

# 1. Introduction

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In many, if not most, jurisdictions representation before the courts and in some cases the provision of legal advice outside the courts is the prerogative of those holding particular qualifications who are members of a designated body which we call the 'legal profession'. Traditionally members of the 'legal profession' have been required to adhere to particular ethical norms or codes of behaviour. In the second half of the twentieth century and particularly the final quarter of that century these ethical norms and codes of behaviour have been seen by economists as giving rise to restrictive practices which inhibit competition in the market for legal services to the detriment of consumers of these services. During this period and into the present century in many jurisdictions the promotion of competition in markets for goods and services has become a central plank of public policy. As the promotion of competition has developed, the professions and particularly the legal profession have been the last bastions in which 'free competition in the market' has been resisted under the protection of the law. Particularly as we have moved into the twenty-first century in some jurisdictions the legal profession has come under increasing pressure to remove these 'restrictive practices' and acquiesce to greater competition in markets for legal services. This has been particularly the case in those jurisdictions within what is now the European Union. However, the pace of reform has been different in each jurisdiction of the EU.

Alongside the policy debate there has developed an economic literature on professional regulation. This literature is predominately conceptual/theoretical in nature and, relatively speaking, short on empirical evidence. Nevertheless it has strongly influenced the policy debate across jurisdictions. However, empirical evidence has been gathered, some of which is supportive of the theoretical literature, but some of it qualifies it.

Public policy in the UK during the later part of the twentieth century has sought to introduce greater competition in markets for legal services whilst still recognizing that the market cannot be completely free of regulation. However, in the first decade of the twenty-first century it has taken a more radical approach, particularly in England & Wales, under which the market for legal services has been opened up to suppliers

owned by non-lawyers. This has the potential to radically change not only the nature of competition in the market for legal services but also to change the nature of legal services themselves. The present book seeks to put these changes in context and examine their potential for reshaping the nature of the legal services market.

One way of reading this book is that it charts the changes in public policy in the UK towards the legal profession over the last 30 years or so. In doing so it examines the conditions under which individuals and organizations have been permitted to provide legal services to the public in the jurisdictions of the United Kingdom at various times over this period. In particular, it examines the manner in which these conditions have been liberalized over time and where the most recent liberalization might lead us. It sets the trends in the UK in context in two ways: first, by examining the process of liberalization which has taken place in some other European jurisdictions; secondly, by examining what economic literature has to say on the benefits and costs of regulating markets for professional services. In the latter context attention is paid not only to theoretical work but also to empirical work which tests these theories or the validity of claims made by policymakers to justify the introduction of particular policies. The policy of introducing regulatory competition in reserved activities introduced in the late 1980s is seen to have been of limited success in stimulating competition through innovation. The Legal Services Act 2007 is interpreted as further extending regulatory competition and also introducing the basis for technological innovation in legal services in England & Wales. This technological innovation will be brought about by the entry into the legal services market of consumer-focussed businesses which have developed superior business models to those of existing suppliers. Such business models are not available to existing legal service market suppliers. The new entrants are engaging in brand extension based on the brand capital they have built up in other markets. This brand capital provides assurance to consumers on the characteristics and quality of service to be provided.

A second reading of the book is that it is a review of the economic literature on professional regulation as applied to the legal profession. It sets out what economists have had to say about the likely costs and benefits of regulating markets for legal services. Subsequently, it examines empirical evidence on these questions, utilizing studies that have been undertaken during the process of liberalizing legal service markets in the UK. These studies cast light on the effects of removing constraints on particular means of competition between professionals and on the

effectiveness of particular policies such as regulatory competition. Regulatory competition has been seen as a basis for ensuring that self-regulation does not operate in the interests of suppliers rather than consumers. The experience of regulatory competition between solicitors and licensed conveyancers in the market for conveyancing services and between solicitors and barristers in the market for advocacy services in England & Wales are seen to have been of limited success. It is argued that innovation in legal service markets has been restricted by the rules precluding businesses owned by non-lawyers from providing legal services. In particular the technology of legal service provision is seen to be inferior to that developed by consumer-focussed businesses. The Legal Services Act 2007 not only extends the possibilities for regulatory competition, but, by permitting non-lawyers to own legal service providers, provides the opportunity for technological innovation in the provision of legal services.

Individual readers will have their own preference as to which way of reading this book is appropriate to their own discourse. The book has been structured in a way that fits with either approach. Each of the three parts contains descriptive chapters on policy/theory and chapters which review and evaluate empirical evidence.

Part I ('Why do we regulate lawyers?') examines the question of why we regulate lawyers in ways in which relatively few other markets are regulated. Chapter 2 first looks at the case traditionally put forward by lawyers themselves or at least by bodies which represent the interests of lawyers and secondly examines the case put forward by some economists. Chapter 3 provides an economic analysis of what the consequences of how markets for legal services are regulated might be. In many ways the positive and negative views about regulating markets for legal services are based on different perspectives on the motives of lawyers and their regulatory bodies. The case put forward by the legal profession relies on lawyer behaviour being motivated by factors other than their own self-interest. That of economists rests on lawyers, like all economic actors, being motivated by their own self-interest. Chapter 4 presents empirical evidence on the motivations of both individual lawyers and their regulators through their revealed behaviour. This evidence suggests that self-interested behaviour of lawyers and of their regulators should not be ruled out.

Part II ('Deregulation of legal markets in the UK and Europe') discusses the process of liberalization of markets for legal services over the last 30 or so years. In Chapter 5 the evolution of UK policy is examined. It is seen to have been shaped by a political agenda which has had at its core until recently the reshaping of the regulatory system to

incorporate the idea of regulatory competition. Next the liberalization of legal service markets in a number of European jurisdictions is discussed. Particular attention is paid here to the role of the European Commission. In a number of jurisdictions constitutional courts have had to rule on the priority to be given between statutory authorization of anti-competitive practices and national and European competition policy. Chapter 6 examines empirical evidence on the effects of particular elements of the UK's liberalization process. It is demonstrated that some elements of liberalization have had a positive effect. However it is also demonstrated that the policy position taken by competition bodies on some alleged anti-competitive behaviour is not supported by the evidence.

Part III ('The future of lawyering') looks at the implications of the provisions of the Legal Services Act 2007 for the future of legal services markets in the UK, particularly in England & Wales. Chapter 8 looks at the evolution of the Act from the review carried out by Sir David Clementi. It is argued that the particular regulatory structure proposed by Sir David and implemented by the Act is founded on the principles of regulatory competition. The chapter examines these principles. Chapter 9 discusses the provisions of the Act, which permit non-lawyers to own the business units providing legal services and argues that brand-name capital of consumer-focussed organizations providing legal services will provide assurance to consumers on the characteristics of the services being provided. These assurances will be bolstered through the competition between the regulators of these service providers. The chapter also discusses the experiences of two other jurisdictions where ownership by non-lawyers is permitted. Finally, the chapter looks at the consumer-focussed organizations which have moved into the market for legal services or have indicated an intention to do so, concluding that the predicted technological revolution in the provision of legal services in England & Wales is already under way.