, however, and cannot be allowed to impede the conduct of the client's case. The barrister cannot permit his or her absolute independence, integrity and freedom from external pressures to be compromised. As between a lay client and any professional client or other intermediary, the barrister's primary duty is owed to the lay client. A barrister cannot permit the intermediary to limit his or her discretion as to how the interests of the lay client can best be served.

2.13 The public abhorrence attaching to, in particular, certain alleged criminal behaviour can present a challenge for barristers. The adviser to the prosecution may advise that no charges arise or only against a certain person. The decision to prosecute, to continue a prosecution, or not to prosecute at all may lead to public upset and criticism. The independence of the adviser is important to ensure that possible

miscarriages of justice and unlawful convictions are avoided even if this leads to public disquiet. Similarly, the fact that an individual is accused of the most heinous of acts must not deprive them of the protection of their constitutional right to a fair trial conducted in accordance with law. The independence of the Bar means that counsel cannot be subject to the influences of, for instance, an employer who is concerned that acting in the defence of an alleged child abuser is adversely affecting their business. The independence of the Bar means that any person in Ireland who may be accused of a crime is assured of the right to choose the most suitably qualified barrister for his or her case. The introduction of legal aid in criminal cases since the mid-1960s has meant that the inability to pay for the services of a solicitor and barrister is not an impediment to a fair trial. These statutory provisions give life to the constitutional guarantees in relation to the administration of justice. Similarly, the acknowledgement that a barrister of one's choice is part and parcel of the constitutional guarantee to a fair trial has allowed for the development and maintenance of a modern criminal Bar. The fact that the law recognises that the choice of solicitor and counsel is a matter for the client must be seen as permitting of healthy competition, which has not led to any disregard of the overriding obligations to the court and the administration of justice.

(c) Duty to accept instructions in any case in the field of which a barrister professes to practice at a proper professional fee unless justified by special circumstances

2.14 A barrister is bound to accept instructions in any case in the field of which he or she professes to practice at a proper professional fee unless justified by special circumstances in refusing to do so. This duty is colloquially known as the *"Cab Rank Rule"*. This duty applies irrespective of whether the client is paying privately or is publicly funded and irrespective of the party on whose behalf the barrister is instructed, the nature of the case and the brief or opinion which the barrister may have formed as to the character, reputation, cause, conduct, guilt or innocence of the person.

2.15 The cab-rank rule is unique to the barristers' profession and is an articulation of its commitment to making available to members of the community the skills and expertise of all members of the profession. It ensures that clients, no matter how unpopular their cause or claim, are entitled to retain any barrister of their choice and

thus are entitled to access to the courts through a representative of their choice. This point merits emphasis. As an eminent jurist observed:

> *"It is easier, pleasanter and more advantageous professionally for barristers to represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter".*[28]

2.16 The rule thus plays a fundamental role in facilitating equal access to justice. It ensures that all citizens, however unpopular they or their cause may be, are able to obtain the services of advocates of high quality. By extension, it ensures that neither the government nor any organisation can prevent a challenge to their position at law by counsel who are equally skilled and expert as those whom they wish to retain. This rule is vital to the proper functioning of a democratic society.

2.17 The cab-rank rule also preserves barristers' independence from their clients which is essential to the proper performance of their professional duties. It is a fundamental principle of advocacy that, when making submissions to the court, a barrister is advancing his client's case and not his own opinions or beliefs. It is this principle which makes the representation of unattractive and even reprehensible clients morally acceptable. The fact that a barrister is obliged to act for any client means that acceptance of instructions cannot be taken to connote any personal approval or endorsement of the client or the client's opinions or conduct. As David Pannick Q.C. observed:

> *"If counsel were entitled to pick and choose between potential clients on the basis of the acceptability of their conduct, the advocate would necessarily become identified with those for whom he does agree to act. … If the advocate claims the right to refuse to act for those whose conduct he finds reprehensible, he asserts his approval of those for whom he acts, and he cannot expect the public to accept that, when he makes his submissions in court, he is speaking on behalf of his client and not on behalf of himself."*[29]

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[28] *Per* Lord Pearce in *Rondel v Worsley* [1969] 1 AC 191 at 275.

[29] David Pannick, *Advocates* (Oxford University Press, 1992) at 140.

(d) Duty to act as a sole trader

2.18 A core feature of the independent referral Bar in Ireland is the obligation of each barrister to act as an independent sole trader. This obligation is a fundamental component of the administration of justice system in the State and, in particular, it immeasurably underpins the State's constitutional obligation to ensure that all citizens have equal access to justice.[30] As of 2003, there were over 9,000 solicitors practising in Ireland engaged by 2,000 solicitors' firms and approximately 83% of those firms employed no more than three solicitors.[31] In the light of this distribution of solicitors' firms throughout the State, the existence of an independent referral Bar whose members are each sole traders immeasurably underpins the State's constitutional obligation to ensure that all citizens have equal access to justice. One of the critical effects of the sole trader requirement of the barrister's profession is that each firm of solicitors in the State – irrespective of its location, size or status – has available to it, for the benefit of its clients, the full range of advocacy and specialist services provided by members of the Bar. This enables the small firms to compete effectively with larger firms and, in particular, to provide their clients with access to the same specialist advocacy services which are available to large firms. A solicitors' firm can purchase barristers' services on a case by case basis, thus greatly reducing the cost to them and ultimately to the clients, while not compromising on the standard of service which the client receives. Effectively, the firm enters into an *ad hoc* joint venture with a barrister for a particular case and incurs no cost burdens for doing so other than those agreed with the individual barrister for the particular case.

2.19 Against this background, it is manifest that, far from restricting competition in any way, the existence of the independent referral Bar is vital to the ability of solicitors throughout the country to provide competitive services to their clients. In an age of increasing specialisation and legal complexity, it is not an over-statement to observe

[30] Article 40.1 of the Constitution provides, *inter alia*, that *"[a]ll citizens shall, as human persons, be held equal before the law"* and Article 40.3.1 guarantees, *inter alia*, the right of access to the courts; in this context, see, e.g., Macauley v. Minister for Posts and Telegraphs [1966] IR 345, McMahon v. Leahy [1984] IR 525 and State (Keegan) v. Stardust Compensation Tribunal [1986] IR 642 at 658 where Henchy J. stated that "*Article 40, s.1 of the Constitution requires that people who appear before the Courts in essentially the same circumstances should be dealt with in essentially the same manner*".

[31] Law Society Annual Report 2003

that survival of these firms is intrinsically related to the availability to them of the independent specialist legal services which are provided by the Bar. Of course, apart from the availability of specialist legal services, the Bar provides advocacy services that a small firm of solicitors simply could not provide by reason of cost and time constraints. The existence of the independent referral Bar which enables these services be made available to firms throughout the country, and in particular those members of the Bar who travel on circuit is an essential ingredient not only for the provision of legal services to the consumer on a competitive and localised basis but for the administration of justice generally. The role of the Bar in making available specialist legal services on a country-wide basis and enabling justice to be administered locally cannot be over-emphasised.

2.20 In this context, the market for barrister services is only fragmented in that it is made up of 1,540 sole practitioners. Within that number, however, there are 269 Senior Counsel and, within the Bar as a whole, there are areas of important expertise (e.g., tax, local government, defamation, European Union law), where the numbers of specialists may be less than a dozen. If even a handful of these specialists become employees or partners of solicitors or join multi-disciplinary practices, they are then no longer potentially available, as they are at present, to the clients of any other firm. [32]

2.21 The removal of the sole trader requirement would severely impede the operation of the principle of equal access to justice by all citizens of the State. In this context, it is appropriate to reiterate the State's constitutional obligation to ensure that all citizens have equal access to justice.[33] It is also appropriate to highlight the international obligations of the State and, in particular, its obligations pursuant to the European Convention of Human Rights[34] and the Charter of Fundamental Rights of the European Union.[35] The sole trader requirement of the Bar is an

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[32] Cooke, '*Competition in the Cab Rank and the Challenge to the Independent Bar*' (2003) 8 Bar Review, 148 & 197, at 198.

[33] Article 40.1 of the Constitution provides, *inter alia*, that *"[a]ll citizens shall, as human persons, be held equal before the law"* and Article 40.3.1 guarantees, *inter alia*, the right of access to the courts. See also the cases referred to in fn. 32 above.

[34] See, in particular, Article 6 of the Convention which provides, *inter alia*, that *"[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

[35] See, in particular, Article 47 of the Charter which provides as follows:

integral part of the process by which the State fulfils its constitutional and international obligations concerning effective representation, legal aid and access to justice.

2.22 It is also clear that the removal of the sole trader requirement would fundamentally undermine the existence of a profession of independent competing barristers and could well result in a concentrated market – particularly as regards the leading barristers in various areas of the law – which is intrinsically harmful to competition.

(e) Duty of independence

2.23 Barristers are individually and personally responsible for their own conduct and for their professional work and are required to exercise their own personal judgment in all their professional activities and to be absolutely independent and free from all other influence. In particular, they must operate independently of their personal interests and any external pressures. The independence of each individual member of the Bar is not a simple administrative arrangement. It is a cornerstone of the profession and a fundamental component of the administration of justice system in this jurisdiction. The ability of a barrister to take on the cause of what may be an unpopular client and to present their case fearlessly and in a manner which may displease powerful interests and other potential clients or result in personal or professional unpopularity for the barrister is necessarily lessened by the extent to which the barrister is accountable to others. Under the present structure, barristers are accountable only to the Court and to their client. If a barrister's accountability is extended to other persons, the scope for inhibiting the barrister in the discharge of his or her professional obligations is increased and, concomitantly, the administration of justice is impaired.

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

2.24 The duty of independence strongly underpins the *"high degree of trust"*[36] which the public are entitled to repose in barristers. Moreover, the fact that barristers do not have a direct and continuing relationship with clients and are not engaged in managing the affairs of their clients or holding their funds, enables barristers to provide clients with advice which is more objective – and hence more valuable – than would otherwise be possible. Such advice can serve to deter litigation that has little or no realistic prospect of success, to the benefit of clients and of society generally. It can also assist in shortening the length of hearings by limiting the scope of the issues.

(iii) Comment

2.25 These are the core principles which define the services provided by an independent referral bar. They are the ethics of the barristers' profession and are integral to the services which barristers provide. They are not rules which are designed to promote the financial self-interest of barristers. On the contrary, they impose very onerous obligations on barristers in the practice of their profession. They are rules to which barristers must conform irrespective of the personal or financial consequences. They are rules which impose on barristers a duty additional to the normal duty which any professional person owes to their clients. They are inextricably linked to the integrity of the justice system which is enshrined in the Constitution and administered by the courts. It is clear from these duties that barristers do not operate like many other professionals, and are subject to duties that do not arise in general business and trade. In business and trade, a person's exclusive duty is to himself, as long as he keeps within the law. Such persons are entitled – and expected – to pursue their own self-interest and financial well-being. While other professions may be subject to general obligations to refrain from bringing their profession into disrepute, they do not owe a duty to a third person and are not under the intense scrutiny and supervision by the very body to which that duty is owed, in the actual conduct of their practice. Other professions are free to select their clients and, in representing those clients, are not obliged to disclose to third parties matters which may be prejudicial to their clients' interests.

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[36] *Per* Keane C.J. (Murphy and Murray JJ. concurring) in In re Frank Burke [2001] 4 IR 445. In a similar vein, Cooke J. highlights "*the social interest of retaining public trust in the quality and integrity of such services by not allowing the administration of justice to be governed by predominantly commercial criteria*": Cooke, '*Competition in the Cab Rank and the Challenge to the Independent Bar*' (2003) 8 Bar Review 148.

2.26 The European Court of Justice has recognized the need to have particular regard to the significant public interest dimension when analysing the barristers' profession from the perspective of competition law. In Wouters v. Algemene Raad van de Nederlandescher Ord van Advocaten,[37] the European Court of Justice had to consider the validity of a rule adopted by the Dutch Bar Council which prohibited lawyers in the Netherlands from entering into partnership with non-lawyers. The Court concluded that the prohibition could reasonably be regarded as necessary in order to ensure the proper practice of the legal profession as was organised in the Member State concerned. The Court stated:

> *"[N]ot every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or one of them necessarily falls within the prohibition laid down in Article 81(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience... It is then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives."*

2.27 Two very important points emerge from this decision of the European Court of Justice. First, the decision clearly recognises the importance of ethical values and their role in any assessment of competition issues in the context of an assessment under Article 81(1) of the Treaty and not simply in the context of the exempting provisions of Article 81(3). Secondly, the decision recognises that legal services more than most, if not all, other economic services in modern Europe are fashioned by the significantly different legal contexts in which they are provided. Thus, the Court stated:

[37] Case C-309/99 [2002] ECR I - 1577.

"Furthermore, the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former State are incompatible with Community law... Even if multi disciplinary partnerships of lawyers and accountants are allowed in some Member States, the Bar of the Netherlands is entitled to consider the objectives pursued by the 1993 Regulation cannot, having regard in particular to the legal regimes by which the members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restricted means...

In light of those considerations it does not appear that the effects restrictive of competition such as those resulting from members of the Bar practising in the Netherlands from a regulation such as the 1993 Regulations go beyond what is necessary in order to ensure the proper practice of the legal profession..."

2.28 It is clear that a competition law assessment of the rules that govern the barristers' profession in this jurisdiction can and must be undertaken in the light of the fundamental role in our constitutional democracy of an independent referral Bar.

2.29 It is also vital to understand the essential nature of the advocacy services provided by the independent referral Bar. The nature of these services in any legal system is affected by the role of the Judge and the way in which trials are conducted. The adversarial trial system of the Irish common law jurisdiction, as compared with other trial systems, is characterised by a number of obvious features:

(a) The necessity of proof based upon direct oral testimony of witnesses under cross-examination and the production of original documents in proper custody.

(b) The oral presentation of legal argument is a matter of contradictory debate.

(c) The concentration of judicial time in the court hearing and the subsequent writing of judgments and not in pre-trial investigation and management of the exchange of written pleadings.

(d) The much greater role played in trials by the rules of procedure and rules of

evidence.

(e) The degree to which the progress of the case is dependent upon the initiative of the parties rather than that of the court administration of a judge – nothing happens in a case unless one or other party makes the necessary application to move things forward and the Court does not become seized of the case and the case file with any obligations to move it to a conclusion. All of this is of vital economic significance on at least two fronts. It means that the advocacy service is in itself a specialised skill requiring full time application and not merely an incidental episode in the overall conduct of litigation, most of which takes place on paper. Any system therefore which favours the occasional provision of advocacy services through membership of a large firm will inevitably dilute the quality of service offered.

2.30 Efficiency and delivery of advocacy services involves the use of the particular skills which the adversarial trial system requires. These are skills which benefit from daily practice and familiarity with what is required; a capacity to deliver same produces significant efficiencies and cost savings. Specialised advocacy services assist not only in the presentation of the case on behalf of the client but in significant saving of costs and expenses within the court system. If this efficient system is to continue to thrive, it is vital that barristers engage in a sufficiently high volume of court work and not merely advocacy on an occasional or sporadic basis.

2.31 The features of the independent referral Bar which have been outlined above constitute the essential backdrop against which the Report of the Competition Authority must be analysed.

3. REGULATORY REFORM

(i) Introduction

3.1 This chapter addresses the regulatory reforms which are proposed by the Competition Authority in chapter 3 of its Report and, in particular, its proposals for the establishment of a Legal Services Commission.

(ii) Summary

3.2 The Bar Council welcomes the review of regulatory issues by the Competition Authority. The Bar Council recognises that a complaints system in which a majority of members of the profession are involved can lead to a perception of bias or conflict of interest. The fact that such members give of their time and expertise voluntarily does not necessarily eliminate the possible concerns in this regard. Similarly, the resolution of internal complaints without recourse to external assistance may result in a perceived lack of transparency. The provision of greater information and the simplification of these procedures (whilst respecting due process) are practical and sensible suggestions in this context.

3.3 Against this background, the Bar Council will propose reforms of the complaints and disciplinary systems. In particular, it will reform the disciplinary system to ensure that non-barristers are in the majority when complaints are considered. The Bar Council will also propose the creation of an Ombudsman to deal with appeals from the disciplinary procedures, to monitor the effectiveness of complaint procedures and to make specific recommendations in that regard. The Bar Council is committed to competition between barristers (which it sees as enhanced by prohibiting barristers to form partnerships with each other) not only because such competition tends to improve the quality and value of barristers' services to the public but because the structure of barristers as independent sole traders competing with each other fundamentally preserves and enhances the administration of justice in the State. Furthermore, the Bar Council obviously subscribes to the requirement that the profession must be conducted by its members in accordance with the requirements of law including the Competition Act.

(iii) Reforms to be undertaken by the Bar Council

3.4 The Report of the Competition Authority contains a number of valuable comments on the perception of the complaints and disciplinary system of the Bar and the transparency of the rules of professional conduct. The Bar Council will recommend the following reforms:

(a) The creation of a new conduct Tribunal and a new Appeals Board to deal with all complaints about individual barristers, each consisting of a lay chairman, a majority of lay representatives,[38] and with a guarantee that there will be a majority of non-barristers on the deciding panel in relation to each individual complaint.

(b) The new conduct tribunal and Appeal Board will have power to bind the Bar Council in relation to the sanctioning of individual members.

(c) The Bar Council will propose the creation of a Bar Services Ombudsman who will be nominated by the Government / the Minister for Justice, Equality and Law Reform. The function of the Ombudsman would be to hear appeals from the new conduct tribunal and complaints in relation to and concerning the complaints procedure. The Ombudsman would also monitor the effectiveness of the complaints procedures and make recommendations in respect thereof.

(d) The Bar Council will provide simple forms in plain language to facilitate the making of complaints by consumers and other users of barrister services.[39] This simplified form will be available on the Law Library website with clear instructions as to how to initiate a complaint.

(e) The new procedures will be explained in a simple leaflet and will be the subject of an information campaign. The procedures for the expeditious disposal of complaints by the Tribunal / Ombudsman will be set out.

[38] Expansion of lay representatives to incorporate nominee from the Consumers Association of Ireland, ICTU, ISME, social partners, Oireachtas, senior civil servants, Competition Authority etc.

[39] E.g. simplified model of the EAT claim form.

(f) The Ombudsman and the Tribunal will be required to publish annual reports containing, *inter alia*, statistical information in relation to the nature of complaints, percentage of complaints upheld.

(iv) Self-regulation and the Legal Services Commission

3.5 The Competition Authority recommends the establishment of a Legal Services Commission.[40] This recommendation is founded on a number of assumptions in respect of the capacity of the Bar Council, the Law Society and the King's Inns to regulate in a manner that is pro-competitive and promotes the interests of consumers and the general public.[41] These assumptions are encapsulated in paragraph 3.1 of the Report wherein the Competition Authority asserts that "*[l]eaving the existing regulatory framework unreformed would allow the future development of other rules and practices that would limit competition, hinder the efficient and innovative supply of services and harm buyers*". In other words, the Competition Authority simply assumes that the Bar Council (and King's Inns) will act in an anti-competitive fashion and then uses this assumption as to future behaviour to justify a change in the regulatory structure. In an attempt to substantiate this theory in relation to the Bar Council, the Competition Authority states, *inter alia*, that the Bar Council has "*an unfettered power to set rules for itself*" and that "*[t]his discretion creates an opportunity for regulation to be enforced in an anti-competitive manner….*". In its conclusion, the Competition Authority asserts that "*[a]s long as self-regulatory bodies retain such extensive discretion over the creation and enforcement of rules and regulations governing the supply of the service, there will continue to be a conflict between the interests of buyers and sellers of legal services, in which the suppliers will be inclined to restrict competition as they have done in the past*"[42] and that "*[f]or this reason, the Competition Authority considers that external independent regulation of the legal profession is indispensable for ensuring competition in the provision of legal services*".[43]

3.6 These assertions have no basis in fact and are precisely the sort of non-evidenced based "*analysis*" that the European Court of Justice roundly criticised in

[40] See generally chapter 3 and, in particular, paragraphs 3.1, 3.2 and 3.52.

[41] See Appendix I for a review of the methodology of the Competition Authority in this regard.

[42] Paragraph 3.52.

[43] *Ibid*. (Emphasis added).

Commission v. Tetra Laval.[44] The Bar Council does not have an unfettered power to set rules for itself. Nor is it at liberty to create or enforce regulations in an anti-competitive manner or otherwise to act anti-competitively. The powers of the Bar Council must be exercised subject to and in accordance with the laws of the State, including the competition laws. The Competition Authority makes no reference to this fact in the assessment underlying its assertion that a Legal Services Commission is "*indispensable for ensuring competition in the provision of legal services*", an omission all the more remarkable since the Competition Authority rejects the point that abolition of the sole trader rule would lead to harmful concentration in the market on the basis that "*it is unlikely to happen in practice [because] [c]ompetition law, including merger regulation, counter-acts the harmful exercise of market powers by undertakings, including barristers and solicitors*".[45] This approach of the Competition Authority reflects a significant contradiction in its methodology.

3.7 Thus, on the basis of assumptions which are unsupported by any factual basis or any appropriate analysis, the Competition Authority proposes a regulatory super-structure to govern the legal profession as a whole. No attempt is made to cost such a proposal. Neither is any consideration given as to the effect which such costs would inevitably have on the price of legal services. The Competition Authority does not present any evidence that the interests of clients and competition would be promoted by the establishment of such a body and, even more significantly, it ignores the available evidence which indicates that, ultimately, it would almost certainly have precisely the opposite effect. Furthermore, in proposing such a regulatory superstructure the Competition Authority blurs the line between the questions of market economics in the supply of legal services (which is within the Competition Authority's remit) and a wide variety of public interest issues related to the administration of justice which may fall outside of the Competition Authority's core area of competence but which are fundamental to the evaluation of proposals to alter the way in which legal services are supplied.

3.8 The issue as to the best model for regulating the market for legal professional services in England and Wales has been the subject of intense debate amongst practitioners, academics and competition-theorists over the past decade. This debate culminated in the recent report of David Clementi, which recommended several

[44] KC-12/03, European Court of Justice, 15 February 2005.

[45] Paragraph 5.22. (Emphasis added).

models for the regulation of the professions.[46] As indicated previously, however, it is necessary to be very careful when considering proposed reforms for England and Wales having regard to the geo-social structure of the market for legal services in that jurisdiction and, also, the constitutional dimension to the provision of legal services in this jurisdiction. The Competition Authority's failure to analyse the nature of the Irish market in order to assess the feasibility of implementing the Clementi proposals in this jurisdiction is a fundamental failure of methodology and renders the proposal unjustified.

3.9 The Competition Authority places considerable emphasis on the fact that the Bar Council discharges regulatory and representative functions. For the reasons which have been outlined, the Bar Council does not accept that this combination of functions raises any concerns from a competition law perspective. Moreover, having regard to the fundamental role of the Bar in the constitutional democracy of the State,[47] it is clearly in the public interest that the Bar should be independent and self-regulating. In this context, it is appropriate to refer to the Recommendation issued by the Committee of Ministers of the Council of Europe to E.U. Member States (including Ireland) on the freedom of exercise of the profession of lawyer.[48] The Recommendation states, *inter alia*, as follows:

- Bar associations or other professional lawyers' associations should be self-governing bodies, independent of the authorities and the public.

- The role of Bar associations or other professional lawyers' associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected. Bar associations or other lawyers' professional associations should draw up professional standards and codes of conduct and should ensure that, in defending the legitimate rights and interests of their clients, lawyers have a duty to act independently, diligently and fairly.

[46] Clementi, *Review Of the Regulatory Framework for Legal Services in England And Wales*, 2004.

[47] In this context, see chapter 2 of this submission.

[48] The Recommendation was issued on 25 October 2001. A copy of the recommendation is contained at Annex III. It is appropriate to note that similar resolutions and declarations have been issued by the European Parliament (2003) and the United Nations (1990).

- Lawyers should respect the judiciary and carry out their duties towards the court in a manner consistent with domestic, legal and other rules and professional standards. Any abstention by lawyers from their professional activities should avoid damage to the interests of clients or others who require their services.

- Governments of Member States should, where appropriate to ensure effective access to justice, ensure that effective legal services are available to persons in an economically weak position, in particular to persons deprived of their liberty.

- Bar associations or other lawyers' professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers.

3.10 These recommendations also accord with current regulatory thinking in relation to consumer protection. In this regard, the following passage from the European Commission Green Paper on Consumer Protection[49] merits note:

> *"Many problems may not be suitable for regulatory action. Self-regulation can achieve some consumer protection goals, especially in industries that recognise they have a strong common interest in retaining consumer confidence and where free riders or rogue traders can harm this confidence. Effective self-regulation that contains clear voluntarily binding commitments towards consumers and which is properly enforced can reduce the need for regulation or co- regulation."*

3.11 At the public hearing on the Commission Green Paper approach to self-regulation and the draft Directive on Unfair Commercial Practices, David Mair, (Commission Administrator), summed up the policy of the Commission, as follows:

> *"The green paper refers to those parts of codes that seek to interpret 'good practice' in relation to business-to-consumer commercial practices. Of course, as some from industry have pointed out, there are poor codes in the*

[49] The Paper was published in 2001.

market. Such codes clearly need to be nipped in the bud. The green paper therefore proposes making code-owners responsible for their codes. The intention is not to make them legally liable for their members' compliance but to make them responsible for the quality of their codes. Free riders need to be effectively tackled. A framework directive should always provide a sufficient legal basis to do this. To enhance this, the green paper also suggests that codes could be used as a point of reference for courts.

Of course for some industries, plagued by rogue traders and free riders, codes will never work. The only answer can be regulation. But the choice should be that of the industry. If they can make self-regulation work, there is no need for regulators to intervene, once the basic [framework] regulation is in place".[50]

3.12 Other commentators have expressed concerns arising from the integration of commercial interests into areas of wider public interest. In an article on self-regulation in the market for legal services in the U.K.,[51] Professor David Moorhead, stated as follows:

"There are other public policies reasons for wondering about the most appropriate home for regulation, more to do with protection of democratic principles, rather than instrumental concerns about the appropriate balance between quality, access and cost. Immigration tribunals issue "certificates of concern" against practitioners they regard as behaving inappropriately. Highly respected immigration practitioners have indicated that they would regard such certificates of concern with ambivalence: both a badge of honour but also something likely to lead to problems with their funders. The implication of this is that they view 'quality concerns' as being used to stifle fearless, independent advocacy. Similarly, in relation to criminal work, the Home Office pushes an agenda centred around the control of crime and the need to process defendants quickly whereas criminal practitioners are obliged to focus more on the needs of their clients and the protection of their

[50] Published 2001.

[51] Self regulation and the market for legal services - Richard Moorhead, Cardiff Law School - viewable at http://www.ccels.cardiff.ac.uk/pubs/moorheadpaper.html

legitimate rights. The setting of quality standards can critically effect how the balance between quality and efficiency is held."

3.13 A number of the assertions of the Competition Authority in relation to self-regulation merit specific note. In addressing the fact that each branch of the legal profession in Ireland has its own regulator, the Competition Authority states that *"[t]his causes additional problems, such as unnecessary duplication of regulatory action, complexity with regard to complaint procedures and the lack of a specific public benefit and client assistance focus."*[52] This assertion is not based on any stated analysis or evidence. The complaints procedures of the Bar are not complex, consisting as they do of a Conduct Tribunal and an Appeals Board.[53] The suggestion that there is duplication of regulatory actions implies that a large volume of identical work is carried out in parallel such that there is significant resource wastage. However, the Competition Authority does not identify where any duplication exists and how it is therefore unnecessary. Moreover, its assertion is at variance with the suggestion elsewhere in the Report that there should be more competition between regulators.

3.14 The Competition Authority asserts that *"[t]he manner in which regulatory and representative functions are bundled together has also led to dissatisfaction amongst some in the profession."*[54] The relevance of this general comment to the Bar is far from clear, particularly when read in the light of the accompanying footnote which states that *"[t]his dissatisfaction is documented in the Law Society's own Regulatory Review Task Force Report, January 2005"* and refers to the anecdotal evidence therein contained in relation to the views of some solicitors that the Law Society is too proactive in regulating professional conduct. To the extent that there is an implication that there is some dissatisfaction amongst barristers in relation to the discharge of regulatory and representative functions by the Bar Council, the absence of a comparable reference in the footnote indicates that the Competition Authority has no evidence to support its assertion.

3.15 The Competition Authority asserts that *"[t]he lack of an explicit client-based approach means that the existing regulatory bodies do not have a formal*

[52] Paragraph 3.36 of the Report.

[53] Information of and concerning these bodies is contained on the Law Library Website.

[54] Paragraph 3.44 of the Report.

responsibility for, or focus on, providing information and assistance to clients that would facilitate competition."[55] This broad statement is fundamentally at variance with the rules which govern membership of the Bar of Ireland[56] including, in particular, the core rules which were addressed in chapter 2 of this response.

3.16 Having referred to the approximately 1,100 complaints which the Law Society receives about solicitors, the Competition Authority states that *"[t]he Bar Council receives fewer complaints"* and that *"[t]his is possibly due in part to the fact that members of the public do not deal directly with barristers."*[57] These statements are misleading. In fact, the average number of annual complaints received by the Bar Council is approximately 25. The Competition Authority advances one possible explanation for the very low number of complaints against barristers but does not mention that this might be a factor of the nature of practice at the Bar and the existence of a system where consumers are generally satisfied with the services which they receive from members of the Bar.

3.17 In fact the Competition Authority in its report came to the following conclusion in respect of the Bar Council rules::

> *"Many of the specific regulatory rules and practices of the Law Society, King's Inns and the Bar Council are necessary and proportionate. These organisations also provide services both to their members and to the public that facilitate the operation of the legal profession and the administration of justice to the benefit of all."*[58]

[55] Paragraph 3.46 of the Report.

[56] See, e.g., the provisions of the Code of Conduct concerning the cab-rank / no choice rule, competence, and relations with lay clients.

[57] Paragraph 3.50 of the Report.

[58] Paragraph 3.34 of the Report.

4. RESTRICTIONS ON BUSINESS STRUCTURES

(i) Introduction

4.1 This chapter examines the Bar Council's Rules with regard to business structures which have been addressed in chapter 5 of the Report of the Competition Authority. These Rules are essential to the survival of an Independent Referral Bar.

(ii) Summary

4.2 The Bar Council proposes a number of significant changes to its Rules on business structures which will achieve significant benefits in terms of efficiencies and cost savings without jeopardising the benefits of an Independent Referral Bar. These changes include:

(a) making provision for maximum mobility between the solicitor's profession and the barrister's profession; and

(b) formalising and encouraging the existing practice whereby barristers make use of collective purchasing power to achieve significant costs savings, and

(c) enabling a barrister to engage another barrister for non-advocacy work on a contract for services basis;

4.3 These changes must of course be seen in a context where the existing Bar Library system achieves enormous economies of scale with huge consequential cost savings for barristers. Effectively, the Bar Library system allows any barrister with the appropriate qualifications to automatically practice at the bar without the necessity of obtaining admission to a chambers or to a firm but with the benefit of office accommodation, legal resources and a wide array of ancillary services at very low cost. Not alone are significant cost savings achieved by the enormous economies of scale generated by the operation of the Bar Library system but there is significant subsidisation of new entrants by older barristers. It is therefore desirable and in the public interest that the advantages of this system should be maintained and further efficiencies should be generated by improvements to the existing system rather than adopting alternative untested business structures which the Competition Authority

has acknowledged have not been costed by it.[59] In the absence of any such cost analysis there is no basis for asserting the claimed advantages of altering the business structures. Furthermore a failure to analyse the proposed changes as required by European competition law paying proper regard to the public interest in ensuring the integrity and independence of the Bar completely undermines the basis for the Competition Authority's proposals.

(iii) The analysis of the Competition Authority[60]

4.4 Any analysis of the structures within which barristers operate requires a proper understanding of the nature of a barrister's job. In this light, it is essential to have particular regard to the features of the independent referral Bar which have been set out above in chapter 2. It is also essential to have regard to the jurisprudence of the European Court of Justice and the European Court of First Instance in the field of competition law.

4.5 In the recent case of Commission v. Tetra Laval,[61] both the Court of First Instance and the European Court of Justice reversed a decision of the European Commission prohibiting a merger, largely on the grounds of the failure of the Commission to carry out the necessary rigorous, coherent and data based economic analysis required before there should be a regulatory intervention in the market. In stressing the necessity for a rigorous and detailed examination of alleged anti-competitive effects, the ECJ pointed out that *"such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely"*. The Court stressed that it was impermissible to draw conclusions as to anti-competitive consequences where, in its words, "*the chains of cause and effect are dimly discernible, uncertain and difficult to establish*". The Court continued as follows:

> *"... the quality of the evidence produced by the Commission in order to establish [the alleged anti-competitive effect] is particularly important, since*

[59] See letter dated 6th April 2005 from Dermot Nolan of the Competition Authority to Jerry Carroll of the Bar Council.

[60] Appendix I contains a detailed review of the analysis and methodology adopted by the Competition Authority.

[61] KC-12/03, European Court of Justice, 15 February 2005.

that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible."

4.6 In correspondence with the Bar Council in relation to the data underlying its proposals, the Competition Authority stated as follows:

"The Competition Authority has not sought to undertake a detailed cost analysis of different models of organisational form."

4.7 In the light of what the Court of Justice itself has said, the foregoing statement is remarkable. It underlines, however, one of the core failings in the analysis of the Competition Authority in its Report – its failure to connect cause with effect on the basis of evidence-based reasoning. Instead, the Competition Authority relies on the making of assumptions which are subsequently adopted in the Report as facts and the assertion of conclusions divorced from any chain of reasoning embedded in any empirical data.

4.8 The Competition Authority proposes that barristers should be permitted to form partnerships with each other (or to operate a chambers system such as operates in the United Kingdom), and that barristers should be permitted to form partnerships with solicitors and it queries whether it might also be desirable that they should be permitted to form partnerships with other professionals such as accountants or to incorporate as companies. The Competition Authority does not suggest that these alternative business structures are better than the existing structure or that they produce less anti-competitive effects. The Competition Authority does not conduct the sort of analysis which the European Court of Justice has said is required. Instead, it proposes that various models or structures should be permitted to co-exist. It puts the matter in the following way:

"The Authority is not suggesting that partnerships of barristers or partnerships of barristers and solicitors, or indeed MDPs [multi disciplinary practices], are the best models of business structure for the supply of legal services. There are advantages and disadvantages to each different model. This suggests that no one model is clearly the best and that, subject to sufficient safeguards, all should be allowed to co-exist,

giving lawyers and clients the ability to find the most appropriate one for them."

4.9 In advancing the idea that various forms of business structures should be permitted to co-exist, the Competition Authority has:

(a) ignored the experience of the United Kingdom where an attempt to have a library system (i.e. a system involving sole traders) co-exist with a chambers system failed miserably;

(b) failed to appreciate the practical difficulties of operating more than one business structure in a small jurisdiction such as Ireland and the damaging effect such an attempt would have on the existing sole trader model which the Competition Authority acknowledges has many advantages; and

(c) failed to analyse any other jurisdiction in the world in which various business structures have been shown to co-exist successfully for any length of time.

4.10 Furthermore, and perhaps more importantly, when analysing the sole trader model and comparing it with the other models which it advocates, the Competition Authority has:

(a) failed, in large measure, to substantiate any anti-competitive object or effect arising from the sole trader model;

(b) failed to appreciate the pro-competitive aspects of the sole trader model; and

(c) failed to analyse, quantify or appreciate the legitimate non-economic objectives served by the sole trader model.

(a) Why co-existing models do not work

4.11 Elsewhere in this response, the Bar Council has highlighted methodological errors and omissions in the Competition Authority's analysis. However, in the present

context, the Competition Authority has advanced the radical proposition that various forms of business structure should be permitted to coexist without analysing any jurisdiction in the world in which such a system of co-existing structures has been seen to operate successfully for any length of time. This is so notwithstanding the fact that the Competition Authority draws regularly upon experience in other jurisdictions to support other propositions. The Competition Authority has based recommendations on the co-existence of these models without adducing any evidence of such co-existence and without making any attempt to take account of the significant differences between the market for advocacy services in this and other jurisdictions and also the significant differences in the whole system of administration of justice.

4.12 The Competition Authority has also ignored the experience in the neighbouring jurisdiction of England and Wales. There, the chambers system is long established. One of the difficulties associated with that system concerns people who have qualified but who cannot obtain access or entry into chambers. Such barristers are effectively precluded from practice without any opportunity to even begin to practice and clearly such a scheme may operate in an anti-competitive fashion, and has been criticised for being elitist. In the late 1980s, the English Bar Council, with a view to addressing this problem sought to introduce a Bar Library similar to our own Law Library from which barristers could operate as sole traders. The project failed very quickly because the English Bar Library was perceived by the market (and indeed many service providers) as being the refuge of barristers who were not good enough for chambers.

4.13 The Competition Authority fails to take account of the significant differences of the distribution and size of solicitors' firms in this jurisdiction compared with England and Wales. The fact that so many solicitors' firms comprise one man operations[62] makes it vital the full range of barrister services be available to that solicitor on a case by case basis. This not only enables the solicitor to engage the most suitable barrister for a case but to engage an entirely different barrister who may be more suitable for a different case. The fact that a solicitor has a full choice amongst a pool of 1,540 barristers for each individual case results in significant cost savings as well as maintaining the highest quality standards. The network of small rural solicitor practices provides an important facility to the community and ensures

[62] 46%.

access to justice and legal advice. In addition, it provides a cost-efficient local competition to large urban-based firms. The existing network of small solicitor practices is a positive feature of Ireland legal market and a benefit to citizens. Notwithstanding the foregoing, the Competition Authority appears to be less than supportive of small local practices. At paragraph 5.52 the Competition Authority expresses its view that:-

> *"It is unlikely that top advocates would base themselves in small rural firms. While the Authority does not see any reason for protecting small firms from competition, it accepts that a wide spread of firms facilitates access to justice and local competition."*

4.14 The Report also fails to appreciate that these other systems of chambers and partnership inevitably operate as at least a partial reduction in competition. Given client obligations and concerns over confidentiality, firms of solicitors would be very unlikely in major litigation to brief counsel from a particular set of chambers if the other party had already briefed counsel from that chambers. If barristers were in partnership it would not be possible to do so. The fact that the chamber system may not cause such a serious problem in England and Wales is of course a function of the very large Bar and the multiplicity of different chambers specialising in the same area. The situation in Ireland is wholly different but no account of that has been taken by the Competition Authority.

4.15 The experience in England and Wales is particularly instructive for Ireland. The market in Ireland is relatively very small and the purchasers of legal services relatively few. If barristers were permitted to form partnerships either with each other, with solicitors or with other professionals, then over time it is undoubtedly the case that those barristers who did not form such a partnership would come to be regarded as second-rate barristers. This perception would lead to the ultimate demise of the sole trader model. In England and Wales the attempt to promote the sole trader model died very quickly because the chambers system was the pre-existing system. In Ireland, the demise of the sole trader model might be a little slower because it is the pre-existing model but its demise would nonetheless be inevitable. In promoting the idea that other forms of business structure should be allowed to co-exist with the sole trader model the Competition Authority has ignored completely the probability that such co-existence will ultimately lead to the

demise of the sole trader model. Such demise will lead to the loss of all of the advantages of that model which the Competition Authority itself recognises.

4.16 When one recognises the dangers posed to the sole trader model by the idea of co-existing models one appreciates all the more the need to evaluate carefully the existing model before concluding that it requires modification. The Competition Authority has failed to conduct such a careful analysis for the very reason that it somewhat blithely acknowledged that there were advantages and disadvantages to all models and settled upon the easy option of suggesting that all models should be permitted. In the next section, flaws in the Competition Authority's analysis of the sole trader model are identified and the advantages of the model explained. In terms of analysing the system as it operates in Ireland, the Competition Authority, while acknowledging the fact that outside the cities most firms are comprised of one or two practitioners, make no attempt to assess the economic importance of the circuit system to which barristers provide services to the clients of these firms or to evaluate its obviously pro-competitive effects.

4.17 It is clear from the Report that the Competition Authority has not concluded that the sole practitioner model is less efficient than a partnership or chambers system.[63] The Competition Authority asserts that if, as the Bar Council contends, barristers currently have a very low cost base, then the sole practitioner model would be more efficient and would not be abandoned. In effect, the Competition Authority is acknowledging that it cannot say that the sole practitioner model is inefficient. It acknowledges the possibility that it might be the most efficient system and it follows therefore that it cannot reach any justifiable conclusion that the present system is anti-competitive.

4.18 Neither is there any attempt, in analysing supposed restrictions, to take into account the nature of the court system or the system of administration of justice generally. In Ireland, the degree of litigation specialisation by barristers significantly reduces the administration back-up required by the court system. In other jurisdictions, the court system has to spend a considerable amount of time in checking papers and providing assistance to litigants in the preparation of papers and with regard to the court requirements. In Ireland, this is not necessary as these services are performed by barristers in the main and, also, by litigation solicitors. This also leads to the

[63] See, in particular, paragraph 5.29.

Court having confidence in the accuracy of what is presented to it, both in terms of the paperwork and the oral presentation. Such confidence is vital in the administration of justice.

(b) The Sole Trader Model explained and justified

4.19 Perhaps the least radical of the Competition Authority's proposals is that barristers be permitted to form partnerships with other barristers or operate some form of chambers system. The Competition Authority does not understand how the sole trader model operates and does not substantiate any anti-competitive object or effect arising from that model. Furthermore the Competition Authority's analysis has failed to assess the impact of alternative business structures on the performance of markets for legal services and, in particular, the risk that the resulting market structure may have an adverse effect on competition and permit the emergence of players with market power.[64]

4.20 The Competition Authority asserts two anti-competitive effects arising from the sole trader model. The first is identified in paragraph 5.8 of the Report which states as follows:

> *"First, the Rule prevents barristers from organising the supply of their services in the most efficient way possible. It prevents potential efficiencies being realised from being able to build shared reputation among professionals and from economies of scale, e.g., in advertising. It can also hinder the efficient allocation of work among barristers with differing skills and expertise. This may mean that the fees charged for services do not relate to the level of service provided. Being able to choose from among a broader range of organisational forms would permit greater efficiency, without impairing the cost effectiveness of the sole trader model that currently exists. Allowing alternative organisational forms would provide barristers themselves with a choice of how to organise the provision of the entire advocacy service for cases; currently only solicitors can put together a team of barristers to argue a case."*

[64] See Report of Professor Martin Cave in Appendix II.

4.21 Clearly, the thrust of this criticism is to the effect that the rule operates to prevent barristers from availing of the economies of scale that would be available if they were permitted to form partnerships and/or to operate in chambers. The implication is that the fees charged to consumers may therefore be higher than might otherwise be the case. Nowhere is it considered that chambers or partnerships might charge higher fees. No attempt is made by the Competition Authority to evaluate the costs associated with a partnership or chambers system. Any of those systems would inevitably give rise to additional costs which do not have to be borne by barristers at the moment. Apart from the direct financial cost the operation of such systems involves a considerable amount of management time which would impose significant indirect costs that would ultimately be borne by the public.

4.22 In a wide variety of ways, barristers under the existing system, are permitted to avail of all of the economies of scale that may be available to partnerships or barristers operating in a chambers. Indeed because of the number of barristers contributing to the operation of the Bar Library system, the economies of scale are significantly greater than could be achieved by any partnership or chambers. Thus, to take Dublin, for example, a barrister may, in addition to the possibility of practising exclusively from his home, exclusively from the Law Library or exclusively from an office which he operates on his own:

(a) take up a tenancy in one or other of the premises owned and operated by the Bar Council on Church Street. Typically, tenants in these premises are gathered in office units suitable for two / three barristers;

(b) take up a tenancy in other offices. In such circumstances there is no restriction on the number of barristers who may choose to gather together as co-tenants;

(c) purchase office premises of his own. Again there is no restriction on the number of barristers who may gather to purchase and conduct their business from private office space.

4.23 In each of the situations outlined above, barristers are permitted to – and do – share the costs of:

(a) office space;

(b) reception and secretarial costs;

(c) rates and insurance (other than professional indemnity insurance);

(d) Library and database costs;

(e) service charges and maintenance fees.

4.24 These are not mere theoretical possibilities. There are approximately270 barristers renting premises from the Bar Council and sharing costs in this way. In addition, approximately 50 barristers operate from premises at Arran Square. Some are owner occupiers and others are tenants. They likewise share costs in the manner outlined above. More recently, a number of barristers have purchased premises in a building on Capel Street and are likewise expected to share costs in the manner outlined above.

4.25 If a barrister does not wish to incur the expense of renting premises from the Bar Council or providing alternative office accommodation, he or she is provided with facilities in the Law Library which enable that person to practice as a barrister. In addition to the physical facilities, each barrister has access to every Act, instrument, judicial decision, from Ireland, the UK and other common law jurisdictions, as well as learned text books and articles, and to the Library staff who can find such resources quickly. These are the raw material of any barrister's practice. The costs associated with the Library are borne collectively and provide a facility which no individual or partnership could reasonably hope to duplicate (and such duplication would be an inefficiency in itself).

4.26 It is absolutely clear, therefore, that the rule does not operate to prevent economies of scale and cannot be said to result in any unnecessary increase in fees. If barristers were allowed form partnerships those in partnership would not contribute and subsidise the Library system, thus decreasing the economies of scale available in the current system and increasing costs for those participating in that system, to the overall detriment of clients.

4.27 With regard to the Competition Authority's contention that the existing system prevents barristers building a shared reputation, the analysis overlooks the fact that there is no anti-competitive effect by preventing the establishment of a "*shared reputation*". The reputation of an individual barrister is what enables solicitors to choose between barristers. It is difficult to understand how the pooling of reputations constitutes an efficiency. From a user's point of view, it is preferable that an individual would earn their own reputation outside of a partnership, particularly where access to the partnership may not have been granted on merit.

4.28 The Competition Authority suggests that the rule can hinder the efficient allocation of work among barristers with differing skills and expertise. This is very difficult to accept. On a very regular basis, barristers are requested by solicitors to identify other barristers who might be suitable for particular types of work. Under the present system, a barrister faced with such a request is free to nominate whoever he or she thinks is the other barrister most suitable for the task. In a partnership or chambers type system the barrister facing such a request would find it difficult to nominate a barrister outside his partnership or chambers. It must also be remembered that there is a huge variety of work and no one grouping of barristers would be suitable for all forms of work. Lastly, in the context of the first alleged anti-competitive effect, the Competition Authority suggests that only solicitors may put together a team of barristers to argue the case. Whilst this strictly speaking may be true it is very difficult to see its anti-competitive effect. Firstly, in the majority of cases only one barrister is engaged. Secondly, solicitors are the professionals best placed to choose a team of barristers to represent the client's interests. Thirdly, in practise, when a solicitor proposes to engage more than one Counsel they will consult with the Counsel first engaged regarding the identity of other Counsel to be engaged. Fourthly, the partnership or chambers model proposed is likely to reduce the choice available to a solicitor when putting together a team of barristers. Those models would inevitably bring pressure to bear on a solicitor to instruct his "team" from the one partnership or chambers. Lastly, it may be that pressure is brought to bear so as to encourage clients to use more than one barrister from the partnership. Partners may be expected to sell each other's services. This contrasts with the current situation where any recommendation by a barrister of another barrister's services (made in accordance with the Code of Conduct) does not result in any financial benefit to the person making the recommendation.

4.29 The second anti-competitive effect of the rule identified by the Competition Authority centres upon the current restriction upon a barrister employing another barrister. The Competition Authority puts the matter in the following way:

> *"Second, it may act as a barrier to sustainable entry. As detailed in Chapter 2, successful entry to the Bar is difficult. Most new barristers have few cases and limited income in their first years; this directly raises the costs of entry for them. The Rule prevents barristers being employed by other, possibly more experienced, barristers. Employment would provide these barristers with more certainty of income and might assist them in making contacts in the early years of their career. While entry is theoretically possible to all, potential new entrants may be deterred by the difficulties in supporting themselves. The Rule thus limits the number of barristers who can operate in the market over time."*

4.30 It is undoubtedly true that the vast majority of barristers find it difficult to earn even a modest income in their first years at the Bar. While the cost of entry to the Bar is undoubtedly low, the ability to earn in the early years is likewise low. However, the argument that this is a barrier to entry has not been proved and ignores the fact that anybody setting up as a self-employed professional is unlikely to generate significant income in the early years and is likely to face much higher start-up costs. The system that is currently operated, as explained above, provides significant economies of scale to barristers starting off in the profession. Unlike other professionals, the system (as explained above) provides considerable economies of scale, which offsets to a significant extent the risk of low earning in the early years.

4.31 The contention that this is a barrier to sustainable entry limiting the number of barristers who operate in the market over time is not substantiated by the evidence. The Competition Authority does not explore the possibility that the drop out rate, which it alleges exists, could be a product of the ease of access and low barriers of entry which exist in the market. At no time in the history of the Bar has there been a shortage of barristers. There has always been and continues to be more barristers than there is available work. That said, some barristers who might otherwise survive the early years of practise do not do so because of an inability to earn even small amounts of money. While competition law could not oblige barristers to subsidise other barristers competing with them, the Bar Council will recommend to its

members that barristers will be given the opportunity to engage other barristers on a case-by-case basis if they choose.

4.32 It is apparent therefore that the Competition Authority has failed to substantiate any anti-competitive object or effect arising from the sole trader model. It has, in addition, failed to appreciate the pro-competitive aspects of the model. In particular:

(a) The uniform sole trading status of barristers reduces rather than increases or creates barriers to entry. Thus, a barrister in his or her first year will be entitled to commence practice by incurring the entrance fee,[65] the cost of Law Library subscription[66] and professional indemnity insurance[67]. As his or her practice expands he or she will incur additional overheads such as increased secretarial expenses and the like. It is immediately apparent that under the current sole trader model a barrister is enabled to commence practice by incurring relatively few costs. This assists entry to the profession and increases competition. In contrast, the entry costs to a partnership or to a chambers are likely to be much more significant. Comparisons with the United Kingdom chambers system demonstrate that the cost of entry to the Bar in Ireland is significantly lower

(b) The Rules promotes equality amongst barristers and provides a level starting point which encourages and promotes competition. In contrast, a system based upon partnerships or chambers will necessarily disadvantage the starting position of some barristers. Those who obtain a partnership or tenancy in a well regarded chambers will necessarily have an advantage over those who do not and this advantage may have no basis in their respective standards of practice at the Bar.

(c) The partnership and chambers models lend themselves to concentration in the market with almost inevitable anti-competitive effects. In the small market that exists in Ireland barristers having a particular speciality will almost certainly congregate in a small number of partnerships or

[65] Currently €1,500.

[66] Currently €1,430.

[67] Currently €100.

chambers. This will enable them to corner the market in a way that is less likely in the sole trader model given the absence of "brand recognition". Even in the sole trader model there are real difficulties for barristers who seek to switch from one speciality to another but these difficulties would be greatly exacerbated in circumstances where a small number of partnerships or chambers had cornered the market. In the chambers or partnership model it is very unlikely that other barristers will succeed in challenging that dominance.

(c) Public interest advantages to the sole trader model

4.33 Any competition analysis of the structure within which barristers conduct their business must, in addition to having regard to economic issues, have regard also to issues of public interest. The sole trader model has a number of positive public interest effects, many of which have been endorsed by the European Court of Justice in the Wouters[68] case. Independence of barristers from each other, from solicitors and from other professional partners promotes the ability of the barrister to:

(a) avoid risk of conflict of interest;

(b) offer independent advice to clients unaffected by considerations of how such advice might impact upon the partnership or chambers of which the barrister is a member;

(c) discharge his or her obligation to the Court to appraise the Court of all relevant facts and issues of law;

(d) act on behalf of any client who requests his or her services subject only to the requirement that the barrister is available to act and has the necessary expertise to act;

(e) take on pro bono work unaffected by considerations as to whether his or her partner (who must necessarily bear some of the costs) approves of either the practice or the extent of the taking on of such work.

[68] KC - 309/99 *J.C.J.* Wouters and others -v- Algemene Raad van de Nederlandse Orde van Advocaten - 19 February 2002.

4.34 In particular, the ability of a barrister to take on the cause of what may be an unpopular client and to present his or her case fearlessly and in a manner which may displease powerful interests, other potential clients or in a manner which may bring the barrister personal professional unpopularity is necessarily lessened by the extent to which the barrister is accountable to others. Under the present structure the barrister is accountable only to the Court and to his client. If their accountability is extended to partners, of whatever type, the scope for inhibiting the barrister in the discharge of his professional obligations is increased and the administration of justice thereby suffers. The Competition Authority has failed to attach sufficient weight to these crucially important considerations.

4.35 While the Competition Authority recognises the objective of a barrister being free from undue influences as being valid and acknowledge that it is in the interest of justice that a barrister operates in an independent manner,[69] it asserts (again with no supporting data or evidence) that the restriction requiring barristers to be sole practitioners is: (a) disproportionate to the objective; and (b) does not necessarily guarantee its achievement.

4.36 The issue of whether the restriction is disproportionate to the objective requires an analysis of the extent and effect of the restriction, which is wholly lacking. The measured effect must then be evaluated in the context of the importance of the protection of this independence. Again this is not done. It cannot be doubted that independence is not only a valid consideration but is a vital consideration in the administration of justice and even the claimed restrictions of competition are, on any view minor, and could, to use the Authority's own analysis, be removed or reduced in a far less disproportionate way. There is not only a failure therefore adopt the correct approach to any valuation of the whole issue but even within the Competition Authority's own methodology, the disproportionality arises in the context of the Competition Authority's suggested remedy and not in the context of the alleged restriction.

4.37 The Bar Council is also of the view that the sole trader independent referral Bar is conducive to representation on a no foal no fee basis and that no foal no fee services ensure an equality of arms in the conduct of litigation in many areas. An

[69] Page 53 of the Report

unacceptable level of inequality between litigants has never, to the knowledge of the Bar Council, become an endemic issue in Ireland. Were such services not provided by the Irish Bar (and solicitors) it would be a serious issue. .

4.38 In the case of *Steel and Morris v. the United Kingdom*,[70] commonly referred to as the *McLibel* case,[71] the Court of Human Rights held that circumstances can arise where there is an unacceptable inequality of arms which can deprive citizens of the opportunity to present their case effectively before the courts in violation of Article 6.1.[72] The *McLibel* case illustrates the importance of equality of arms, legal representation and Civil Legal Aid in order to vindicate the civil rights of citizens.

4.39 In respect of Ireland's civil legal aid scheme, the present eligibility limit is a disposable income of €13,000 per annum[73]. The Legal Aid Board deals only with a limited range of civil matters and the majority of its budget is directed to family law services.[74] Ireland's civil legal aid scheme has been heavily criticised by the non-Governmental organisations, such as FLAC[75].

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[70] Judgment, Strasbourg, 15 February 2005, (Application no. 68416/01).

[71] The case involved the publication by Helen Steel and David Morris, of pamphlets in which various allegation were made in respect of McDonalds. Ms Steel was at times employed as a part-time bar worker, earning approximately £65 per week, and Mr Morris was dependent on income support. McDonalds sued the Defendants for defamation and were represented by a legal team comprised of a number of Queens Counsel, Junior Counsel and an international law firm. The Defendants were for the most part forced to represent themselves, by virtue of no legal aid being available. The Court held that '*the inequality of arms could not have been greater*'. The trial lasted for 313 court days, of which forty were taken up with legal argument and was the longest trial (either civil or criminal) in English legal history. The Court found that:- "*…they [the Defendants] had lacked sufficient funds for photocopying, purchasing the transcripts of each day's proceedings, tracing and proofing expert witnesses, paying the witnesses' costs and travelling expenses and note-taking in court. All they could hope to do was keep going: on several occasions during the trial they had to seek adjournments because of physical exhaustion.*"

[72] The relevant part of Article 6.1 of the Convention of Human Rights, was identified as: "*In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...*";

[73] The applicable criteria for assessing financial eligibility are contained in Section 29 of the Civil Legal Aid Act, 1995 and in Part 5 of the Civil Legal Aid Regulations, 1996, as amended by the Civil Legal Aid Regulations, 2002.The figures shown below became operative on 1st February, 2002. The present eligibility limit is 13,000 per annum disposable income. Disposable income is the income that remains after various deductions have been made in respect of dependants, childcare, accommodation costs, income tax and social insurance.

[74] The Board is prohibited from providing legal advice or legal aid in the following categories of cases:

4.40 No analysis has been carried out by Competition Authority on the impact of their proposals on the provision of no foal no fee services and its impact on the access of impecunious litigants to legal representation. The Bar Council is of the view that the Competition Authority is concerned with the demand from, and needs of commercial users and is not concerned with consumers of low (or no) income. This suspicion is grounded on the fact that impecunious consumers are consigned by the Competition Authority to a bare mention in one footnote of the Report.[76]

4.41 The public interest benefit of no foal no fee services has not been analysed by the Competition Authority. In addition, the Competition Authority does not consider, from an economic perspective, the market reality for the impecunious buyers of legal services. There is no exploration of the inferences that could be drawn from this atypical feature of the market, in relation to the competitive functioning of the market.

(iv) Other models proposed by the Competition Authority

4.42 The analysis in this submission has so far concentrated largely upon the least radical proposal advanced by the Competition Authority, namely, partnerships between barristers. The Competition Authority's more radical proposals involve partnerships between barristers and solicitors and/or partnerships between barristers, solicitors and other professionals such as accountants. Everything which has been said

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- defamation claims (i.e., where a person's reputation has been damaged as a result of libel or slander)
- land disputes (i.e., disputes concerning rights and interests in or over land)
- civil matters covered by the small claims procedure
- licensing (publicans' licenses)
- conveyancing (i.e., the legal transfer of a property from one party to another)
- election petitions
- claims made in a representative, fiduciary or official capacity
- claims brought by a person on behalf of a group of persons to establish a precedent on a particular point of law ("test cases")
- any other group or representative action ("class actions")

[75] FLAC is a non-governmental organisation which campaigns for full and equal access to justice for all and which promotes and operates a range of services to meet the legal needs of those living in poverty

[76] Footnote 18 acknowledges that "No-foal-no-fee charges facilitate access to justice for those who may otherwise not be able to afford legal representation, but are considered by some to encourage vexatious litigation."

already in this submission regarding the absence of any anti-competitive effects arising from the sole trader model, the pro-competitive aspects of the sole trader model and the public interest considerations which support the sole trader model are equally applicable to the more radical proposals advanced by the Competition Authority.

4.43 The *"one-stop shop"* law firm which the Competition Authority is advocating can only attempt to achieve economic efficiency by seeking to acquire and keep a wide range of long-term individual clients. Such a firm could only justify maintaining a permanent advocacy department if it had a sufficient number of clients. That in itself involves a significant restriction on its independence. It cannot afford to lose a major client and therefore if there is a dispute between two clients of the firm, its independence is compromised. It first must choose which client to continue to represent. It must then pass on the other client to another firm which as a competitor will do its best to keep the client. It will be concerned that any action taken on behalf of the client for whom it continues to act will impact on the possibility of it recovering the business of its other client at the end of the litigation.

4.44 The significant costs associated with running such firms again have the potential to compromise independence and indeed ability to take *pro bono* or no foal, no fee work. If that consequence results then there will be a very significant diminution in the advantages that the public currently enjoy from the present system.

4.45 If, as suggested by the Competition Authority, there are economic advantages in the one-stop shop and if it is commercially advantageous to provide advocacy services, one would expect that the large solicitors' firms would have developed their own advocacy departments over the years just as they have developed banking departments, tax departments, etc. Furthermore, in circumstances where it is relatively easy for a barrister to switch to become a solicitor, solicitors' firms could, if they wished, entice experienced and skilled barristers to change profession as opposed to building up an advocacy department.

4.46 Far from being a restraint, the sole practitioner rule ensures the independence of barristers and enables them to provide advocacy services free of the restraints that would inevitably exist in the "one-stop shop" system.

(v) Solicitor and Barrister Partnerships

4.47 The Bar Council welcomes the Competition Authority's review of Solicitor Barrister partnerships and the examination of any potential advantages / disadvantages that they might bring.

4.48 The Competition Authority proposes that barristers and solicitors should be entitled to form partnerships together (generally referred to as legal disciplinary partnerships or "*LDPs*"). This, it says, would allow lawyers freedom to choose their organisational model. At present, the Solicitor's Act 1954 precludes this. The Bar Council's Code of Conduct precludes practising barristers from working in a solicitor's office.[77]

4.49 The Bar Council agrees with the Competition Authority that freedom of professional movement is desirable and proposes to facilitate choice of business model for lawyers. The Bar Council is in favour of making it as easy as possible for lawyers who have qualified as members of one branch of the legal profession to switch to the other branch. The Bar Council intends to recommend to its members the amendment of any Rule that restricts in any way the ability of a solicitor to switch to the barristers' profession, and vice versa.[78]

4.50 The Bar Council also proposes to significantly expand the existing direct professional access scheme. The reformed scheme will enable a wide range of users of barristers' services to engage barristers directly in respect of an expanded range of work. The Bar Council recognises the potential benefit to users, which may arise by the provision of advice directly.

4.51 Any positive effect that in the view of the Competition Authority is hoped to arise from their proposal, would appear to be achievable by (i) enabling lawyers switch profession without any difficulty and (ii) providing for an improved Direct Access.

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[77] Of course, a non-practising barrister is free to work as an employee in a solicitor's office.

[78] Because most legal services are supplied to the public by solicitors, the switching issue arises most often when a person who is already qualified as a barrister wishes to join a solicitors' firm. It should be noted that for such a person to acquire the right to practise as a solicitor is now extremely straightforward. When practising as a solicitor, the individual will retain and may exercise all rights of audience already acquired as a barrister.

In contrast to Barrister Solicitor partnerships, the changes in (i) and (ii) are not coupled with disproportionate negative effects.

(a) Anti-competitive object or effect

4.52 The Bar Council does not agree that the current rules have an anti-competitive object or effect.

4.53 The Competition Authority views the prohibition on LDPs as restrictive of competition, firstly, because the prohibition limits the ability of lawyers to supply services through what the Competition Authority claims to be more efficient forms of organisation. The Competition Authority takes the view that the prohibition prevents the economies of scale that would arise were a one-stop shop for legal services to exist. Secondly, the prohibition is viewed as limiting the capacity of providers "to find new and innovative methods of offering legal services to clients".

4.54 The Bar Council believes that the legislative prohibition on LDPs preserves the independence of the bar and should not be repealed. Again, the Bar Council is of the view that, in proposing the repeal of the prohibition on LDPs, the Competition Authority has repeated the errors in analysis made in relation to the restriction on barristers forming partnerships and operating a chambers system outlined in the previous section, and made errors in methodology as detailed in Annex I of this Response.[79] The Competition Authority while recognising the obvious value in the independent referral Bar and the sole trader model, does not consider whether the existence of competing organisational models are sustainable. Thus the Competition Authority fails to make any assessment of the impact of its proposals on the market which it purports to be studying. For example, the Competition Authority never assesses the impact of solicitor and barristers partnerships on the sole trader model, the independent referral bar, equality of access or the administration of justice.

4.55 Secondly, the Competition Authority has failed to have regard to the cost of subjecting barristers to the more rigorous regulatory structure required of solicitors by virtue of the fact that the latter may take general responsibility for their clients'

[79] The Competition Authority does not define what it means by partnership.

affairs and frequently act as trustees for their clients and handle their clients' money, whereas the former do not.

4.56 Thirdly, the Competition Authority, at paragraph 5.50, states that, as both barristers and solicitors have full rights of audience in court, there is no reason for distinguishing between them. Access to justice is unlikely to be affected, as there is no evidence that top advocates would join the firms of solicitors. The introduction of LDPs would not necessarily result in an end to the independent referral bar. If the latter were an efficient model, it would be likely to be maintained (paragraph 5.56). While barristers' overheads were lower, they might choose not to join partnerships with the result that the lower cost-efficient model would survive (paragraph 5.57).

4.57 For the reasons outlined above, the Bar Council considers the Competition Authority's analysis to be unpersuasive. The Competition Authority's conclusion as to the anti-competitive nature of the prohibition rests on the premise that LDPs would generate economies of scale. The cost of producing two services together would be less than the cost of producing them separately. Again, no economic analysis is conducted to enable this conclusion to be drawn.

4.58 In fact, both branches of the profession acknowledge that barristers' costs are lower than solicitors' costs to be passed on to the user. While not examined in any detail in the Report, the lower costs may be attributable to the specialisation in advocacy encouraged by the independent referral Bar, the minimal start up and operating costs, the wide-spread facility sharing and the collective resourcing inherent in the Library system. By providing advocacy services through LDPs, the barristers' costs will be more likely to increase to the level of solicitors' costs. This would follow as a result of increased overheads and, in particular, an increase in insurance costs. In effect, the Competition Authority promotes the notion of the "*one stop shop*" without ever drawing a conclusion as to whether the independent referral bar is an efficient model. If it is an efficient model, then it is difficult to see how it can be viewed as restrictive of competition.

(b) Pro-competitive and public interest justifications

4.59 The Bar Council has made detailed submissions in chapter 2 of this Response on the pro-competitive and public interest justifications for the existence of an independent

referral bar. The Bar Council does not propose setting out these arguments again in full, but notes that the independent referral Bar is a specialised and expert body of advisers, available to all users and consumers, which plays a independent role in assisting the judiciary in the administration of justice. The analysis undertaken by the Competition Authority fails to take adequate account of the positive role played by the independent referral bar in the administration of justice generally and the provision of legal services. There is no evidence that the independent referral bar could survive the emergence of Solicitor-Barrister partnerships.

4.60 There is no consideration of the impact that allowing Barrister Solicitor partnerships would have on the ability of barristers to dedicate themselves to advocacy work. The Irish system cultivates quality to the overall benefit of users and to the benefit of the administration of justice. There is a recognised public interest in ensuring that the advocates appearing in a particular court have the requisite standards of expertise and skill.

4.61 The Report fails to consider in detail the existence of the combined service which may already be availed of by customers who employs a Solicitor, as a Solicitor enjoys a full right of audience. The Report fails to fully acknowledge that such a combined service already exists in the market for those who wish to use it. There is no evidence that there is any significant demand for such a combined service.

(c) Difficulty with regulation

4.62 Generally, solicitors are regulated more extensively than barristers, reflecting the broader functions and range of work that solicitors undertake. Most importantly, solicitors are permitted – whereas barristers are not – to take general responsibility for their clients' affairs and to act as trustees for their clients and to handle their clients' money. Applying a risk-based approach, handling clients' money involves obvious dangers from a regulatory point of view, including theft, mismanagement and involvement in money laundering. These risks necessitate an extensive (and expensive) regulatory structure in relation to solicitors, which includes

- Accounts Rules which lay down very detailed requirements concerning the handling of clients' money, the operation of client accounts and the accounting systems and controls necessary for these purposes;

- A Compensation Fund to provide compensation to members of the public who suffer losses as a result of the negligence or dishonesty of a solicitor in circumstances where the money cannot be recovered from the solicitor or his firm's insurers; and

- Far-reaching statutory powers of intervention in a solicitor's practice, including powers to freeze or take over a solicitor's bank accounts, and to require the delivery up of documents and re-direction of post. These powers are typically exercised when there is suspicion of the misuse of clients' money. In effect the Law Society can (and not infrequently does) take over a solicitor's practice in such circumstances.

4.63 The barristers' profession does not have any similar regulatory structure for the reason that barristers are not permitted to handle clients' money. Nor would it be justifiable or appropriate to establish such a structure. In particular:

(a) The Bar Council does not believe there is any demand from barristers to undertake responsibility for handling clients' money;

(b) In these circumstances, introducing and operating the necessary regulatory structure to enable barristers who choose to work with solicitors to handle clients' money would be wholly disproportionate and involve considerable complexity and cost (which, in one way or another, would inevitably be passed on to the public) in return for minimal benefit;

(c) The only way in which such a structure (including a Compensation Fund) could realistically be financed would be by compulsory levy from the whole profession. However, it would be unfair as well as inefficient from an economic point of view to compel the great majority of barristers who do not wish to work in partnership with solicitors to handle clients' money to pay for regulation required for a few who do;

(d) The imposition of such a burden would be all the more unjustified since

any barrister who wishes to handle clients' money can (as already indicated) readily practise as a solicitor.

4.64 There are good reasons, therefore, why the functions that may be undertaken by a barrister do not include the handling of clients' money. If a barrister wishes to handle clients' money, this facility is already available to them once they obtain a solicitor's practising certificate and practise under the regulation of the Law Society.

4.65 The effect of the rules of partnership law is to make every partner in a firm responsible for clients' money handled by the firm, and for any misappropriation or misapplication of that money, whether or not he or she personally has access to the firm's client accounts. A barrister who becomes a partner in a firm of solicitors therefore needs to be regulated in relation to his responsibility for handling clients' money. For the reasons given, this is best done by requiring him or her – in common with all the other partners – to practise under a solicitor's practising certificate. As mentioned earlier, this does not involve any restriction of the individual's rights of audience (or other legal rights).

4.66 Quite aside from the considerations relating to handling client's money, the Bar Council considers it essential, in view of the nature of a partnership, that individuals who choose to practise together in a partnership should be regulated by a single regulator and subject to the same professional rules.

4.67 The Bar Council does not think that this necessarily arises merely from the fact that the individuals are working alongside each other in the same practice. Some matters will give rise to a complaint not just against one or more particular individuals but against the firm itself and may attract disciplinary proceedings and sanctions against the firm. It would potentially give rise to inconsistency and unnecessary confusion, if a complaint against a firm were to be dealt with by more than one body or were to result in disciplinary proceedings against the firm conducted by two different bodies. Logic requires that, where the firm takes the form of a partnership, then the partners who constitute the firm and who are jointly responsible for all the firm's activities should operate under a single set of rules enforced by a single professional body.

4.68 In the circumstances, the Bar Council disagrees with the Competition Authority's

proposal to the effect that the Bar should amend the Code of Conduct to permit barrister and solicitor partnerships. No adequate justification for this proposal has been put forward. No demand for LDPs has been identified. No efficiency would result from LDPs. Rather, increased costs would result for barristers operating through LDPs. Increased risks would also result, arising from the requirement to handle clients' money. The Bar Council is in favour of increased freedom of movement between the professions. Such flexibility would enable barristers who wish to operate through a partnership model to become solicitors without impediment.

(vi) Multidisciplinary Practices and Non-Lawyers Owning a Law Firm

4.69 The Competition Authority makes no proposals in relation to multidisciplinary practices ("*MDPs*") or non-lawyers owning law firms. In relation to the former, the Competition Authority states that, while it does not believe that a total ban on MDPs is justified, it recognises the very real problems that the concept poses for the legal profession. One solution put forward by the Competition Authority is to allow limited forms of MDPs with bodies whose ethos is close to that of the legal profession.

4.70 As regards non-lawyers owning law firms, the Competition Authority indicates that relaxed restrictions on ownership of law firms could permit greater access to capital and allow for increased owner and manager competence in efficiently running a business. These efficiencies could be passed on to buyers. Concerns about conflicts could be addressed by proportionate controls. Consequently, the Competition Authority invites further consideration of this issue.

4.71 While the Bar Council notes the Competition Authority's exploration of this issue, the Bar Council wishes to underline that the legal profession in Ireland would be out of line with prevailing international opinion and practice if legal services were allowed to be delivered either through MDPs or LDPs that could be owned and controlled by non-lawyers.

4.72 The American Bar Association (ABA) in July 2000 decided to reject recommendations for a relaxation on the ban of MDPs. The resolution which was adopted by the ABA on that occasion was the culmination of an extensive debate in

the United States on the issue of MDPs . The ABA resolution affirmed 8 principles, including the following:

> *"The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession".*

4.73 So far as we are aware, the debate about MDPs in the United States was effectively brought to a close by the adoption of this resolution, and there has been no subsequent attempt to reopen the issue.

4.74 Of more direct relevance to practice in this country, the Council of the Bars and Law Societies of the European Union (CCBE), of which the Bar Council of Ireland is a member, has consistently affirmed its opposition to "integrated forms of cooperation" between lawyers and non-lawyers. The most recent statement of the CCBE's position on these issues, adopted in Athens on 12 November 1999 sets out very clearly its reasons for opposing such arrangements with the European Union. A copy of the CCBE statement is to be found at Annex IV of this submission.

4.75 It should be noted that the objections of the CCBE relate not only to MDPs but also to structures in which persons outside the legal professions have "*a relevant degree of control*" over the affairs of the organisation. See, for example, the following observations in the CCBE statement:

> *"The duty to maintain their independence, to avoid conflicts of interests and to respect client confidentiality are particularly endangered when lawyers exercise their profession in an organisation which, factually or legally, allows non-lawyers a relevant degree of control over the affairs of the organisation. Interests conflicting with the stated duties of lawyers, arising from the concerns of the non-lawyers involved, may then directly influence the organisation's aims or policies. As already indicated, the interests involved may, viewed by themselves, be legitimate and salutary, rendering their potential influence particularly insidious."*

4.76 The CCBE concludes that, in the jurisdictions with which it is familiar:

"…the problems inherent to integrated cooperation between lawyers and non-lawyers with substantially differing professional duties and correspondingly different rules of conduct, present obstacles which cannot be adequately overcome in such a manner that the essential conditions for lawyer independence and client confidentiality are sufficiently safeguarded, and that inroads upon both, as a result of exposure to conflicting interests served within the relevant organisation, are adequately avoided."

4.77 The Bar Council wholeheartedly endorses these views.

4.78 The Bar Council is not aware of any jurisdiction in which the ownership of legal practices by investors who are not lawyers is permitted. The greatest caution should be exercised before taking a decision to permit this. The principal objection to outside ownership of legal practices is the conflict that would inevitably arise between the commercial interests of the owners and the ethical duties on which the practice of law is based. An owner of a law firm who was not a lawyer and therefore not subject to those duties would be perfectly entitled to pursue his own financial interests, even in circumstances where those conflicted with the best interests of clients of the firm or with other core values of the legal profession. For this reason, the Bar Council believes that it would not be acceptable to permit persons outside the legal profession to exercise control over the delivery of legal services.

4.79 The most startling issue for the consumer is the question of ownership of such a firm. Since part of the rationale for the creation of MDPs is greater access to capital, ownership of these firms by non-lawyers is a distinct possibility. The effect of such ownership would be to make practising barristers accountable to shareholders. Commercial pressure would compromise the fundamental principle of the independence of legal advice offered by barristers. Commercial pressure may damage the essential trust that exists between the judiciary, the bar and clients and which ensures proper conduct of cases before the courts. It is in the public interest that barristers do not come under undue pressure in matters of disclosure and vexatious actions. It is in the public interest that barristers are accountable to the courts and to their clients rather than to shareholders.

(vii) Prohibition on Limited Liability

4.80 The Bar Council notes the Competition Authority's exploration of the application of limited liability models to the Barrister profession. The Bar Council assumes that, as the Competition Authority has put forward no proposal on this issue, it will not make any recommendation that limited liability vehicles be introduced for lawyers. In any event, the Bar Council welcomes the opportunity to set out its view on this issue.

4.81 The Competition Authority views the fact that solicitors are not permitted to organise their legal practices as limited liability companies or as limited partnerships as a restriction of competition. This issue affects barristers only insofar as the Competition Authority has proposed that there should be no restriction on the form of business structures that barristers should be permitted to use. Consequently, any proposal by the Competition Authority that the introduction of limited liability companies was appropriate would apply equally to barristers if the Competition Authority's general proposal on opening up business structures to barristers were endorsed.

4.82 While the Competition Authority views the restriction on lawyers' use of limited liability vehicles as a restriction of competition, its analysis (or lack of it) does not support the conclusion. It has not formed a view on whether this is a proportionate restriction and seeks submissions in respect of this issue

4.83 The Competition Authority claims that the anti-competitive effect of the prohibition on limited liability ("*the prohibition*") arises as it precludes lawyers from availing of the advantages of limited liability, such as facilitating the raising of capital, the potential expansion and longevity of the legal practice and the transfer of ownership interests. The restriction is also viewed as limiting the range of potential suppliers, possibly at the expense of innovation and efficiencies (paragraphs 5.35 and 5.36).

4.84 The Bar Council does not accept that the rule on barristers operating as sole traders, and thus precluding the operation of limited liability models, is anti-competitive or that the Competition Authority's analysis has demonstrated that the rule constitutes a restriction on competition. There are important public interest considerations which justify the retention of the prohibition. Fundamentally, while limited liability is an advantage for those conducting any form of business, it is an inappropriate business structure for professionals. The public wishes professionals to be fully

accountable for their professional advice. The Bar Council does not believe that consumers would in any way benefit from granting professionals, such as lawyers, doctors or auditors, the benefit of limited liability. The Bar Council is not aware of any profession in this jurisdiction that has sought or has been granted the possibility of conducting its business through limited liability vehicles. Clearly, the prospect of abuse of the advantages afforded by limited liability is one which all professionals would wish to avoid. That professionals are personally liable for their professional advice is, in the Bar Council's view, important from the perspective of the consumer. The introduction of limited liability, which is sought neither by the consumer of professional services nor by the professionals themselves, could only harm those relying on the services of barristers, both users and the judiciary. .

4.85 The Competition Authority does not consider the distaste with which the Bar Council believes both consumers and professionals would view the introduction of limited liability. The approach of the Competition Authority fails to be persuasive, for three reasons.

4.86 Firstly, it is argued that it is possible to lift the corporate veil in cases of misconduct, and the example is given of fraudulent or reckless trading. However, the lifting of the corporate veil is an exception to the general rule and is only permitted in limited circumstances. The exceptions to the rule do not generally apply so as to make a individual personally liable for liabilities arising from negligence. The primary purpose of reckless and fraudulent trading provision in the Companies Acts 1963-2001 is the protection of creditors, as opposed to customers. Reckless and fraudulent trading are not concerned with professional competence or professional duties per se. It seems completely inappropriate that a consumer of legal services should face the prospect of instituting proceedings for fraudulent or reckless trading to recover damage suffered by wrongful conduct on the part of legal professional.[80]

4.87 Secondly, it argues that incorporation would not preclude individual lawyers from being liable to sanctions. This is of course true, insofar as individual lawyers would continue to be liable to sanction by their professional bodies in the event of unprofessional conduct. Nonetheless, limited liability necessarily limits the extent to which a harmed consumer of legal services could pursue a negligent adviser.

[80] Such proceedings are usually taken by a liquidator, examiner or receiver.

4.88 Lastly, it is argued that the Companies Acts provide sanctions against directors who fail to comply with the Companies Act. While this is again true, such sanctions are again of limited benefit to the consumers of legal services and apply only to breaches of the Companies Acts which have little relation to customer issues or consumer matters; sanctions such as a disqualification from practice as a director would not affect a lawyer who was not a company. Nor would such sanctions preclude a former director from practising as a lawyer.

4.89 In the circumstances, the Bar Council submits that the Competition Authority's analysis of this issue is inadequate. The prohibition on limited liability is not anti-competitive and is underpinned by serious public interest considerations.

4.90 If and when barristers become partners in commercial enterprises made up of barristers, solicitors, accountants, tax advisors, auctioneers, engineers or others or if and when barristers form themselves into limited companies raising capital by investment from outside investors, then the core values served by an independent referral Bar will be diluted and ultimately eroded to the significant detriment of the public interest values served by the availability of barristers as independent sole traders. Barristers should not be accountable to the commercial interests of shareholders for the way in which justice is administered.

5. RESTRICTIONS ON HOLDING DUAL TITLES

(i) Introduction

5.1 In Chapter 6 of its report, the Competition Authority deals with the restrictions on a lawyer holding the professional title of barrister and solicitor at the same time. This restriction is imposed, in relation to persons switching from the profession of barrister to the profession of solicitor, by statute.[81] The restriction on switching from the profession of solicitor to barrister is imposed by Article 8.11(a) of the Bar Council Code of Conduct.[82]

(ii) Summary

5.2 The Bar Council fully supports any proposals that would ease restrictions on the transfer of barristers to the profession of solicitor and vice versa. The Bar Council has itself sought to ensure that restrictions on entry by former solicitors are minimal. In February 2005 the Bar Council abolished a provision in its rules prohibiting former solicitors from being briefed by the firms in which they previously worked. Nonetheless, the Bar Council will amend the Code of Conduct to provide simply that a solicitor who has worked in a solicitor's office must, prior to his entry to the Law Library, have ceased practising as a solicitor. However, the Bar Council fundamentally disagrees with the Competition Authority's proposal that barristers should be allowed to simultaneously hold the titles of barrister and solicitor. This proposal is entirely inconsistent with the Competition Authority's recognition of the crucial and fundamental role played by the independent referral bar in the administration of justice in this country.

[81] Section 43 of the Solicitors Act 1954.

[82] Article 8.11(a) provides that, where a barrister was, before his call to the Bar a solicitor, or has worked in a solicitors office, that barrister must, prior to his entry to the Law Library, satisfy the Bar Council that he has ceased to be a practising solicitor and has ceased to work in a solicitor's office for at least two months prior to admission to the Law Library.

(iii) Analysis of the Competition Authority

5.3 The Competition Authority considers the rules precluding legal practitioners from using the titles of barrister and solicitor simultaneously have an anti-competitive effect. In this regard, the Bar Council repeats the criticisms made of the Competition Authority's analysis set out in Chapter 4 (and in more detail in Appendix I to this submission). Again, the Competition Authority has: (a) failed to substantiate any anti-competitive object or effect arising from the prohibition on the simultaneous use of both titles; (b) failed to appreciate the pro-competitive aspects of the restriction; and (c) failed to appreciate the legitimate non-competition objectives served by the restriction.

5.4 The Competition Authority considers that the rule: (a) restricts competition for clients between barristers and solicitors; (b) may deter solicitors from providing advocacy services, thereby reducing choice for clients; and (c) deters switching.

5.5 There is no evidence whatever that only a limited number of solicitors conduct litigation on behalf of clients because solicitors are unable to appear in court without using the title of barrister. Rather, the small number of solicitors who engage in advocacy underscores the level of competition in the area (it may be that the market is saturated), the importance of expertise and the valuable and efficient service provided to solicitors and the public by the independent referral Bar. Solicitors have had the right of audience since 1971 and, in general, do not choose to exercise that right in the higher courts where a greater degree of advocacy skill is required and where these skills are developed by constant practice. Moreover, there is no evidence that the rule deters lawyers from switching profession, and the Bar Council does not believe that this is the case. Nonetheless, the willingness of the Bar Council to facilitate solicitors wishing to switch profession should deal with this concern in a proportionate manner.

5.6 The Competition Authority considered "*justifications*" put forward for the restriction and, in particular, the public interest considerations on which the rule is based, being the benefit to the administration of justice and society general of the existence of an independent referral bar. These public interest considerations, accepted at European level in Wouters v. Algemene Raad van de Nederlandescher

Ord van Advocaten,[83] are dealt with at some length in throughout this submission and particularly in Chapters 2 and 4 , and the Bar Council does not propose repeating them here. The Competition Authority considered only briefly the public interest in what it describes as "*the preservation of lawyers' core values*", but concludes nevertheless that the restriction on holding dual titles is "*disproportionate*".[84] Having proposed that lawyers should be entitled to act as barristers and solicitors at the same time – in the absence of any analysis whatsoever of the impact of this proposal on the importance (which is acknowledged by the Competition Authority) of an independent referral Bar – the Competition Authority gives scant consideration to the ethical and regulatory difficulties that its proposal would entail. Furthermore the lack of any such analysis prevents any conclusion that the restriction is disproportionate. The Competition Authority acknowledges that the question of which professional body should regulate a lawyer holding dual titles could be "*complex*".[85] However, it proposes that this difficulty could be met by the establishment of the Legal Services Commission proposed in Chapter 3. As indicated in chapter 3 of this submission, the Bar Council's is unable to endorse the proposal to create a Legal Services Commission and, instead, proposes the creation of a new tribunal/ombudsman to deal with complaints in respect of barristers. It follows that the Bar Council does not accept that the involvement of the proposed Legal Services Commission would provide a solution to the complex regulatory issues that would arise in relation to lawyers holding dual titles.

5.7 The alternative proposal of the Competition Authority is that a lawyer holding dual titles would be regulated solely by the Law Society. However, it gives no further consideration to this proposal. In the view of the Bar Council, this proposal is without merit. The Bar Council wishes to ensure that its members comply with the Code of Conduct. There should not be a situation in which it would have no control over persons providing services under the title of barrister. This could only serve to undermine public confidence in the independent referral Bar which, as noted above, is vital to the administration of justice in our constitutional democracy.

5.8 The Competition Authority acknowledges that its proposals are based on no particular dissatisfaction with the current system.. It concludes that, if the current

[83] Case C-309/99 [2002] ECR I - 1577.

[84] Paragraph 6.10 of the Report.

[85] Paragraph 6.12 of the Report.

structure is in fact the most efficient, then matters will remain as they are. In the absence of a definitive view as to whether the existing system is or is not efficient, it is very surprising that the Competition Authority should propose to change the system in the manner suggested. It inevitably follows that if the current structure is the most efficient, then there could be no anti-competitive restriction. To contend that the Rule is a restriction while acknowledging the possibility that the current structure might be the most efficient is wholly inconsistent and incompatible with the requirements of competition law.

6. DIRECT ACCESS AND RESTRICTIONS ON BARRISTER PRACTICE

(i) Introduction

6.1 This chapter addresses the issue of direct access and the restrictions on a barrister's practice which are the subject of chapter 7 of the Report of the Competition Authority.

(ii) Summary

6.2 The Bar Council supports the provision of legal advice through direct access to barristers consistent with the maintenance of an independent referral Bar. The Bar Council recognises the potential cost savings and efficiencies which may arise by the provision of advice directly. An expansion of the Direct Access scheme that realises these benefits, provided that it does not undermine the Irish justice system, the integrity of the independent referral bar and quality of service, is welcomed by the Bar Council.

6.3 The Bar Council intends to commence a public consultation process to explore the best means of maximising the benefit to users of a wider Direct Access scheme. The Bar Council intends to seek the views of organisations which already use the existing Direct Access scheme, potential users and other interested persons. The consultation will canvass views as to the needs and demands of potential participants and will address access, organisation, quality, and other regulatory issues. It is the Bar Council's intention to promote an expanded scheme to create Direct Access codes where appropriate and to ensure there is a direct access structure in place which meets market demand consistent with the maintenance of the independent referral Bar and the quality of the Irish justice system.[86]

[86] The level or qualities of any existing or potential demand is unknown at this time. There is no data provided by the Competition Authority as to the level of demand, type of service required and other customer requirements for direct access.

(iii) The existing Direct Access scheme

6.4 Since 1990, the Bar Council has authorised a number of approved organisations and institutions and their members to have direct professional access (DPA) to members of the Bar. The scheme enables approved professional bodies to instruct barristers directly. Organisations must formally apply for inclusion on the Register and satisfy the Bar Council of a number of matters.[87] The scheme does not extend to court appearances. The rationale for this limit on the scheme is discussed below. The following organisations are Approved Professional Bodies for the purpose of the Scheme:

- Association of Chartered Certified Accountants [Fellows and Associates]
- Institute of Chartered Accountants in Ireland [Fellows and Associates]
- Institute of Chartered Accountants in England & Wales [Fellows and Associates]
- Institute of Certified Public Accountants in Ireland [Fellows and Associates]
- Chartered Institute of Management Accountants [Fellows Associates]
- Royal Institute of Architects in Ireland [Members]
- Irish Association of Architects and Surveyors [Corporate Members]
- Society of Chartered Surveyors in the Republic of Ireland [Fellows and Professional Associates]
- Royal Town Planning Institute [Members]
- Chartered Institute of Building [Fellows]
- Institution of Engineers of Ireland [Fellows and Ordinary Members]
- Institution of Taxation in Ireland [Associates and Fellows]
- Ombudsman for Credit Institutions
- Ombudsman for the Insurance Industry
- The Ceann Comhairle & Oireachtas Committees
- The Chief Returning Officer for Referenda

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[87] These are: -

(a) that the members of the body provide skilled and specialist services;

(b) that the affairs and conduct of the body are regulated by constitutional provisions governing standards of admission of members and disciplinary measures for unethical and/or dishonourable conduct;

(c) that the body or institution has a significant requirement for services of a barrister.

- Institute of Chartered Secretaries and Administrators [Members]
- Irish Institute of Secretaries and Administrators [Members]
- Irish Auctioneers and Valuers Association [Members]
- Chartered Insurance Institute [Society of Fellows]
- Official Assignee's Office, The High Court
- Commission for Aviation Regulation
- Vintners' Federation of Ireland
- The Office of the Information Commissioner
- O2 Regulatory Frameworks Section

(iv) Minimising detriment to public interest objectives

6.5 The Bar Council regulates direct access. Such regulation is necessary in the interests of the maintenance of the Independent Referral Bar and the integrity of the justice system. The Bar Council wants to create the correct balance between the clear benefits of direct access whilst preserving the core public interest objectives inherent in the current system.

6.6 These limits on direct access are not maintained by the Bar Council for self-serving reasons. The limits preserve the role of the independent barrister in the Irish judicial system and in the administration of justice, as well as protect public interest benefits that arise from the preservation of the core values of the independent referral Bar.

6.7 There is little consideration by the Competition Authority of the differences in providing legal advisory services directly to a client and having a direct relationship with a client when acting as their advocate in the courts (i.e. litigation). As far as the Bar Council is concerned, this is a key distinction. Indeed the Competition Authority appears to misunderstand this distinction. As part of its rationale for change, it argues that the current structure of direct personal access operates without *"any evident damage to the objective"* of an Independent Referral Bar and that the Bar Council itself says that scheme is working very well. This is true but it is because the scheme is confined to advisory work and not to litigation.

6.8 The Competition Authority has accepted certain pro-competitive effects of the limited restrictions and some of the public interest objectives behind the rule. The

Competition Authority is of the view that these restrictions go too far.[88] The Bar Council is in favour of expanding the direct access scheme in respect of consultancy and advisory services but before any such expansion can be introduced, it is vital to carry out a consultation process, as indicated, in order to ensure that the existing scheme is expanded in the manner which at best benefits the public.

6.9 The Bar Council sets out below certain issues which arise in respect of direct access. The Bar Council also details certain limitations on direct access which are central to the preservation of important public interest objectives. In addition, pro-competition effects of the limitations are reviewed. The issues are dealt with under the following headings - (a) promoting specialisation, dividing labour and ensuring quality of advocates in court (b) trustee services (c) protecting the public, the ability to choose and equality of access.

(a) Promoting specialisation, dividing labour and ensuring quality of advocates in court

6.10 The current legal system, by reason of the organisation of barristers as a separate profession, cultivates expertise in particular legal activities and services, relating to litigation and specialist advisory work. The Irish Bar is a resource and pool of expertise to which all members of society have access when they are party to civil disputes or criminal prosecution, or where legal advice is required. The division of labour between a solicitor and a barrister in the conduct of litigation is efficient and cost-effective and ensures quality standards in service.

6.11 The work of members of the Bar involves advisory work, drafting pleadings, affidavits and providing advocacy services. In respect of litigation, the solicitor is the first contact point for the client seeking legal representation in court. A solicitor issues proceedings, collects evidence, takes statements of witnesses, and assembles paperwork including the organisation of expert reports. The solicitor may define a legal or procedural problem on behalf of the client and recommends a barrister, who

[88] The Competition Authority states at paragraph 7.18:- *"In summary, a total prohibition on direct access (apart from the existing Scheme) is not justified in the light of the objective it seeks to attain. This objective could be met by less restrictive means."*

in turn provides a specialist opinion for the solicitor. The solicitor plays an instrumental role in communicating and guiding a client through the legal process.

6.12 .Under the present rules, solicitors can provide any of the services provided by barristers and therefore the rule does not restrict solicitors from competing with barristers. On the other hand, there are some legal services that barristers may not offer. Members of the solicitors' profession provide legal services such as conveyancing, the administration of estates and commercial services. These transactions can involve the maintenance of accounts and the administration, as a trustee, of the funds of clients or third parties and require significant administrative resources. Thus, specialist-promoting rules do not protect barrister from competition from solicitors. They may restrict barristers from competing in some measure with solicitors. The rationale for this is that, in order to provide solicitor-services, they would *de facto* have to cease to function as independent referral barristers. These firms of solicitors are in direct competition with one another and their ability to compete is enhanced by the availability of the independent referral Bar. Limitations under the direct access system which supports the maintenance of an independent referral Bar are therefore not anti-competitive.

6.13 It should be noted that there are about 2,000 solicitor firms in the country, with about 9,000 practising solicitors, while there are 1,540 barristers. The degree to which the restrictions on barristers competing with solicitors in certain limited areas constitutes a competitive constraint in a very competitive market for solicitor-services is highly questionable. The existing rules are rooted in the view that the continued existence of the independent referral bar necessarily entails that there are some services which barristers do not provide. Furthermore, there is no indication that the demand for these services is not being fully met by solicitors. . Neither is there any indication that, insofar as individual barristers are concerned, the fact that they cannot provide such services has any material anti-competitive effect in the market for legal services. A specialist and expertise-focused Bar is designed to ensure service quality to the benefit of all users, the judiciary and society at large.

6.14 If one compares barristers to specialist medical consultants, it is certainly the case that some patients would prefer to get general practitioner (GP) services from expert consultants no matter what the price. If patients were systematically permitted to do so, the expertise of medical consultants, as a body, would be at risk of becoming

devalued. Similarly, the expertise of the Barrister may become debased if barristers are unable to devote themselves to matters of advocacy. If medical consultants wish to provide general practitioner services, they can of course become general practitioners. Similarly, a barrister who wishes to provide solicitor services, or both solicitor and barrister services, can avail of the proposed freedom to transfer between the professions.

6.15 A combined service may already be availed of by customers employing a solicitor (since solicitors enjoy a full right of audience before the courts). The Report of the Competition Authority fails to fully acknowledge that such a combined service already exists in the market for those who wish it. Despite the combined service already existing in the market, there is no evidence that there is any significant demand for such a combined service.

6.16 There may be a perception that customers wish to have direct access not to a combined service *per se*, but to barristers providing a combined service. This may be because of the public perception of the skills, competency and expertise of barristers. However, such skills, competency and expertise are permitted to develop precisely because the current system requires barristers to dedicate themselves to advocacy work. Specialisation is not anti-competitive and a system which requires specialisation, while allowing members transfer, is not anti-competitive. The Irish system cultivates quality to the overall benefit of users and to the benefit of the administration of justice and there is no demand or justification for debasing that system. There is a recognised public interest in ensuring that the advocates appearing in a particular court have the requisite standards of skill (and a high standard of probity).

6.17 The current system promotes certain efficiencies by dividing the services provided in litigation between barristers and solicitors. In contrast to advisory services, the running of a case requires both the skills of a barrister and the organisation, preparation and management of the case by another person, a solicitor. Barristers taking on the role of solicitors would substantially increase the costs to both individual barristers and customers. It is difficult to see how paying a barrister to provide solicitor-services would result in any cost savings to the client. It is worth noting that litigation costs are substantially higher in jurisdictions where there is only one profession (e.g. USA and Canada).

6.18 In its 2003 Report on the barristers' profession, Indecon dismiss the risk of extra administrative costs in the following terms:

> *"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."* [89]

6.19 This approach is methodologically unsound. There is no comparison in the Report of the cost base of running a practice as a barrister at present and the costs "*where barristers would have to become more like solicitors*". Without such comparison, it is not possible to draw a conclusion that the present system operates anti-competitively.

6.20 A change such as that recommended by the Competition Authority would require an enormous transformation in the whole system of regulation of barristers with very significant increase in regulatory costs and, in effect, there would be much duplication of the work of barristers and solicitors and in the regulation of barristers and solicitors. In effect, the provision of solicitor services by barristers, as envisaged by the removal of all restrictions, would end the independent referral Bar and create one profession. The present restriction on direct access in respect of litigation is of course an essential aspect of the existence of an independent referral Bar. Expanding direct access in respect of advisory services in contrast provides considerable overall benefits while retaining the public interest advantages of the current system.

[89] Indecon, London Economics, *Competition and the Barristers' Profession in Ireland*, March 2003 at paragraph 5.146.

6.21 For the above reasons, the Bar Council is unable to endorse a direct access programme in respect of court appearances, which in effect turns barristers into solicitors.

(b) Ability to choose and equality of access

6.22 The Indecon Report indicates that members of the public call on the services of barristers very infrequently:

> *"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."*[90]

6.23 At paragraph 5.29 of their Report, Indecon recognise that a difference exists between consumers and organisational customers of legal services and their ability to assess the quality of barristers' services:

> *"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."*

6.24 The Indecon report asserts, by reference to insurance companies, that organisations are better able to assess the quality of service (and thus select an appropriate barrister) than members of the public. This accords with the views of the Bar Council and is reflected in the Direct Access scheme which targets organisations which are likely to make informed choices and which are coming from a position of economic and organisational strength.

6.25 As described throughout this submission, and in particular in chapter 2 and 4, equality of access is preserved in the Irish system by requiring all practising barristers to be sole practitioners and to accept work on the basis of the *'cab-rank rule'*. A barrister must act for a client where they are requested to do so subject to the limited qualifications which have been addressed above. The rule frequently

[90] Para 5.28 of the Indecon Report.

requires barristers to act in cases for unpopular clients or causes. Equality of access to members of the Bar is of enormous benefit to society in general and also allows smaller solicitor practices to compete with larger firms.

6.26 Proposal 11 option B of the Report contains a number of features, none of which are discussed or analysed in the Report. For example, immigration and asylum are to be excluded from direct access in the opinion of the Competition Authority. There may be merit in this opinion, but no explanation is provided in the Report. Another important direct access proposal, which receives no explanation, relates to equality of access. The Competition Authority suggest in proposal 11 option B that: "*A barrister would not be obliged to accept instructions from a direct access client*." The Competition Authority thus suggests expanding direct access to the public but does so at the cost of removing the barrister's duty to accept instructions in any case in the field in which he or she professes to practice as a barrister. There is no discussion, explanation or analysis of this radical aspect of the proposal in the Report. There is no regulatory assessment of the impact of such a change. The fact that the existing direct access scheme does not apply to barristers to accept instructions from a direct access client does not provide a justification for this proposal. The existing scheme is significantly different from what is proposed by the Competition Authority. The scheme now proposed by the Competition Authority would represent a fundamental inroad into the principle of equality of access.

(c) Trustee services

6.27 Unlike a solicitor, a barrister does not manage a client's affairs on their behalf, or act in a position of trustee for a client and or manage client monies. The provision of such services, would entirely change the relationship between a barrister and a client, and a barrister and the Court. The limit on barristers holding client monies on behalf of clients is essential to the existence of an independent arm of the legal profession. The provision of a service involving holding clients' accounts is not necessary for direct access to occur. Independence of advocates is a vital feature of any legal system which maintains the confidence of the public. The preservation of the independence of barristers has been recognised by the Competition Authority

as a valid objective.[91] Acting as a trustee for clients is entirely inconsistent with a barrister's role.

6.28 Barristers are not trustees, employees, servants or agents of their clients and have an overriding duty to the court, as described in chapter 2 of this submission. The duty works because a barrister is an independent person who is not dependant on any one client and is not a servant of any client. The holding of client accounts would alter the existing balance. The Bar Council is strongly of the view that holding client monies might be of benefit to individual members of the Bar, but as a group and as a profession, providing such a service would undermine the independent ethos of the profession. There is little or no evidence that the holding of client funds is demanded by the public or that there is a lack of legal professionals willing to provide that service.

6.29 A further concern in respect of handling client funds is the impact on ethical standards. There is no regulatory impact assessment by the Competition Authority in respect of the impact on the administration of justice, costs, equality of access or discipline.

6.30 In addition, the prohibition on handling client funds keeps overheads (administration, compliance, support) and insurance costs low, guaranteeing delivery of the service at a lower price. For example, professional indemnity costs for barristers in Ireland are a fraction of the equivalent for solicitors. It cannot be the case that imposing a requirement on a profession that automatically presupposes substantial additional cost would result in a consumer benefit without some clawback in other areas.

6.31 The Bar Council is of the view that direct access should not include the provision of trustee services, such as managing a client's general affairs or managing client accounts and monies.

(d) Developments in the United Kingdom

6.32 In paragraph 7.17 of its Report, the Competition Authority states that "*[i]n the United Kingdom, where an independent referral Bar also exists, direct access has*

[91] At paragraph 7.27

now been extended to the public at large (although there are still significant restrictions on the circumstances in which it can be exercised).” The UK Public Access Rules are severely truncated in the Report of the Competition Authority. The UK rules do not envisage any expansion of the services provided by barristers and prohibit barristers conducting litigation or providing solicitor services. To the extent that the above paragraphs give the impression that what the Competition Authority proposes, and what has been adopted in the UK, are one and the same, (or even similar), that impression is incorrect. In fact, much of what is urged by the Competition Authority is precisely what has been rejected in the UK.

6.33 A key aspect of the UK direct access scheme is that barristers are prohibited from conducting litigation, that is to say, carrying out litigator or solicitor services. In addressing the 2004 changes to their direct access scheme, the Bar Council of England and Wales *“stress that the essential function of a barrister is that of an advocate and adviser, whose role is not to conduct litigation or to take general responsibility for their clients’ affairs.”*[92] Under the UK direct access scheme, where a person’s needs are such that they require a solicitor, the participating barrister is required to decline to act until a solicitor is retained.[93] Rule 6(c) of the UK direct access scheme obliges all barrister participants to notify any lay client in writing, and in clear and readily understandable terms, that they (the barristers) cannot perform the functions of solicitors:

6.34 The *Guidance For Barristers* provides guidance on the interpretation of the Rules. UK Barristers are required to have regard to it by paragraph 403.2(c) of their Code. The *Public Access Work - Guidance For Barristers* emphasises the Direct Access scheme does not qualify or permit a Barrister to provide solicitor-services:

> *“One model would have been public access for litigator as well as barrister services. Another was access only for conventional barrister services. The Committee chaired by Sir Sydney Kentridge QC recommended the latter. The Kentridge Report stated:-*

[92] See the website of the Bar Council of England and Wales (www.barcouncil.org.)

[93] By virtue of Rule 2, 4 and 5 of the Public Access Rules.

An essential condition of permitting direct access in our view is that there should be no expansion in the functions that barristers are permitted to undertake.

This policy was approved by the Bar Council, and has been implemented in the Code changes and Public Access Rules. The purpose of public access is to remove unnecessary barriers to the provision of barrister services, and to save costs by cutting out superfluous intermediaries. It is no part of the purpose of public access that barristers in independent practice should assume professional roles for which they are unprepared by training or unfitted by professional infrastructure."

6.35 In conclusion, that which is proposed by the Competition Authority is in direct conflict with the 2004 developments in the UK. For the reasons outlined above, the Bar Council is of the view that any widened direct access scheme should not expand the functions that barristers undertake.

(v) Employed Barristers and Barristers in Part-time Practice

6.36 The Bar Council is responsible for maintaining quality and integrity amongst its members. Barristers in full time practice should not have occupations inconsistent with full time practice at the Bar, in the same way that other professionals, such as doctors, are also restricted in their outside occupations. This is necessary to ensure the integrity, independence and quality of persons who put themselves forward as independent advocates, representing the public before the courts of Ireland. Regular attendance in court and at the Law Library exists to retain quality, to the benefit of the public and the judiciary.

6.37 The presentation of a case to the judiciary by an independent person is a valid objective and is central to Ireland's legal system. The Bar Council agrees with the Competition Authority when it states in paragraph 7.27 of the Report that:

"The objective that barristers should perform their functions with due independence and in a manner consistent with the administration of justice, is a valid one."

6.38 The Bar Council seeks to protect this objective for the reasons outlined throughout this submission and, in particular, in chapter 2.

6.39 From an economic perspective, it is difficult to see how this rule has any material effect on competition. It is unclear if the restriction were removed that the opportunity to practice would be availed of by any material number of employees.[94] Furthermore, the number of cases in which the employed barrister finds it feasible to exercise the right of access is likely to be very limited. Cost and time constraints make this an impractical option. .

6.40 Allowing barristers who are employees of organisations and companies to also practice at the Bar would make very little (if any) economic impact on the financial interests of individual practitioners, or the Bar in general.[95] It cannot be said that the rule exists for any self-serving economic reasons.

6.41 The Bar Council is opposed to allowing employed barristers maintain a practice at the Bar.[96] The reasons for this approach is that the existing controls are essential to the administration of justice, the presentation of cases to judges in an independent manner and the retention of trusted persons to appear in the courts on behalf of the public. The restrictions are essential in order to preserve the integrity of the independent referral Bar.

6.42 In the view of the Bar Council, it is not possible to be a member of an independent referral Bar with an over-riding duty to the courts while being formally dependent on a single client for one's livelihood and obliged to obey that client's instructions on pain of dismissal from one's job. A core difficulty in allowing employees practice as barristers relates to the obligation of disclosure to the court which has been addressed in chapter 2 of this submission.

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[94] The Indecon report at paragraph 5.156 recognises 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'.

[95] There is not data provided by the Competition Report in its report.

[96] The Bar Council does not have any role in relation to the professional activities of those that are not members of the Law Library and in those circumstances acknowledge that this is essentially a matter for the courts.

6.43 Employed barristers are frequently in a position of conflict of interest. On the one hand, they owe a duty as an employee to obey the instructions of their employer. On the other hand, they are bound by a duty of disclosure to the court, including a duty to disclose relevant legal authorities to the court. This puts the employed barrister in a precarious position of conflict which is incompatible with the requirements of the administration of justice. Put simply, such a situation contains an inherent conflict of interest which threatens the discharge of a barrister's duty to the court. It is not an uncommon complaint of a client, and sometimes a solicitor, that a barrister has revealed an aspect of law, a rule of procedure or a feature of their case to the Court, which is unfavourable. However, this is required so as not to mislead the judiciary and facilitates the administration of justice. It is a primary duty of the independent barrister.

6.44 It is a fundamental tenet of practice that a barrister is required to inform the judge of all relevant facts and law, including any such which may be adverse to their client's interest. This means that barristers are in a unique position in the context of the administration of justice to help the judiciary by providing an independent, accurate and complete assessment of the facts and law relative to their own case. Because barristers support the judiciary in this way, any change to these rules would require an equivalent root and branch reform of the entire justice system, with a huge increase in the number of judges and the provision of support staff, researchers and other facilities for the courts.

6.45 The Report states that clients may be served as well by employee barristers. However, the pressure that can be brought to bear on in-house counsel who are dependent financially and in terms of job security on their employer is fundamentally inconsistent with the independence required of barristers. In-house counsel would inevitably be put in a difficult position to advise where the substance of their advice has negative repercussions for their employer. . An employer will inevitably regard the employees having an overriding duty to the employer. This is inconsistent with the overriding duty to the Court. The pressures on in-house counsel are not present when advice is sought from a full-time practising barrister. This point would appear to be partially accepted by the Competition Authority.[97]

[97] At paragraph 7.30 the Competition Authority states that "…it is true that that an employed barristers may in certain circumstances, such as the example given by the Bar Council, have much to lose."

6.46 The Indecon Report, in its executive summary, concludes in respect of employed Barristers that:-

> *"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."*

6.47 A competition law evaluation of Ireland's legal system and regulation of barristers must balance economic reasons and matters of public interest.[98] Indecon's recommendation appears to be based on a pure economic analysis and does not take account of the public interest objectives referred to in this response, and required to be considered in any competition law analysis.

6.48 There is an absence of any data provided by the Report and no regulatory impact assessment has been carried out by the Competition Authority in respect of its proposals to allow employees, who are qualified as barristers and who have completed a pupilage, also practice at the Bar, while at the same time remaining as employees. No regulatory impact assessment has been carried out on the impact on the judicial process. No regulatory impact assessment has been carried out on the effect on access to barristers by the public by allowing organisation employ barristers to act for them solely. No assessment has been carried out on judicial reaction to employed barristers and the consequences, in terms of, inter alia, the time required for matters ranging from preliminary applications to full hearings.

6.49 While the focus of the Report has been on the effects of allowing suitably qualified employees practice at the Bar, there is no regulatory impact assessment of the demand by large organisations for existing practitioners and their ability to take them out of public practice for their own benefit. Nor is their any consideration in the report of this possibility and its consequences for equality of access.

(vi) Membership of Law Library

6.50 Rule 8.3 of the Code of Conduct confines membership of the Law Library to full-time practising barristers. The Bar Council seeks to promote dedicated and

[98] Wouters, Case C-309/1999 [2002] ECR I-1577.

independent practitioners. For the reasons outlined in the above section of this submission, some limits are placed on practising barristers engaging in occupations inconsistent with full-time practice at the Bar and inconsistent with regular attendance at Court and at the Law Library. The reasons for the limits on employed barristers engaging in practice have also been explained in the above section of this submission.

6.51 The Bar Council wishes to take all possible steps to enhance the opportunities for those entering the barristers' profession to establish themselves quickly and successfully. In this regard the Bar Council will review its restriction on part-time occupations and will recommend a more permissive rule so as to permit barristers engage in a significantly increased range of part-time occupations

7. RESTRICTIONS ON ADVERTISING

(i) Introduction

7.1 This chapter addresses the restrictions on advertising which are addressed in chapter 9 of the Report of the Competition Authority.

(ii) Summary

7.2 The Bar Council intends to recommend to members significant amendments to its rules on advertising. The proposed amendments include the following:

(a) permitting barristers to advertise and provide information in appropriate forums in respect of:

i. availability;
ii. areas of expertise;
iii. prior professional experience;
iv. publications; and
v. pricing, charges and hourly rates.

(b) expanding barristers' profiles in the Bar Council diary and Bar Council Website, to allow information of the type outlined in i. – v. above.

(c) sending engagement letters in respect of pricing - akin to the solicitor's "*Section 68 letters*".

7.3 It is also intended to identify the most effective means in which barristers can advertise and provide information of the type outlined in i. – v. above to clients and where necessary further amendments of the Rules will be sought by the Bar Council.

7.4 The implementation of these proposed changes would address any legitimate concerns raised by the Competition Authority. Both the Competition Authority and the Bar Council acknowledge that, in addition to the benefits which accompany

advertising, there is potential for significant adverse consequences. Increased freedom to advertise should not encourage litigation or contain misleading information or diminish public confidence or act as a barrier to entry.

(iii) The present rule in relation to advertising

7.5 Rule 6.1 of the Bar's Code of Conduct states that:

> *"A barrister may advertise by placing prescribed information concerning himself on the website of the Bar Council and subject to such rules and regulations as may be promulgated from time to time by the Bar Council in respect of the content of such an entry. A barrister may advertise by such other means as the Bar Council may prescribe by way of regulations promulgated from time to time, which regulations shall be promulgated for the purposes of protecting the public interest and maintaining proper professional standards."*

7.6 In Chapter 9 of its report, the Competition Authority recognises that the existing rule pursues valid objectives, namely: (a) protecting the public interest; (b) maintaining proper professional standards; and (c) the proper administration of justice.[99] However, the Competition Authority concludes that the rule, as presently expressed, is disproportionate to the objectives it seeks to achieve, because those objectives could be obtained by a less restrictive rule.

7.7 While accepting the case for certain reforms, the Bar Council welcomes the Competition Authority's recognition that the objectives underpinning the existing rule are valid and desirable. Similarly, the Bar Council welcomes the Competition Authority's acceptance that some regulation of advertising by barristers and solicitors is appropriate and that certain forms of advertising could contribute to bringing the administration of justice into disrepute.[100] In considering proposals for reform, the Bar Council is of the opinion that certain, less restrictive, controls on advertising will be necessary to ensure that the objectives listed above continue to be met.

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[99] Paragraphs 9.1 & 9.10 of the Report.

[100] Report at para. 9.10

(iv) Response to the Analysis of the Competition Authority

7.8 The Bar Council agrees that the current rule impacts on the information available to purchasers of legal services and agrees that truthful and objective advertising gives clients useful information and helps them to choose between competing barristers. For this reason, the Bar Council has taken steps to broaden the scope of barristers' profiles in the Bar Council diary. Commencing with the 2006 diary, barristers' profiles will include expanded information, including their specialisations, past publications and experience. This diary is distributed free of charge to approximately 6,000 solicitors nationwide and the expanded profiles will also be available to the public on the Bar Council website.

7.9 While the Bar Council agrees that it is appropriate to reform the current rule, it maintains that the removal of all restrictions on advertising (as proposed in Proposal 19, Option A) would result in the following anti-competitive effects:

- *Barrier to Entry*: The Competition Authority repeatedly argues that the existing rule has a disproportionate and negative impact on junior barristers and "*unbalance[s] the playing field*" in favour of well-known barristers. In the view of the Bar Council, this analysis fails to appreciate that, given the low earnings of barristers in their early years, it is unlikely that new barristers would be able to meet the cost of commercial advertising. Indeed, it is much more likely that established barristers would take advantage of the removal of the existing rule. Rather than levelling the playing field, it is likely that the total removal of advertising restrictions would have the unwelcome result that advertising costs would become a barrier to sustainable entry for junior barristers.

- *Misleading Information*: As the Competition Authority appears to accept, it would be particularly misleading for consumers if individual barristers were permitted to advertise their alleged success in cases. Success in cases is difficult to measure. Any evaluation of success would require a knowledge of the respective merits and also consideration of the extent to which the outcome was influenced by adherence by the individual barristers to the overriding requirement of disclosure and honesty to the court. Any form of advertising therefore should not be permitted by reference to success in cases or indeed a

purported discussion of the individual cases or statements of the work performed in those cases. It might also influence practitioners to prefer to act for clients who are unlikely to lose.

7.10 Aside from the pro-competitive effects of regulation (outlined above) there are other legitimate, non-competition objectives of regulating advertising. In particular, the regulation of advertising serves the important objective of discouraging frivolous litigation. It is widely accepted that the market for legal services is atypical and, in particular, that unregulated advertising tends to promote litigation. Plainly, this is not in the public interest. For example, the expansion in the litigation market fostered by the liberalisation in solicitors' advertising in the 1980's increased the cost of insurance and, ultimately, resulted in u-turn and the imposition of additional restrictions by the Solicitors (Advertising) Regulations, 2002.

7.11 The Competition Authority accepts that the reduction of fraudulent or vexatious legal claims is a valid objective. However, it argues that this objective is more appropriately met by the procedural rules governing frivolous and vexatious claims, whereby such claims can be struck out with costs awarded against the Plaintiff.[101] In the Bar Council's view, the procedural rules alone are inadequate to meet the harm caused by frivolous and vexatious claims. First, while they are in being, such claims tend to waste judicial and legal resources, irrespective of whether they are ultimately struck out. Second, the mere bringing of vexatious claims tends to bring the administration of justice into disrepute, notwithstanding that such claims might ultimately be thrown out. Third, the overall economic cost to the public at large, and the consequent impact on insurance premiums, is occasioned whether or not the frivolous claim is struck out. Fourth, because the courts cannot determine disputed facts without a full hearing of the evidence the jurisdiction to strike out cases prior to trial is limited and narrowly confined and cannot achieve the objectives acknowledged by the Competition Authority.

7.12 Against this background, it is unsurprising that, even in states where restrictions on advertising have been relaxed, certain sector-specific restrictions are generally maintained. It is noted that the European Commission, in its Report on Competition in Professional Services, (which is cited by the Competition Authority), lists the following countries in which lawyers are permitted to advertise, but subject to

[101] Report at para. 9.33-9.34

significant restrictions: Austria; Belgium; France; Italy; Luxembourg; and Spain.[102] Indeed, in England and Wales, barristers are permitted to advertise, subject to the following restrictions:

> *"710.2 Advertising or promotion must not:*
> *(a) be inaccurate or likely to mislead;*
> *(b) be likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;*
> *(c) make direct comparisons in terms of quality with or criticisms of other identifiable persons (whether they be barristers or members of any other profession);*
> *(d) include statements about the barrister's success rate;*
> *(e) indicate or imply any willingness to accept instructions or any intention to restrict the persons from whom instructions may be accepted otherwise than in accordance with this Code;*
> *(f) be so frequent or obtrusive as to cause annoyance to those to whom it is directed."*[103]

7.13 It is also appropriate, in this context, to note the following passages from the judgment of O'Connor J. (a Judge of the U.S. Supreme Court from 1981 until 2005) in Shapero v. Kentucky Bar Association:[104]

> "*Assuming, arguendo, that the removal of advertising restrictions should lead in the short run to increased efficiency in the provision of legal services, I would not agree that we can safely assume the same effect in the long run. The economic argument against these restrictions ignores the delicate role they may play in preserving the norms of the legal profession. While it may be difficult to defend this role with precise economic logic, I believe there is a powerful argument in favour of restricting lawyer advertising and that this argument is at the very least not easily refuted by economic analysis.*

[102] Report on Competition in Professional Services, para. 46, Table 3

[103] Code of Conduct of the Bar of England and Wales, para. 710.2.

[104] 486 U.S. 466 (1988). O'Connor J. (joined by Rehnquist C.J. and Scalia J.) dissented in this case.

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be. Rather, special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.

It is worth recalling why lawyers are regulated at all, or to a greater degree than most other occupations, and why history is littered with failed attempts to extinguish lawyers as a special class. See generally R. Pound, The Lawyer from Antiquity to Modern Times (1953). Operating a legal system that is both reasonably efficient and tolerably fair cannot be accomplished, at least under modern social conditions, without a trained and specialized body of experts. This training is one element of what we mean when we refer to the law as a "learned profession." Such knowledge by its nature cannot be made generally available, and it therefore confers the power and the temptation to manipulate the system of justice for one's own ends. Such manipulation can occur in at least two obvious ways. One results from overly zealous representation of the client's interests; abuse of the discovery process is one example whose causes and effects (if not its cure) is apparent. The second, and for present purposes the more relevant, problem is abuse of the client for the lawyer's benefit. Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand that clients bargain for their services in the same arm's-length manner that may be appropriate when buying an automobile or choosing a dry cleaner. Like physicians, lawyers are subjected to heightened ethical demands on their conduct towards those they serve. These demands are

needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialized knowledge that these professionals possess.

Imbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless natural force of economic self-interest. It cannot be accomplished directly by legal rules, and it certainly will not succeed if sermonizing is the strongest tool that may be employed. Tradition and experiment have suggested a number of formal and informal mechanisms, none of which is adequate by itself and many of which may serve to reduce competition (in the narrow economic sense) among members of the profession. A few examples include the great efforts made during this century to improve the quality and breadth of the legal education that is required for admission to the bar; the concomitant attempt to cultivate a subclass of genuine scholars within the profession; the development of bar associations that aspire to be more than trade groups; strict disciplinary rules about conflicts of interest and client abandonment; and promotion of the expectation that an attorney's history of voluntary public service is a relevant factor in selecting judicial candidates.

Restrictions on advertising and solicitation by lawyers properly and significantly serve the same goal. Such restrictions act as a concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other. There is no guarantee, of course, that the restrictions will always have the desired effect, and they are surely not a sufficient means to their proper goal. Given their inevitable anticompetitive effects, moreover, they should not be thoughtlessly retained or insulated from skeptical criticism. Appropriate modifications have been made in the light of reason and experience, and other changes may be suggested in the future.

In my judgment, however, fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession."

(v) Specific Proposals

7.14 As indicated previously, the Bar Council fully supports expanded advertising by barristers but proposes a number of specific restrictions thereon. They can be summarised as follows:

(a) The placing of advertising by barristers should be limited to appropriate forums, such as the Bar Council website and diary, legal and academic journals and periodicals.

(b) Barristers should be able to advertise the following information about their practices:

i. Availability;
ii. Areas of expertise;
iii. Prior professional experience;
iv. Publications;
v. Pricing.

(c) Barristers should be allowed provide information with regard to the prices of their services. While it is difficult for barristers in many cases to identify in advance at the time of retainer (as opposed to at the time of trial) the precise cost of their services, having regard to lack of information with regard to the precise work that will be required of them in an individual case, it is accepted that fees estimates could be given. The Competition Authority has suggested that something akin to the solicitor's Section 68 letter might provide a solution. The Bar Council agrees with this suggestion. In addition, there is no reason why barristers could not have an indication of the hourly rate for a wide range of services offered by them. The Bar Council fully supports transparency of price to the best extent possible having regard to the nature and circumstances of the services supplied by barristers.

(d) Advertising by barristers should not be likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.

(e) Advertisements should not include statements about the barrister's success rate or make direct comparisons in terms of quality with other identifiable lawyers.

(vi) Incomplete and inadequate data in relation to barristers' incomes

7.15 In its Report, the Competition Authority sets out its figures for the average and midpoint incomes of various categories of solicitors and barristers. The Report states that the income figures were derived from survey data obtained from the Revenue Commissioners and that a random sample of nearly 40% of all lawyers was used (footnote 1). This also is stated to be the basis of the information in tables 2 and 3 which set out percentages of various categories of lawyers with incomes over certain specified levels and also set out income for junior counsel by years of experience.

7.16 It now transpires that (a) the figures are not derived from a random sample of lawyers and (b) the figures are not income figures at all but are turnover figures i.e. gross fees before adjustments are made in respect of capital allowances, interest paid, losses, allowable expenses and retirement annuities. In particular, the Revenue Commissioners have confirmed to the Bar Council that the Competition Authority supplied the Revenue Commissioners with an original list of 6,498 individuals in the legal profession (covering solicitors, employed solicitors, junior and senior counsel) containing their names and addresses which were broken down into six sub-categories. The Revenue Commissioners were asked to extract particulars of the incomes of these individuals from the individuals' income tax returns. Because of the unstructured nature of addresses on the Revenue records and other technical incompatible features, a match of only 2,434 individuals (37%) was achieved. Thus, not only does the sample appear to have been non-random but the number making up the sample fell significantly short of the sample size requested by the Competition Authority itself.

7.17 No information has been furnished to the Bar Council as to how many of the 6,498 individuals on the Competition Authority's original list were barristers or how the subset of barristers was divided between senior counsel and junior counsel. Nor is this information available in relation to the 2,434 lawyers in respect of whom information from their income tax returns was sent to the Competition Authority

and which forms the basis of the figures in the report. Finally, the fact that the figures are turnover rather than net income figures means that the income figures attributed to barristers in the report are significantly overstated.

8. SENIOR COUNSEL

(i) Introduction

8.1 This chapter addresses the proposals in Chapter 11 of the Report of the Competition Authority in relation Rule 10 of the Code of Conduct[105] and the system for the appointment of Senior Counsel in Ireland.

(ii) Summary

8.2 Appointments of counsel to the rank of Senior Counsel are made by the Government.[106] The Competition Authority proposes that the title of Senior Counsel should be retained but that the Government should establish objective criteria for awarding the title of Senior Counsel, together with a procedure for monitoring and removing the title. The Competition Authority also proposes that solicitors should be eligible for the title. The Bar Council endorses the first and second of these recommendations. As the Competition Authority has acknowledged, the title of Senior Counsel operates as a quality mark and assists clients in their choice of advocates. In addition, it serves as an encouragement to junior barristers to aim for excellence, to the ultimate benefit of the public at large. The Bar Council acknowledges that, in order to operate effectively as a quality mark, candidates wishing to become Senior Counsel should be subject to a process which would serve the public interest by offering a fair and transparent means of identifying excellence in advocacy in the higher courts.

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[105] Rule 10 provides as follows:

"10.1 Admission to the Inner Bar is confined to practising barristers.

Only a barrister of professional eminence should apply for admission to or be admitted to the Inner Bar. It shall be unprofessional conduct for a barrister to apply to the Government for admission to the Inner Bar unless that barrister has a bona fide intention to conduct his practice as a member of the Inner Bar and enjoys a status of professional eminence by virtue of his practice at the Bar.

A client is never required to retain the services of a Senior Counsel. 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 to decide the number of Counsel to be retained in a case."

[106] A process which is also referred to as "*taking Silk*" or being admitted to "*the Inner Bar*".

8.3 However, for the reasons outlined below, the Bar Council considers that the title should remain as a mark of excellence for *barristers*. The profession of barrister is the profession which, in this jurisdiction, specialises in advocacy. Consequently, a mark which is designed to reward excellence in advocacy should be awarded only to those members of the profession of barrister. As outlined at Chapter 4 above, the Bar Council considers that any restrictions on the transfer of legal professionals between one branch of the legal profession and another should, insofar as they exist, be eased. This means that solicitors who wish to specialise in advocacy should transfer to the profession of barrister and should be able to do so easily.

(iii) Background

8.4 In its initial submission made to Indecon, (the economic consultants appointed by the Competition Authority), the Bar Council emphasised the fact that the title of Senior Counsel was "*a mark of quality accorded by the Government to advocates of exceptional ability*". The point was made that this qualification served the public interest by identifying a particular level of skill. In its 2003 Report, Indecon accepted that the submissions of the Bar Council in support of the existence of Senior Counsel were justified on competition grounds.[107] As well as providing a signal of high quality to solicitors and clients, the title also provided a career structure to more junior members, and therefore acts to increase the level of competition on the market.

8.5 In its submission to the Competition Authority, the Bar Council underlined that the economic justification of the silk system was twofold. First, it operates as a quality mark. Secondly, it operates as a signalling device by experienced lawyers that they are not available for less important work, given their experience, the demands on their time and the opportunity cost of their time. Consequently, their fees were correspondingly higher than those of less experienced lawyers. The Bar Council acknowledged, however, that any valid concerns in relation to the appointment of barristers who do not have the necessary skill or experience to allow the mark to operate as a quality mark could be addressed by a reform of the system of appointment.

[107] See paragraph 5.95 of the Report.

(iv) Developments in England and Wales

8.6 The Bar Council is aware of the developments in the area of appointment of Queen's Counsel in England and Wales. In that jurisdiction, significant attention has been afforded to the issue of whether the title of Queen's Counsel should be retained. The UK government has decided to retain the title of Queen's Counsel on that basis that it serves to maintain a kitemark for advocacy services, both recognising excellence and providing useful information to consumers.

8.7 In July 2003, the Department of Constitutional Affairs published a consultation paper on the future of Queen's Counsel. Views were sought on the role of Queen's Counsel, the advantages and problems and possible ways forward. 376 responses were received to the consultation paper. The responses were analysed in the Department of Constitutional Affairs Summary Of Responses to the Consultation Paper on the Future of Queen's Counsel.[108] The responses disclosed that a majority of respondents (66%) considered that the rank of Queen's Counsel benefited the public. Its value as a quality mark was its principal benefit. Only 22% of respondents to the question of whether the system should be abolished agreed that it should. As a result of this analysis, the Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer, considered that the title should be maintained but that a new scheme should be put in place for accrediting legal advocates. He therefore invited the professions to develop and implement a new scheme. He underlined that the kitemarking scheme to be designed should serve the interests of consumers by identifying genuine excellence while providing fairness for members of the profession.

(v) The system in Ireland

8.8 The Competition Authority considers that the title of Senior Counsel is capable of amounting to a restraint on competition if it does not operate as a reliable mark of quality because there are no transparent criteria for awarding the title. It also criticises the fact that there is no ongoing monitoring of quality nor any procedure for withdrawing the mark in the event of a reduction in the level of quality.

[108] Published in January 2004.

8.9 At present, the grant or refusal of the title of Senior Counsel is a matter for the discretion of the Government on the advice of the Attorney General. The Bar Council is aware that the Attorney General has recently sought recommendations as to the qualifications and experience that should be considered in terms of eligibility for appointment to the Inner Bar. These recommendations are designed to ensure that only exceptional candidates are permitted to become Senior Counsel. Such recommendations, designed to tighten up the system, should address the Competition Authority's concerns. The Bar Council believes that the primary qualities required of a candidate to be awarded the title of Senior Counsel are as follows:

(a) A demonstrated capacity for advocacy, sound judgment, independence, maturity, leadership and diligence in the exercise of the profession of barrister which is exceptional;

(b) A thorough knowledge of the law and in particular recent statute and caselaw. Where the applicant holds him or herself out as specialising in a particular area of law, the applicant should have demonstrated such specialist expertise;

(c) A demonstrated high standard of social consciousness, public service, advancement of the profession and knowledge of the wider community within which the law operates;

(d) Worthiness as demonstrated by a constantly high standard of honesty, integrity, courtesy and professionalism over many years recognised by such as clients, instructing solicitors, colleagues and members of the judiciary.

8.10 The Bar Council believes that, in order to attain the level of expertise as an advocate required to become Senior Counsel, practice at the bar for a significant period should generally be required. At present an advisory committee, comprising the Chief Justice, the President of the High Court, the Attorney General and the Chairman of the Bar Council advises the Government on whether or not the title of Senior Counsel should be granted to any particular applicant. The Bar Council believes that this advisory committee is in a strong position to assess and verify the suitability of candidates for call to the Inner Bar. The Bar Council believes that the

advisory committee should conduct a detailed assessment of each candidate by way of more detailed consultation than has been the case heretofore, with judges, other barristers and solicitors. A formal questionnaire should be drawn up and, where necessary, an interview could be conducted by a panel including lay persons.

8.11 In essence, the Bar Council supports the putting in place of criteria and procedures designed to ensure that the title of Senior Counsel operates effectively as a quality mark.

(vi) Senior Counsel and fees

8.12 The Competition Authority notes that, once the title of Senior Counsel operates as a quality mark, Senior Counsel may be justified in charging higher fees than junior counsel. However, it criticises what it describes as a "*practice*" whereby junior counsel charge a fee of two-thirds of the fee marked by Senior Counsel. In this regard, it is appropriate to highlight that the Code of Conduct contains no rules relating to the level at which fees should be charged. The provision of the Code of Conduct requiring junior counsel to charge two-thirds of the fee of senior counsel was abolished by the Bar Council in 1990.

8.13 The Competition Authority proposes that the Bar Council should advise all junior counsel to mark a fee based on work done when acting in a case. The fee should not depend in any way on that marked by Senior Counsel. The Bar Council agrees with the Competition Authority that the fee charged by junior counsel should relate exclusively to the work done in relation to a particular case. It is recommended by the Bar Council that fees be calculated by reference to, amongst other things, the work done and the value of that work to the client, and that Junior Counsel fees be calculated without reference to Senior Counsel fees.[109] The Bar Council does not in regulate the manner in which its members charge fees. Ultimately, the question of the level of fees paid to senior or junior counsel is a matter for agreement with the client.

[109] See Chapter 9 for a full discussion.

(vii) The role of solicitors

8.14 The Competition Authority proposes that solicitors should be eligible for the title of Senior Counsel. It does not indicate whether there is any demand from the solicitor's profession that solicitors should be eligible to become Senior Counsel. Nor is there any indication that there is any demand from the public, or indeed public benefit, associated with such a proposal. It seems clear that the Competition Authority has not in fact conducted any particular research on the role of Senior Counsel in this jurisdiction. The sole basis of the Competition Authority's proposal in this regard is its conclusion that there "*appears to be no justification for confining the title to barristers to the exclusion of solicitors*".[110] The Competition Authority reaches this conclusion on the basis that solicitors are trained in advocacy. It is argued that, if the title of Senior Counsel could be awarded to solicitors, it might encourage solicitors to exercise their right of audience more frequently than they do at present. In this regard, it is appropriate first to note that the Competition Authority makes no significant attempt to examine whether the fact that only barristers can apply to become Senior Counsel constitutes a restriction having an anti-competitive object or effect.

8.15 Insofar as the title relates to excellence in advocacy, the Competition Authority has no difficulty with the fact that only barristers are eligible for the title. However, it concludes that the title of Senior Counsel is perceived as a mark of quality for specialisations other than advocacy. Only in this light does it propose that solicitors be entitled to become Senior Counsel. The Bar Council does not agree with this analysis. As indicated previously, the title of Senior Counsel recognises advocates of exceptional ability. The title does not reward excellence other than as an advocate. Moreover, the Bar Council is not aware of any evidence to support the view that the failure on the part of solicitors to exercise their rights of audience before the superior courts that they have enjoyed for the last 25 years is in any way related to the fact that the title of Senior Counsel is reserved to barristers. While it is of course possible in theory that solicitors would choose to exercise their rights of audience and would, over the years, develop the degree of expertise in the provision of advocacy services required of those barristers seeking to become Senior Counsel, this has simply not happened in practice. The reality is that solicitors who wish to specialise as advocates become barristers. Aside entirely from competition law

[110] Paragraph 11.27 of the Report.

issues, there is no demand or need for the title of Senior Counsel to be made available to solicitors. It is firmly of the view that solicitors who wish to become specialist advocates should (and do) become barristers. It is also firmly of the view that there should be as few restrictions as possible on legal practitioners wishing to switch professions. This issue is addressed at Chapter 4 above.

9. LEGAL FEES AND THE TAXATION OF COSTS

(i) Introduction

9.1 This chapter addresses the analysis in chapter 10 of the Report of the Competition Authority in relation to the fees of barristers and the taxation of costs.

(ii) Summary

9.2 The Bar Council is in favour of a complete transparency and competition between barristers in respect of fees. The Bar Council does not approve or recommend to members any particular fee or billing structure. The Bar Council position is to foster competition and price transparency to the benefit of clients and in this regard proposes to recommend to members new positive measures to protect those objectives.

9.3 The Bar Council proposes a number of reforms in respect of the system of legal fees and taxation of costs. They can be summarised as follows:

i. Legal costs should be assessed on the basis of the work undertaken by individual lawyers and the value of that work to the clients.

ii. Taxing Masters should cease the general practice of allowing counsels' fees at two-thirds that of senior counsel. Instead, fees should be set on the basis of the work undertaken by each of senior and junior counsel and the value of that work to the clients.

iii. The Department of Justice, Equality and Law Reform should introduce legislation to permit persons other than solicitors be appointed to the position of Taxing Master.[111]

iv. The Legal Costs Group established by the Minister for Justice, Equality and Law Reform should undertake a careful review of the current system.

[111] Proposals 30 – 32 on page 111 of the Preliminary Report of the Competition Authority.

v. Obsolete or out-of-date provisions contained in Order 99 of the Rules of the Superior Courts should be revoked.

vi. The process of taxation should be expedited.

vii. Additional Taxing Masters should be appointed to deal with the level of work and to allow proper assessments to be carried out in accordance with the requirements of section 27 of the Courts and Court Officers Act, 1995 (*"the 1995 Act"*).

viii. It is important that the taxation process should look at both the value or worth of the work done and the necessity to carry out that work. Unnecessary costs should not be for the account of the paying party.

ix. All taxations of costs should be centralised in one agency in the State, with provision to allow Taxing Officers to travel around the country to facilitate country practitioners.

x. The objections process should be examined. Objections should be dealt with by a different Taxing Master to the Taxing Master who heard the original taxation.

xi. Appeals to the court should be dealt with by judges specifically assigned to reviews of taxation.

xii. A simple taxation process should be introduced to deal with cases where only a single item is in dispute or only a very small number of items are in dispute. A simple written process might well be appropriate in such cases.

(iii) Competition and transparency in the setting of barristers' fees

9.4 In paragraph 12.9 of its Report, the Competition Authority makes the following observations in relation to the setting of legal fees:

> *"Competition in the setting of legal fees is desirable. Apart from the economic harm caused, excessive fees limit citizens' constitutional right of access to the courts. Different lawyers will offer different levels of service*

and fees reflect this. All clients, regardless of what legal service they are demanding, should be able to make informed decisions about which lawyer to choose and at what rates. This requires greater transparency in the setting of lawyers' fees."

9.5 The Bar Council is in complete agreement with the foregoing analysis. It is axiomatic that competition in the setting of legal fees is desirable and is to be encouraged and that consumers must be furnished with information on the basis of which they can assess the quality and cost of the services they wish to obtain. In this context, a number of features of the barristers' profession merit particular note.

9.6 First, barristers are particularly susceptible to the benefits of competition in relation to the setting of legal fees (and, indeed, in relation to all other aspects of their practices) since their work – whether it be the provision of advices, the drafting of submissions, dealing with clients or advocacy in court – is continuously subject to the scrutiny of solicitors, clients and/or colleagues. Thus, a barrister's instructing solicitor, who works closely with the barrister, is in a position to assess the quality and value of every aspect of the barrister's work. In a similar vein, if a barrister fails to perform adequately in court, their reputation suffers in the eyes of the watching market – which includes solicitors, clients and colleagues – and they incur the risk of another barrister being chosen for other matters. It is difficult to think of any other provider of a professional service whose skill, competence and value is continuously subjected to such public scrutiny. A substantial body of information on the quality and value of the services from individual barristers thus accrues to legal service consumers which in turn promotes high standards and competition between barristers.

9.7 Secondly, every client is free to ask counsel to nominate fees in advance so that the client is in a position to make an informed judgment on the level of fees and, ultimately, whether they wishe to engage that barrister. As the Competition Authority correctly observes, *"[d]ifferent lawyers will offer different levels of service and fees reflect this"*; [112] *"clients, regardless of what legal service they are demanding, should be able to make informed decisions about which lawyer to choose and at what rates*". [113] The Bar Council encourages the practice of solicitors

[112] Paragraph 12.9 of the Preliminary Report of the Competition Authority dated 24 February 2005.

[113] *Ibid*.

and clients seeking price indications prior to a barrister being retained. As the Competition Authority acknowledges, however, it is difficult in many cases for barristers to identify at the time of retainer (as opposed to the time of trial) the precise cost of their services having regard to lack of information with regard to the precise work that will be required of them in an individual case. Nevertheless, the Bar Council is of the view that fees estimates could be given in every case. The Competition Authority has suggested that something akin to the solicitor's Section 68 letter might provide a solution. The Bar Council recognises the merit in such a suggestion. In addition, there is no reason why barristers could not provide an indication of the hourly rate for a wide range of services offered by them. The Bar Council fully supports transparency of price to the widest extent possible having regard to the nature and circumstances of the services supplied by barristers. Indeed, the practice of solicitors and their clients requesting estimates of fees from barristers has become increasingly prevalent in recent years. This practice undoubtedly increases efficiencies in the market for the provision of legal services. In this context, it is appropriate to highlight the knowledge and expertise of solicitors in relation to the negotiation and determination of barristers' fees. It is also appropriate to highlight the dependence of barristers on the work of individual firms of solicitors and, thus, the significant bargaining power which solicitors possess in relation to the negotiation and determination of barristers' fees.

9.8 Thirdly and related to the foregoing, every client is also in a position to instruct their solicitor to ask any number of barristers to quote for the same work. There is no provision in the Code of Conduct (nor is there any practice) which prevents clients from taking this course. Surprisingly, it is not a course which has been frequently adopted to date. However, there is no reason why it could not be adopted and it should be encouraged. It is a sensible and obvious step to take. There are very significant numbers of barristers in the Law Library who practice in similar areas of the law. There is therefore no reason why clients should not seek quotes from a number of barristers before deciding which of them should be retained for the purposes of a particular case. The Bar Council is committed to maximising transparency and competition on fees between barristers and in this regard will recommend to members that certain measures be put in place in respect of advertising and the setting of fees estimates before engagement.

9.9 Fourthly, even if clients do not wish to approach more than one barrister, it is always open to them or their solicitor to bargain with counsel as to the level of fees to be paid. They do not have to accept any fee nominated by counsel. They can decide for themselves whether to accept a fee or to suggest that the fee should be lower. It is not uncommon for clients to suggest that they are not prepared to pay more than a particular price for any particular work.

9.10 Fifthly, many purchasers of barristers' services have immense market power. This is particularly true for large blocks of litigation such as litigation where barristers represent the State in civil proceedings, legally aided criminal defence work, work on behalf of the Director of Public Prosecutions, legal aid for family law work and work for insurance companies and banks. In most cases these clients unilaterally determine fees which they are prepared to pay.

9.11 Sixthly, the market for legal services is very unusual in that there is an independent mechanism for reviewing barristers' fees and other legal costs in the form of the Taxing Master. As a result, a client or party who is unhappy with the price that he or she is ultimately charged can have recourse to a system of taxation operated and provided for by law. This system is addressed in more detail in section 10(iv) below.

9.12 Seventhly, it must be remembered that barristers take on many cases on a no foal no fee basis (i.e. without any guarantee of payment). This principle is generally applied in cases involving persons with a good cause of action who do not have sufficient means to discharge lawyers' fees. In a legal system which does not provide an adequate civil legal aid scheme, the availability of this fee structure is essential to ensure that persons with legitimate claims can retain the services of leading members of the Bar to represent their interests. The application of the principle by Counsel acting for the plaintiffs in *Hanrahan v. Merck Sharpe and Dohme* [114]was an integral part of the process by which the plaintiffs vindicated their rights in that case. In this context, the scale of the effort that was involved in achieving justice for the plaintiffs in that case merits note. It is encapsulated in the following passage from the book which subsequently charted the plaintiffs' ten year struggle against the defendants:

[114] [1988] ILRM 629.

"Despite two technical studies, it took a court order and forty-seven days in the High Court [at the time, the longest civil case in Irish legal history] to uncover the full extent of the malfunction in the incinerator [on the Defendant's premises]. It took three years and a further fourteen days in the Supreme Court before those facts were accepted. The same legal recourse and the extraordinary, even obsessive, persistence of the family was required to prove that Merck emissions must have been reaching the Hanrahan farm in dangerous amounts. The combined wisdom of science and the Government was unable to establish it." [115]

9.13 The operation of the no-foal no fee principle means that barristers at the height of their professional success act without payment and take the risk of never being paid if the action fails. Illustrations of this principle in operation can also be found in many medical malpractice suits, particularly those brought on behalf of minors such as the case of *Dunne v. National Maternity Hospital*. [116] The no foal no fee payment structure is also frequently applied in constitutional litigation, actions concerning environmental protection issues, challenges to planning decisions and similar public interest based litigation. Where payment is dependent upon a successful outcome, a barrister's payment will be delayed until the matter is finally determined, which in the case of *Best v. Wellcome*,[117] was 14 years after proceedings were commenced; in this regard, it is also appropriate to note that *Best v. Wellcome* was at hearing in the High Court for 34 days over a 3 month period. Indeed, the text books and law reports are littered with cases which have changed the face of the legal landscape (including constitutional law, judicial review, and the law of negligence and breach of duty) in this jurisdiction as a result of the courage of counsel and solicitors to litigate cases over a long period of time and to defend the rights of clients in the face of vested interest with large pockets. Further examples include *Crotty v. An Taoiseach*[118] (which concerning the Single European Act), *Synnott v. Minister for Education*[119] (which concerned the education of an autistic child and was at hearing before the High Court for 7 weeks) and *TD v. Minister for Education*[120] (concerning

[115] Jerry O'Callaghan, *The Red Book, The Hanrahan case against Merck, Sharp and Dohme* (Poolbeg, 1992) n.6, 214-215.

[116] [1989] IR 91.

[117] [1993] 3 IR 421.

[118] [1987] IR 713.

[119] [2001] 2 IR 545.

[120] [2001] 4 IR 259.

disadvantaged children in need of accommodation and treatment). This not only benefits the individual litigants, but society in general. In this regard, it is appropriate to note that the parties to a judicial review are frequently mismatched in terms of financial resources. A typical judicial review involves a person of limited means bringing proceedings against a Government Department, the Gardaí, a District Judge, a Disciplinary Body or the State itself. As a result of the no foal no fee principle and the existence of an independent referral Bar operating the cab rank rule, a "David" wishing to take on a Government "Goliath" can retain the barrister of his or her choice and gain access to the courts. Notwithstanding the absence of a properly funded legal aid system, private citizens still manage to litigate the issues concerning them. Important issues of principle and justice are litigated because of the existence of an independent referral Bar and because barristers continue to take cases on without any guarantee of being paid.

9.14 In the absence of a properly funded free legal aid system, the acts of such Counsel have played a fundamental role in giving reality to the constitutional right of access to the courts, the vindication of legal rights and the enforcement of the rule of law. In cases where the plaintiff is successful, Counsel will ultimately be paid a fee but, in other cases, where the plaintiff fails or (for one reason or another) the case does not proceed, Counsel will be unremunerated for all of the work done by them. This is a significant feature of the current system. It is difficult to identify any other area of work undertaken in the State where professional people provide services where there is no guarantee that payment will ever be made for those services.

9.15 In nominating a fee, a barrister will have regard to the matters identified in clause 11.1(a) of the Code of Conduct for the Bar of Ireland. In so doing, all features of the instructions which bear upon the commitment may be taken into account, including:

i. the complexity of the legal issue or subject matter;
ii. the length and venue of any trial or hearing;
iii. the amount or value of any claim or subject matter in issue;
iv. the time within which the work is or was required to be undertaken;
v. any other special feature of the case.

9.16 It will be seen from this list (which is not intended by the Code to be exhaustive) that time is one of the factors taken into account in proposing a fee. In this context, it is the general experience of barristers that neither clients nor solicitors ask barristers to calculate fees on a time basis such as an hourly rate. An hourly rate might appear to be a more appropriate way to calculate fees. However, if there were a general perception that hourly rates would be a more appropriate or less costly way to charge, it is surprising that there has not been any perceivable demand from either clients or instructing solicitors that fees should be calculated on that basis. The explanation may well be that clients perceive that an hourly rate would lead to an increase in costs. It has to be said that if an hourly rate were charged by barristers, it is likely that there would be significant increases in costs – particularly at District Court and Circuit Court level (where most civil litigation takes place), and in the drafting of pleadings and the provision of opinions. The adoption of an hourly rate would also be likely to drive up the brief fee in the vast majority of High Court cases. However, it might not make so much difference in very large and complex High Court cases where the brief fee charged is higher than that proposed in the more routine cases.

9.17 The criticisms of the Competition Authority in respect of what it describes as the "*practice*" whereby junior counsel mark a fee at two-thirds that of senior counsel have been addressed above in chapter 8. However, it is appropriate to reiterate that the criteria for the engagement of senior and junior counsel, the level of fees and the provision of specific services are not subject to any control or guidance by the Bar Council and are always a matter for individual negotiation as between a barrister, solicitor and client.

(iv) The taxation of barristers' fees

9.18 This section outlines the manner in which disputes in relation to the levels of fee charged by a barrister are currently addressed. In this regard, it is appropriate first to note that most disputes in relation to the level of fees charged arise not as between client and counsel but as between party and party – where one party in the case has succeeded against the other party and the court has made an order that the successful party should recover his or her costs from the unsuccessful party. When a case is concluded with an order of that kind, the successful party will ordinarily provide particulars of his or her costs to the unsuccessful party. Those particulars

may be delivered informally or in a very formal manner by delivering a bill of costs prepared by a legal costs accountant. The relevant particulars (or bill of costs) will indicate the fees charged by counsel for the successful party. In the majority of cases, those fees will ultimately be agreed (with or without adjustments) by the unsuccessful party. In a minority of cases, where there is a dispute between the unsuccessful party and the successful party, that dispute can be referred for "taxation" to be measured by an officer of the High Court known as the "Taxing Master". Where such dispute is referred to the Taxing Master in that way, it is known as a "party and party taxation".

9.19 The existing taxation system seeks to provide a independent review process for those cases where (inter alia[121]) the fees of counsel (or other legal costs) are believed to be too high or too low (as the case may be). The process of taxation is provided for in Order 99 of the Rules of the Superior Courts. Order 99 sets out detailed provisions in relation to the manner in which taxation is to be conducted. In addition, there is a significant body of case law to guide the Taxing Masters in their work.

9.20 The principles applicable to a party and party taxation in the High Court are equally applicable to the taxation of costs in the Circuit Court, where the taxation process is undertaken by the County Registrar. The purpose of the taxation process is to resolve disputes about the level of costs. It only deals with those cases where there are disputes. As mentioned earlier, the majority of costs are dealt with by agreement between the parties. It is only in the minority of cases that a dispute exists requiring taxation. As in the resolution of any dispute, there have to be clear rules and established procedures to ensure that cases are dealt with fairly and on a consistent basis. It is important that both sides should know what the rules and procedures are so that they know how to approach the dispute in their own best interests. The procedures which apply in the Taxing Master's office serve the same purpose as any rules of procedure in any forum designated to resolve disputes. Such rules should, of course, be kept under review to ensure that they assist rather than undermine the purpose of the process.

9.21 The current system has a number of advantages which include the following:

[121] Obviously, the taxation process deals with a great deal of matters other than the fees of counsel.

(i) The taxation process is governed by well established principles;

(ii) It operates in an open manner. The entire process is open not only to the parties concerned but to the public. Sittings of the Taxing Master take place in public.

(iii) The process is operated by skilled professionals (legal costs accountants) who are in a position to make all necessary points and submissions on behalf of their client.

(iv) There are in-built safeguards in the system. If either party is unhappy with the initial decision of the Taxing Master, the party has the opportunity to criticise that decision by means of filing objections. However, it is anomalous that these objections are heard by the same Taxing Master whose decision is contested in the objections.

(v) If the ultimate decision of the Taxing Master is considered unjust by either party, the party aggrieved has a statutory right of appeal to the High Court under section 27(3) of the Courts & Court Officers Act, 1995. [122] The relevant test for the purposes of such appeals is whether the decision of the Taxing Master is unjust. This was recently confirmed by the Supreme Court in *Cronin v. Astra Business Systems Limited*.[123] Thus, if in any particular case, the paying party believes that the fee allowed by the Taxing Master to counsel is unjustly high, they have the ability to take that matter to the High Court. [124] The test applicable under section 27(3) of the 1995 Act is commendable for its simplicity and ease of application. It represents a considerable improvement on the old test applied under the pre-existing law which was unnecessarily complicated.

9.22 However, there are also a number of significant deficiencies in the present system. The present system can be costly. There is a significant disincentive to remit cases to taxation in circumstances where court fees of 6% must be paid. This represents a very significant additional burden on a party who wishes to have an independent review carried out of costs. Furthermore, there are cases where perhaps only one

[122] A similar right exists to appeal to the Circuit Court from decisions of the County Registrar.

[123] Unreported, Supreme Court, 14 May, 2004. See also Bloomer v. the Law Society [2002] 1 IR 189.

[124] Examples of cases where the courts have significantly reduced the fees proposed by counsel include Smyth v. Tunney [1993] 1 IR 451; Superquinn Limited v. Bray UDC *(No. 2)* [2001] 1 IR 459 and (in the case of a solicitor and client taxation) Commissioners of Irish Lights v. Maxwell Weldon & Darley [1997] 3 IR 474.

item is in dispute and no simple procedure exists to enable that item to be dealt with speedily. Consideration might be given to adopting a simple exclusively written procedure for such items. An oral hearing is hardly required in every case. In addition, several features of the present system are quite antiquated. Some of the provisions of order 99 are outdated. There is also a need to review the provisions of Order 99 to ensure that they accord with the provisions of section 27 of the Court & Court Officers Act, 1995. No amendments have been made to the rules notwithstanding the enactment of the 1995 Act. Furthermore, the procedures employed in the Taxing Master's office and under Order 99 require careful review. For instance, the procedure under which the objections of a party dissatisfied with a decision of the Taxing Master are dealt with by the very same Taxing Master appears to be inherently wrong. Moreover, the process of taxation can be quite lengthy and time-consuming. Notwithstanding the rise in litigation, there have been no increases in the number of Taxing Masters in the High Court for a long number of years. Insofar as the Circuit Court is concerned, the County Registrar is expected to fulfil the role of Taxing Master notwithstanding the many other responsibilities of the County Registrar and notwithstanding the increase in case loads in the various Circuit Courts. The appointment of additional Taxing Masters in the High Court and Taxing Officers in the Circuit Court would speed up the process. It would also mean that those assessing the level of costs would have more time to spend on individual cases in carrying out the type of assessments contemplated by section 27(1) of the Courts & Court Officers Act, 1995.

9.23 There have been improvements in the system. As mentioned already, section 27 of the 1995 Act represents a significant advance on the previous position. In this context, one of the most common complaints in the past about the level of fees allowed by the Taxing Master to counsel arose from the practice that a Taxing Master could not reduce the amount of counsel's fee unless satisfied that no solicitor acting reasonably carefully and reasonably prudently based upon experience acquired in the course of a solicitor's practice would have agreed such a fee. While that practice did not prevent Taxing Masters and courts from reducing the level of brief fees proposed by counsel, [125] it effectively prevented the Taxing Master from embarking on a personal review of the work done by counsel with a view to measuring an appropriate fee for that work. [126] However, that restriction on the

[125] See, for example, The State (Richard F. Gallagher Shatter & Co.) v. De Valera [1987] IR 57.

[126] As exemplified by the approach adopted by Murphy J. in Smyth v. Tunney [1993] 1 IR 451.

powers of the Taxing Master was abolished and set aside by the provisions of section 27(1) of the Courts & Court Officers Act, 1995 which provides that on any taxation of costs, the Taxing Master has power "to examine the nature and extent of any work done or services rendered or provided by counsel…..". Thus, the Taxing Master is now freed from the restrictions previously imposed and can look in any individual case at the actual work undertaken by counsel and decide whether or not the fee proposed by counsel is appropriate having regard to the level of that work. Similarly, a paying party on any taxation of costs can also now make submissions to the Taxing Master on the same basis. Thus, if the paying party believes that the level of work undertaken by counsel (or the attention given by counsel to a particular item of work) does not justify the level of fee proposed in that particular case, the paying party is entitled to examine the work undertaken and to test whether or not the fee proposed by counsel is commensurate with the level of work actually done. If it is not, then it would clearly be unjust to force the paying party to pay such a fee to counsel on a party and party taxation and the fee will inevitably be reduced.

9.24 The Competition Authority makes the following three recommendations in respect of the taxation system:

(i) Taxing Masters should not consider the size of any award when assessing legal costs. Legal costs should be assessed on the basis of the work undertaken by individual lawyers.

(ii) Taxing Masters should cease the general practice of allowing counsels' fees at two-thirds that of senior counsel. Instead, fees should be set on the basis of the work undertaken by each of senior and junior counsel.

(iii) The Department of Justice, Equality and Law Reform should introduce legislation to permit persons other than solicitors being appointed to the position.[127]

9.25 The Bar Council agrees with the foregoing recommendations with the qualification that a blanket prohibition on the size of an award as a relevant factor may unintentionally eliminate what is unquestionably a legitimate consideration, namely

[127] Proposals 30 – 32 on page 111 of the Preliminary Report of the Competition Authority.

the value of the work done to the client. In addition, the Bar Council makes the recommendations set out hereunder:

(i) The Legal Costs Group established by the Minister for Justice, Equality and Law Reform should undertake a careful review the current system.

(ii) Obsolete or out-of-date provisions contained in Order 99 of the Rules of the Superior Courts should be revoked.

(iii) The process of taxation should be expedited.

(iv) Additional Taxing Masters should be appointed to deal with the level of work and to allow proper assessments to be carried out in accordance with the requirements of section 27 of the 1995 Act.

(v) It is important that the taxation process should look at both the value or worth of the work done and the necessity to carry out that work. Unnecessary costs should not be for the account of the paying party.

(vi) In view of the significant burden already imposed upon County Registrars around the country, it would make sense (and would lead to greater consistency in decision-making) if all taxations of costs were centralised in one agency in the State. However, provision would obviously have to be made to allow Taxing Officers to travel around the country to facilitate country practitioners who would not have the opportunity to travel to Dublin.

(vii) In particular, the objections process needs to be examined. It is hardly right that the objections should be dealt with by the same Taxing Master who heard the original taxation. If there were sufficient numbers of Taxing Officers, it would be possible to have the objections dealt with by a different person (or perhaps by a panel of different officers) to the officer who dealt with the initial taxation.

(viii) It would make sense if appeals to the court were dealt with by judges specifically assigned to reviews of taxation so that such judges would develop expertise in the area. This would shorten the length of hearings under section 27(3) of the 1995 Act and would, in itself, lead to a saving in costs.

(ix) A simple taxation process should be introduced to deal with cases where only a single item is in dispute or only a very small number

of items are in dispute. A simple written process might well be appropriate in such cases.

9.26 The Bar Council believes that an independent review of the work done is the only way in which a just and fair computation can be made of the amount which the paying party should be obliged to pay to the successful party in litigation. Such a process of independent review should strike a balance between the interests of the paying party on the one hand and the successful party on the other. It should be capable of ensuring that the paying party is not required to pay unjustly high costs to the successful party, while at the same time it should also be capable of ensuring that the successful party should be entitled to recover such costs as were necessary to enable that party to attain justice in the proceedings in which he or she has been found to be in the right. The Bar Council believes that a system of independent review is the only system capable of balancing the competing interests of the parties and which can properly test the value and the necessity of the work actually done in any case.

9.27 The Bar Council believes that, ideally, there should be a single costs assessment body appointed to deal with all disputes in relation to costs which arise in the context of civil litigation governing the Supreme Court, High Court, Circuit Court and District Court. Such a system would enable a coherent and consistent approach to be taken to costs on a countrywide basis. Such a system could also include provision for ongoing review. The Bar Council believes that such a system would require periodic review. Any body established for this purpose should have the power to revise its rules to deal with new situations which may arise (and new forms of litigation which may arise). Whether that body should be formed by expanding and reforming the present Taxing Master's office, or whether it should be a newly appointed body, is a matter which obviously requires careful consideration by the Group. The Bar Council believes that the present taxing system is capable of being re-organised and reformed, but it has no difficulty in principle with an entirely new body being set up for the purposes of dealing with any disputes that may arise in relation to the necessity or level of costs to be paid in civil litigation.

10. MISCELLANEOUS RESTRICTIONS

(i) Introduction

10.1 This chapter addresses the miscellaneous restrictions addressed in chapter 13 of the Report of the Competition Authority.

(ii) Summary

10.2 The Bar Council proposes to recommend an amendment of its rules to include:

(a) removing the rule which prevents barristers who have previously been employed from accepting work from their former employer for a specified period or, alternatively, replacing the rule with a new rule which requires barristers to make a declaration of any interests that might give rise to a conflict or to undue influence, and

(b) removing rule 7.5 of the Code of Conduct which precludes a barrister from taking over a case from another barrister until that other barrister has been paid.

(iii) Previously employed barristers

10.3 Rule 2.15 of the Bar Council's Code of Conduct prevents barristers who have previously been employed from accepting work from their former employer for a specified period. An undertaking prohibiting a barrister from accepting work from previous employers is given to the Bar Council, at the request of the Bar Council when an individual applies to become a member of the Law Library.

10.4 In general, the undertaking is only required where an individual's employment either involves the giving of legal advice and/or participation in the process of litigation (for example an individual employed in a legal capacity or an individual involved in claims handling in the insurance industry).

10.5 The historical justification for the rule arises, first, from a concern that individuals

who worked for an institution in a legal or quasi-legal capacity would have an unfair advantage over other entrants to the Law Library and would effectively attempt to monopolise the work of that employer to the detriment of other practitioners who hitherto had obtained work from that source. In order to ensure a level playing field, a two-year undertaking was generally required. A second concern arises from the potential conflicts of interest that may occur if a barrister is requested to advise on a piece of work or project on which they had previously advised before commencing practise at the Bar. For example, were a barrister asked to advise on the validity of a will which they themselves drafted, a conflict of interest and the attendant risks, could arise.

10.6 Although the Bar Council does not believe this rule has any material effect on competition in the relevant market, it is prepared to remove the rule, or to amend it (as suggested by Proposal 38 of the Report) by replacing it with a rule requiring barristers to make a declaration of any interests that might give rise to a conflict or to undue influence.

(iv) Barristers taking over a case

10.7 Rule 7.5 of the Bar Code of Conduct precludes a barrister from taking over a case from another barrister until that other barrister has been paid. The basis of this rule is to ensure that there is no abuse of the system whereby barristers have no legal entitlement to sue for outstanding fees. It is not dissimilar to the lien that solicitors retain over the files of their clients where they have not been paid, although it operates on a less formal basis.

10.8 The Bar Council is opposed to allowing barristers sue for their fees. The Bar Council does not seek any change to the existing prohibition on barristers suing for unpaid fees as a quid pro quo for amending or abandoning rule 7.5. The Bar Council is opposed to legislative measures to establish the existence of contractual arrangements between barristers and solicitors, and in the case of direct access, between barristers and their clients. In particular in respect of any widened direct access, it is undesirable for barristers to be permitted to use the judicial system, to which they are a servant and expert, in order to enforce a debt arising out of their services. Notwithstanding its rationale the Bar Council has decided to remove Rule 7.5 from its Code of Conduct as it recognises that there will be cases where a client

needs to urgently engage another barrister and is not in a position at that stage to discharge the former barrister’s fees.

APPENDIX I

1.1 This Appendix reviews the analysis and methodology underpinning the proposals set out in the Report of the Competition Authority. In the view of the Bar Council, the methodology and analysis of the Competition Authority are seriously deficient. The methodology governing the type of economic analysis which must be carried out by a national competition authority to adequately support conclusions of anti-competitive behaviour or market structure were recently set out by the European Court of Justice ("*ECJ*") in Commission -v- Tetra Laval.[128] Both the Court of First Instance ("*CFI*") and the ECJ reversed a decision of the European Commission prohibiting a merger, largely on the grounds that the Commission had failed to engage in the type of rigorous, coherent and data-based economic analysis that is required before the Commission (and, by analogy, a national competition authority) can satisfy the burden that rests upon it if it proposes that there should be regulatory intervention in a market. This decision follows similar criticisms made by the CFI in two previous cases in 2002.[129] It is clear from the decision that, when predicting anti-competitive effects or consequences, the relevant authority must base its view on sound economic analysis that explains how a particular set of anti-competitive consequences is likely to occur and that the likelihood that they would occur is not merely theoretical but substantial. In a large number of respects and across wide areas of its report, the Competition Authority has failed this test. Indeed the Competition Authority has acknowledged (as will be explained further below) that is has not undertaken the appropriate cost analysis from any of its proposals.

1.2 In stressing the necessity for a rigorous and detailed examination of alleged anti-competitive effects, the ECJ pointed out that "*such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely.*"[130] It is wholly impermissible to draw conclusions as to anti-competitive consequences where, in the words of the ECJ, "*the chains of cause and effect are dimly discernible, uncertain and difficult to establish.*"[131]

[128] Case C-12/03, European Court of Justice, 15 February 2005.

[129] Airtours -v- Commission (2002) ECR II-2585; Schneider -v- Commission (2002) ECR II-4071.

[130] Paragraph 43.

[131] Paragraph 44.

1.3 The analysis of the Competition Authority in its report rarely connects cause with effect on the basis of evidence, or evidence-based reasoning. Assumptions are made which subsequently are adopted in the report as facts. It relies on conclusions which are drawn without reasoning or empirical data. and asserts conclusions which float anchorless, divorced from any chain of reasoning embedded in any empirical data.

1.4 The decision of the ECJ in Tetra Laval is all the more striking because it is not concerned with the merits of the decision of the Commission as such but, rather, with a review of that decision for manifest error. Notwithstanding that element of judicial deference (which does not arise in the present context where the merits of the Competition Authority's report are themselves in issue), the ECJ stated that this *"does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature"*:

> "*Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it."*[132]

1.5 The CFI stated that *"the proof of anti-competitive … effects … calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects."*[133] In a similar vein, the ECJ stated as follows:

> "*the quality of the evidence produced by the Commission in order to establish [the alleged anti-competitive effect] is particularly important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible."*[134]

1.6 The Competition Authority's analysis, relies on assertion in place of evidence and cogent reasoning. Such an approach leads to conclusions which, both in respect of the effect of existing structures and the likely effect of alternative structures, in

[132] European Court of Justice, paragraph 39.

[133] Paragraph 155.

[134] Paragraph 44.

many cases do not have the necessary connection between evidence, analysis and conclusion to the extent required by the ECJ.

1.7 A number of points will suffice to illustrate the extent to which the Competition Authority's report fails to comply with these standards.

(i) The Competition Authority makes proposals on the basis of assumed restrictions of competition which are unsupported by evidence or analysis

1.8 One of the fundamental deficiencies in the analysis and methodology of the Competition Authority is its failure to establish by any evidence as distinct from assertion that the acts, rules and practices which are the subject of its proposals are anti-competitive, whether in their object or their effect. Throughout the Report, the Competition Authority asserts that particular rules of the Bar Council restrict competition without providing any analysis – or any plausible analysis – to support such assertions. Nor, in the case of many of the rules which it addresses, does the Competition Authority indicate the evidential basis upon which it asserts the rules are anti-competitive. Indeed, it is clear that many of the asserted restrictions on competition are unsupported by any evidential basis whatever and that the Competition Authority has failed to undertake even the most rudimentary assessment of the impact on competition of the rules which it contends should be reformed.

1.9 In this context, it is also appropriate to note that, when requested by the Bar Council to furnish the information in relation to its proposals concerning what it refers to in chapter 5 as "*a system of chambers such as exists in the Bar of England and Wales*", the Competition Authority responded as follows:

> *"… the Preliminary Report is meant to provide the Competition Authority's initial views on the legal profession, and to elicit responses from interested parties. The Competition Authority has not sought to undertake a detailed cost analysis of different models of organisational form. It has analysed the restrictions on competition within the legal professions and is interested in any further justification you have for such restrictions. If you disagree with any of the analysis or proposals, I would encourage you to specify why in any*

submission you make."[135]

1.10 In a replying letter dated 6 April 2005, the Bar Council enquired whether the Competition Authority had any cost analyses or raw data in relation to different models of organisational form, and requested any such analysis or data. Despite reminder letters dated the 9th May 2005 and 15th of June 2005 the Bar Council did not receive a response to its requests and, therefore, assumes that the Competition Authority does not have such information.

1.11 Thus, much of the Report is posited on assumed restrictions on competition. The significance of this approach is underlined by the Introduction to the Report wherein the Competition Authority sets out its "*Method of Analysis*" and states that its "*approach to completing the professions study involves producing an initial report for each profession setting out its analysis of existing restrictions and its proposals for reform*".[136] Assumed restrictions on competition are thus presented as actual restrictions on competition and, on the basis thereof, the Competition Authority advances proposals for reform. It is unsurprising that this approach has resulted in a number of proposed reforms that are ill-conceived, both in terms of the requirements of competition law and in terms of the inextricably linked requirements of the public interest and the administration of justice.

1.12 A competition law evaluation of Ireland's legal system and the regulation of Barristers requires, inter alia, a clear definition of the relevant market or markets, the identification of practices which are demonstrated by reference to empirical data to be restrictive of competition in the defined markets, and a careful consideration of what legitimate interests are served by such practices. These legitimate interests are not confined merely to the extent to which such practices contribute to improving the delivery of the services in question or to promoting technical or economic progress. They include and (in light of the ECJ decision in Wouters discussed later in this Appendix) must include the extent to which such practices provide the ultimate consumers of legal services with the necessary guarantees in relation to integrity, independence and experience on the part of advocates which is universally acknowledged to be a corner stone of any civilised system of administering justice. Although lip service is occasionally paid in the Report to the importance of the

[135] Letter dated 6 April 2005 from Dermot Nolan to Jerry Carroll. (Emphasis added).

[136] Emphasis added.

administration of justice, no attempt is made to engage in an analysis of the extent to which the practices in question (e.g. the sole trader rule) effectively serve the interests of maintaining an independent Bar and the administration of justice. On the contrary, the Competition Authority has purported to apply a conventional analysis utilising the jargon of anti-trust analysis such as barriers to entry, efficiencies etc. without either having the empirical data and analyses which could justify such a conventional analysis even on its own terms and, even more significantly, without appreciating that the contribution of the practices in question to the core ethical values of the legal profession which underpin the administration of justice is not susceptible to measurement and quantitative analysis. The Competition Authority's solution to this problem appears to be to simply by-pass it. Instead, it engages in a mechanistic attempt to apply competition law to the barristers' profession without properly distinguishing and appreciating the significant respect in which that profession contributes to consumer welfare in a manner which cannot be captured by conventional economic models of pricing and efficiency.

1.13 The Competition Authority recommends the establishment of a Legal Services Commission.[137] This recommendation is ultimately founded on a number of assumptions in respect of the capacity of the Bar Council, the Law Society and the King's Inns to regulate in a manner which is pro-competitive and promotes the interests of consumers and the general public. These assumptions are encapsulated in paragraph 3.1 of the Report wherein the Competition Authority asserts that "*[l]eaving the existing regulatory framework unreformed would allow the future development of other rules and practices that would limit competition, hinder the efficient and innovative supply of services and harm buyers*". In other words the Competition Authority simply assumes that the Bar Council (and King's Inns) will act in an anti-competitive fashion and then uses this assumption as to future behaviour to justify a change in the regulatory structure. In an attempt to substantiate this theory in relation to the Bar Council, the Competition Authority states, *inter alia*, that the Bar Council has "*an unfettered power to set rules for itself*" and that "*[t]his discretion creates an opportunity for regulation to be enforced in an anti-competitive manner….*". In its conclusion, the Competition Authority asserts that "*[a]s long as self-regulatory bodies retain such extensive discretion over the creation and enforcement of rules and regulations governing the*

[137] See generally chapter 3 and, in particular, paragraphs 3.1, 3.2 and 3.52.

supply of the service, there will continue to be a conflict between the interests of buyers and sellers of legal services, in which the suppliers will be inclined to restrict competition as they have done in the past"[138] and that "*[f]or this reason, the Competition Authority considers that external independent regulation of the legal profession is indispensible for ensuring competition in the provision of legal services*".[139]

1.14 These assertions are devoid of factual substance and are precisely the sort of non-evidenced based "*analysis*" that the ECJ roundly condemned in Tetra Laval. The Bar Council does not have an unfettered power to set rules for itself. Nor is it at liberty to create or enforce regulations in an anti-competitive manner or otherwise to act anti-competitively. It is manifest that the powers of the Bar Council must be exercised subject to and in accordance with the laws of the State, including the competition laws. The Competition Authority makes no reference to this fact in the assessment underlying its assertion that a Legal Services Commission is "*indispensable for ensuring competition in the provision of legal services*", an omission all the more remarkable so since the Competition Authority rejects the point that abolition of the sole trader rule would lead to harmful concentration in the market on the basis that "*it is unlikely to happen in practice [because] [c]ompetition law, including merger regulation, counter-acts the harmful exercise of market powers by undertakings, including barristers and solicitors*."[140] Instead, the Competition Authority portrays the Bar Council as an institution which is immune from the requirements of competition law and/or incapable of acting in accordance with those requirements or of promoting the interests of consumers. The Bar Council rejects such assertions. They are entirely without merit and unsupported by any evidential basis whatever. The failure of the Competition Authority in this regard is all the more spectacular having regard to the express requirement set out by the European Court of Justice in Tetra Laval that in assessing incentives to engage in anti-competitive practices

> "*the Commission must also consider the extent to which those incentives would be reduced, or even eliminated, owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent*

[138] Paragraph 3.52.

[139] *Ibid*. (Emphasis added).

[140] Paragraph 5.22. (Emphasis added).

authorities, both at Community and national level, and the financial penalties which could ensue.

Since the Commission did not carry out such an assessment in the contested decision …it's findings in this respect cannot be upheld."[141]

1.15 Thus, on the basis of assumptions which are intrinsically flawed and unsupported by any factual basis or any plausible analysis, the Competition Authority proposes a regulatory super-structure to govern the legal profession as a whole. The Competition Authority does not present any evidence that the interests of consumers and competition would be promoted by the establishment of such a body and, even more significantly, it ignores the available evidence which indicates that, ultimately, it would almost certainly have precisely the opposite effect. Furthermore, in proposing such a regulatory superstructure the Competition Authority blurs the line between the questions of market economics in the supply of legal services (which is within the Competition Authority's remit) and a wide variety of public interest issues related to the administration of justice which may fall outside of the Competition Authority's core area of competence but which are fundamental to the evaluation of proposals to alter the way in which legal services are supplied.

1.16 Another of these failings arises in the context of the Competition Authority proposals regarding the rule of the Code of Conduct which prevents barristers from forming partnerships with other barristers. The Competition Authority asserts that this rule is anti-competitive on the basis that, first, it "*prevents barristers from organizing the supply of their services in the most efficient way possible*" and, secondly, "*it may act as a barrier to sustainable entry*". No evidential basis is provided to support these assertions, since they are in fact unsupported by the available evidence. Yet, on the basis of these asserted "*effects*", the Competition Authority concludes that the rule is anti-competitive and ultimately proposes that the rule should be abolished. On any proper analysis of the rule, however, it is clear that the rule actually promotes competition and that it is the proposed abolition of the rule which would have the adverse impact on competition which the Competition Authority purports to avert. The manner in which the rule promotes competition and the extent to which it underpins the administration of justice in this jurisdiction is apparent from a consideration of the following:

[141] ECJ, paragraphs 159 and 160.

(i) Far from inhibiting the realisation of efficiencies, the rule manifestly facilitates the creation of significant economies of scale. The costs of the "infrastructure" and facilities necessary for the provision of legal services are shared collectively through the Law Library system. Sole traders operating from the Law Library realize significant costs savings which enure to the benefit of end users. The Competition Authority has entirely overlooked the low level of overheads which the rule facilitates. The abolition of the rule would almost certainly increase the costs of delivering legal services, to the detriment of consumers

(ii) Far from creating or increasing barriers to entry, the uniform sole trading status of barristers clearly reduces such barriers. On discharging the relatively small cost of a Law Library subscription (which is subsidised by more senior members of the Bar) and a professional indemnity insurance, an entrant to the Law Library can commence providing legal services. It is incontrovertible that the cost of providing comparable resources for a group of barristers seeking to rival the Law Library system would constitute a very significant barrier to entry and one which would effectively restrict the option of forming partnerships to barristers who are established and/or well funded.

(iii) Moreover, the rule provides a level starting point for entrants to the profession which fosters competition as the new barristers differentiate themselves by the quality of services they provide rather than by any difference in resources and research facilities available to them. The rule enables all barristers to enjoy the benefits of a partnership / chambers system without their disadvantages, not least the very significant barrier to entry which results from the very limited opportunities to obtain a tenancy and gain admittance to a chambers, a fact which is clearly borne out by the English experience in this regard.

(iv) In this context, it is also appropriate to highlight that the partnership and chambers models lend themselves to concentration in the market with almost inevitable anti-competitive effects. In the small market that exists in Ireland,

barristers having particular specialities will almost certainly congregate in a small number of partnerships or chambers. This will enable them to corner the market in a way that is less likely in the sole trader model.

(v) The Competition Authority also fails to offer any analysis of what would actually be involved in barristers combining to form partnerships, how this would be more efficient than the sole trader method of organisation, and what precisely would be permitted in such a partnership that is not permitted in the way barristers in Ireland currently practice. A partnership involves, in essence, three factors: (a) the sharing of overheads (such as premises, secretarial services, library and research facilities etc.); (b) the sharing of the profits of the partnership in accordance with an agreed formula; and (c) the retention for the benefit of the partnership of work which comes to a partner but which he or she is unable to do so that the work is given instead to another member of the partnership.

1.17 As regards the first of these factors, it is the existing reality that barristers can and do share overheads or the cost of secretarial services without forming partnerships and so the abolition of the sole trader rule is clearly not necessary to afford barristers the option of this type of cost sharing if they consider it more efficient to do so.

1.18 It is difficult to understand what the second feature of partnerships (sharing of profits) has to do with improving the efficiency of the supply of barristers' services. If, in the "*partnership*", each barrister retains the benefit of the fee income derived from the cases he or she does himself, then this is in fact the sole trader system in reality. If the barristers pool their income and divide the pool in some previously agreed proportions, it is again difficult to see how this is a more efficient way to supply barristers' services (particularly if one takes the economist's concept of efficiency as maximising output from a given set of inputs). If anything, such a pooling of income is likely to lead to less efficiency because it presents an opportunity for the less efficient and less hard-working partner to effectively exploit the earning capacity of his or her colleagues.

1.19 The third factor (work kept within the partnership) merely acts as an inhibition on work being transferred to the next most suitable or efficient barrister unless that barrister happens to be already a membership of the partnership in question. If the

solicitor is in fact free to withdraw the work from the partner who cannot do it and instruct another barrister outside the partnership, then the difference to the sole trader system is hard to discern. If on the other hand, the solicitor is inhibited by rule, custom or practice from transferring the work elsewhere, that restriction on choice can clearly be inefficient.

1.20 The Competition Authority, however, has made no attempt to analyse these issues or discuss how such alternative structures might work in practice, let alone cite any evidence as to how such structures work in alternative jurisdictions. In circumstances where the ECJ has stressed the necessity for the evidence relied on to be "*factually accurate, reliable and consistent*"[142] it is all the more surprising that the Competition Authority should reach such an important conclusion without any evidence at all.

1.21 The paucity of evidence and analysis underpinning the proposals of the Competition Authority in respect of the sole trader rule can also be illustrated by the manner in which the Competition Authority addresses the cab-rank rule which it facilitates. Of particular note in this context is the manner in which the Competition Authority cross-references to analysis in other sections of the Report which simply does not exist. In paragraph 2.34, the Competition Authority states the following in relation to the cab-rank rule:

> "*Practising barristers are subject to the 'cab-rank' rule. If requested to work on a case they must take it if they are available, subject to their usual brief fees. Submissions to the Competition Authority suggested that this rule was not always adhered to. The 'cab-rank' rule is discussed further in chapter 5.*"

1.22 The only reference to the cab-rank rule in chapter 5 is in paragraph 5.23 where the Competition Authority asserts as a fact that *"[t]he cab-rank rule does not operate well in practice as was noted in Chapter 2."* But no such thing was noted in chapter 2. Instead, there was a reference to submissions to the Competition Authority which "*suggested*" that the rule was not "*always*" adhered to, a comment in itself unsupported by any empirical data or analysis. Moreover, the Competition Authority states that the cab-rank rule is "*discussed further*" in chapter 5, which

[142] *Tetra Laval* paragraph 39.

discussion turns out to be merely one sentence in relation to the cab-rank rule which in turn is purportedly rooted in what the Competition Authority states in chapter 2. This is not a matter of mere linguistics or fastidiousness. Throughout its Report, the Competition Authority makes numerous proposals which are based on assertions which are unsupported by empirical data or analysis and which accordingly fail the most basic tests set out by the ECJ as to how competition authorities are to conduct their analyses of allegedly anti-competitive effects. The Competition Authority persistently glosses over the absence of such data and analysis – in this instance, by a process of internal cross-referencing which is both circular and misleading. In this context, it merits note that the fundamental and far-reaching proposal that the sole-trader rule should be abolished and that barristers should be permitted to form partnerships with other barristers is rooted in part in the asserted fact that *"[t]he cab-rank rule does not operate well in practice…."*.[143]

(ii) The Competition Authority fails to understand the profession of the Bar and, in particular, the constitutional and public interest dimension to the services provided by its members

1.23 One of the striking features of the sections of the Report which concerns the Bar Council is the extent to which the Competition Authority has failed to understand fundamental tenets of the profession of a barrister. The Report contains generalisations which are inaccurate and/or lack any evidential basis. In its purported description of the role of a barrister, for instance, the Competition Authority states as follows:

> *"Barristers are usually engaged in contentious matters. In these matters, barristers provide general advice and draft the necessary paperwork, called pleadings. Advocacy, involving representing a client in court, is required less frequently as most cases settle before a court hearing. Commercial clients may engage barristers to provide opinions on specialized legal matters."*[144]

1.24 It appears from the foregoing that the Competition Authority considers that advocacy constitutes only a small proportion of a barristers' work, a view which is plainly at variance with the fact that the entire profession of the Bar revolves around

[143] See paragraphs 5.23 *et seq*.

[144] Paragraph 2.8.

advocacy in the courts. Indeed, as noted in the report which was commissioned by the Competition Authority: *"[t]he key skill of the barrister is advocacy."*[145] It is also implicit in the passage quoted above that advocacy skills are separate from or irrelevant to the settlement of cases which is clearly not the case as the advocacy skills involved in preparing a case for hearing are a crucial determinant of the outcome of the negotiations which take place in most cases both up to and sometimes after the commencement of the court hearing.

1.25 At a more fundamental level, the Competition Authority fails to appreciate the constitutional and public interest dimension to the services provided by members of the Bar and, in particular, the extent to which these considerations must be factored into a competition law analysis of this market. These deficiencies can be illustrated by reference to chapter 5 of the Report wherein the Competition Authority addresses what it asserts are "*four main restrictions*". In paragraph 5.2 of the Report, the Competition Authority summarises its proposals in respect of two of those restrictions – the sole trader rule and the rule prohibiting solicitors and barristers forming partnerships together – in the following terms:

> *"The Competition Authority proposes allowing barristers to form partnerships. This will facilitate competition by allowing barristers to choose the corporate form that they find is the most efficient to meet the demands of buyers. It may also make sustainable entry easier. Concerns about compromising the independence of barristers or creating market power are either not justified or can be achieved with lesser restrictions. It is also proposed to allow solicitors and barristers to form partnerships together, which would allow related services to be combined and economies of scope to be realized. There are concerns about limiting smaller clients ability to access the top barristers, but the concerns do not seem sufficiently well-founded to justify the restriction."*[146]

1.26 It is clear from the foregoing that the over-riding objective of the proposed reforms is to realize increased efficiencies in the market. Quite apart from the evidence which indicates that such reforms would be likely to achieve precisely the opposite result, the analysis of the Competition Authority merits note in the present context

[145] Paragraph 5.10 of the Indecon Report.

[146] Paragraph 5.2.

because of the peremptory manner in which it dismisses the very significant constitutional and public interest considerations which underlie the rules it proposes should be abolished. It is incontrovertible that the public interest is served by the existence of an independent referral Bar[147] and, indeed, this has been acknowledged by the Competition Authority. The independence of each individual member of the Bar is not a mere administrative arrangement. It is a cornerstone of the profession and a fundamental component of the administration of justice system in the constitutional democracy of this State. The ability of a barrister to take on the cause of what may be an unpopular client and to present their case fearlessly and in a manner which may displease powerful interests and other potential clients or result in personal or professional unpopularity for the barrister is necessarily lessened by the extent to which the barrister is accountable to others. Under the present structure, barristers are accountable only to the Court and to their client. If a barrister's accountability is extended to partners, of whatever type, the scope for inhibiting the barrister in the discharge of their professional obligations is increased and the administration of justice thereby suffers. Thus, in any regulatory assessment of the Bar, the independence of its members must weigh very heavily in the balance. Indeed, it is a measure of the deficiencies in the analysis of the Competition Authority that it is actually advocating reforms which would fundamentally undermine the existence of a profession of independent competing barristers and would inevitably result in a concentrated market – particularly as regards the leading barristers in various areas of the law – which is harmful to competition.

1.27 The assertion of the Competition Authority that it simply wishes to give barristers the option of alternative business structures and that the sole trader model will survive if it is an efficient model[148] is a wholly inadequate defence of its proposals, not least because it entirely fails to have regard to the very significant public interest considerations which are outlined above and addressed in more detail in chapter 2 of

[147] In this regard, see generally chapter 2 of this submission.

[148] See paragraph 1.11 of the Report:

> *"It is important to note that the removal of the specified restrictions will not force any change upon either barristers or solicitors; it will simply allow them greater flexibility in the way in which they provide their services. If the disproportionate restrictions identified above are removed, any features of the current system that are efficient will be retained. For instance, allowing barristers to form partnerships does not mean they will be obliged to do so; if the sole practitioner model is an efficient one, barristers will be free to retain it."*

this submission. In any event the Competition Authority's acknowledgement[149] of the possibility that the sole practitioner model is more efficient emphasises that they cannot conclude that there is anything anti-competitive about the present system. In that context, it is of particular concern that the Competition Authority would suggest changes to a system which might be more efficient in circumstances where those changes are very likely to undermine the very efficiency of that system.

1.28 In this context, it is also appropriate to highlight the capacity of clients with limited means to access leading barristers, a core feature of the present independent referral Bar. The Competition Authority acknowledges that *"[t]here are concerns about limiting smaller clients ability to access the top barristers"* but dismisses these concerns on the basis that they *"do not seem sufficiently well-founded to justify the restriction"*. Irreparable damage would almost certainly be caused to the administration of justice system and the public interest if barristers were free to form partnerships and to enter into the other business arrangements which the Competition Authority proposes. It is manifest that the freedom to enter into such arrangements would impede – and, in some cases, entirely prevent – the access which ordinary members of the public currently enjoy to leading barristers. This inexorable consequence of the proposals of the Competition Authority exemplifies the seriously deficient nature of the analysis of the Competition Authority and the manner in which its proposals would fail to achieve the requirements of the public interest, including the promotion of competition. The assertion that the concerns expressed by the Bar Council *"do not seem sufficiently well-founded to justify the restriction"* is a wholly inadequate defence of an experiment which would fundamentally recalibrate the legal profession in this jurisdiction to the manifest detriment of the administration of justice, the public interest and the promotion of competition. The Competition Authority are not entitled to assert that the concerns of the Bar Council do not appear to be sufficiently well-founded: a responsible Competition Authority must establish that the rules under consideration are anti-competitive and its proposals for reform in respect of those rules which are anti-competitive must be such as to promote competition, including the requirements of the public interest, and not impede it; this, the Competition Authority has singularly failed to do.

[149] Paragraph 5.29

1.29 Furthermore, the Competition Authority's emphasis on allowing a choice between alternative methods of organisation on the simplistic basis that choice is a good thing and that the partnership model may be more efficient is a curious methodology of reform. It has no data or analysis which would permit it to say so and accordingly it confines itself to suggesting that barristers should be allowed to choose the form of business organisation they find *"most efficient."*[150] This priority given to the profit maximising self-interest of barristers makes no attempt to analyse why barristers have voluntarily denied themselves the choice of alternative organisational methods and ignores the fact that the sole trader rule is an exceptionally effective underpinning of the independence of barristers and the administration of justice. To blithely suggest the dismantling of this structure because an alternative structure might prove more efficient for some barristers but without even being sure itself that this is so, is a remarkable suggestion. In the present case, the Competition Authority has inverted this analysis. It raises the possibility that alternative structures may involve greater efficiency for some and then concludes that the absence of such alternative structures is anti-competitive. This is a hypothetical premise elevated to a key conclusion.

1.30 The negative defence of its proposals put forward on this and other occasions by the Competition Authority – even if there is no evidence that the proposed change will have positive effect it will not do any harm and the change should therefore be introduced – singley fails to comply with the methodological requirements as set out by the ECJ in Tetra Laval in at least two respects. First, to justify a proposed change on the grounds that it is likely to be harmless without analysing the potential harm, let alone gathering and assessing evidence in relation to the supposed harm flies in the face of the mandatory requirement laid down by the ECJ that the evidence must not be merely factually accurate, reliable and consistent, but that the evidence in question (even assuming it exists) contains all the necessary information to assess a complex situation and must be capable of substantiating the asserted conclusions. It must be recalled that this is simply the standard which a court reviewing the decision of the Commission or a competition authority must invoke under the manifest error test so that the substantive requirement on a competition authority for rigorous evidence-based analysis is all the greater. Secondly, it is wholly insufficient to assert the absence of harm of a proposed change as a sufficient justification in itself. The positive good alleged to flow from the proposed

[150] Paragraph 5.2.

change must be analysed to the same standard. The Competition Authority's failure to adduce and cite evidence of either the harm or the good and the consequential inevitable failure to engage in any form of acceptable economic analysis of the issue is all the more remarkable when the conclusion asserted is one which has profound implications for the administration of justice and the independence of advocates. The fact that Ireland has a successful tradition in both of these respects should neither lead to them being taken for granted nor to ignoring the fragile nature of these qualities in a judicial system which does not keep their preservation at the forefront.

(iii) The Competition Authority overlooks the judgment of the European Court of Justice in Wouters

1.31 The decision of the European Court of Justice Wouters[151] is the single most important decision on the relationship between competition law and the legal profession. Remarkably, the only references to this case in the 143 page Report of the Competition Authority are in paragraphs 5.69 – 5.73, wherein certain aspects of the decision are fleetingly considered. The decision of the Court of Justice in Wouters is fundamental to any competition law analysis of the Bar in this jurisdiction and, accordingly, it is addressed in some detail below.

1.32 In Wouters, the plaintiff challenged a rule adopted by the Dutch Bar Council which prohibited lawyers in the Netherlands from entering into partnership with non-lawyers. He wished to practice as a lawyer in a firm of accountants. A number of questions were referred to the ECJ as to the compatibility of such a rule with ECJ competition law. Having found that the prohibition of multi-disciplinary partnerships was *"liable to limit production and technical development within the meaning of Article 81(1)(b) of the Treaty*[152]*"*, it also considered that the rule had an effect on trade between Member States. However, at paragraph 97 of its judgment the Court stated as follows:

> *"However, not every agreement between undertakings or any decision of an association of undertakings which restricts the*

[151] Wouters -v- Algemene Raad Van De Nederlandescher Ord Van Advocaten Case C-309/99 [2002] ECR I-1577.

[152] Paragraph 90

freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience …. It is then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives."

1.33 It is important to note is that the ECJ recognised in the context of Article 81(1) – and not simply by reference to the exempting provisions of Article 81(3) – the importance of ethical values and their role in any assessment of the competition issues arising in relation to the rules. The Court went on[153] to conclude that the prohibition could reasonably be regarded to be necessary in order to ensure the proper practice of the legal profession as it was organised in the Member States concerned. The Court continued as follows:[154]

"Furthermore the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former state are incompatible with Community law. … Even if multi-disciplinary partnerships of lawyers and accountants are allowed in some Member States, the Bar of the Netherlands is entitled to consider the objectives pursued by the 1993 Regulation cannot, having regard in particular to the legal regimes by which the members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restrictive means ……..

[153] Paragraph 107

[154] Paragraph 108

In light of those considerations it does not appear that the effects restrictive of competition such as those resulting from members of the Bar practising in the Netherlands from a regulation such as the 1993 Regulations go beyond what is necessary in order to ensure the proper practice of the legal profession. ……"

1.34 Wouters is clearly a very important case. Previous cases had accepted the idea of ancillary restrictions on conduct where they were ancillary to some other legitimate purpose. What was different in Wouters however was that the restriction was not necessary for the execution of a commercial transaction or the achievement of a commercial outcome on the market. It was ancillary to a regulatory function to ensure that the ultimate consumer's legal services and the sound administration of justice were provided with the necessary guarantees in relation to integrity and experience. That appears to be a different application of the concept of ancilliarity from that in the earlier case law.

1.35 By determining that it is legitimate to take into account the need to pursue public interest objectives in deciding whether agreements infringe Article 81(1) EC, the ECJ has explicitly acknowledged the significance of ethical values as defining the nature of legal services. In particular, the judgment recognises that, while legal services are tradable and therefore subject to competition law, they are not directly comparable with services normally provided by undertakings operating in the market which are usually defined solely in economic terms. The services provided by an accountant, an engineer, an architect, a stockbroker and service providers generally do not give rise to the same public interest issues analogous to those that arose in Wouters. The traditional analysis of competition law in terms of analysing whether an agreement is in breach of Article 81(1) and then testing the justification in terms of output and efficiency under Article 81(3) is more suited to an analysis in respect of an economic product whose value whether to society, the seller or the purchaser is largely measured by the price. However, the product into which barristers' services are input is not such a product. Justice is not traded. It cannot be expressed in terms of output or price. This suggests that orthodox economic analysis if mechanically applied in a competition context is likely to detract from, rather than augment, consumer welfare.

1.36 None of this is analysed in the Competition Authority report. The only reference to

Wouters is in the context of the discussion on multi-disciplinary practices[155] (presumably because that was the specific factual context of the Wouters case) but the discussion in the report is confined to whether multi-disciplinary practices increase or decrease competition. The Competition Authority appears to have completely overlooked the much greater significance of the Wouters case for the entirety of its Report. This is a fundamental misapprehension which seriously undermines the credibility of a large number of the proposals put forward by the Competition Authority.

(iv) The Competition Authority fails to act in accordance with good regulatory practice

1.37 In advocating its far-reaching proposals for regulatory reform, the Competition Authority refers to the principles designed to improve regulatory policy which are set out in the Government White Paper entitled "*Regulating Better*".[156] It is remarkable, however, that the Competition Authority has itself failed to adhere to basic principles of good regulatory practice. In particular, the Competition Authority failed to conduct a Regulatory Impact Analysis / Assessment ("*RIA*") of its proposals in accordance with the Better Regulation programme of the Government and in accordance with European and International best practice. The development and use of RIA has been identified as an essential tool for good policy making and reform by the Government,[157] the European Community[158] and the OECD.[159] As indicated in the Government White paper,[160] RIA is a tool to assess the impact of regulatory recommendations:

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[155] See paragraphs 5.69 – 5.73 of the Report.

[156] *Regulating Better: A Government White Paper setting out six principles of Better Regulation* (January 2004).

[157] See *Towards Better Regulation - A Public Consultation Document leading to a National Policy Statement* (Government Publications).

[158] The introduction of RIA at national and EU levels was also recommended by the Report of the EU High Level Consultative Group on Regulatory Quality (Mandelkern Group). On 5 June 2002, the European Commission published a package of measures on Better Regulation.

[159] OECD Report *Regulatory Reform in Ireland* (2001).

[160] *Regulating Better: A Government White Paper setting out six principles of Better Regulation.*

"Regulatory Impact Analysis (RIA) is a policy tool designed to identify and quantify, where possible, the impact of new regulations.[161] *It can also be used in the review of existing regulations. In essence, RIA attempts to clarify the relevant factors for decision-making through the comprehensive and systematic compilation of information. It encourages policy-makers to make balanced decisions when considering legislative action that trade off possible solutions to a problem, against the wider economic and distributional goals."*

1.38 The White paper emphasises the importance of evidence-based policy making:

"[RIA]…promotes evidence-based policy-making, based on a detailed consideration of the impacts of decisions along with structured participation of stakeholders and citizens. Evidence-based policy is about making better use of research and analysis, in both policy making and practice."

1.39 The purpose of RIA is to ensure that the effects of regulatory recommendations are given due consideration. The White Paper reviews best-practice models of RIA and identifies, amongst others, the following key elements of best practice:

- Identification and quantification (where possible) of impacts. Any model of RIA must be designed to ensure that all relevant potential impacts are examined, without creating an overly burdensome assessment process.

- Structured consideration of alternatives to regulation and of different regulatory approaches. It is recognised that State regulation is not always the best option and alternatives to regulation, or different regulatory approaches, need to be examined. Efficient and effective policy action is only possible if all options are considered. This includes the possibility of the State taking no action where the problem can be solved by other means.

[161] It is clear that the use of RIA applies not only to legislative instruments but also decisions, development of policy recommendations and assessment of different options. The following passages from the White paper merit note in this regard:

"The introduction of Regulatory Impact Analysis is not just a matter of improving the quality of legislation. It must be seen in the wider context of enhancing the capacity of the public service to provide high quality timely analysis to inform policy-making. …

The enhanced capacity required to operate RIA will support all forms of impact analysis, proofing and evidence-based policy-making - whether or not legislation is involved."

- An assessment of whether the assumptions upon which recommendations are made are correct.

1.40 The White Paper recognises that, in practice, many of the steps in the RIA process are already undertaken in Ireland. A number of state bodies use formal RIA in the carrying out of their statutory functions and in their decision-making processes.[162]

1.41 Against this background it is, at minimum, surprising that the Competition Authority has failed to carry out any methodological RIA of the Bar Council rules. Even more significantly, the Competition Authority has failed to carry out any RIA in respect of its recommendations. One would have expected that the far-reaching recommendations of the Competition Authority – some of which would fundamentally restructure the legal profession in this jurisdiction – would be based on, or accompanied, by an RIA.

1.42 In its 2001 report on regulatory reform in Ireland, the OECD recommended the introduction of RIA in the light of the weaknesses which it identified in Ireland's capacity to produce high quality decisions and regulation.[163] In the view of the Bar Council, these weaknesses are exemplified in the methodological approach of the Competition Authority. The generic deficiencies which pervade the methodology of the Report include the following:

- The recommendations are not the result of evidence-based policy-making.

- The Report does not identify the potential impacts of recommendations; there is no quantification – or no detailed quantification – of the impact or negative consequences of recommendations.

[162] For example, the Commission for Communication Regulation (ComReg) regularly uses RIA in respect of its proposals and recommendations. Where ComReg's decision may have a significant impact on the markets, which it regulates, a RIA is always carried out.

[163] These weaknesses include the fact that "*command and control*" approaches to regulating behaviours still predominate and specific gaps in the existing methods by which the impact of policy proposals are assessed. On foot of these and other findings, the OECD recommended RIA on the basis that this method places greater emphasis on quantification of economic and social impacts on individuals and groups and promotes standardised approaches to public consultation.

- There is no structured method for evaluation of policy options. In most chapters, there is no identification – let alone assessment – of alternatives.

- There is a dearth of research and analysis to support the recommendations and findings.

- There is no comprehensive or systematic compilation of information.

- By failing to identify the potential impacts of recommendations, there is no balance between the recommendations and their consequences or costs.

- There is no assessment of whether the assumptions which underlie particular recommendations are correct.

1.43 The weaknesses set out above can be illustrated by reference to proposals 6 and 12 in the Report. Proposal 6 relates to the proposed abolition of the sole trader rule and its replacement with a rule which permits barristers to choose their own business structures, to form partnerships with other barristers and to establish a chambers systems similar to that in England and Wales. There is no RIA of the numerous potential consequences of this proposal. In particular, there is no data of the cost benefit (if any) of such arrangements; there is no assessment of their impact on equality of access to the public; there is no assessment of the impact on the Law Library system of the emergence of partnerships and chambers; there is no assessment of the extent to which concentrations would occur; there is no assessment of the impact on availability of pupilages and the supply of undertakings to the market. Proposal 12 advocates the abolition of rule 2.6 of the Code of Conduct so that barristers are permitted to be in part time practice at the Bar or to be in employment. The Report contains no data in respect of this proposal. No RIA has been carried out on the impact which it would have on the judicial process and administration of justice. Nor has an RIA been carried out in relation to the manner in which access to barristers would be affected by allowing organizations to engage barristers to act for them alone.

1.44 The conclusion of the Court of First Instance in *Airtours* is, with respect, equally applicable to the conclusion of the Competition Authority:

"*In light of all the foregoing, the Court concludes that the decision, far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as the factors fundamental to any assessment…*"

(v) Absence of any analysis on the impact of its recommended changes on business structures:

1.45 As the Report of Professor Cave explains, the Competition Authority has failed to carry out a proper assessment of the impact of its recommendations. This Report is included in Appendix II.

APPENDIX II

The provision of legal services

Martin Cave*

July 2005

A. Introduction

2.1 Markets for legal services have many of the same characteristics as markets for other goods and services. These include in particular the possibility of market failure, arising from such factors as restrictions on competition and consumer ignorance. These considerations may require regulatory or deregulatory intervention, but it is unusual for such actions to take the form of restrictions on the business structure, defined as the scale and form of ownership of the firm, through which the good or service is supplied. The argument generally prevails that competition among alternative business structures will identify the most efficient options, and thus benefit consumers.

2.2 However the provision of legal services has associated with it objectives which go beyond the welfare of the immediate clients. The legal system is also expected to achieve objectives such as the maintenance of respect for the law, justice in individual proceedings and access to justice. Achieving these aims requires practitioners to pursue non-commercial objectives, exemplified by *pro bono* work, operation of the cab rank principle, and adherence to standards of conduct which go beyond minimum codified levels. As a shorthand, I will refer to these objectives as 'public value'.[164] Widening the scope of the objectives raises questions as to how the mode of production (the alternative business structures) bear upon attainment of the objectives.

2.3 With both value for money for consumers and public value as objectives, some balancing or trade-off among aims is likely to be needed. This has to be done by

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[164] Public value is a term which has found recent currency in a number of policy areas, including broadcasting, education and health services. It includes both redistributive effects and accounting for (normally beneficial) externalities.

appropriately accountable authorities. My aim in this report is not attempt such a trade-off but to examine the pressures on the behaviour of legal practitioners likely to be created by a range of structures.

2.4 In many discussions of markets for legal services, a major role belongs to information problems.[165] In relation to members of the public seeking legal advice on infrequently occurring incidents (injury, wills, divorce, house purchase), this is clearly a major issue. But the context of the present discussion is services currently provided by members of the Bar in Ireland. The customers of such services are typically solicitors who are well informed and repeat purchasers[166]. Indeed, in some respects barristers offer a level of transparency in relation to their performance surpassed only by fund managers or participants in competitive sports. Accordingly, only a limited role is played in the discussion which follows by information problems.

2.5 Instead, I make observations on the interplay between individual and public objectives associated with the following business structures:

- barristers as sole practitioners (the current regime)
- partnerships of barristers
- legal partnerships involving solely barristers and solicitors
- multi-disciplinary partnerships
- structures in which external providers of capital are the residual legatee of profit.

B. Sole practitioners

2.6 I treat this as a base case. The sole practitioner can pursue his or her own objectives, which will include income and public value, subject to prohibitions created by the rules to which he or she is subject. In the notation used throughout, the sole practitioner task can be expressed as:

$$\text{Max } U_i \qquad = \qquad U_i(R_i(Y_i) - C_i(Y_i), P_i(Y_i))$$

[165] See the discussion in R. Baldwin, M. Cave and K. Malleson, 'Regulating legal services: time for the big bang?', *Modern Law Review*, 67(5) 2004, pp. 787-811.

[166] Direct access to barristers may change the situation slightly, but is unlikely to do so fundamentally.

subject to: —

Y_i = lies within Y.

Here U_i = utility of practitioner i

R_i = revenue

C_i = non-labour costs

Y_i = activity of practitioner i

P_i = the scale of practitioner i's pursuit of 'public value'

Y = activities permitted under regulatory regime from practitioners of the relevant type.

2.7 In relation to costs, it is quite consistent with the model for the practitioner to share costs with others, benefiting from economies of scale with respect to premises, research facilities, secretarial support etc. Only joint presentation to customers via branding or marketing is excluded, as this would involve pooling revenue rather than costs. This consideration means that sole practice can generate many of the benefits of economies of scale in legal practice.

2.8 Clearly this formulation implicitly acknowledges the possibility of divergent incomes for barristers, and recognises that pursuit of public value can be an unattainable luxury for many. The Bar's current proposal to allow employment of one barrister by another is relevant here. However the main points from the base case are that i) the profession is maximally competitive and ii) the structure allows variety in objectives (hence the delivery of public value) as a result of the highly individualistic nature of the objective function.

C. Partnerships

2.9 Legal practitioners in partnerships present themselves to the public as a combined entity, with common branding and marketing, even if clients seek out individual partners. One way of viewing the partnership's objective is as a co-operative, seeking to maximise net income per head. This formulation implies some (but not necessarily complete) pooling of income –and is consistent with the application of 'lock-step' salary regimes (with remuneration to partners based on seniority, rather than individual marginal productivity). The pursuit of public value becomes a collective choice problem within the partnership.

2.10 In my notation, the objective is:

$$\text{Max } y = \left((R_p (Y_p) - C_p (Y_p) \right)/N$$

As before Y_p must lie within Y.

Here y = net income per capita of partners

N = number of partners

Y_p, R_p and C_p are, respectively, the activities, revenues and non-partner costs of the partnership.

2.11 Why are partnerships formed? Carr and Mathewson explain them as a mechanism for investment in brand-name capital.[167] Such investment is made possible and productive by partners monitoring each others' behaviour. This is costly but may nonetheless provide competitive advantage if customers lack information.[168] It is a corollary of this approach that both provision of legal services and monitoring have to be remunerated – hence an associated reward system, based on pooling of individual revenues – in the limit a lock-step regime.

2.12 In this formulation partnership is providing added value – to assuage customers' anxiety about poor performance (in American parlance, 'chiselling'). Yet that is not our chief concern, as the Bar has knowledgeable and repeat buyers.

2.13 Accepting that the informational benefit may be small, what impact does partnership have? Firstly, it brings marketing (more generally, revenue-related) economies of scales. Secondly, the structure may extinguish the desire to pursue public value in a non-transparent way. This is likely to emerge through the pooling procedures: partners may not be able to agree on cross-subsidisation of particular clients or activities, even if they may agree on particular activities which have marketing benefits.

[167] Carr, J and Mathewson, G. F. (1990), The economics of law firms: a study in the legal organisation of the firm', *Journal of Law and Economics* 33(2) 307-330.

[168] Monitoring is cheaper in specialised partnerships, but clients may need variegated expertise. This conflict has to be resolved.

2.14 Thirdly, partnerships – as a form of labour co-operative – may have adverse efficiency effects.[169] The problem is that partnerships have no incentive to expand beyond the point where income per head is maximised –even if there exist external persons willing to act as partners at a lower income. There is no equalisation of marginal product. Income differentials across partnerships can abound; and there is no incentive to leave a prosperous partnership. The reluctance to expand output is further prejudiced if the partnership exercises market power. As Estrin writes

> *'Just like its capitalist counterpart, the self-managed monopolist restricts production, preventing efficient allocations in product and factor markets and generating monopoly welfare deadweight losses. However, the effects are more serious because the product market inefficiencies are transmitted through to earnings… in and the fact that they arise from monopoly power means they will not be eliminated by entry'.*
>
> *'Thus self-managed firms will use monopoly power for exactly the same reasons as their capitalist counterparts, and its allocative and welfare consequences will be even more serious. The existence of imperfect competition … does provide an additional source of welfare loss…..'*[170]

2.15 These passages highlight the possible dangers that i) partnerships without freedom of entry may distort the allocation of resources and ii) if they have market power, the situation will be worse. Of course, there is no certainty that exit from partnerships by individuals will not relieve the situation. But if there is a tendency for the market to 'tip' towards the partnership mode,[171] the existence of a fringe of individual competitors would not necessarily protect consumers from harm.

2.16 These arguments suggest that, as against the benchmark case of sole practice, partnerships might i) benefit from economies of scale in revenue generation, ii)

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[169] I am assuming that law firms as partnerships employ non-partner labour ('associates', in solicitors' terms), but that partners (as the residual legatees of the firm's income) and associates are employed in given proportions. Otherwise, a single partner could employ outside labour and turn the partnership into a profit-maximising firm. See J. E. Meade, *Alternative systems of business organisation and of workers' remuneration*, 1986, pp. 56-70.

[170] Estrin, S (1983) *Self-management*, Cambridge University Press, pp. 34, 35-6.

[171] This might occur if sole practice were seen (even in some degree) as an indication of poor quality or reputation; though this would likely be a graver problem with solicitors' practice than with the bar.

impede the pursuit of particular forms of public value and iii) lead to inefficient outcomes (especially if they exercise market power).

D. Legal disciplinary and multidisciplinary partnerships

2.17 These will be taken together, as they are susceptible to the same analytical approach. The partnership arrangement is likely to introduce the same maximand as for a single disciplinary partnership. Synergies in revenue generation or economies of scope may increase net revenue per head – which would not necessarily be passed on to customers. Agreement to pursue public value might be harder to achieve.

2.18 The regulatory regime would also be more complicated, in the sense that excluded behaviour would be different for members of each profession. This might lead to asymmetries – for example, an accountant could try to cross-sell legal services but not vice versa.

2.19 These issues have been widely discussed in international debates about alternative business structures, but I am doubtful whether, absent data on the behaviour of alternative partnerships, economists (rather than, say, sociologists) can say very much *a priori*. (This does not, of course, make the exercise of proper judgement any less important.)

E. Organisations with external provision of capital[172]

2.20 A further key shift occurs when a firm changes from a regime in which net revenues accrue to a sole practitioner or member of a partnership to one in which they accrue two external owners. Put briefly, the switch from a regime in which labour hires capital to one in which capital hires labour is a profound significance[173]. Intermediate forms are, of course, possible, but I will focus on a plc structure for a single disciplinary legal firm,

[172] Reliance on external capital is quite different from cases where professionals, in order to limit liability, seek corporate status but in other respects behave as partnerships. In such cases partners have to supply capital when they join, but those assets are not the residual legatee of net income.

2.21 The maximand in this standard case (from a market economics point of view) is profit:

$$\text{Max } \Pi = R_c(Y_c) - C_c(Y_c) - w_c L_c$$

subject to Y_c lies within $\bar{Y}$ the prohibition of certain activities.

Here

Π = the firm's profit

Y_c, R_c and C_c are, respectively activities, revenue and non-labour costs of the capitalist firm

w_c = employee wages

L_i = number of employees

2.22 From an economic standpoint, this is the standard template in which a competitive, well-functioning markets can deliver good results. Under this system, in the famous words of Adam Smith (replacing the activities of brewing and baking with which he illustrated his propositions in *The Wealth of Nations):*.

> *"It is not from the benevolence of [capitalist law firms] that we expect our [legal services], but from their regard to their own interest. We address ourselves not to their humanity but their self love".*

2.23 The key issue here is the impact of an unadulterated profit motive, enforced by parties with no necessary acquaintance with the legal services market, on the attainment of public value and the enforcement of disciplinary codes. In connection with the former aspect, I suggested above that, for reasons essentially associated with collective rather than individual choice, non-pecuniary motives will be harder to express within a regime of partnerships that of sole practice. I conjecture that this pattern will be exacerbated with firms based on the external supply of capital.

2.24 The second aspect – the impact of business structure on adherence to disciplinary codes – is also hard to forecast. Profit maximisation would entail a calculation of the benefits and costs of any infraction. Those costs would include reputational costs to the legal firm, but many of them may fall on the employee whose conduct was impugned. There is thus at least the possibility of weakened compliance.

F. Conclusions

2.25 This report has attempted to shed light on the impact of alternative business structures on the performance of markets for legal services in circumstances where – as seems appropriate for the Bar – informational problems are not of fundamental importance. I have considered the implications for technical and allocative efficiency and the attainment of public value of various stylised aims imputed to organisations.

2.26 The policy question is whether limitations on alternative business structures are justified. In terms of standard economic analysis, the main potential detriment from liberalisation is that the resulting market structure may have an adverse effect on competition and permit the emergence of players with market power. This might be exacerbated by the structure of incentives in partnerships.

2.27 These concerns must be accompanied by questions relating to the attainment of non-economic objectives under different structures. Here I have identified the possibility that, in the transition from a sole practitioner structure, via partnerships of various kinds, to profit-maximising firms, it is probable (but not certain) that less importance would progressively be attached to public value. The uncertainty arises in part from the difficulty of projecting how devoted partnerships would be to the attainment of public value via their collective decision-making processes. On top of this is uncertainty about the relative weight of different modes of production in a liberalised market. If more lucrative activities were supplied by large partnerships or capitalist firms, the impact on public value would be the greater.

2.28 In my opinion, if these non-pecuniary public policy objectives are acknowledged, it is unsatisfactory simply to say, as the Competition Authority frequently does, that a particular restriction on business structures is 'disproportionate'; unless it were also able to say that a lesser restriction is consistent with the same outcome. If this cannot be said, then a reasoned trade-off must be made among competing objectives. It is not clear that the Competition Authority has done this.

APPENDIX III

COUNCIL OF EUROPE COMMITTEE OF MINISTERS Recommendation Rec (2000) 21of the Committee of Ministers to member stateson the freedom of exercise of the profession of lawyer (Adopted by the Committee of Ministers on 25 October 2000at the 727th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe, Having regard to the provisions of the European Convention on Human Rights; Having regard to the United Nations Basic Principles on the Role of Lawyers, endorsed by the General Assembly of the United Nations in December 1990;

Having regard to Recommendation No. R (94) 12 on the independence, efficiency and role of judges, adopted by the Committee of Ministers of the Council of Europe on 13 October 1994;

Underlining the fundamental role that lawyers and professional associations of lawyers also play in ensuring the protection of human rights and fundamental freedoms; Desiring to promote the freedom of exercise of the profession of lawyer in order to strengthen the rule of law, in which lawyers take part, in particular in the role of defending individual freedoms;

Conscious of the need for a fair system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason;

Aware of the desirability of ensuring a proper exercise of lawyers' responsibilities and, in particular, of the need for lawyers to receive sufficient training and to find a proper balance between their duties towards the courts and those towards their clients;

Considering that access to justice may require persons in an economically weak position to obtain the services of lawyers,

Recommends the governments of member states to take or reinforce, as the case may be, all measures they consider necessary with a view to the implementation of the principles

contained in this recommendation.

For the purpose of this recommendation, "lawyer" means a person qualified and authorised according to the national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters.

Principle I - General principles on the freedom of exercise of the profession of lawyer

1. All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights.

2. Decisions concerning the authorisation to practice as a lawyer or to accede to this profession, should be taken by an independent body. Such decisions, whether or not they are taken by an independent body, should be subject to a review by an independent and impartial judicial authority.

3. Lawyers should enjoy freedom of belief, expression, movement, association and assembly, and, in particular, should have the right to take part in public discussions on matters concerning the law and the administration of justice and to suggest legislative reforms.

4. Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.

5. Lawyers should have access to their clients, including in particular to persons deprived of their liberty, to enable them to counsel in private and to represent their clients according to established professional standards.

6. All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law.

7. Lawyers should not be refused access to a court before which they are qualified to appear and should have access to all relevant files when defending the rights and interests of their clients in accordance with their professional standards.

8. All lawyers acting in the same case should be accorded equal respect by the court.

Principle II - Legal education, training and entry into the legal profession

1. Legal education, entry into and continued exercise of the legal profession should not be denied in particular by reason of sex or sexual preference, race, colour, religion, political or other opinion, ethnic or social origin, membership of a national minority, property, birth or physical disability.

2. All necessary measures should be taken in order to ensure a high standard of legal training and morality as a prerequisite for entry into the profession and to provide for the continuing education of lawyers.

3. Legal education, including programmes of continuing education, should seek to strengthen legal skills, increase awareness of ethical and human rights issues, and train lawyers to respect, protect and promote the rights and interests of their clients and support the proper administration of justice.

Principle III - Role and duty of lawyers

1. Bar associations or other lawyers' professional associations should draw up professional standards and codes of conduct and should ensure that, in defending the legitimate rights and interests of their clients, lawyers have a duty to act independently, diligently and fairly.

2. Professional secrecy should be respected by lawyers in accordance with internal laws, regulations and professional standards. Any violation of this secrecy, without the consent of the client, should be subject to appropriate sanctions.

3. The duties of lawyers towards their clients should include:

a. advising them on their legal rights and obligations, as well as the likely outcome and consequences of the case, including financial costs;

b. endeavouring first and foremost to resolve a case amicably;

c. taking legal action to protect, respect and enforce the rights and interests of their clients;

d. avoiding conflicts of interest;

e. not taking up more work than they can reasonably manage.

4. Lawyers should respect the judiciary and carry out their duties towards the court in a manner consistent with domestic legal and other rules and professional standards. Any abstention by lawyers from their professional activities should avoid damage to the interests of clients or others who require their services.

Principle IV - Access for all persons to lawyers

1. All necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers.

2. Lawyers should be encouraged to provide legal services to persons in an economically weak position.

3. Governments of member states should, where appropriate to ensure effective access to justice, ensure that effective legal services are available to persons in an economically weak position, in particular to persons deprived of their liberty.

4. Lawyers' duties towards their clients should not be affected by the fact that fees are paid wholly or in part from public funds.

Principle V - Associations

1. Lawyers should be allowed and encouraged to form and join professional local, national and international associations which, either alone or with other bodies, have the task of

strengthening professional standards and safeguarding the independence and interests of lawyers.

2. Bar associations or other professional lawyers' associations should be self-governing bodies, independent of the authorities and the public.

3. The role of Bar associations or other professional lawyers' associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected.

4. Bar associations or other professional lawyers' associations should be encouraged to ensure the independence of lawyers and, inter alia, to:

a. promote and uphold the cause of justice, without fear;

b. defend the role of lawyers in society and, in particular, to maintain their honour, dignity and integrity;

c. promote the participation by lawyers in schemes to ensure the access to justice of persons in an economically weak position, in particular the provision of legal aid and advice;

d. promote and support law reform and discussion on existing and proposed legislation;

e. promote the welfare of members of the profession and assist them or their families if circumstances so require;

f. co-operate with lawyers of other countries in order to promote the role of lawyers, in particular by considering the work of international organisations of lawyers and international intergovernmental and non-governmental organisations;

g. promote the highest possible standards of competence of lawyers and maintain respect by lawyers for the standards of conduct and discipline.

5. Bar associations or other professional lawyers' associations should take any necessary

action, including defending lawyers' interests with the appropriate body, in case of:

a. arrest or detention of a lawyer;

b. any decision to take proceedings calling into question the integrity of a lawyer;

c. any search of lawyers themselves or their property;

d. any seizure of documents or materials in a lawyers' possession;

e. publication of press reports which require action on behalf of lawyers.

Principle VI - Disciplinary proceedings

1. Where lawyers do not act in accordance with their professional standards, set out in codes of conduct drawn up by Bar associations or other associations of lawyers or by legislation, appropriate measures should be taken, including disciplinary proceedings.

2. Bar associations or other lawyers' professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers.

3. Disciplinary proceedings should be conducted with full respect of the principles and rules laid down in the European Convention on Human Rights, including the right of the lawyer concerned to participate in the proceedings and to apply for judicial review of the decision.

4. The principle of proportionality should be respected in determining sanctions for disciplinary offences committed by lawyers.

APPENDIX IV

[CCBE statement – see over the page]

CCBE

CONSEIL DES BARREAUX DE L'UNION EUROPÉENNE RAT DER ANWALTSCHAFTEN DER EUROPÄISCHEN UNION **C**ONSEJO DE LOS COLEGIOS DE ABOGADOS DE LA UNIÓN EUROPEA **C**ONSIGLIO DEGLI ORDINI FORENSI DELL'UNIONE EUROPEA **R**AAD VAN DE BALIES VAN DE EUROPESE UNIE **C**ONSELHO DAS ORDENS DE ADVOGADOS DA UNIÃO EUROPEIA ΣΥΜΒΟΥΛΙΟ ΤΩΝ ΔΙΚΗΓΟΡΙΚΩΝ ΣΥΛΛΟΓΩΝ ΤΗΣ ΕΥΡΩΠΑΙΚΗΣ ΕΝΩΣΗΣ **R**ADET FOR ADVOKATERNE I DEN EUROPAEISKE FAELLESKAB **E**UROOPAN UNIONIN ASIANAJAJALIITTOJEN NEUVOSTO **R**ÁÐ LÖGMANNAFÉLAGA Í EVRÓPUSAMBANDINU **R**ÅDET FOR ADVOKATFORENINGENE I DET EUROPEISKE FELLESSKAP **R**ÅDET FOR ADVOKATSAMFUNDEN I DEN EUROPEISKA UNIONEN **COUNCIL OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN UNION**

POSITION OF CCBE ON INTEGRATED FORMS OF CO-OPERATION BETWEEN LAWYERS AND PERSONS OUTSIDE THE LEGAL PROFESSION, ADOPTED IN ATHENS ON NOVEMBER 12TH, 1999.

POSITION OF CCBE ON INTEGRATED FORMS OF CO-OPERATION BETWEEN LAWYERS AND PERSONS OUTSIDE THE LEGAL PROFESSION, ADOPTED IN ATHENS ON NOVEMBER 12TH, 1999.

The problem of integrated co-operation between lawyers and professionals of other disciplines has been considered by CCBE on previous occasions, and CCBE has affirmed its position on the subject in 1993 and 1996. In view of continuing developments since those years, it is appropriate that CCBE examine its earlier findings in the light of those developments. That examination has been duly carried out. The conclusion reached by CCBE in this respect is based on the following considerations:

The regulation of co-operation between lawyers and persons not being lawyers (hereinafter to be termed: non-lawyers) requires a delicate balancing of interests, made more difficult by the fact that the interests concerned are all both serious and legitimate.

On the one hand there is the interest in promoting freedom of economic activity, including the provision of services. It is considered in the interests of society at large that lawful economic activities may be conducted without unnecessary restraints, a.o. because freedom of initiative in this respect, in a society allowing free competition, is believed to be best calculated to promote that economic activities correspond to the needs and preferences expressed within that society.

On the other hand it has traditionally been recognised that the profession of lawyer is conditional upon respect for professional independence. That independence is required, principally, to permit lawyers to serve the interests of their clients unreservedly, without being influenced by other interests to which the lawyer, were he not in an independent position, might legally be bound, or factually be inclined to recognise a duty of loyalty. One-sided loyalty to the interests of clients, which is one of the lawyer's principal duties, can be jeopardised when a lawyer is closely tied to persons or institutions which require him to respect other loyalties - in particular where those other loyalties are, viewed on their own merits, legitimate or even salutary.

With a view to the duty of lawyers to serve only their clients interests, the legal profession has always maintained strict rules on the avoidance of conflicts of interests. These rules concern situations where a lawyer might be bound to serve the interests of more than one party in a matter where those interests are significantly different. In such a situation, serving the best interests of one party is likely to jeopardise the interests of the other parties, seriously affecting the lawyer's principal duty of loyalty. Here, again, the lawyer's position will necessarily be compromised if he serves in an integrated organisation with other professionals whose professional rules do allow them to serve clients with conflicting interests.

A further duty of lawyers recognised as crucial to the proper provision of legal services, is the duty to maintain confidentiality with respect to all information professionally received in confidence. In fact, the rules with respect to conflicts of interests referred to in the previous paragraph, usually also serve to avoid the possibility – or even the appearance – that clients with differing interests could benefit from (let alone have access to) information imparted to the relevant law firm by the other client.

This duty also is a source of major difficulties when lawyers combine their services in integrated co-operation with other professionals, if those other professionals have different rights and duties as concerns confidentiality. This can readily be envisaged when the co-operation involves professionals having a duty to positively denounce (to public authorities) illegal activities of their clients - which is the case, f.i., with accountants in some jurisdictions.

The problem becomes more complex where co-operation involves a broad range of professionals from a variety of different disciplines, either subject to differing rules and standards, or even including

professionals not subject to any specific regulatory framework at all[1]. It can generally be said that the existence of organisations combining professionals with different professional rules, or not being subject to regulatory supervision at all, is calculated to make the supervision of the rules applicable less effective, and in due course to erode both the regulatory framework and its effective supervision.

The duty to maintain their independence, to avoid conflicts of interests and to respect client confidentiality are particularly endangered when lawyers exercise their profession in an organisation which, factually or legally, allows non-lawyers a relevant degree of control over the affairs of the organisation. Interests conflicting with the stated duties of lawyers, arising from the concerns of the non-lawyers involved, may then directly influence the organisation's aims or policies. As already indicated, the interests involved may, viewed by themselves, be legitimate and salutary, rendering their potential influence particularly insidious.

CCBE notes that concerns on similar lines have been voiced as to the independence of other professionals for which such independence is an essential requirement, in cases where those other professionals are integrated into organisations serving different purposes. This has, f.i., been noted as an issue of primary concern in respect of the accountancy profession (in its role as independent auditors). CCBE subscribes to these concerns. These are equally justified, with respect to auditors, as they are with respect to lawyers. Indeed, the requirement inherent to both the legal profession and the accountancy profession, for the relevant professionals to be guided by objective and independent consideration of (in the case of the lawyer) the interests of the client or (in the case of the accountant) the interests which the provision of audited financial statements aims to serve, cannot but be detrimentally affected where those professionals attempt to integrate their practices. Thus, the qualities for which these professionals are principally valued in their respective roles in society, are visibly diminished.

The concerns addressed in the previous paragraphs are reflected in the facility provided by article 11 of Council Directive 98/5/EC of 16 February 1998, which recognises the legitimacy of restrictions upon multidisciplinary practice.

The negative aspects inherent to inter-professional co-operation as indicated above, must be balanced against the legitimate interest in the free pursuit of economic activity, as referred to in the opening paragraphs of this paper. In this respect it has been advanced that there is a relevant demand on the part of users of professional services, for the forms of service made possible by integrated professional organisations, and that this demand may not justifiably be denied. CCBE observes, however, that there is no actual evidence of the existence of any public consensus as to the desirability or the legitimacy of the forms of integrated co-operation examined here; whilst it is a matter of overriding public interest, that the negative aspects considered above be effectively dealt with.

CCBE recognises that the problems considered above vary from country to country, depending on the circumstances encountered there. For instance, some countries extend protection of confidentiality to other professionals than lawyers. There, the problem of confidentiality is obviously not of the same dimension which it has in those countries that exclude protection of client confidentiality for non-lawyers.

CCBE nevertheless concludes that, in the jurisdictions with which it is familiar, the problems inherent to integrated co-operation between lawyers and non-lawyers with substantially differing professional duties and correspondingly different rules of conduct, present obstacles which cannot be adequately overcome in such a manner that the essential conditions for lawyer independence and client confidentiality are sufficiently safeguarded, and that inroads upon both, as a result of exposure to conflicting interests served within the relevant organisation, are adequately avoided.

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[1] It should be noted that this position paper does not address the position of lawyers employed by the organisations which they serve (colloquially known as "in-house counsel"). The position of such lawyers, a.o. as concerns independence and confidentiality, is distinct from that of lawyers serving the public at large to such an extent, that the two can not be considered within the same context.

CCBE respects that in a number of jurisdictions forms of integrated co-operation between lawyers and non-lawyers are permitted, and are effectively carried on. In some of the relevant jurisdictions the local regulatory situation obviates some of the problems discussed above, as for example where rules on confidentiality are applicable to other professionals on the same footing as they apply to lawyers. Where integrated co-operation is permitted, there is also often a body of rules intended to provide for the problems discussed, such as rules on internal partitioning of the relevant organisation (colloquially referred to as the use of "Chinese Walls"). CCBE does not accept that, given circumstances and/or specific professional rules such as these, the likelihood of the actual occurrence of breaches of lawyer independence, of client confidentiality or of the respect for the avoidance of conflicts of interests, will be appreciably lessened. The complexities alone that are necessarily attendant upon an organisation as under consideration here, and upon the application of rules of the type indicated, make it unlikely that the relevant problems can truly be adequately met.

The legal profession is a crucial and indispensable element in the administration of justice and in the protection available to citizens under the law. Safeguarding the efficacy and integrity of this factor within a democratic society, is a matter of the highest concern and priority. It is part of CCBE's mission to ensure, that both are given their due.

CCBE consequently advises that there are overriding reasons for not permitting forms of integrated co-operation between lawyers and non-lawyers with relevantly different professional duties and correspondingly different rules of conduct. In those countries where such forms of co-operation are permitted, lawyer independence, client confidentiality and disciplinary supervision of conflicts-of-interests rules must be safeguarded.