The economic implications of partnership restrictions in the legal services sector and their possible removal

An Opinion
Professor Stephen Davies
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1 Introduction
I have been asked to examine the economic issues raised by the current partnership restrictions in place in the legal services sector and the possible removal of those restrictions. In particular, the current restrictions that I have been asked to consider are that (i) solicitors can only operate as sole traders or in partnership with other solicitors, and (ii) barristers in the independent Bar are restricted to practising as sole practitioners.¹

I should stress at the outset that I am not an expert on the legal services sector - I have no prior experience of researching or consulting on the sector in England and Wales, or in any other jurisdiction. Rather, I am an academic economist, with expertise and research experience in the field of competition economics in general. Therefore, I have approached this subject, initially as an ‘outsider’, and applying my general knowledge and expertise to this particular sector as a case study.

In the main, I assume a readership that is largely conversant with the institutional details of the sector, and the current policy debate. Thus, I will dwell on the background of the case only insofar as it is necessary for me to identify what I believe are the key competition issues, and to locate economic terminology and the concepts I use in my analysis. I do not include any survey of previous academic literature on this sector in this country since, somewhat surprisingly, there is very little.³

The rest of my report has eight more sections. Sections 2 and 3 describe the sector. I do this in two stages. Thus section 2 stylises, using what I refer to as ‘the traditional model’. I use this to focus on some of the unusual, but essential, characteristics of the sector, such as vertical separation, asymmetric information and the special meaning of public interest. However, it is only a stylisation – broadly speaking, a description of the sector as it was historically. Section 3, refines the model by recognising that the traditional dichotomy between solicitors and barristers has become blurred; it also acknowledges more generally some of the changes which are occurring. I believe this distinction between stylisation and reality is of some pedagogical value. In my initial reading of the recent literature, it seemed to me that there were at least two different voices – one referring to a sort of text book world of how the sector may once have

¹ I have reproduced my Terms of Reference as Appendix 1 to this paper.
² I am a Professor of Industrial Economics at the University of East Anglia, and a founding member of the ESRC Centre for Competition Policy at that University. I am also an Academic Advisor to the Office of Fair Trading. However, I have written this report as a private individual, not as a representative of either the University or the OFT. The opinions are mine alone.
³ The scoping study of the DCA (2003) includes a survey (Appendix 1 to Annex B). It is striking how small is the academic economics literature on the UK. The main issues addressed appear to have been the liberalisation of conveyancing and the effects of deregulation of advertising restrictions (and mainly only for the US, and, even there, not often for legal services).
Section 4 identifies, as I was asked to, those Bar Council and Law Society professional rules which articulate the partnership restrictions. Section 5 briefly summarises the relevant part of the recent policy debate which relates to partnerships. As I have said, I assume a readership which is already familiar with that literature, and so I focus only on the main recommendations of the “Review of the Regulatory Framework for Legal Services in England and Wales” (2004), (hereafter, referred to as Clementi (2004)), and the publicly available literature and comments leading up to and after Clementi.

Sections 6 and 7 report my own assessment: section 6 outlining the potential gains from removing the restrictions, and section 7 considering some arguments in favour of retaining them. Section 8 discusses, albeit much more briefly, some issues relating to multidisciplinary partnerships. Section 9 concludes.

2. The legal services sector – the traditional model
I start with a brief summary of the legal services sector in England and Wales. Since my purpose is to identify what I take to be some essential features, as a presentational device, I begin by describing an abstraction, which I refer to as the ‘traditional model’. This emphasises the traditional sharp distinction between solicitors and barristers, and ignores more recent developments which have introduced additional players into the market and softened the solicitor/barrister dichotomy.

2.1 Functional structure in the traditional model
Broadly speaking, legal work can be broken down into three broad categories:

- Non-contentious. This includes: property conveyancing, contracts, trusts, wills and estates, and advice/ correspondence to/on behalf of clients to resolve problems and disputes without litigation
- Litigation. This includes: issuing proceedings, serving statements of case, issuing and serving applications, interviewing and taking instructions from the client and keeping the client informed of the progress of the proceedings; corresponding with other parties; collecting evidence and interviewing witnesses; reviewing, collating and disclosing documents in the control of the client; inspecting documents disclosed by other parties; instructing experts; preparing documents for court; paying court fees and handling client’s money.
- Advocacy in courts and advisory work there for.

In the traditional England and Wales model, the first and second categories were the preserve of solicitors, and the third was conducted exclusively by barristers. Indeed, in the traditional model, there was a very clean distinction, or separation, between these functions. The consumer’s first point of call is the solicitor. For non-contentious work, this is therefore a standard one stage market: solicitors selling direct to final consumers. But where the required service involves the court, and both litigation and advocacy, there is a two stage vertically-linked market, the solicitor taking on the role of ‘middle-man’, introducing the consumer to the barrister.
Interestingly, this strict distinction between barristers and solicitors is not made in the other major Common Law jurisdiction, the United States, although it can be observed, to a greater or lesser extent in other Common Law jurisdictions in the English-speaking world.

2.2 Asymmetric information
Almost by its nature, any market for professional services will involve an asymmetry of information between the consumer and supplier. In this particular case, many consumers will be unsure of the nature of their particular legal problem and therefore of the advocacy or specialist advice they require. Moreover, many will have little or no knowledge about the skills and experience of different advocates, or ability to judge their quality. For many consumers, the demand is exceptional, and there is little opportunity for quality comparison through repeat purchases. Thus, legal services are not homogenous - consumers differ in their problems and barristers differ in their skills, knowledge and experience – there is therefore a potentially important initial match-making function to be provided.

In the traditional model, the solicitor plays this middle-man role. This is, of course, not particularly exceptional – few markets in general are characterised by perfect information on both sides, and a common response to this market imperfection is the existence of the middle-man. Of course, we should not expect the asymmetry to be pronounced for those consumers who make repeat purchases, and for whom it is worthwhile to accumulate costly information (e.g. many corporate customers).

2.3 The wider public interest
However, there is a second type of ‘market imperfection’ which has fewer counterparts in other markets. This is the unavoidable regulation (both statutory and imposed by the professional bodies) which flows from obligations to ‘The Law’. At the risk of over-simplifying, there are two dimensions to this:

- Responsibility to the courts and Justice
- Equality before the Law

For example, as described by a Bar Council document (2002, para. 20):
“A barrister’s overriding duty is to the court itself to act with independence in the interests of justice….The barrister may not employ obstructive or delaying tactics in court even if it would be in the client’s interest to do so.”

Other examples are the so-called "Cab-rank" rule (see section 7.2.4) and the provision of Legal Aid by the state.

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4 As a general rule, barristers in independent practice accept instructions only from solicitors and not directly from clients.
5 I hasten to explain that my use of the word ‘imperfection’ in this context has no intended pejorative implication. The obligation to the Law must entail, to a greater or lesser extent, some sort of intervention in the market place. That intervention prevents the market from operating in a free, unfettered, manner. In that sense, it is ‘imperfect’. Whether or not this obligation is singular is arguable – there are perhaps similarities in the professional and ethical obligations of other professions, most obviously doctors.
2.4 Market structure

OFT (2001, pp.47-8) reports that, in 2000, there were 101,000 registered solicitors in England and Wales\(^7\), and the largest 10 solicitors’ firms had a market share of 46.8%.

I have updated these figures to 2004\(^8\). There are now 121,000 solicitors on the Roll and 9,211 solicitors’ firms in England and Wales: that is, a 20% growth in the size of the profession in just 4-5 years, but a decline in the number of firms by about 500. Most solicitors’ firms are very small: 45% are sole practitioners, and a further 40% have between only 2 and 4 partners. At the other end of the scale, there are 31 firms with 81+ partners. Interestingly, the identities of the top 10 in 2004 remain completely unchanged from 2000, with only minor changes in their rankings.

Thus, the size distribution is heavily skewed, with a large, but quite sharply falling, number of small firms. Concentration is relatively modest: the largest firms do not have a particularly high combined market share in comparison to most industries\(^9\), but their leading positions have remained remarkably intact over the last four years (although there was apparently quite intense merger activity in the 1990s).

The Bar is a much smaller profession: there are currently about 10,000 barristers in independent practice in England and Wales, and another 2,500 employed barristers. All independent barristers are sole proprietors, but most belong to Chambers. The conventional wisdom is that the Chambers is primarily a structure for sharing common costs, but in which the members are quite independent players on the demand side, in principle, competing with each other. I have been told, by the Bar Council, that there are currently about 300 Chambers, with an average of about 30 members each. The size of Chambers can vary from only a handful\(^10\) to over 100 members\(^11\). Chambers are mostly located in London, but with some in other major cities of the country\(^12\). On turnover, Brick Court was the largest in 2004 (£34.5 million), which is only 3-4% of the turnover of Clifford Chance (the largest firm of solicitors). Size inequalities are also much less pronounced than amongst solicitors’ firms; for example, the turnover of the largest Chambers is only 4 times the turnover of the 25\(^{th}\) largest, while the ratio is 12 times for the 1\(^{st}\) and 25\(^{th}\) largest solicitors’ firms. I return to the Chambers in the next sub-section.

2.5 The conditions of entry

Education and training for both solicitors and barristers is a three stage process: academic, vocational and training/pupillage. This is commensurate with entering into such a profession, and “LECG did not find evidence that current entry qualifications and continuous professional development requirements are themselves having significant undue restrictive effects.” (OFT, 2001, para 27). Obviously, it is at the last stage that the professions might most conceivably exercise quantity restrictions (i.e. in

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\(^7\) It should be noted that not all registered solicitors are employed in solicitors’ firms. Apparently, roughly 80% of all registered solicitors are actually practising.


\(^9\) In accountancy, the top 5 firms account for 70% (OFT, 2001, p.47).

\(^10\) Apparently, there are also about 250 independent barristers practising alone, i.e. outside Chambers.

\(^11\) A listing of the largest Chambers, in The Lawyer’s Annual Report 2004, records St Philips Chambers as having 137 tenants.

\(^12\) Apparently about 30% of independent barristers are located outside of London.
the number of training contracts available from solicitors and pupillages from the chambers). However, the statistical evidence (OFT (2001)) suggests very significant expansions of both professions over the last 20-30 years. For example, for barristers, there is roughly 500 new places per year. Nevertheless, as a general proposition, one might expect that entry to become a sole practitioner is, in principle, a more risky prospect than into a partnership.

2.6 An economist’s summary of the traditional model
As I have described the market thus far, the sector is organised into two distinct vertical stages. The consumer deals initially with the solicitors stage. In principle, he can choose from a very wide range of suppliers, at one extreme, sole proprietors, and at the other extreme, larger firms with more than 100 partners. If the required service is routine and non-contentious, then the consumer/solicitor transaction is all that is involved. However, if the required service involves (or may involve) an eventual court case, the solicitor acts as a middle-man, introducing the consumer to an appropriate barrister, who can give further specialist advice and act as advocate in Court. The function of middle-man can be explained by the market imperfection of asymmetric information.

In some of the public debate, I have seen comparisons between the market so described and the economists’ ideal notion of perfect competition. In my opinion, this is not an appropriate comparator. Perfect competition is characterised by (i) perfect information, (ii) an homogeneous product, (iii) the absence of regulation. None of these assumptions is appropriate for legal services. Asymmetric information is an innate feature of the market, and it is difficult to imagine how any policy intervention could entirely remove this market imperfection. Amongst barristers (and perhaps between solicitors too), there are important differences in their services (specialisms). The profession’s obligations to “The Law” and universal access dictates that some sort of regulation is unavoidable.

Therefore, I prefer the following stylisation:

- **A two stage vertically-linked market**, with an upstream solicitors’ industry serving a downstream barristers’ industry.\(^{13}\)
- Both stages are best described as forms of **monopolistic competition**, in which a large number of downstream competitors (barristers) offer different ‘brands’ of advocacy (by specialism, and, to some extent, by geographical location). While the same differentiation by specialism may not be so marked amongst solicitors, their geographical location is also, in effect, a form of product differentiation: a sole proprietor in Bakewell offers a different service from a large City practice.

Without digressing very far into oligopoly theory, the two key features of a monopolistically competitive industry are: (i) different firms offer slightly different versions of the same product (brands), but (ii) there is a large number of firms, and free entry into the market. Broadly speaking, because (i) implies downward sloping demand curves for each firm, there is a similarity to monopoly, but the large numbers and free entry of (ii) implies a similarity to perfect competition.

\(^{13}\) Here, I abstract from the non-contentious side of solicitors’ businesses.
If one accepts this characterisation, product quality and choice become important aspects of the competitive process. In turn, this raises a potential trade-off between choice and efficiency. One of the best known results of the classic models of monopolistic competition was that firms will sell at a higher price than under perfect competition (the ‘excess capacity’ result), but the market will provide the choice which is singularly absent under perfect competition. Nevertheless, if excessive profits are to be avoided, then, as with perfect competition, free entry is essential (but see below).

Another implication of product differentiation is different consumers may well prefer different brands. If consumers are unclear which ‘brand’ best suits them, and indeed of the nature of different brands, then the market will function better (with reduced transactions costs) if there is some mechanism for matching consumers to suppliers. This is the function of the upstream industry (solicitors) - to advise consumers, and then to match them to the appropriate downstream brand (barristers).

However, because there are two vertical stages, in principle, there could be a variety of corporate structures. Some firms might be unintegrated (i.e. specialised solicitors or barristers), but some might be integrated (providing both functions). Integration within the firm may bring with it certain efficiency gains, but it may restrict consumer choice: for example, if integrated firms were only to offer consumers their own in-house brands (barristers). In that case, it would be important that the consumers still has the option to choose from unintegrated, as well as integrated, suppliers.

Finally, it is still inevitable that there will still be some constraints on the free operation of the market: because of obligations to the Law and equal justice for all consumers, and professional constraints on fitness to act as a Lawyer are a necessary constraint on completely free entry.\(^{14}\)

### 3 A revised, more ‘realistic’, model

The above stylisation may suffice as an historical textbook description, but it is clearly deficient as an accurate description of the contemporary legal services sector in England and Wales. I now turn to three revisions, each of which is potentially highly relevant to the question of partnerships.

#### 3.1 Blurring of the separation

The traditional strict demarcation between solicitors and barristers has undoubtedly undergone some softening in recent decades.

Firstly, increasingly, solicitors are able to fulfil the traditional functions of barristers. While they have always had the right to appear in county courts, magistrates courts and tribunals, additionally from 1993, the Courts and Legal Services Act (1990) enabled them to qualify as advocates in the higher courts (Crown Court, High Court, Court of Appeal and House of Lords). This has given rise to the so-called solicitor-advocate. Clementi (2004, p.4) suggests that there are currently about 2000 solicitors

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\(^{14}\) Such constraints, for example, necessary education and training qualifications, are necessary to alleviate informational asymmetry about the quality of the individual supplier
with such higher court rights\textsuperscript{15} (i.e. about a fifth of the number of independent barristers).

Secondly, barristers do have the choice to become employed barristers. There are almost 2500 employed barristers registered with the Bar Council. A survey in 2001 reports that 20% were employed by the Government Legal Service (i.e. lawyers in government departments providing legal advice to policy makers, and also drafting instructions to counsel etc), a further 20% by the Crown Prosecution Service, and the remainder in local government, the private sector (although not necessarily as practicing lawyers, but still retaining the title of ‘barrister’) and only 7% were employed in solicitors’ firms.

In terms of my previous stylisation, then, there has been vertical integration between sectors, with both some solicitors and some institutional consumers now having their own in-house barristers. Technically, however, solicitor-advocates are not known as barristers because they must be regulated by the Law Society, rather than the Bar\textsuperscript{16}.

Relatedly, solicitors may choose not to belong to a partnership with other solicitors, but to become an in-house solicitor for outside firms, whose primary activity is non-Law (i.e. the consumer). This is also a form of vertical integration, in which the customer integrates forwards into the solicitor stage, by employing its own solicitors.

In other words, different forms of integrated structures and competition have begun to emerge (e.g. between solicitors and barristers). Just how intense is this competition depends on the degree of substitutability, for example, between independent barristers and other advocates, to which I return below.

3.2 The Chambers revisited
Previously, I characterised the Chambers as a sort of cooperative on the (fixed) costs side - members share the same physical location and facilities, but with members who are quite independent of each other on the ‘selling’ side.

However, the reality appears to be rather more cooperation than on just fixed costs. For instance, I have also been told (by the Bar Council) that a Chambers will often put together a team of barristers to work on a particular case; that it is common for members to exchange ideas and experiences; and that the costs of training new members are shared. LECG (in OFT, 2001, para 234) went much further in suggesting that:

“it is the clerks of Chambers who normally negotiate on behalf of individual barristers. In practice, our observation is that competition takes place at the level of Chambers rather than at the level of individual barristers.”

\textsuperscript{15} This would imply a significant growth since 2000, when LECG (OFT, 2001, para 167) referred to about 1,000 solicitor-advocates, with 184 transfers from barristers into the Law Society in that year.  
\textsuperscript{16} Interestingly, in January 2003, chairman of the Bar Council, Matthias Kelly QC, called for all advocates, including solicitor-advocates, to be regulated by the Bar Council. He said, “That is a logical position. The present position is that the Bar Council regulated all barristers, even those employed in solicitors offices, in the same way as the Law Society regulated sole practitioner solicitor-advocates”. (The Gazette, 9 January, 2003, p.5).]
Moreover, each Chamber is not merely a random sample of barristers, who share only a common physical location. It appears that a set of Chambers will often specialise in a particular branch of the law. In consequence, in some relatively small parts of the Law, there may be a very small numbers of Chambers: for example, there only two specialising in EU and Competition Law and three in Pensions (Figure 16 p.70, OFT, 2001). This obviously raises the question: ‘how intense is competition within Chambers?’ To the extent that it were muted, my previous stylisation of monopolistic competition would be inappropriate.

3.3 Entry of new forms of competition
Recent years have also seen the emergence of what might be termed ‘para-legal-firms’. The most obvious example is the entry of licensed conveyancers – made possible by legislation in the mid 1980s. Other developments, involving new players in the market are listed\textsuperscript{17} in the DCA’s scoping paper (2003), and include: greater roles for insurers and accountants, growing use of on-line email services, referral agents and claims intermediaries.

3.4 Globalisation
Although much of the sector is still geographically localised, in recent years, there is increasingly more globalisation of legal work and the growing impact of international rules.

These last two points suggest that the traditional sector is coming under increasing competitive pressure from outside, and together with the challenges and opportunities presented by new IT technology, it will important that is able to respond, if necessary, in an innovative way.

4 The partnership restrictions
In Appendix 2, I have identified the professional restrictions, of the Law Society and Bar Council, that have most direct bearing on partnerships. I do not wish to claim that my list is exhaustive, but it does capture the key points:

- Independent barristers are not allowed to form partnerships amongst themselves (rules 205, 403.1 and 405b)
- Independent barristers are not allowed to form partnerships with solicitors or members of any other professions (rules 205, 403.1 and 405b)
- While solicitors are allowed to form partnerships amongst themselves, they are not allowed to form partnerships with other professions (rule 7).

Two other related restrictions, with seemingly important restrictions on competition, are:

- Solicitors in the employment of non-solicitors are not allowed to provide their services to third parties (Rule 4)
- Employed barristers may not charge for their services to 3\textsuperscript{rd} parties (with some exceptions).

\textsuperscript{17} This is based on interview responses from those in the industry.
My interpretation
Restriction 1 prevents horizontal integration between barristers; restrictions 2 and 3 prevent vertical integration between solicitors and barristers and mergers of a conglomerate nature between lawyers and other professions (such as accountancy). While restrictions 4 and 5 are not partnership restrictions, in themselves, their removal could introduce more competition from those suitably-qualified working in different business structures. However, the Law Society (for example, 2004, p.88) has since indicated its readiness to permit employed solicitors to provide any service to the public provided that clients enjoy the same protection as they would from a solicitor in private practice. I presume, therefore, that the principle involved is no longer contentious, even although the restriction remains in place at present. Restriction 5, in effect, prevents employed barristers from selling their services to anyone other than their employers or the public authority to which they are contracted.

5 The Clementi Review and the related policy debate
For the purpose of my report, the key passages in Clementi (2004) concern the proposal of Legal Disciplinary Practices (LDP). His description (p.124) defines an LDP as a law practice which permits lawyers from different professional bodies to be managers in firms that provide legal services for third parties. Non-lawyers would also be permitted to be managers, with their role being to enhance the provision of legal services (but not to provide other services to the public), but lawyers must be the majority of managers. Outside owners would be permitted, subject to safeguards.

If accepted, this proposal will mean that all five restrictions I described in the previous section would be lifted, although, as I understand it, the restriction on solicitors forming partnerships with outside professions would only need to be lifted where the purpose of the partnership was confined to legal services. The possibility of Multidisciplinary partnerships (MDPs) is left on the agenda but no immediate proposal is made.

Many of the issues addressed by Clementi in his consultation document and final review, and debated in the accompanying responses are anticipated in the OFT’s (2001) report. This provides a natural starting point for my own assessment.

First, the DGFT suggested that ‘separation’ “may add unnecessarily to costs” (para 49). In particular, he highlighted the Solicitors’ Practice Rules 4 and 7 as potential restrictions on indirect entry. He also suggested that employed barristers have only very limited rights to practice and commented that the Bar Council’s:

“requirement that only sole practitioners can supply barristers’ services is anomalous in the context of professional services and beyond. A similar requirement for, say, bookselling would have clear disadvantages in terms of inter alia, costs, price, efficiency, innovation and choice…Moreover, the sole practitioner requirement might also have the effect of deterring some people from a career as a barrister, but who do not have the financial resources to fall back on if their flow of business were to fall off, or who are quite reasonably averse to such financial risk. Lifting of the restriction could therefore help broaden access to and diversity in the profession” (ibid, pp.14-5).
6 My assessment: the case in favour of removing restrictions

In a nutshell, then, the concern is that these restrictions act as a constraint on the operation of market forces\(^\text{18}\) – in particular, the freedom of actors to choose the organisational structure which best suits them. Viewed as such, they are a constraint on competition, and the onus is on those who support the restrictions to show why they do not harm competition, or why they might yet be in the public interest for other reasons.

In that sense, the case in favour of removal will be, for some people, a fairly conventional, and predictable, assertion of the general benefits of competition. Notwithstanding this predictability, I first set out the case in favour of removal, in this section, before turning in more detail in the next section to the arguments in favour of retention.

When listing the restrictions in section 4, I interpreted them as barriers to various forms of integration. Therefore, I will first set out the possible advantages, in general, from horizontal, vertical and conglomerate integration.

6.1 Horizontal integration

This applies particularly to the removal of restrictions on partnerships between barristers. At present, independent barristers are required to operate as sole proprietors. Thus, they are denied the very basic freedom, available to nearly all firms in nearly all other markets, to choose their scale of operations. In turn, this must constrain the level of profits, degree of risk, size of portfolio, or anything else which is scale-related of the ‘firm’. It is true that the Chambers structure provides a means of relaxing the constraints so far as costs (mainly fixed costs) are concerned – but that is, at best, a very limited relaxation. Of course, the issue of risk is highlighted in the previous quotation from the OFT, and to the extent that operating as a one-man business is more risky than in a partnership or even wider business structure, it follows that this restriction may, indeed, be also an entry deterrent.

6.2 Vertical integration

This applies particularly to the removal of restrictions on partnerships between barristers and solicitors. There is a general presumption among most economists that, where it occurs, vertical integration is driven by efficiency considerations.

This presumption derives from the theory of transactions costs. In principle, many economic activities can be carried on either via transactions in the market or by internalising the transaction and activities within the firm. In some cases, it is more efficient to use the market, but, in others, transactions within the firm are more efficient. The transactions costs of using the market derive from imperfect information, problems of monitoring and avoidance of opportunism by the other party etc. Where these transactions costs are likely to be high, integration may be the better option. This does not mean that vertical integration is always preferable to separation, only that, where it does occur, it is probably for efficiency reasons. This is not to

\(^{18}\) The OFT’s analogy to booksellers may seem somewhat obscure, I take it that bookselling was cited as a randomly selected industry to highlight the worry that, were these restrictions imposed in any other ‘industry’, one’s initial reaction, as an economist, would be to suspect that they would have competition-constraining consequences.
deny that integration can sometimes be anti-competitive. For example, it can be used, under certain circumstances, to foreclose rivals. I return to this possibility in the following section.

6.3 Providing horizontally complementary products within the same firm
This applies particularly to the removal of restrictions on partnerships between barristers, solicitors and other professions (e.g. accountancy, property and financial services). As with the two previous types of integration, this may be motivated by a desire to reduce risk, achieve scale economies and reduced transactions costs. In this case, there may be two additional benefits: economies of scope on the cost side (sometimes it is cheaper to supply two products together than to produce them in separate firms) and portfolio advantages on the demand side (‘one-stop shopping’).

6.4 ‘Freeing up the market’
The previous paragraphs refer to quite general reasons (i.e. not specific to this sector) why one form or another of integration may bring with it its own benefits; and each of them resonates with some of the arguments I have read in the policy literature in favour of removing partnership restrictions in the legal services sector.

Ultimately, however, there is a higher-level reason for removal of restrictions, and this is simply that, with certain qualifications, ‘the market knows best’. To develop the argument, I should make two preliminary points. First, the removal of partnership restrictions does not mean, of course, that sole proprietors or vertically unintegrated firms will be prohibited. At least initially, we should expect that they will continue to co-exist alongside partnerships and integrated firms. Second, when assessing the benefits of removal of restrictions, we need to compare the anticipated outcome with an accurate counterfactual: what would be the consequences, in future years, of persisting with partnership restrictions? What is relevant to this, of course, is not what I called the traditional model (how things once were) but how we would expect the market to evolve, given our experiences of the fairly rapid change in recent years.

Bearing in mind these preliminaries, it is important to stress that, in any free market, competition is not only between firms, it is also between organisational forms. In this respect, the traditional model of perfect competition is positively misleading, in that it depicts a world of a large number of small homogenous players – all firms are assumed to be identically structured. The model is also quintessentially static. In fact, in a free market, the very existence of firms themselves is the result of a choice made by actors to organise production and exchange (to some extent) within the firm, as opposed to relying on transactions within the market place (see above). In turn, that choice will be based on considerations of efficiency. More generally, when firms choose to become vertically integrated, horizontally integrated, diversified or multinational, we would expect them to base those decisions on what is most profitable. In part, at least, this will depend on the relative efficiencies of these alternative corporate structures. This may be illustrated with an almost endless series of examples from the real world: a merger between supermarket chains, a shoe manufacturer selling through its retail chain of shops, a chocolate manufacturer diversifying into ice-cream, a British soft drinks manufacturer acquiring soft drinks manufacturers overseas are randomly selected instances.
An important part of this argument is evolutionary. In a dynamic world, in which consumer tastes and technology may be fast changing, it is important that firms have the ability to respond by, amongst other things, modifying their corporate structure. By permitting alternative corporate structures, we provide potentially new opportunities for innovation (putting together innovative packages of different services), entry, and investment. Such flexibility might be crucial in response to a world which is beginning to change rapidly outside (and increasingly inside) the legal profession.

It is not difficult to find periods in history where corporate structures have evolved quite substantially. Two very general examples are the wave of diversification in the 1960s and 1970s, followed by ‘return to the core’ in the 1980s and 1990s. Perhaps even more strikingly, the globalisation of the last 20 years saw an explosion of foreign direct investment, heralding choices by ever more firms to go multinational, or to increase their multinationality. On a more micro level, most historical accounts of the life cycles of individual industries identify evolutionary patterns in the development of corporate structure with eras of initial specialisation, followed by subsequent horizontal and vertical integration.

At the heart of all this is the notion that the market will give rise to the corporate structure or structures which are most efficient – both statically and dynamically. This is not to say that in any particular market all firms will adopt one particular corporate structure: we observe integrated and unintegrated shoe retailers, multinational and purely domestic soft drinks and chocolate manufacturers.

Of course, it might be argued that market conditions will tend to favour one particular corporate structure, and applying this argument to the case in hand, one might perhaps argue that, given the special public interest concerns, the current structures are already ideal. But, if this is the case, liberalisation should present no threat to those structures, since their efficiency advantages will enable them to win any post-liberalisation competition between structures.

7 My assessment of the case for retaining restrictions

I now turn to consider the arguments which might be used to justify retaining the restrictions. I start by returning to the thesis of the previous section, but now with a critical eye: does the market always know best? And is integration always a good thing? This acts as a general backcloth to the remainder of the section in which I consider a series of more specific arguments in favour of retaining the restrictions.

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19 One fairly common historical pattern is for structures to be fairly integrated in the early stages, giving rise to specialisation as demand growth facilitates scale economies. This is sometimes replaced in later stages by a period of re-integration, motivated by transaction costs savings.

20 However, one might question whether there is any innate reason why current restrictions should be ideally suited to the special nature of this market, given that, in the USA which is also based on Common Law, actors do have more choice of structures, and there is no clear demarcation between solicitors and barristers.
7.1 Does the market always know best? And for whom?
I have already pointed out that the removal of partnership restrictions does not dictate that vertical/horizontal/conglomerate integration should occur – only that it would be permitted. As such, I have argued that, if existing structures are indeed more efficient, then they will surely survive any such liberalisation, and remain intact. It is as if we would be putting existing structures to an ‘efficiency test’ – they will survive, but only to the extent that can match, or out-perform, new structures.

However, this overstates the benevolence of the market because it ignores the potential for divergence between private and public interest. Following the liberalisation of any market, we should expect suppliers to respond in their own self-interest. In this case, this would mean switching to an integrated corporate structure if it was profitable to do so. Where these new profitable opportunities are cost-driven, and do not compromise the wider public interests, there is no divergence – private and public interest coincide. On the other hand, if the new opportunities are profitable because they soften competition (and thus raise price or reduce quality), or compromise on the wider public interest, then fears about new corporate structures will be justified.

A fairly common feature of markets after liberalisation is that their fragmented structure immediately post-liberalisation gives way to significant consolidation in the years that follow. This consolidation is often the result of restructuring through mergers and/or rapid organic growth by the most successful of firms in the newly competitive environment, perhaps due to superior innovation. Many examples come readily to mind. Purely in terms of my own recent research, I can point to retail opticians and bookselling (after the repeal of the Net Book Agreement)\textsuperscript{21}, the retail supply of electricity\textsuperscript{22} and the local bus industry.

Of course, increased concentration does not automatically imply anti-competitive behaviour. Often, quite the reverse is true: certain firms thrive in the post-liberalisation years because of their greater efficiency and/or innovation, and, as they thrive, they achieve ever larger market shares. This only becomes a matter for concern if large market shares give rise to dominance and subsequent abuse. This takes us into the familiar territory for competition economists. Horizontal integration (mergers) may involve a trade-off between efficiency gains and unilateral (perhaps even coordinated) effects. Vertical mergers may raise foreclosure concerns which might outweigh gains from reduced transactions costs.

7.2 Specific arguments in favour of retaining current partnership restrictions
The above comments are by way of a general preliminary, and they are not, in any sense, my forecast of what would happen in the legal services sector were partnership restrictions to be removed. In this sub-section, I consider, more specifically, how applicable they might be to this particular sector.

From my reading of the policy literature and submissions leading up to the Clementi report, I have identified four broad types of argument in favour of retaining current structures. The first two emphasise the strengths of the status quo, and the second two

\textsuperscript{21} Both reported on in Davies et al (2004).
\textsuperscript{22} Following liberalisation, in most regions of the UK, in 1999, the consumer could choose between up to 15 different suppliers. Currently, the choice has been reduced to five.
focus on hypothesised downsides of allowing new structures. I briefly discuss and then assess each in turn. For reference purposes, I acknowledge their explicit appearance in the Bar Council’s general case in favour of retention, as manifested in the Kentridge report (2002). I view this report as the most comprehensive and vigorous defence of current structures.

7.2.1 The traditional benefits from separation

These relate to the efficiency benefits of specialisation which might be lost if partnerships were allowed. In effect, this is the classic ‘efficiency’ defence of the traditional model, and is essentially an argument against vertical partnerships. The term efficiency should be interpreted widely to encompass the costs of using the market as well as the operating costs of actors therein.

Barristers

For barristers, it is argued that specialisation enables them to:

- attain higher levels of experience and skill
- provide more objective (and thus more valuable) opinion
- perform more cheaply than solicitors.

My opinion

The predictable, and in my opinion telling, response to these claims is that if, indeed, independent barristers can achieve lower costs and higher quality by specialisation, then they will still be able to compete effectively with integrated partnerships. In fact, it is not obvious why they will no longer be able to specialise even if located within integrated partnerships: as a general proposition, specialisation is equally as possible within firms as in the market place.

Less importantly, I find two details of the Kentridge argument unpersuasive (although this is not crucial given the previous paragraph.) First, the price comparison between solicitors and barristers, used by Kentridge (para 11), is misleading, precisely because, as is acknowledged, barristers have lower fixed costs. The services typically provided by solicitors and barristers are different under the current system. But both are typically required by the consumer, and this would remain just as true if the consumer could buy a package from a single integrated partnership as it is, currently, where they buy from two separate firms. Second, I have been told that by no means all barristers specialise in specific areas of law, while some solicitors are extremely specialised in specific areas. Indeed, I wonder whether the traditional demarcation between the two professions is as clear cut as it once was. Clementi (2004, p.4) reports that “there are a large number of barristers, such as those who advise on tax or conveyancing issues, whose job is similar to many solicitors”.

I am insufficiently knowledgeable about the legal profession to comment confidently on the assertion that independent barristers offer more objective advice than would barristers in integrated practices. However, were it to be true, then this would give the independent barrister a significant quality advantage in the post-restriction world.

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24 Consider the analogy of clothing manufacturers and retailers. One would not necessarily argue that the former are less efficient than the latter because their costs differ. Nor would one necessarily argue that an integrated manufacturer/retailer (say Benetton) would have to charge the consumer a higher price than unintegrated retailers.
Either way, it is apparently quite routine for law firms to check internally for second opinions on important issues.

7.2.1(b) Solicitors
For solicitors, non-integration allows them better to fulfil their role as intermediaries, enabling them in particular
- to match the attributes of barristers & clients
- monitor the quality of barristers

My opinion
As mentioned earlier, many markets have imperfections which are ‘solved’ by middle-men. This is not usually considered reason to prevent them from integrating forwards. Indeed, even under present restrictions, solicitors are already more than just intermediaries, they are also direct providers of legal services, including lower courts advocacy, and, in the case of those who qualify as solicitor-advocates, higher courts advocacy. Moreover, even with the split profession, the consumer still faces the problem of asymmetric information – in choosing not just a barrister, but also a solicitor in the first place.

Again, the predictable, but persuasive response to this point is that, if there is, indeed, an identifiable demand for the disinterested (i.e. unintegrated) middle-man, it will be profitable for some solicitors to remain unintegrated.

7.2.2 The reality of current structures already delivers the hypothesised gains from allowing partnerships
This argument relates not to the traditional model of section 2, but rather to what I referred to in section 3 as the ‘reality’ model. In other words, it rests on the reality that ‘separation’ between the professions is nowadays somewhat blurred. There are two parts to the argument: (i) there are no longer significant restrictions on mobility within/between the two professions and (ii) the greater flexibility of career routes for barristers facilitates entry.

The greater mobility/flexibility derives from the fact that, nowadays, independent barristers can avoid the restrictions by either:
- Practising as a solicitor: “any barrister in independent practice who wishes to practise in a partnership, conduct litigation and/or have direct access to clients can do so as a solicitor – by passing a test. If so, he retains his rights of audience”, or by
- Becoming an employed barrister: “even without joining the solicitors’ profession, a barrister may conduct litigation and have direct access to clients while continuing to practise as a barrister in the employment of a solicitors’ firm.”

7.2.2(a) Competition within the market (Kenridge, 2.19 and 2.30-2.34),
Thus, although the traditional model involved strict demarcation, the modern reality is that there is already competition between independent barristers and integrated firms, i.e. those with in-house advocates (either solicitor-advocates or employed barristers). This should be sufficient to match any enhancement to competition which might be achievable from removing partnership restrictions.
My opinion

There is no doubt that recent years have seen a significant increase in the number of solicitor advocates and employed barristers. However, for this argument to be persuasive, one would need to be assured that independent barristers, solicitor-advocates and employed barristers are seen as strong substitutes on the demand side. I do not believe this to be the case, and I have sought to clarify my thoughts on this by seeking opinions on the question: “Given that solicitor-advocates have more flexibility, why have not more independent barristers chosen to become solicitor-advocates?”

The main answers have been:

- A preference for the working conditions and freedom from being self-employed
- A preference for the wider range of cases typically taken by an independent barrister
- A sense that members of the independent bar have greater prestige/status.

The first two are of little relevance, so far as demand substitutability, although I return to them presently in a slightly different context. But the third seems, to me, to be crucial, and implies that solicitor-advocates (and employed barristers) may be viewed, in some quarters at least, as being of inferior quality. This certainly resonates with a passage in OFT (2001, paras 173-7) which refers to problems of third part perception, for example in the attitude of some judges to solicitor-advocates. It also cites statistics which show that solicitors account for disproportionately very low shares of the judiciary. If these perceptions are shared by consumers, then solicitor-advocates may indeed suffer from being perceived of as ‘lower quality’, and therefore as an imperfect substitute for independent barristers. It is as if, by belonging to the independent bar, the independent barrister enjoys a reputation effect – a sort of official stamp of approval – equivalent to a first mover advantage.

Of course, I am unqualified to make a judgement on the relative qualities of independent barristers and solicitor-advocates, and it may be that there is some value in having some sort of high-quality stamp of approval. However, it is not obvious why this should be bundled with the requirement to practice independently.

In any event, whether or not there is a real quality differential, it does mean that the three types of advocates are imperfect substitutes.

7.2.2(b) Entry into the market (Kentridge 3.25-3.26)

This is a direct response to the OFT’s suggestion (quoted above in my section 5) that partnership restrictions also indirectly restrict entry to the barristers’ profession itself: they deter those without the financial resources to survive potential downturns of business, or those who are averse to such financial risk. The Kentridge response is to argue that the risk-averse can choose instead to become employed barristers or to practise as solicitor-advocates. Moreover, Kentridge suggests that there is no

25 In fact, I have been told that the majority of solicitor-advocates are solicitors who have attained the rights of advocacy, rather than previously independent barristers who now practice within solicitors’ firms.
evidence, anyway, that potential entry into independent practice is deficient; in fact, heavy demand for pupillages and tenancies at the Bar would suggest the contrary. Apparently, sets of chambers compete with one another to attract new entry, and the Bar Council has recently approved an amendment to the Code of Conduct which provides for the compulsory funding of pupillages.

My opinion
To the extent that my above concern – that employed barristers and solicitor advocates may wrongly be seen as second-class barristers – is at all valid, the implication of this response is that the risk-averse or non-wealthy entrants must settle for second best. This would not be so if the demarcation between barristers and solicitors were removed and if more had the financial security of partnerships.

The greater financial security of the partnership is a compelling argument, as is underlined in Clementi (2004, p.129) who quotes from the Chairman of the Bar Council:

“The trade-off of a career at the Bar is that you have rotten years at the beginning and maybe do not make it at all and leave. We have a big shakeout around the age of 30.”

Assuming that potential entrants into the profession have foresight, surely this would dissuade those who are risk averse and without a deep pocket?

I concede that this is largely an empirical matter, and facts on what might happen without partnership restrictions are of course, unavailable. However, I have been told that, typically, about 1500 persons per year qualify from vocational training. In 2003, they were competing for 1500 pupillages, but this has since fallen, following the compulsory funding just mentioned to about 550. The issue is whether this last number would be any higher without partnership restrictions.

7.2.3 Competition concerns from allowing partnerships
The arguments I grouped under this heading are specific instances of the general concerns I described in section 7.1.

7.2.3(a) Reduced competition and choice between barristers (paras 3.4-3.12)
This is an argument against horizontal integration. Thus, Kentridge (3.20-3.22) raises the possibility that it might be in the private interest of independent barristers to enter into partnerships even though it was not ‘cost-effective’ for the public. This could happen because partnerships would reduce the number of competing undertakings, and raise price.

He explains that, currently, members of the same Chambers frequently act for clients with opposing interests. This would be impossible if they were in partnership, since partners cannot properly act for clients whose interests conflict. It follows that, if partnerships were permitted, this would automatically reduce the choice available to.

26 Furthermore, I have also been told that pupillage is far harder to find for employed barristers.

27 The same point is also made in paras 3.13-3.14. Although they are titled ‘Minimising costs’, the discussion seems to relate to prices charged by barristers, i.e. costs to the consumer.
the consumer. This danger would be most pronounced in specialised branches of the law, in which there is only a small number of barristers with the relevant expertise.

There is an analogous potential problem in geographical space: in most regional centres, there tends only to be a small number of Chambers which themselves tend to specialize. If the members were to become partners, choice would be severely limited for the second party, and in many cases, the option of instructing a suitable local barrister would be removed for many consumers.

My opinion
In considering this hypothesis, I have sought informed opinion and read very carefully the responses to the Clementi consultative paper because this is potentially a very concrete example of how deregulation might yet dampen competition because of consolidation. Certainly in the opinion of one barrister, this is not a general problem, because the sheer number of independent barristers. However, this is not necessarily to deny the possibility of significantly reduced choice in some particular specialisms. Therefore, I have considered the specific example of competition law, since this was identified in OFT, 2001, as an area with only two specialist Chambers. I have been told that there are currently about 30-40 independent barristers specialising in this area, and that 85% of these belong to just two Chambers. Of course, if one were to accept the proposition of LECG mentioned earlier, that competition is between Chambers, rather than between individual lawyers, there would already be a duopolistic structure. This seems somewhat unlikely to me, so I will assume that there is, at least to some extent, competition within Chambers.

What would happen if partnerships were allowed? One answer is ‘nothing’. This would be true if the attractions of working conditions, independence and range of cases mentioned above are compelling considerations. But even if they were not, there is another compelling reason why independent barristers would not wish to join large partnerships: it would clearly drastically reduce the number of cases in which they could act. To take the point to the extreme, unlike nearly every other market, advocacy requires competition since there are always at least two sides to any case. So, while it is true that dominant partnerships in any specialism would deny consumers much choice (because of conflicts of interest within partnerships), equally, it would deny the members of that partnership much custom!

I think that the parallel concern in geographical space raises even fewer problems. Surely, travel from the provinces to London for advice from a barrister is already fairly commonplace for many consumers? It is also not clear to what extent clients actually see barristers in person anyway, given that communication via the solicitor is possible.

7.2.3(b) Partnerships would disadvantage smaller solicitors (para 2.15)

28 Wolfe’s “Thoughts on the Kentridge report and the OFT investigation (2003, para 48).
29 However, Wolfe (ibid para 22 cites a number of practices within Chambers which imply only a very limited degree of independence for the individual barrister from the commercial interests of the Chambers to which he belongs.
30 Perhaps professional football is another example.
Again, this is a specific instance of the general worry, mentioned in the previous section, that vertical mergers may lead to the foreclosure of smaller firms. Under the present structure, all solicitors ‘fish in the same pool’ – all have access to the independent bar. But if partnerships were allowed, this might lead to, not only a horizontal concentration of barristers (see above), but also an increased number of in-house barristers for the larger solicitors. Both would reduce access for smaller solicitors.

My opinion
There is already evidence that the number of smaller firms is declining, and presumably this implies doubts about the continued health of the small high street solicitor. In turn, there are two worries: (i) the wider public interest, i.e. equal access to the Law, (ii) a softening of competition between larger and smaller solicitors. I discuss the former in the following sub-section.

The latter depends very much on the extent of substitutability and nature of competition within the profession – but, this time, within the solicitor’s profession. Insofar as one might expect most vertical integration to occur within mainly the largest of solicitors, and so long as they do not see themselves in competition with small high street solicitors, the obvious solution for the smaller firms is to seek expert opinion and advocacy services from the larger firms. Worries about foreclosure are only real given two implicit assumptions: (i) that the largest solicitors tie up a significant proportion of currently independent barristers, and (ii) that they have an incentive to foreclose their smaller high street brethren. Both assumptions seem to me to be questionable. I have already cited reasons why at least some barristers will prefer to remain independent, and it would be clearly in their interests that there continued to be a pool of unintegrated solicitors. Also, it is not clear what would be the motive for the larger solicitors to squeeze out the smaller solicitors. I have been told that the large City Law firms have quite different customer bases than do high street solicitors. (Indeed, most City law firms do not have private clients). It is by no means obvious therefore why the largest solicitors would have any real interest in foreclosing the smaller firms, and, in this case, there would be no motive to deny them access to the services barrister partners.

7.2.4 Removal of restrictions would compromise the wider public interest
There are two main planks to this argument: the demise of the small solicitor as just discussed, and the potential threat to the cab-rank rule.

7.2.4(a) Demise of small solicitors jeopardises access to justice and equality before the law (Kentridge, para 2.17)
As already explained, this is the worry that affordable justice, which, for the majority, depends on the smaller solicitors’ firms based in local communities, may be compromised with the decline in numbers in the independent Bar.

My opinion

31 It might be argued, alternatively, that it is the medium sized solicitors who have most to gain from the exit of their smaller brethren. However, they will not have the ability to foreclose the smaller firms by ‘buying up’ large numbers of independent barristers.
Clearly, the demise of the high street solicitor is already an issue, even without any changes to partnership rules. Integration between the larger solicitors and barristers would only add to these worries if smaller solicitors were denied access to advice from what would now be the in-house barristers of the larger firms. Unless the larger firms were indeed intent on foreclosing their smaller rivals, it is unclear why they should wish to deny this access. As I have just said in the previous sub-section, I do not believe this would be the case.

In fact, I suspect that the solution to potential problems of universal access lies with future developments in the sector which take me outside my research brief and area of expertise. For example, it has been suggested to me that one solution might be what is called “RAC Law”, i.e. an organisation such as the RAC setting up a widespread chain of law centres throughout the country. Another possible future development might be the establishment of franchising by the larger Law firms. This could well be feasible, given that many legal services transactions (including conveyancing, probate work, even some routine criminal or family work) traditionally undertaken by high street solicitors are fairly commoditised in nature.

7.2.4(b) Threat to the cab-rank rule (Kentridge, paras 2.20-29 and 3.15-19)

According to the Bar Council, an integral part of the responsibility, to ensure that everyone has equal access to justice, is the so-called "Cab-rank" rule.

“This rule expresses more than a duty to clients: it expresses a duty to the public at large and to the administration of justice....It requires a barrister to accept instructions in any field in which he or she professes to practice…on being offered a proper fee. This duty exists whatever the barrister’s views of the client, or of the client’s case. In the words of the Bar’s Code of Conduct, a barrister must act for any person "irrespective of (i) the party on whose behalf he is instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause conduct guilt or innocence of that person" (ibid para. 23).

It is argued that this rule (i) preserves the barrister’s independence of his client, and (ii) facilitates access to justice.

Kentridge argues that partnerships would significantly increase the chances that conflict of interest/knowledge would rule out a barrister from accepting instructions, thereby jeopardising cab-rank. If a barrister belonged to a partnership, the clients to whom these rules applied would not be limited to just the barrister's own clients, but would include the clients of his partners. More generally, because partners “could not appear against each other combined with the loss of the cab-rank rule (there) would almost certainly be increased polarisation within the profession. For example, barristers in the field of criminal law would be likely to gravitate towards appearing only for prosecution or only for defendants...” It is claimed that this would deprive barristers of breadth of experience, jeopardise their independence, and accentuate inequalities between litigants as the most able barristers would be monopolised by the most wealthy clients.

My opinion

32 This is identified in Annex B (section 2.2) of the DCA’s scoping paper (2003).
As a matter of sheer arithmetic, it must be true that any consolidation amongst independent barristers would reduce the pool of eligible taxis (barristers) arriving at the rank. However, it is not clear to me how pronounced this effect will be. As Clementi notes (p. 131), the analogy to taxis is misleading, given that prices are not regulated. There certainly seems to be some doubts about how widely the rule is adhered to, and the Bar’s own conduct rules include various opt-outs (especially for QCs). Again, a quotation from a barrister by Clementi (p. 131) is illustrative:

“being busy is “often a flexible concept and any reasonably successful barrister will be able credibly to assert that his current professional and private commitments preclude him or her taking on a case that is unattractive 33.”

In fact, Clementi (para. 81) expresses serious doubts that the cab-rank rule really fulfils the claims that Kentridge makes of it:

“Even if there were no issues about feel levels or availability, this rule does not ensure the right to representation often claimed. The barrister is required to accept a brief from a solicitor. In the restricted cases where the client can approach the barrister direct, the Kentridge Report states that the rule is not to apply. Thus for the public the rule would amount to: ‘if you can hail a solicitor, you can hail a barrister’. This rule would be stronger if it were allied to wide direct access to barristers by clients”.

Given my lack of expertise and experience on the details of how this rule works out in practice, it would be inappropriate for me to add anything to Clementi’s conclusions.

8 Restrictions on partnerships with complementary professions
I will deal more briefly with the issues surrounding Multi-Disciplinary Partnerships (MDPs) (where the other disciplines would include, for instance: accountancy and finance, insurance, and various management functions such as marketing). It seems to me that MDPs raise no additional direct competition concerns beyond those I have already discussed. It also appears that MDPs are not on the immediate agenda.

Current professional restrictions rule out such partnerships for both barristers and solicitors, although, in the case of solicitors’ firms, such professionals may be employed by a practice, but they are not allowed to be partners. The Bar Council is opposed to relaxing their restrictions, explaining (Kentridge, paras 3.27-3.29) that:

“All the reasons for prohibiting partnerships between barristers apply also to partnerships with members of other professions. Also, "multi-disciplinary partnerships" would give rise to difficulties of differing: professional standards, approaches to conflicts of interest and rules on client confidentiality and the operation of legal professional privilege.”

The Law Society, on the other hand, is not opposed to relaxing its own restrictions:

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33 This quote is from Wolfe (op.cit) who also gives a number of other reasons why observance of the cab-rank rule is often circumvented (paras 24-29).
“The Law Society’s long-term objective remains to permit MDPs on an unrestricted basis, subject to establishing the necessary consumer protections” (Law Society 2004)

The protections they have in mind are similar to those referred to in the latter part of the quote from the Bar Council.

As I mentioned earlier, the arguments in favour of multi-disciplinary partnerships are largely economies of scope on the cost side, and offering a one-stop shopping facility to consumers on the demand side. Depending on the strength of these effects, mergers between, say, lawyers and accountants could become attractive, and we might observe the appearance of conglomerate professional services firms over time. Insofar as, say, accountancy and legal services are not substitutes, this would cause no immediate competition concerns. Of course, one can speculate that, in the longer run, there might be rapid consolidation and concentration: if such firms began to secure dominant market shares, because they offered a more attractive product to consumers, there might be potential worries of abuse (hypothetically, predatory behaviour financed from a ‘deep pocket’ as an example). But any such potential practices would be subject to scrutiny under general competition law. On the other hand, the potential to adopt a multi-disciplinary structure might be attractive to smaller regional solicitors. But this is speculation.
Conclusions
In my opinion, the most compelling argument in favour of removing current partnership restrictions is that this would be merely a facilitative, i.e. permissive, change, and certainly not prohibitive of existing structures. No solicitor or barrister would be obliged to join a partnership with anyone else. It may, or may not, be the case that horizontal partnerships between previously independent barristers, or vertical partnerships between barristers and solicitors, or partnerships with other professionals prove to be viable in the marketplace. The key issue is not whether integration is better than non-integration, it is simply that one should permit competition between alternative forms to occur.

In general, ‘survival of the fittest’ is the logic of the market, and so long as fittest can be equated with ‘most efficient’, this is desirable for the public welfare. I have considered the alternative interpretation, namely that such partnerships would grow at the expense of existing structures, not because they were more efficient, but because they would be privately profitable due to a dampening of competition. I do not believe that there are compelling reasons for expecting this to be the case. Of course, one can not rule out the possibility that there will not be specific mergers/partnerships in certain niches in the market. But this is no different from any market, especially those in which there are relatively small niches, and one should expect that the competition authorities/regulator would be vigilant.

Concerns have also been expressed that, by permitting partnerships, one might seriously jeopardise the professions’ capability to observe responsibility to the courts and to equal justice for all. Having read these arguments and consulted others with more institutional knowledge, I am unconvinced this fear is likely to be justified. However, I should stress that I am not a legal expert, and I leave this to others to judge.
Appendix 1: My Terms of Reference

This opinion has been written in response to a request from the Department for Constitutional Affairs with the following terms of reference: You are asked to examine the economic issues in relation to current restrictions in place in the legal services sector and the possible removal of those restrictions. Currently solicitors can only operate as sole traders or in partnership with other solicitors. Barristers in the independent Bar are restricted to practising as sole practitioners.

In doing this work you will:

- review the relevant publicly available literature leading up to, during, and following the Review of the Regulatory Framework for Legal Services in England and Wales;
- review the relevant Bar Council and Law Society professional rules;
- meet with anyone you may deem necessary to inform your work; and
- with reference to the relevant theoretical and empirical academic economics literature, discuss the economic implications of both keeping restrictions in place and also removing restrictions on:
  - competition;
  - access to justice; and
  - entry into the legal professions.
Appendix 2:
Relevant Law Society and Bar Council professional rules

Extracts from the Law Society’s Practice Rules

Rule 4 Employed solicitors
Prevents employed solicitors from instructing Council; exercising extended Rights of Attendance; or acting for anyone other than employer.

Rule 7 Fee sharing
Fee sharing is restricted to other solicitors; foreign lawyers; employees; retired/deceased partners/predecessors; estate agents; law/advice centres (legal aid fees only). Partnership is restricted to solicitors; foreign lawyers; recognised bodies. A solicitor cannot practice through any body corporate except a recognised body or as employed solicitor.

Private Practice
3.02 Partnerships
A solicitor shall not enter into partnership with anyone other than a solicitor, foreign lawyer or recognised body (or an English barrister overseas).

3.03 Fee sharing: reiterates Practice Rule 7

Employed solicitors
4.03 Reiterates Practice Rule 4.

Professional fees
14.02 Fee sharing - commissions and credit card payments
Reiterates Practice Rule 7.

Relations with the Bar, other lawyers and professional agents
20.08 Barrister employees
Non-practising barristers may be employed in a solicitor's office.

34 Cautionary note: I am not a qualified lawyer, and these excerpts constitute the best attempt of a layperson to identify restrictions which may be germane to partnerships. Although I have used the referenced webpages, I have sometimes abridged the prose. Thus these are not necessarily the quoted regulations verbatim.
Extracts from the Bar Council’s Code of Conduct\textsuperscript{36}

II. Practising requirements
205. A practising barrister must not supply legal services to the public through or on behalf of any other person (including a partnership company or other corporate body) except as permitted by paragraph 502.

IV. Self-employed barristers

Instructions
401 A self-employed barrister:
(a) may supply legal services only if appointed by the Court or is instructed:
(i) by a professional client; or
(ii) be a licensed access client (with further condition)
(b) must not in the course of his practice:
(i) undertake the management administration or general conduct of a client's affairs;
(ii) conduct litigation or inter-partes work
(iii) investigate or collect evidence for use in any Court;
(iv) take any proof of evidence in any criminal case (with exceptions);
(v) attend police station without a solicitor to advise a suspect/interviewee.

Administration and conduct of self-employed practice
403.1 must not practice from the office of or in any unincorporated association (including any arrangement which involves sharing the administration of his practice) with any person other than a self-employed barrister or any of the following:
(a) a registered European lawyer;
(b) subject to compliance with the Foreign Lawyers (Chambers) Rules (reproduced in Annex H) and with the consent of the Bar Council a foreign lawyer;
(c) non-practising barrister or retired judge who is practising as an arbitrator/mediator.
403.2 A self-employed barrister:
(c) must have regard to any relevant guidance issued by the Bar Council including:
(i) the administration of chambers;
(ii) pupillage and further training; and

Fees and remuneration
405 may charge for any work undertaken by him on any basis he thinks fit provided it
(b) does not involve the payment of a wage or salary.

V. Employed barristers
502. Employed barristers may supply legal services to employer (and employees; directors; company secretary); other public authorities, Ministers and Officers of the Crown (where employer is a public authority); justices (where the barrister is a justices' clerk); individual members (where the employer is a trade association); any client (where employer is a solicitor/practice/authorised litigator); members of the public (where employer is Legal Services Commission); clients (where the employer is Legal Advice Centre); any member of the public free of charge.

VIII. Miscellaneous
808.1 A barrister who is a member of another authorised body and currently entitled to practise as such shall not practise as a barrister.

\textsuperscript{36} http://www.barcouncil.org.uk/document.asp?languageid=1&documentid_ddl=2831&documentid=2818&original_documentid=2831
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