

# ASPECTS OF REGULATORY REFORM IN THE IRISH SOLICITOR PROFESSION: REVIEW & EVALUATION

EDWARD SHINNICK

---

## 1. Introduction

Regulation, through establishing a series of rules and guidelines, attempts to balance consumer and producer interests in a general context of increasing economic growth. Many markets are subject to regulation including air transport, utilities and retailing. Professional service markets are subject to possibly the greatest amount of regulation, ranging from rules on education, admission, advertising behaviour, fees and on general conduct. The reasons for such extensive involvement centre on an inherent asymmetric information problem in professional markets between consumers and suppliers, brought about by the experienced nature of these services. Attempts have been made to reform regulatory rules across many markets on the basis that they have not always achieved their objective by becoming overly restrictive, damaging to competition or outliving their usefulness. These issues, along with a more general goal of increasing national competitiveness, through lower prices, increased efficiency and development of services, are the primary reasons for pursuing a policy of regulatory reform.<sup>1</sup> For example, Forfás (2000) considered regulatory reform to be essential for Ireland's competitiveness.

The Irish government has correctly identified that the objective of regulation should be consumer orientated and has outlined three dimensions to better regulation, these are, to increase the (i) performance of the economy and enhance consumer welfare, (ii) quality of governance and (iii) efficiency and effectiveness of the public sector (*Towards Better Regulation*, 2002).

<sup>1</sup> "Re-regulation" is another term used to describe the regulatory reform process on the basis that regulatory rules are not abolished completely, but rather re-designed to reflect competition concerns.

This policy document followed a report by the OECD (2001a) on regulatory reform in Ireland, which called for large-scale change to domestic competition with an emphasis placed on consumer interests rather than on producer interests along with less control of competition. Reforms were considered necessary by the OECD so that the economy could continue to innovate, develop and prosper even as less favourable macroeconomic conditions took hold. Some reform has taken place in, for example, telecommunications, airlines, taxis and the electricity sectors. However, many more sectors, such as airports, bus and rail transport, pharmacies, retail and legal services have yet to be subject to comprehensive reform.

This paper will concentrate on one aspect of domestic competition in this country, namely professional legal (solicitor) services, and focus on how legal services impact on competitiveness and the subsequent policy consequences that this may necessitate. Such non-traded services are a crucial part of national competitiveness because they have a direct bearing on the cost base of Irish producers. Given that only domestic competition, not foreign competition, can keep downward pressure on prices of these services, it is crucial that a competitive business environment in non-traded services exist. This necessitates a greater role for policy analysis and reform than that which has occurred to date.

Following this introduction, a brief description of the Irish legal profession is provided and this is followed by a rationale for regulation in this market. Estimated benefits of regulatory reform across different countries and markets are then discussed. This is followed by a description of key attempts at regulatory reform in Irish legal services, not all of which were successful. A review of some evidence on aspects of legal services is provided to highlight the potential gains that could follow from a more active regulatory reform process in legal services. The final section concludes with a discussion on what is required for successful regulatory reform. From this a framework can emerge for developing successful regulatory reform initiatives across all areas of professional services in Ireland.

The Irish legal profession is segregated into solicitors and barristers. The solicitors' profession is governed by the Solicitor Acts of 1954-1994 and is controlled by the Law Society. All practising barristers are members of the Law Library, which is administered by the Bar Council. Both the Law Society and the Bar Council are the governing bodies for practising solicitors and barristers respectively, which regulates the activities and represents the interests of its members. Therefore, a self-regulatory regime exists in both professions.

In the case of solicitors, the statutory functions of the Law Society include the maintenance of a roll of practising solicitors, the determination of educational requirements for entry to the profession and the regulation of solicitors' accounts, professional practice, conduct and discipline. The legislation prohibits multi-disciplinary practices, transnational practices and practising through the vehicle of a limited company. Since 1971, solicitors are allowed to represent their clients in all Irish courts. Prior to this, solicitors could only appear in the District and Circuit Courts with barristers holding a monopoly position in all other courts. However,

solicitors do not take up their rights to appear in the higher courts and barristers do not undertake the traditional work associated with a solicitor, which they can lawfully do.

The self-regulatory regime of each profession in addition to the division of the profession into barristers and solicitors has the potential to give rise to restrictive practices within each profession and between the two professions, which can result in market failure. The characteristics of self-regulation have the potential to act similar to that of a cartel. For example, in solicitor services the powers of the Law Society lead to (i) entry controls (ii) restrictions on conduct, such as advertising and using fees as a basis to attract customers and (iii) setting “agreed” prices through the use of scale fees<sup>2</sup> which may result in members earning economic rents. Such powers can have a significant negative impact on the interests of consumers and the economy generally, especially when solicitors have exclusive rights to supply certain services, by driving up prices, limiting access and choice, providing poor value for money and inhibiting innovation.

Any restrictions on trade must therefore be in the consumer’s interest and this necessitates a thorough examination of all restrictions. In the UK, for example, the Office of Fair Trading (2001) calls for the onus of proof to be on the proponents of restrictions when assessing whether restrictions should remain and also calls for regular reviews of all restrictions. The rationale for restrictions in legal services is outlined next.

---

### 3. Rationale for Regulation of Legal Services

Regulation of markets is as old as government itself and exists in almost every aspect of the economy. Negative effects of regulation, such as impeding economic growth and competitiveness through a lack of competition, can be compounded if the regulatory system becomes overly bureaucratic, if vested interest groups seek regulation in order to block competition or if existing regulations become obsolete (see Utton, 1987 for a good summary).

Originally, government regulation was perceived as achieving public interest goals, which would not otherwise be achieved due to a failure of the market, such as monopoly power, inadequate information and externalities (all of which exist in legal services), leading to high prices, high profits and both allocative and productive inefficiencies. This correction of market failure became the central theme of the Public Interest theory. The Private Interest theory later challenged this notion and maintained that regulation benefits groups of people which it may not have initially been set up to benefit. That is, private interest groups can use the political process to achieve, or re-direct, regulatory benefits for themselves at the expense of the public. Therefore, just like markets, government regulation can also fail when it does not achieve its initial

<sup>2</sup> Since the 1991 Competition Act, the Law Society can no longer publish scale fees. However, implicit use of scale fees as focal points in setting conveyancing fees has been identified (Shinnick, 1998). Other means of identifying common fees charged also exist. For example, The Dublin Solicitors’ Bar Association has published a Survey of Costs that list fees charged for 15 separate services, thereby providing members with the standard fee charged for these services.

objective(s). This creates another form of failure, that of regulatory failure.<sup>3</sup>

Market failure is the central issue in the debate on regulation and regulatory reform. In the context of legal services, regulation was introduced to combat the asymmetric information problem brought about by the specialised and complex nature of such services, which leaves the consumer unable to judge the quality of the service provided. This problem is unlikely to be curtailed by repeat purchasing or reputation effects due to the infrequency of purchase, particularly for individual clients as against business clients. One solution was to develop output regulations (in terms of product liability and standards of performance), input regulations (in terms of regulation of entry into the profession, rules of conduct and self regulation) and then to introduce a self-regulatory regime to oversee these regulations.<sup>4</sup> In assessing the regulations it is important to distinguish between what may be called “restrictive” regulations that have the potential to reduce competition and beneficial regulations that can protect consumers. As we will see below, both exist in the Irish case.

The concept of self-regulation focuses on the provision of a code of professional ethics and rules that distinguish between acceptable and unacceptable professional behaviour. This monopolistic control is often justified by claiming to (i) protect inexperienced clients from incompetent producers (ii) provide a cheaper and effective form of rule-making (iii) enable agencies gather expertise efficiently (iv) protect the government from pressure exerted by private interest groups (v) allow the agency to feed back into the regulatory process and (vi) reduce the problem of political interference thereby encouraging a longer-term perspective and more open decision-making (see, for example, Mashaw, 1985 and Ogas, 1994).

Arguments against self-regulated agencies centre on their ability to exploit their power by establishing anti-competitive practices, due to a high degree of monopolistic control and low degree of public accountability (Ogas, 1994). This can stifle competition and support high fees, thereby allowing practitioners earn economic rents. Entry conditions have come in for particular criticism since they usually only involve a test of a minimum overall standard at the beginning of a professional career with no guarantees that this standard will be maintained or even enhanced as changing circumstances warrant.

These negative aspects of self regulation (and regulation in general) have prompted a move by governments worldwide to loosen and sometimes abandon regulatory rules. The benefits of such regulatory reforms are outlined next.

---

#### 4. Benefits of Regulatory Reform

**B**enefits of regulatory reform across different markets can be wide ranging, bringing advantages not only to consumers and firms seeking market entry, but also to existing firms in the market. In the process, public policy can become more efficient, the economy can become more

<sup>3</sup> See, for example, Stigler (1971), Posner (1974) and McChesney (1988) for a detailed discussion on the economic theories of regulation.

<sup>4</sup> See Lees (1966), Stigler (1971) and Dingwall and Fenn (1987), for a more extensive discussion of the issues involved in professional regulation.

competitive and governments are free to pursue other public policy objectives.<sup>5</sup>

In particular, the main benefits of regulatory reform across an economy are (i) consumer benefits through reduced prices, increased choice and improved quality (ii) a reduction in costs of exporting and upstream sectors thereby improving competitiveness (iii) increased flexibility and innovation in the supply-side of the economy, thereby reducing national vulnerability to economic shocks and (iv) increases in employment rates thereby reducing fiscal demands on welfare payments (OECD, 2001b).

Forfás (2000) characterises regulatory reform in Ireland as essential for competitiveness on the basis that (i) traditional government instruments to encourage enterprise are no longer available because of, for example, EU rules and EMU membership (ii) competitor countries are gaining a competitive advantage through pursuing regulatory reform and (iii) regulatory reform results in a redistribution of costs and benefits, where these benefits usually far exceed the implementation costs.

Studies have estimated the benefits of regulatory reform across a range of sectors and countries.<sup>6</sup> The reforms in these sectors centred on easing entry restrictions, resulting in a reduction in the prices of these services. In general, the literature describes the benefits of regulatory reform as not only large but, once implemented, can continue to provide productivity and efficiency benefits long after the initial reforms have taken place. Table 1 summarises the productivity increases in five regulated service sectors for five countries.<sup>7</sup>

**Table 1: Productivity Increases (% of GDP) Within Sectors From Regulatory Reform**

	United States	Japan	Germany	France	United Kingdom
Labour Productivity	0.5	2.6	3.5	2.3	2.0
Capital Productivity	0.5	4.3	1.3	3.3	1.4
GDP Price Level	-0.3	-2.1	-1.3	-1.4	-1.2
Profits Margins	-0.1	-0.2	-0.1	-0.2	-0.2
Total Output	0.4	1.7	1.5	1.7	1.2

*Source:* Adapted from Blondal and Pilat (1997).

These results indicate that regulatory reform can increase labour productivity substantially, between 0.5 to 3.5 per cent and increase capital productivity between 0.5 to 4.3 per cent. The GDP price deflator is estimated to fall by between 0.3 and 2 per cent. Profit margins are likely to fall slightly, between 0.1 to 0.2 per cent. Output is estimated to increase substantially from 0.4 to 1.7 per cent, due to lower output prices and innovation gains.

<sup>5</sup> See also, for example, Breyer (1982) and Majone (1990), for earlier discussions on the benefits of regulatory reform.

<sup>6</sup> Hahn (2000) notes two points concerning estimates of regulatory reform, first the figures are highly uncertain and often incomplete as not all sectors of the economy or all aspects of regulation are included, therefore estimates should be viewed as a lower bound on total regulatory costs. Second, estimates are likely to understate the total impact of regulatory costs because they do not typically include the adverse effects of regulation on innovation, investment and long-term economic growth.

<sup>7</sup> The sectors are, electricity, air and road transport, telecommunications and distribution.

Table 2 highlights the economy-wide benefits of regulatory reform in these same sectors by assessing the overall macroeconomic effects. Here the sectoral effects are aggregated on the basis of the relative size of the sectors.

**Table 2: Percentage Increase in Selected Indicators from Regulatory Reform**

	<b>United States</b>	<b>Japan</b>	<b>Germany</b>	<b>France</b>	<b>United Kingdom</b>
GDP	0.9	5.6	4.9	4.8	3.5
Unemployment	0.0	0.0	0.0	0.0	0.0
Real Wages	0.8	3.4	4.1	4.0	2.5
Price Level	-6.6	-11.1	-9.8	-12.8	-5.8

*Source:* Blondal and Pilat (1997).

The results indicate that the level of real GDP increases substantially, unemployment remains unchanged, real wages increase significantly while the aggregate price level falls dramatically.

Hahn (2000) outlines the projected annual benefits of further regulatory reform as a percentage of GDP for (i) the EU as a whole of between 4.5 to 7 per cent, (ii) US of 3 per cent (iii) Australia of 5.5 per cent (iv) Japan of between 2.3 to 18 per cent and (v) Netherlands of between 0.5 to 1.1 per cent. In general, successive OECD country reports indicate that regulatory reforms across many different sectors in an economy can increase GDP growth by up to 0.5 per cent per annum.

For Ireland, Fingleton (1997) estimates that monopoly profits may amount to hundreds of millions of euro in individual markets, costing the economy several percentage points of GDP. Such losses are attributed to high structural concentration, regulatory barriers to entry and anti-competitive behaviour across a wide range of markets. Industry protection and domestic monopolies are considered to be key traditions in the Irish economy where weak competition, along with weak implementation of a regulatory reform policy, is seen as a significant threat to future economic performance (OECD, 2001a). This threat to economic performance and therefore to competitiveness arises because many of the sectors where competition is weak, such as utilities and professional services, are crucial inputs in the production of other goods and services for Irish companies. Higher input costs will erode Irish competitiveness, if foreign competitors have lower input costs.

Given the benefits of regulatory reform across many different sectors, can the same benefits be achieved in professional services, despite their unique characteristics? Regulatory reform in legal services has occurred in other countries to varying degrees (for example in the US, UK, Holland and Australia)<sup>8</sup> and this evidence suggests that gains can also be made by reforming Irish legal services.

Research on the effects of regulatory reform in the legal profession is limited, mostly due to lack of suitable data. Some studies do exist and these, like the studies in Tables 1 and 2 above, concentrate on the effects of entry restrictions. Friedman and Kuznets (1945) was one of the seminal studies that attempted to measure economic rents earned by professionals in the US. They estimated the global effect of self regulation, including the

<sup>8</sup> See Stephen and Love (2000) and Barker (1996) for a discussion on the benefits of regulatory reform in these countries.

---

**5.  
Regulatory  
Reform in Irish  
Legal Services**

effect of entry restrictions, resulted in economic rents of between 15 per cent - 110 per cent.

In Australia, Baker (1996) found the introduction of competition in conveyancing services resulted in a reduction in fees of 17 per cent in real terms. While for the Netherlands, Bruinsma (2002) found conveyancing fees fell by 12 per cent in real terms.

Stephen and Love (2000) survey the results of studies investigating the removal of exclusive rights to supply conveyancing services in England and Wales. The initial effect of the announcement to introduce competition in conveyancing resulted in a reduction in fees even before new entry took place. Later when licensed conveyancers were introduced, fees in markets where this competition existed were lower. However, over time these fees began to increase and this increase was greater than the increase in markets where no licensed conveyancers existed. This initially counterintuitive result was explained by the total dependence licensed conveyancers had on just the conveyancing market, resulting in an incentive for them to keep fees high. This cautions against introducing the same method of competition in Ireland, where instead banks and other financial institutions may be more appropriate alternative suppliers, given they will not be solely reliant on just the conveyancing market. The next section will review what reforms have taken place in Irish Legal services.

The most significant attempt at reform came via the *Solicitor (Amendment) Bill, 1994*<sup>9</sup> which contained two major proposals (i) to allow fee advertising and (ii) to break the solicitors' monopoly on conveyancing by allowing banks and other financial institutions into the market. Less significant reforms came in 1988, 1996 and 2002; most were in relation to advertising. Regulations are normally introduced to protect the consumer and therefore have beneficial aspects. However, these same regulations can also have consequences, sometime unintentional, that can introduce restrictions on competition and therefore potentially harm the consumer. Regulations should therefore be judged on their ability to restrict competition. This section will discuss attempts at regulatory reform in the context of *output* and *input* regulations. Most of the reforms centre on input regulations and specifically deal with advertising.

#### **OUTPUT REGULATIONS - STANDARDS AND PRODUCT LIABILITY**

Justifications for standards and product liability measures are based on the objective of protecting the consumer against incompetent or malicious solicitors who may use asymmetric information to exploit consumers. This form of protection can serve as an effort to combat the shortcomings of entry controls that do not offer protection once a solicitor is admitted to practice. The alternative to these measures is to appeal to the solicitor's sense of professional ethics, but this may not always guarantee quality.

The more significant measures to address the issue of standards and product liability in the *Solicitor (Amendment) Act, 1994* and *Solicitor (Amendment) Act, 2002* are: (i) the appointment of up to ten lay members

<sup>9</sup> This legislation was first introduced as the *Solicitor (Amendment) Bill, 1991*, but it never proceeded beyond the introductory stages due to the collapse of the government.

and twenty practitioners to the Disciplinary Committee of the High Court to represent the public interest, (ii) tougher financial penalties and criminal offences for breach of client funds, (iii) solicitors to fully insure against damages awarded to clients arising from negligence, (iv) increases power of the Law Society and the High Court to intervene in solicitor practices and to attend, with or without notice, at a solicitor's office to require documents, when investigating complaints, (v) enables the Law Society to seek an injunction against solicitors who are in breach of regulations, (vi) provides the Law society with power to seek a High Court order compelling a response to correspondence or attendance at a meeting, when investigating complaints and allows the Law Society to refuse renewal of a practising certificate on the basis of the number and nature of complaints made to the Society and (vii) provides clients with a right of redress where a solicitor provides inadequate services or where charges for services are thought to be excessive.

These measures are examples of beneficial regulations since they are based on codes of ethics, professional competence and public confidence and are not likely to have a significant negative impact on competition.

## **INPUT REGULATIONS - ENTRY AND CONDUCT**

### **ENTRY**

Entry rules are based on their perceived ability to restrict supply to those qualified to provide the service and thereby protect consumers from incompetent suppliers. This is seen as a relatively cost effective way of attempting to block the entry of incompetent suppliers. However, this measure implicitly assumes that once the initial entry requirement is met, this will guarantee quality now and in the future. Since the Law Society does not hold further examinations once solicitors pass the initial examination, a guarantee of future quality cannot be given.<sup>10</sup> Therefore, entry conditions could also be interpreted as a form of entry barrier by which the members of the legal profession can restrict supply and thereby earn rents. Measures addressing entry issues are contained in the *Solicitor (Amendment) Act, 1994* and include reducing the period of apprenticeship from a maximum of five to two years, reducing from seven to five years the minimum period of continuous practice required before a solicitor can take on an apprentice and permitting solicitors to have two apprentices instead of one and to have an apprentice for every two assistants.

A much stronger measure that would have introduced deregulation in the conveyancing market proposed to permit banks and other financial institutions to enter this market. The Minister withdrew this proposal after the Bill was introduced in February 1994 but before the Bill was enacted in November of that year. Hence, a major opportunity to provide competition from outside the profession in such an important market was lost and with it the most significant change ever to be attempted in Irish legal services.

<sup>10</sup> From July 2003 the Law Society requires practising solicitors to undertake a minimum number of hours of continuing professional development, e.g. attendance at seminars etc., as a condition of renewing their practising certificate. However, enforcement is weak as the Law Society will not require solicitors to submit proof of their professional development, but instead will do random checks.



## CONDUCT

Rules governing conduct were dominated by advertising measures.<sup>11</sup> Advertising rules are often justified as an additional measure needed to maintain and protect standards within the profession. The Law Society and the legislation governing the profession often use terms such as “touting”, “unprofessional” and “conduct bringing the profession into disrepute”. Therefore, advertising restrictions are seen to protect against misleading or false information disseminated through advertising. However, advertising can also help reduce the information problem in professional services. Stigler (1961) argued that advertising could reduce search costs for consumers, inform them about the range of price differences and thereby lead to lower average prices.<sup>12</sup> In this way advertising is seen as a crucial source of the information that is necessary to achieve competitive behaviour in the market for professional services. Advertising restrictions, on the other hand, can inhibit entrants or low-cost firms from expanding, which can place upward pressure on prices and enable solicitors earn rents.

Legislative measures dealing with advertising began with the *Solicitor (Advertising) Regulations*, 1988. This legislation allowed solicitors to advertise their services but not their fees. Solicitors were still prohibited from carrying out their practice in any way that may reasonably be regarded as touting or as attracting business unfairly. For example, they could claim superiority for the quality of their practice over those of other persons, provided these other people were *not* solicitors. The *Solicitor (Amendment) Act*, 1994 went further and allowed solicitors to advertise their fees. A further conduct measure in this Act, stipulated that solicitors must provide, at the outset, particulars in writing of actual charges or an estimate of charges.

The next two pieces of legislation placed restrictions on solicitor advertising. The *Solicitor (Advertising) Regulations*, 1996 set out to curtail misleading advertising on the basis of “no win no fee” claims made by some solicitors which advised clients of free legal services if they lost their case. The 1996 legislation stipulates that solicitors now have to advise their clients that they could be liable for costs and expenses awarded against them by the courts if they lose.

The *Solicitor (Advertising) Regulations*, 2002 prohibited advertising, directly or indirectly, referring to claims for damages for personal injury. In addition, phrases such as “motor”, “workplace”, “public place” accidents, “no win no fee”, “first consultation free”, “most cases settled out of court” and “insurance cover arranged to cover legal costs” are also prohibited. The regulations forbid advertising of any type in an “inappropriate location”, such as a hospital, doctor’s surgery or funeral home.

<sup>11</sup> Two non-advertising related measures concerning conduct were, for example, the (i) *Solicitor (Interest on Clients’ Monies) Regulations*, 1995 which set out proceedings that solicitors must follow in relation to monies held on clients behalf and interest accrued thereon and (ii) *Solicitor (Professional Practice, Conduct and Discipline) Regulations* 1997 which stipulates that a solicitor cannot act for the builder and the purchaser (except in some exceptional circumstances) due to a potential conflict of interest.

<sup>12</sup> In a competitive market, pressure exists to drive average prices down and we should also see an increase in price dispersion as some sellers undercut others. Large price dispersions are, therefore, not of great concern as long as customers can see the different pricing strategies. Advertising is a powerful way of communicating such a strategy.

The 1996 and 2002 advertising regulations were introduced in the general belief of the government, supported by the Law Society, which was never in favour of advertising in the first place, that “ambulance chasing” was responsible for the increase in the volume of personal injury claims over the past 10 years. The existing regulations were considered to be ineffective in curbing our “compensation culture” due to the large number of cases brought by members of the Irish army. No independent evidence was used to support this argument, therefore, the motivation behind the government’s advertising reforms is unclear but it is possibly an attempt to reduce the government’s exposure to litigation.

Most of these advertising regulations could be classified as beneficial since they aim either to provide information to consumers on services offered and fees charged or aim to protect the consumer against false or misleading claims. However, the restrictions on personal injury advertising, which at first glance may seem reasonable, poses two concerns. The first is with regards to access to justice because it limits the information available to consumers who may wish to pursue (legitimate) personal injury claims, check on the availability of suitable solicitors and then make an informed decision on what solicitor to hire. Second, following Stigler’s (1961) argument, these restrictions may inhibit fee competition by limiting consumer information on the availability of such a services and fees charged. This is significant because personal injury business now accounts for the largest single share of a solicitor’s fee income at 33 per cent, followed by conveyancing at 31 per cent (Indecon, 2003). The outcome of such restrictions may not, therefore, be a reduction in the number of claims taken, since it is now common knowledge that a solicitor is the person to help you take such a claim, but rather an increase in fees charged, due to limited information available to consumers leading to consumer ignorance regarding competitive fees.

In addition to the advertising restrictions mentioned above, solicitors are also not allowed to advertise specialist areas or to use comparative fees to attract business. These advertising restrictions add to consumer ignorance and consequently may inhibit competition yet no convincing justification for such restrictions is provided. The Law Society claims that advertising restrictions will stop clients being misled by unscrupulous practitioners (Law Society, 2002), but given that there are already extensive regulations in place governing conduct and general behaviour, in addition to the new powers of discipline gained by the Law Society, these advertising restrictions are unnecessary.

The next section reviews some evidence on aspects of legal services dealing with advertising restrictions and fees.

---

**6.  
Evidence on  
Aspects of Legal  
Services**

**T**here is a substantial body of literature on the effects of advertising setting out to test Stigler’s (1961) seminal article on the economics of information across different countries. Love and Stephen (1996) conducted a survey of these studies across a wide range of self-regulated professions. Of seventeen studies surveyed, sixteen indicated that advertising restrictions tended to increase fees. The evidence also indicated that lower fees as a result of advertising did not result in a reduction of quality.

In Ireland, solicitors have increased their incidence of advertising over the last eight years. Shinnick (1998) found that in 1994 only 13 per cent of firms advertised in the *Golden Pages* Telephone Directory, ranging from 0 per cent in Donegal and Monaghan to 38 per cent in Meath. When asked why little or no advertising was taking place, some respondents cited agreements made by their local Law Society branch. By 2002 this type of advertising had increased to 51 per cent, ranging from 30 per cent in Wicklow to 74 per cent in Monaghan (Indecon, 2003). These latest results compare favourably with the extent of advertising in other countries. For example in England and Wales an average of 46 per cent of firms advertised, in Scotland 56 per cent advertised while in the United States 31 per cent advertised (Stephen *et al.* 1994). However, we have yet to see more extensive forms of advertising in Ireland other than in the *Golden Pages*.

Evidence of fees charged for conveyancing found that average fees in 1994 were 1.2 per cent of the property value (Shinnick, 1998) whereas in 2002 this had fallen to 0.75 per cent (Indecon, 2003), indicating a significant decrease in the percentage fee. However, there was a substantial increase in the value of property during this period, from €66,000 in 1994 to approximately €200,000 in 2002.<sup>13</sup> Despite the decrease in percentage fee charged for conveyancing, the average absolute price almost tripled from €792 in 1994 to €2,235 in 2002. These same studies showed the level of price dispersion has also doubled from 1994, when the standard deviation as a percentage of the mean was 15 per cent, to 31 per cent of the mean in 2002.

Further evidence of fees set out to examine the effect of the Law Society's previously published table of conveyancing scale fees on actual fees charged by solicitors (Shinnick and Stephen, 2000). Evidence was found to show that discounting was widespread, However, some solicitors used the lower of the two scale fees (i.e. the then sale scale of 1 per cent + £100 rather than the purchase scale fee of 1.5 per cent) to determine fees in their local market. That is, the scale fees are sometimes used as focal points in determining conveyancing fees.

What we have seen therefore is a 2.8 fold increase in the average fees charged for conveyancing in Ireland over the last eight years and this corresponds with little significant reform of the restrictive regulations governing the solicitor profession. We have, therefore, failed to harness the benefits of regulatory reform seen in other countries and in other sectors. Immediate reforms should be introduced especially in relation to providing external competition in conveyancing services and abolishing restrictions on specialist advertising and comparative fee advertising. This type of advertising can also help to bring about a "culture of competition" that appears to be absent in legal services. For example, only 39 per cent of the general public and 8 per cent of insurance companies considered there is significant or extensive price competition among solicitors. In addition, 71 per cent of the general public and 92 per cent of insurance companies believe more information on fees and charges is needed (Indecon, 2003).

<sup>13</sup> *Source:* Annual Bulletin of Housing Statistics.

This paper reviewed the government's attempts at regulatory reform in the market for legal services in the context of perceived benefits of such reforms in other markets and in other countries. In Ireland attempts at reform came primarily in the *Solicitor (Amendment) Bill*, 1994 which, among other things, set out (but did not succeed) to break the solicitor's monopoly on conveyancing services. In addition, a range of advertising regulations were introduced with the intention of protecting consumers, but restrictive advertising regulations still remain.

By concentrating on advertising regulations the government has ignored the more substantial issue of competition in the provision of certain legal services such as conveyancing. What we have, therefore, is a failed attempt at reforming the regulation of legal services despite the potential benefits from such reform. Instead we have a powerful agency representing solicitors in the Law Society, which is responsible for all aspects of legal services, from admission to monitoring and enforcing standards. Barristers have escaped any attempts at reform whatsoever, despite concerns raised in the media over the very high level of fees earned by some barristers in the various public enquiries and tribunals that have occurred over the last number of years.

The limited empirical evidence in Ireland suggests further reforms are necessary and this is consistent with the OECD (2001a) who called for further reforms in legal services to remove remaining impediments to competition and for vigorous enforcement of competition policy in self-regulated professions. In particular, regulation that can prevent entry and permit non-competitive behaviour should be eliminated. Conveyancing and personal injury work together and account for, on average, 64 per cent of fee income for solicitors. This implies that *at least* two-thirds of all solicitor fee income is protected from competition from outside the profession through exclusive rights to supply and to a lesser extent from within the profession through restrictions on advertising. Evidence in other countries shows that reducing entry restrictions and allowing more competition from within the profession can reduce fees. This has positive effects not only to the consumers in these countries, but also to producers in terms of reducing their input costs. Therefore, competition in this non-traded sector is important for Ireland's competitiveness, as it affects the input costs of Irish producers.

The dual role of the Law Society of representing their members and in policing these same members should be abolished due to an inherent conflict of interest, which is not in the public interest. One solution to this is to allow the Law Society represent their members and introduce a fully independent body (or regulator) responsible for admission, policing solicitors and investigating complaints.<sup>14</sup>

Whatever the cause, be it capture, incorrect or misguided regulations, regulatory failure can impose substantial costs to the economy so a more coherent and determined approach to regulatory reform is needed to enhance competitiveness. The question is how do we successfully implement

<sup>14</sup> This would be similar to the relatively new term of "co-regulation" which involves a joint approach to regulation between a regulating authority responsible for setting out objectives and regulations and regulated parties (i.e. the profession) responsible for implementation.

these reforms in legal services and in other professional markets. Four issues need to be addressed to achieve this.

First, a rigorous debate is needed on the merits of regulatory reform, with an increasing emphasis on consumer interests, and the political will to carry out such reform. The recent government document *Towards Better Regulation* (2002), which has begun a discussion of the issues in the context of the OECD (2001a) study on regulatory reform in Ireland, is a step in the right direction. This OECD report should provide the political parties with a strong justification to introduce regulatory reform across the economy. The OECD (1997) identifies strong and consistent support at the highest political level as one of the most important elements for successful regulation because such leadership can help to overcome vested interests in private and public sectors that benefit from the status quo and resist change. In this way, the possibility of capture may be reduced through strong political leadership. However, the political process is not as straightforward because these same politicians depend on votes (some, no doubt, coming from professionals) for their survival. Therefore, the solution to the capture problem would seem to be more complex. Indeed this is recognised by the OECD (2001a) that considered the current mechanisms to implement regulatory reform policy in Ireland too weak to change long established habits and culture and to protect the regulatory system from pressures from special interests.

Second, regulations and the regulatory reform process should be evidence-based founded on a Regulatory Impact Analysis framework incorporating an economic assessment of all current and proposed regulations. Hahn (2000) maintains that economic analysis should play a more prominent role, starting with a cost-benefit analysis and a cost-effectiveness analysis, as this may make legislators more accountable for their decisions. Noll (1999) also calls for more economic analysis but goes further by calling for more consensus among affected parties so as to increase the probability of success.<sup>15</sup> He cautions against expecting large immediate change since a compromise between the parties is the most likely outcome as this reduces the risk for politicians. An evidence-based approach should also make the reform process more transparent. Public accountability and transparency are two issues that are becoming increasingly important in Irish political life given the recent revelations with regards to corruption in political circles.

Third, a rigorous competition policy along with an effective enforcement mechanism is also important. The Irish Competition Authority has strong powers and Competition Law is comprehensive. However, the Authority has suffered from a shortage of resources in the past and this has resulted in a backlog of cases. The Competition Authority has an active role to play to ensure strong enforcement of competition law in self-regulated professions. In particular the Competition Authority's role should be to decide on whether restrictions are justified on public-interest grounds. Following an initial study of eight professions by Indecon (2003), a comprehensive study of each profession is now being undertaken. The Competition Authority has announced that engineers will be the first profession to be examined in detail, followed by architects, dentists,

<sup>15</sup> The Pharmacy Review Group set up to advise on new regulations for the pharmacy sector is an example of such consensus.

optometrists, veterinary surgeons, medical practitioners, solicitors and barristers. It is somewhat surprising that the legal profession is one of the last professions to be examined, given the recent debate on legal fees in both insurance claims and in tribunals, the importance of this non-traded sector to the competitiveness of the economy and the Indecon study itself that highlighted the legal profession as one of the more restrictive professions.

Fourth, the issue of how to create public interest in regulatory reform has to be addressed. Effective communication is important here where the public are informed of the potential benefits and the need for regulatory reform. Public debate involving the major stakeholders can achieve this level of information and this can also reduce the influence of powerful lobby groups such as the Law Society who may be against many changes inherent in the reform process. One important stakeholder that has not had a strong voice in the regulatory reform process in Ireland is that of the consumer. Consumer interests must be more fully recognised in any future debate. The new Consumer Advisory Council established in July 2001 to strengthen the consumer's voice is a positive initial step.

Addressing these issues can provide a platform for reform in legal services and other professional markets, thereby helping to improve the competitiveness of the Irish economy. A more comprehensive policy analysis and reform, than that which has occurred to date, is therefore required. The benefits are clear, what is needed now is the political will.

## REFERENCES

- BAKER, J., 1996 *Conveyancing Fees in a Competitive Market*, Sydney: Justice Research Centre, Law Foundation of NSW.
- BLONDAL, S. and PILAT, D., 1997. "The Economic Benefits of Regulatory Reform", *OECD Economic Studies*, No. 28, Paris: OECD.
- BREYER, S., 1982. *Regulation and its Reform*, Massachusetts: Harvard University Press.
- BRUINSMA, F., 2002. "Marktwerking in de taxibranche en de rechtshulpverlening", *Nederlands Juristenblad*, Vol. 77, pp. 553-559.
- DINGWALL, R. and P. FENN, 1987. "A Respectable Profession? Sociological and Economic Perspective on the Regulation of Professional Services", *International Review of Law and Economics*, Vol. 7, No. 1, pp. 51-64.
- FINGLETON, J., 1997. "Standards of Competition in the Irish Economy", *Journal of the Statistical and Social Inquiry Society of Ireland*, Vol. 27, pp. 87-128.
- FORFÁS, 2000, "Statement on Regulatory Reform", *National Competitiveness Council*, Dublin: Forfás.
- FRIEDMAN, M. and S. KUZNETS, 1945. *Income from Independent Professional Practice*, New York: National Bureau of Economic Research, General Series No. 45.
- HAHN, R., 2000. *Reviving Regulatory Reform: A Global Perspective*, Washington DC: AEI-Brookings Joint Center for Regulatory Studies.
- INDECON, 2003. *Indecon's Assessment of Restrictions in the Supply of Professional Services*, Dublin: Indecon Economic Consultants.
- LAW SOCIETY, 2002. "Response of the Law Society of Ireland", available at <http://www.lawsociety.ie/Final%20Submission.pdf>, accessed May 6<sup>th</sup> 2003.
- LEES, D., 1966. *Economic Consequences of the Professions*, London: Institute of Economic Affairs.
- LOVE, J. and F. STEPHEN, 1996. "Advertising, Price and Quality in Self-Regulating Professions: A Survey", *International Journal of the Economics of Business*, Vol. 3, No. 2, pp. 227-247.

- MAJONE, G., 1990. *Deregulation or Re-regulation? Regulatory Reform in Europe and the United States*, London: Pinter.
- MASHAW, J., 1985. "Prodelegation: Why Administrators Should Make Political Decisions", *Journal of Law and Economics and Organisation*, Vol. 1, No. 1, pp. 81-100.
- McCHESNEY, F., 1988. "Rent Extraction and Rent Creation in the Economic Theory of Regulation", Chpt. 15 in C.K. Rowley, R.D. Tollison, and G. Tullock, (eds), *The Political Economy of Rent-Seeking*, Boston: Kluwer.
- NOLL, R., 1999. *The Economics and Politics of the Slowdown in Regulatory Reform*, Washington DC: AEI-Brookings Joint Center for Regulatory Studies.
- OFT, 2001. *Competition in Professions*, London: Office of Fair Trading.
- ORGANISATION for ECONOMIC COOPERATION and DEVELOPMENT, 1997. *Regulatory Reform Vol. II: Thematic Studies*, Paris: OECD.
- ORGANISATION for ECONOMIC COOPERATION and DEVELOPMENT, 2001a. *Regulatory Reform in Ireland*, Paris: OECD.
- ORGANISATION for ECONOMIC COOPERATION and DEVELOPMENT, 2001b. *Regulatory Reform in OECD Countries: Economic Growth and Good Governance*, Paris: OECD.
- OGUS, A., 1994. *Regulation: Legal Form and Economic Theory*, Oxford: Clarendon Press.
- POSNER, R., 1974. "Theories of Economic Regulation", *Bell Journal of Economics*, Vol. 5, pp. 335-365.
- SHINNICK, E., 1998. "Competition, Regulation and the Determination of Fees in the Irish Conveyancing Market", unpublished Ph.D. Thesis, Scotland: University of Strathclyde.
- SHINNICK, E. and F. STEPHEN, 2000. "Professional Cartels and Scale Fees: Chiselling on the Celtic Fringe", *International Review of Law and Economics*, Vol. 20, No. 4, pp. 407-423.
- STEPHEN, F., J. LOVE and A. PATERSON, 1994. "Deregulation of Conveyancing Markets in England and Wales", *Fiscal Studies*, Vol. 15, No.4, pp. 102-118.
- STEPHEN, F. and J. LOVE, 2000. "Regulation of Legal Profession", in *New Palgrave Dictionary of Economics and the Law*, London: Macmillan.
- STIGLER, G., 1961. "The Economics of Information", *Journal of Political Economy*, Vol. 69, No. 3, pp. 213-225.
- STIGLER, G., 1971. "The Theory of Economic Regulation", *Bell Journal of Economics and Management Science*, Vol. 2, No. 1, pp. 3-21.
- TOWARDS BETTER REGULATION, 2002. *A Consultation Document*, Dublin: Department of the Taoiseach.
- UTTON, M., 1987. *The Likely Impact of Deregulation on Industrial Structures and Competition in the Community*, Brussels: Economists Advisory Group, Commission of the European Communities.