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**PROTECTING AND PROMOTING COMPETITION IN RESPONSE TO "DISRUPTIVE"
INNOVATIONS IN LEGAL SERVICES**

-- Issues paper by the Secretariat --

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Abstract

Despite traditional resistance to change in legal professions, pro-competitive “disruptive” innovations are beginning to transform legal services and the manner in which they are delivered. **Online service delivery** is allowing both legal professionals and unlicensed providers to serve clients remotely while taking advantage of the scalability of digital platforms. In addition, **ranking and review information** regarding legal professionals is becoming increasingly accessible, and is allowing clients to assess the quality of professionals before retaining them – a previously difficult proposition. Further, the **unbundling of services**, partially driven by increasing client awareness and fee pressure, is transforming the distribution of tasks in legal services and ending traditional “black box” models of service delivery. As a result, standardised activities are being outsourced to low-cost providers (including unlicensed ones), and new billing models are being introduced. Finally, **automation** is changing the nature, and volume, of tasks that legal professionals perform. Although the extent to which the work of legal professions can be automated is subject to debate, automated systems have been introduced which offer new capabilities and, in at least some instances, improved performance relative to legal professionals.

As a result of these innovations and the new competition they bring, the regulatory framework in which legal professionals operate is under pressure. The exclusivity enjoyed by legal professionals, and the precise scope of activities to which it applies, is becoming unclear as unlicensed entrants offer a widening range of services. Restrictions on the quantity of professionals that can operate in specified regions are being questioned at a time where the services they provide could easily be made available online. Further, legal professional self-regulators may be unable, or ill-suited, to identify accommodations that permit innovative entrants to serve consumers.

Competition authorities, which may have limited experience in legal services markets given that enforcement issues have been rare, should be aware of the challenges described above. Authorities can play a role in advocating for regulatory systems that reflect current market realities and ensure market access for pro-competitive disruptive innovations. Such a role could include advising policymakers who may be seeking to balance the benefits of competition with other policy objectives such as consumer protection. This process will require consideration of the objectives of legal professional regulations, particularly those addressing market failure, as well as the current design of those regulations.

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1. Introduction

1. Recent change in legal services markets has been the subject of much discussion. References to “radical transformation” in the delivery of legal services (Leeke, 2015), the “stumbling” of traditional business models (Rubin, 2014) and a “harsher reality” for a profession traditionally resistant to change (Hallgarn and Björk, 2013) can be found in nearly every publication regarding the state of the industry. While each legal profession¹, area of law and legal tradition will be affected in different ways, it is clear that no professional will be completely immune to transformation. “Disruptive” innovations in legal service offerings, and the new competition they bring, are a driving force behind this transformation.

2. Disruptive innovations are new products, processes or business models that redefine a market and displace incumbent firms. They are distinguished by the fact that they come from outside a market’s extant value network, defined as “the context within which a firm competes and solves clients’ problems” (Christensen and Rosenbloom, 1995; De Streel and Larouche, 2015). While some may be in their early stages, several such innovations are being introduced in legal services markets. These innovations may not be disruptive under some definitions, but they come from outside of existing value networks and have a significant potential, pro-competitive, impact on legal services markets. As McGinnis and Pearce (2014) argue, rather than simply improving the work of legal professions, technology is supplementing and replacing this work at an increasing rate. Examples range from the automated preparation of custom wills to the emergence of outsourced litigation support providers.

3. These types of innovation present some particular challenges for competition authorities. There are relatively few enforcement concerns, but there is a significant opportunity for competition advocacy with respect to professional regulations. The extensive regulation of legal professions is being challenged by disruptive innovations, which often operate outside of, or undermine, traditional regulatory frameworks. Competition authorities have an opportunity to help policymakers balance the goals of professional regulations with the promotion of competition when responding to these challenges. This paper proposes a starting point for this process: assessing current regulatory frameworks and their underlying objectives in the context of evolving market realities.

4. This paper will introduce recent disruptive innovations in legal services markets, as well as the overarching trends giving rise to them. Next, the role for competition authorities in the face of legal services disruptive innovation, particularly with respect to competition advocacy, will be identified. The rationale for legal services regulations and the composition of these regulations will then be briefly summarised. This will provide a starting point for the discussion that follows of the impact of disruptive innovations on the motivations for, and design of, current regulations.

2. Recent disruptive innovations in legal services and their market impact

5. This section will discuss recent legal services disruptive innovations, beginning with an overview of the factors that have contributed to their development.

2.1 Factors leading to recent disruptive innovation in legal services

6. The environment in which legal services are delivered has been subject to several long-term trends. The roots of these trends are not all recent – technology has been changing the way legal professionals do their work for many years without affecting fundamental business models. However, theorists of disruptive innovation note that it can take time for its impact on the market to be fully felt (see, for instance, Hart and Christensen, 2002). The trends appear to be maturing and, in combination with each other, are creating an environment in which disruptive innovations can flourish.

7. Communication technology is enabling an alternative to the traditional face-to-face model of legal service delivery. Legal professionals can now provide services to clients through increasingly-sophisticated online interactions, ranging from video conferencing to live chatting on specialised platforms. This means that market competition can be opened up to a much broader base of service providers who interact with clients remotely, including low-cost providers internationally. Further, legal service providers are making use of communication technologies to outsource tasks (often standardised ones) internationally.

8. At the same time, the accessibility of online information is leading to what is sometimes termed the “democratisation of knowledge” (see, for instance, Rhodes, 2015). While accessibility of information via the internet is not new, availability of information about legal issues and legal service providers is expanding rapidly. Specialised platforms can now provide consumers, or prospective consumers, of legal services with information about the nature of the services they require, the quality of the service providers, cost, legal professional compensation and risks associated with certain legal issues. Much of this information is provided by fellow users sharing their experiences or by legal professionals and is making consumers better equipped to select a service provider and play an active role when seeking legal services.

9. One impact of the increased availability of knowledge regarding legal services is an increase in the pressure on law firms to minimise their fees. This pressure increased significantly during the financial crisis, when clients were under significant cost restraints, and does not appear to have abated since (see, for example, Whalley, 2015; Binham, 2014). Fee pressure has also begun to lead to significant changes in the way legal services are delivered, including the growth of low-cost providers. A US survey found, for instance, that a majority of firm general counsel would be open to hiring less-prestigious firms if they could save a significant proportion of their bill (Smith, 2013). In 2015, 94% of US law firm managing partners responding to a survey indicated they expected to see increasing price competition as a permanent trend in the legal services market (AltmanWeil, 2015).

10. Despite fee pressure from existing clients, the level of fees has been identified as a barrier to accessing legal services in many jurisdictions, including the UK, US, Ireland and Canada.² For instance, recent studies in the UK found that about half of respondents experienced legal problems, but one third did not seek legal advice (CMA, 2016: 7). Other UK studies have found similar access issues for small- and medium-sized businesses, and have identified fee affordability as the main reason for an increase in individuals representing themselves in family courts (CMA, 2016: 7). Further, provision of free advice for low-income consumers is under significant funding and demand stress (see, for example, The Law Society UK, 2015), suggesting that there is significant pent-up demand for legal services that may be taken advantage of by low-cost providers.

2.2 *An overview of recent disruptive innovations in the legal services market*

11. Enabled by the trends described above – namely, communication technologies, democratisation of knowledge and fee pressure – a range of innovations have been introduced for consumers of legal services. Several broad categories of innovations will be discussed below.

2.2.1 *Online service delivery*

12. The provision of information and services over the internet continues to grow rapidly; however, the resistance of many legal professions to change (see, for instance, Legal Week, 2014; Renault, 2015) has limited the pace and extent of online innovations until recently.

13. More legal professionals are serving clients directly, and in some cases exclusively, online, often termed “e-lawyering”. Some lawyers have adopted an online-only, fixed-fee business model in order to

provide competitive pricing by cutting down on office overhead expenses, as well as to achieve greater work-life balance (Peacock, 2014). One online provider, Apogee Legal³, frames its mission as “reduc[ing] waste in business law.” Some law firms are offering online legal services to complement their existing practices, providing clients with the choice of working with lawyers online or face-to-face. These firms include major international firms such as Clifford Chance and Linklaters (insightBee, 2015). The US website DirectLawConnect⁴ connects consumers with low-cost online legal service providers in every state. Other legal professions have also begun offering services online – for instance, notaries in France have begun offering an online service for real estate transactions called Immo-Interactif.⁵

Figure 1. DirectLawConnect



Source: <http://www.directlawconnect.com/>

14. Inverse auction sites have also been introduced to the online legal services market, allowing prospective clients to post their requirements which will then be subject to competing online bids from lawyers. These bids contain information about the proposed service, the experience of the lawyer and pricing. While the first such platform, Shpoonkle, has ceased to operate, a website called Lawtendr⁶ has been launched which serves clients in the US, UK, Canada and Australia (Ambrogi, 2015).

15. Legal professionals who provide services online have experienced significant competition from online platforms created by those outside of the profession. Alternative platforms consist mainly of online providers of legal documents such as wills, real estate contracts, business incorporation filings and patent applications, and include websites such as LegalZoom, Rocketlawyer, Mylawyer and LegalVision.⁷ Licensed professionals will experience particular challenges when consumers do not differentiate their online services from those of unlicensed providers, given consumers may not be willing to pay higher prices for the former when the latter are available (Peacock, 2014).

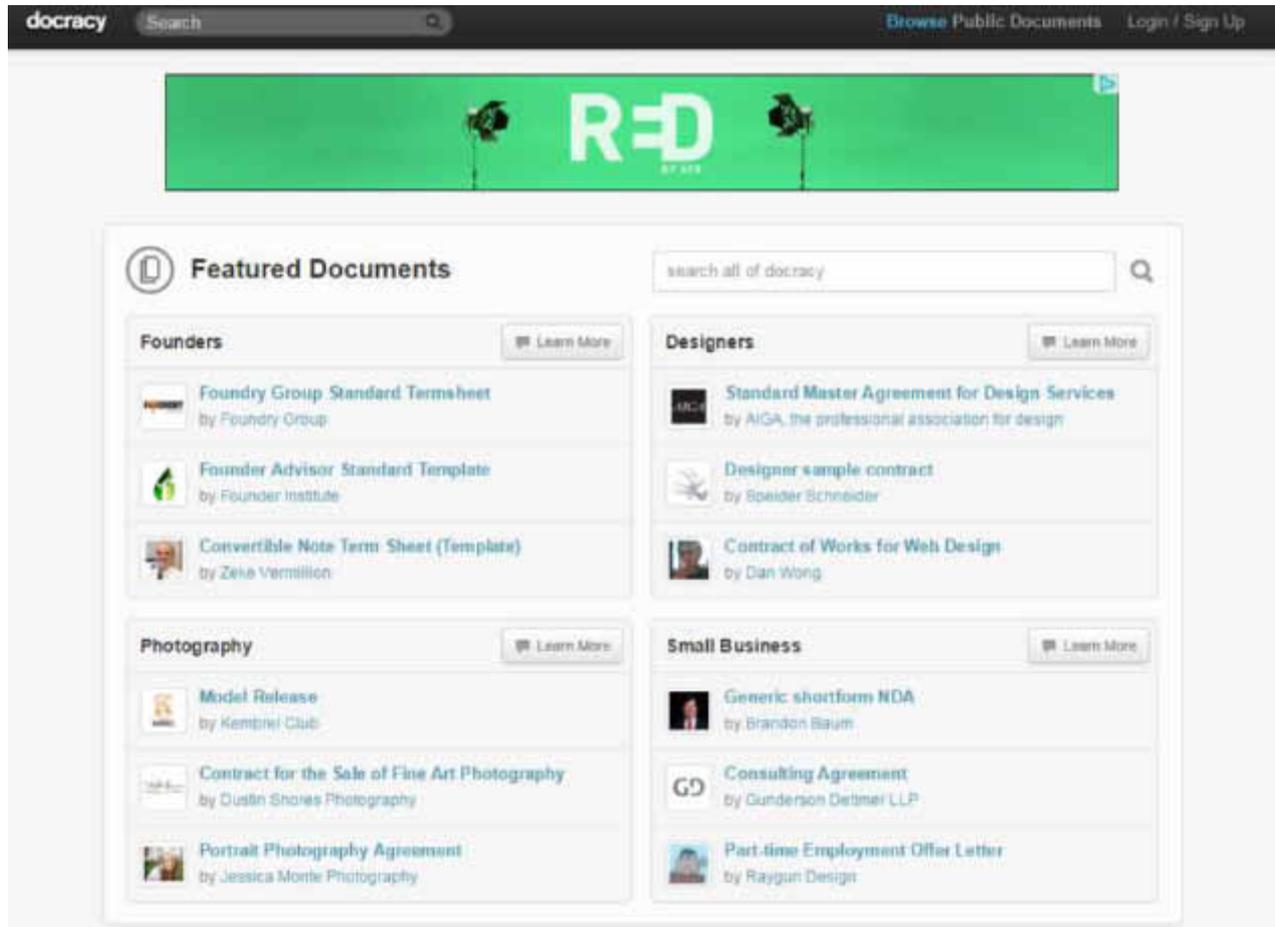
Figure 2. LegalZoom



Source: <https://www.legalzoom.com/>

16. Another platform, Docracy⁸, offers free access to open-source legal documents for both consumers and legal professionals. Documents contained in the database have been contributed to, and vetted by, a community of users including lawyers. This platform allows consumers to access legal documents without retaining a lawyer, and to seek input from the community while customising the document to meet their needs. Docracy is also offering a service called Super Signing which facilitates contract negotiation by simplifying document version control and contract discussion management. LegalOnRamp⁹ provides a similar knowledge-sharing platform focused specifically on lawyers.

Figure 3. Docracy



Source: <http://www.docracy.com/>

17. Beyond preparing legal documents and facilitating contract negotiations, some online services are providing dispute resolution services that replace lawyer-led negotiations, mediations or court proceedings. These include Modria and Resolver¹⁰, which settle disputes in matters related to municipal taxation, parking tickets and e-commerce transactions, among others. SportsJudge¹¹ offers online dispute resolution services from lawyers in disputes related to fantasy sports leagues. Transaction platforms such as eBay have similarly developed internal dispute resolution systems.¹²

2.2.2 Rankings and Reviews

18. Online platforms are also providing a wider range of information to consumers about the quality, cost and nature of the work involved in the provision of legal services. Law firm rankings began in the US with the introduction in the 1990s of the Am Law 100, which provided data to clients about law firm financial performance and operations that could then be used to form expectations about service pricing and quality (Christensen, 2013). For instance, the ranking provided information about the case load of each partner, allowing consumers to evaluate the degree to which their case would receive the attention of senior professionals. Since then, a variety of online service providers have made law firm rankings more accessible and responsive to consumers. For instance, Advancelaw is a subscription service that uses input from general counsel to review law firms on factors including quality, client service, efficiency and innovation.¹³ The service is billed by its founder as the “Yelpification of law” (Christensen, 2013) – a

reference to the popular consumer review website Yelp. Similarly, Avvo is a website which also offers reviews for what it claims to be 97% of the lawyers in the US.¹⁴

19. In addition to reviews, Avvo and several other websites (including WhoCanISue.com and Priori Legal) provide a lawyer matching service, allowing clients to search for lawyers with certain specialties in their jurisdiction. When paired with reviews, these services provide clients with much more information about available legal services than before.

2.2.3 *Unbundling of services*

20. Driven at least in part by increasing attention on fees and more widespread knowledge about the nature of legal services, the offerings of legal professionals are becoming more modular and transparent as well as less bundled. In other words, the “black box” model of legal service delivery, in which clients had relatively little knowledge of the tasks and effort required to provide a service, is gradually being dismantled (Spangler, 2011). McGinnis and Pearce (2014), for instance, note that clients are becoming increasingly aware that not all tasks currently performed by lawyers require their professional judgment, and thus may be delivered in a more commoditised fashion, including through outsourcing or the use of paraprofessionals (both by clients directly and by lawyers on their behalf). This may create significant change for traditional business models in which junior associates bill clients significant amounts for routine work in order to supplement the revenue of senior partners. Low-cost providers, including paralegals or, where possible, non-legal professionals, have begun taking over less specialised (in other words, commoditised) tasks while higher-cost lawyers provide more customised services (Christensen et al, 2013), leading to the emergence of a significant distinction between advice and advocacy versus routine legal services. A recent US Survey found that approximately one quarter of firms outsource non-lawyer functions (rising to 36% for firms with 250 lawyers or more) (Altman Weil, 2015). In the same survey, 52% of respondents, up from 12% in 2009, reported the expectation that outsourcing would become a permanent trend going forward. For consumers, unbundling means greater control and more choice when procuring legal services that involve tasks which can be divided.

21. Several businesses have begun offering services to law firms under pressure from clients to outsource certain activities and contain costs. CPA Global¹⁵ assists law firms with intellectual property matters, including document preparation and the management of patent renewals. Integreon, UnitedLex and Pangea3 (acquired by Reuters)¹⁶ provide outsourced legal support in areas including document review, electronic discovery, due diligence, contract management, legal research and compliance services as part of a broader business support and consulting offering. Specialised firms have also emerged, as is the case with Novus Law¹⁷, which focuses on organising and examining case materials with respect to litigation, investigations and other complex matters.

22. Alongside unbundling, the manner in which legal professionals, and particularly lawyers, charge for services is changing. Firms are beginning to charge fixed fees, rather than hourly rates, for services, particularly commoditised services (Rose, 2013). This is enabling clients to more easily compare costs between competitors and is intensifying price competition.

23. As tasks are increasingly being unbundled among traditional law-firms, low-cost providers, paraprofessionals and non-professionals offering online services, a parallel trend has emerged: a blurring of the lines between professionals. As noted above, outsourcing firms with broad offerings are beginning to provide litigation support services that would have once been the exclusive domain of law firms. Some have predicted that the future will hold greater competition for legal service providers from other professionals, including tax planners, accountants and management consultants, particularly with respect to services that are not required by law to be provided by licensed legal professionals (see, for instance, Susskind and Susskind, 2015). As such, markets for legal services may be redefined based on the needs of

consumers rather than the structure of the legal profession. For example, when a consumer is purchasing a new house, innovative all-in-one services may disrupt existing markets, which require consumers to separately seek out lawyers, real estate agents and other service providers. The boundaries are being tested by legal professionals themselves, some of whom are diversifying their service offering by for example obtaining real estate licenses.

2.2.4 *Automation*

24. As legal services are being unbundled, new unlicensed providers are offering a growing range of technological innovations to consumers of legal services. Automation is emerging as a major disruption to traditional legal services firms, and has the potential to continue growing beyond the services (such as document review) in which it already plays a significant role. A New York Times article with the title “Armies of Expensive Lawyers, Replaced by Cheaper Software” (Markoff, 2011) makes clear the outcome some expect to result from this trend.

25. Digital automation is beginning to take hold in legal services markets for reasons beyond cost. First, digital platforms are easily scalable, whether the offering is a standardised commodity (such as a pro-forma will) or a customised offering developed through a series of interactions with the consumer. McGinnis and Pearce note the potential for computers to automate legal document preparation, including customising documents to reflect court decisions regarding particular contract provisions and track the effect of provisions on the outcome of litigation (2014).

26. In addition, observers have noted that automated systems are able to, in some cases, outperform legal professionals. For instance, the search for relevant documents in large databases can be less error-prone when conducted through automated means. This is in fact necessary for the growth of automated systems in some market segments such as complex commercial litigation, as consumers would opt to pay more for traditional services if there were even a chance that the quality would be better than automated offerings (McGinnis and Pearce, 2014).

27. Digital document review technologies have been available for some time and are generally restricted to keyword searches, meaning they would fail to identify instances where similar concepts or ideas may be present in a document but the precise term or phrase specified in a search does not appear. As a result, Remus and Levy (2015) express in a draft study the view that the automation potential of document review activities is limited when documents cannot be easily grouped into specific types. McGinnis and Pearce (2014) note, however, that automated document review technology developers have begun to expand on basic keyword searching by using predictive coding to construct algorithms for the identification of relevant documents. These applications have been approved by some US courts and the US Department of Justice in antitrust investigations. While there is a risk of the algorithm missing some key documents, the authors note that such a risk also arises when human reviewers are tasked with the identification of relevant documents in a large database. Other activities that McGinnis and Pearce identify as candidates for this type of automation include legal research, which would benefit from the same contextual searching algorithms in development for document review. Contract review services are also candidates for performance-enhancing automation: Kira Systems offers contract review services based on “machine learning” – a form of artificial intelligence.¹⁸

28. Automated services that provide entirely new capabilities have also been introduced. Docket Alarm¹⁹ offers predictive analytics which use big data techniques to provide an assessment of the likelihood of success in litigation. As noted by McGinnis and Pearce (2014), lawyers have often provided their clients with predictions regarding litigation success in an informal manner, but new analytical innovations are providing the ability to make these predictions in a systematic, comprehensive fashion.

29. As automated innovations offer cheaper, easily scalable systems which outperform human professionals and feature new capabilities, current legal service providers may be pressured to find ways to maintain market share and revenues. Some consultancies have focused on the benefits of automation in improving legal professional productivity, allowing professionals to focus on “value-added” activities (see, for instance, Chui et al, 2015).

Box 1. The susceptibility of legal professions to automation

There is significant debate about the likelihood that the work of legal professions will be automated. Many observers paint a dark picture for the future of legal professionals, referring to a “great disruption” (McGinnis and Pearce, 2015) and a rapid decline in the current composition of the legal services industry (Susskind and Susskind, 2015), wherein automation hollows out traditional business models.

Remus and Levy (2015) assess these predictions in their draft study by analysing the employment impact of computerisation in legal firms. Specifically, they found no significant employment impacts, with the exception of document review tasks. They also discuss risks associated with automated legal service provision, for instance the failure of pro forma document preparation tools to anticipate contingencies, or a tendency to ignore non-standard situations. As a result, the authors expect that, while the work of legal service providers will likely be significantly changed by automation, this process will not impact the core demand for lawyers. They point to the need to consider that lawyers will still need to provide many services in person, such as pleadings in criminal cases before juries. More generally, they posit that there is too much complexity for automation due to the “unstructured” nature of interactions involved in the provision of legal services. Automation will, in the view of the authors, only be helpful in very structured environments (they cite the example of the automated preparation of news stories regarding the outcome of baseball games as an example, due to the highly structured nature of the sport).

The views of Remus and Levy contrast with those of other legal services market observers. For instance, McGinnis and Pearce (2014) note that, with case outcome predictions, there may be less litigation and the work of lawyers will be changed in a way that may reduce the volume of work they do. For example, automation will cause lawyers to focus on the presentation and drafting aspects of litigation as opposed to case research. For their part, Susskind and Susskind (2015) emphasise the risk of making predictions about the susceptibility of activities to automation based on technology available today. They posit that just because an activity is non-routine now does not mean it cannot eventually be routinised and therefore automated.

Questions for delegates on recent disruptive innovations in the legal sector

1. What recent innovations in legal services have been introduced in your jurisdiction?
2. Are there factors that make legal services innovations, such as those described above, more or less common in your jurisdiction (e.g. the legal system in your jurisdiction, regulation, a lack of demand)?
3. To what extent have you observed the introduction of automated alternatives to traditional models of legal services delivery?
 - a. Have legal services disruptive innovations in your jurisdiction focused on specific legal professions or fields of law?
 - b. Have these automated service offerings targeted particular types of activities? Are there indications that they may be expanded into other legal service activities?
 - c. Are there any features of your jurisdiction’s legal system, regulatory framework or recent case law that limits the use of automated legal services?
 - d. Have any conditions been placed (or proposed) on the use of automated legal services in your jurisdiction (e.g. the requirement for automated services to be designed or operated under the supervision of a lawyer)?
4. What has been the response of legal professional regulatory bodies and policymakers to these innovations?
5. Have legal services professional regulations been modified in recent years in your jurisdiction?

3. The role for competition authorities in disrupted legal services markets

30. It is evident that legal services are facing significant change from innovation. These markets have not traditionally been a focus of competition authorities' attention: there are few (if any) dominant firms and large international mergers in the industry were until recently somewhat rare (Weaver, 2007; Solicitors Regulation Authority, 2014). Competition authorities will need to monitor potential increasing concentration in the industry and possible anticompetitive behaviour by self-regulators. Most importantly, however, authorities will have a crucial role to play in encouraging the revision of outdated regulations by facilitating productive relationships between disruptors, policymakers and professional regulators.

3.1 *Legal services industry consolidation*

31. First, financial pressure on firms as alternative low-cost providers enter the legal services markets may lead to consolidation in the industry. Law firms and other legal services firms (such as conveyance firms) are undergoing a significant wave of mergers and acquisitions, including international mergers meant to expand market reach and seek out efficiencies (see, for instance, Altman Weil, 2015; Fortado, 2015; Solicitors Regulation Authority, 2014). This trend is a departure from a traditionally fragmented legal services market and has been accelerating, as large firms view acquisitions as a strategy to increase revenue in challenging market conditions. The emergence of dominant firms, or mergers raising competition concerns, may therefore occur in the future. Some features of legal services regulations may, however, act as structural barriers to concentration, such as the requirement for law firms to avoid conflicts of interest (to avoid firms representing clients with opposing interests).

3.2 *Anticompetitive behaviour by professional regulators*

32. Secondly, there is the possibility that incumbents engage in anticompetitive behaviour to prevent innovative new entrants from accessing their markets. There is a risk that legal professional organisations may act to maintain the traditional market structure and business model of the legal services industry in a manner that exceeds their regulatory mandate. This includes efforts by licensing bodies to leverage their regulatory power in order to protect incumbents or proprietary services, such as digital platforms, from competition. Other concerns may arise when self-regulators encourage tying and bundling by professionals to protect ancillary (non-regulated) service revenues.

33. There are some examples of these issues arising in professional service markets. In Italy, the national competition authority imposed a fine on the National Bar Council for attempting to enforce fee limits, despite these limits having been removed by legislation. The Council had also condemned the use by legal professionals of AmicaCard, a discount online platform, to offer services (Szolnoki, 2014). The box below describes the European Court of Justice's 2002 decision regarding the application of antitrust law to bar associations.

Box 2. The European Court of Justice's decisions in *Wouters*

This case (*Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, Case C-309/99, 19 February 2002) involved a challenge to regulations established by the Dutch Bar (Nederlandse Orde van Advocaten) which prohibit lawyers from forming partnerships with other disciplines. Specifically, the challenge was brought by two lawyers who worked for accounting firms. The Court found that Members of the Bar were considered 'undertakings' and therefore that the Bar could be considered an 'association of undertakings.' As a result, the court found that a regulation concerning partnerships between members of the Bar and other members of liberal professions would be a 'decision adopted by an association of undertakings' and therefore subject to competition law. Further, the Court found that the regulations in question could be an infringement of competition law and could affect trade between EU member states.

However, the Court upheld the regulations, recognising that in certain cases non-competition objectives can be balanced against restrictions on competition (and that the former can outweigh the latter). Specifically, the Court found that there is no infringement if the rule in question "...could therefore reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned" (para 107). As noted by Terry (2009):

"The Wouters opinion not only gave deference to the bars on the issue of whether a restrictive rule was necessary, but also gave deference to the bars on the issue of proportionality and whether the restrictive rule could have been drawn more narrowly. Indeed, despite a recommendation to the contrary by the Advocate General, the Court appears to have completely deferred to the Dutch Bar authorities' analysis on this proportionality point, stating that "the Bar of the Netherlands is entitled to consider that the objectives pursued by the 1993 Regulation cannot . . . be attained by less restrictive means."

Despite this outcome, the Wouters decision has been referenced in decisions regarding anticompetitive conduct on the part of bar associations. For example, the Hungarian competition authority imposed a fine on the Hungarian Bar Association for restricting competition by adopting rules regarding advertising and lawyer website design (GVH, 2004).

On the same day as the Wouters decision, the Court released a decision in the Arduino case (Arduino, Case C-35/99, 19 February 2002), which found that the Italian Bar's fee schedule for certain costs was not a violation of the European EC Treaty, given that the schedule required ministerial approval, as well as an opinion from two public bodies.

3.3 *Advocacy opportunities*

34. While there is a possibility that self-regulators may engage in anticompetitive behaviour outside their regulatory mandate, it is likely that current regulatory frameworks are the most important barrier to innovation in the legal services market, as well as to the benefits it brings. As a result, the primary challenge for competition authorities in the legal services market may be related to advocacy, and in particular advocacy in favour of pro-competitive professional regulations that reflect market realities. This includes advocating for the opening up of markets which may not yet be accessible to disruptive innovators.

35. The response of the legal professions to recent innovations, some of which are admittedly in their early stages, appears to be somewhat muted. Incumbents can underestimate the disruptive nature of innovations being introduced into markets, as well as the pace at which they grow (see, for instance, Momeni and Rost, 2016). Nonetheless, there are many articles warning consumers of the dangers of "do-it-yourself" legal solutions, written by legal associations and lawyers.²⁰ Some legal professional self-regulators have begun to take action against new disruptive service providers, as we will further discuss in Section 0 below. It is not difficult to imagine legal professional organisations advocating for the maintenance of the status quo, or an altered system which leaves traditional business models intact. Policymakers will therefore be faced with the difficult task of weighing various concerns, ranging from consumer protection to regulatory fairness (e.g. do disruptive entrants compete fairly if they avoid current regulatory frameworks?) in what may be a contentious environment. This could be further complicated by the fact that regulations, and the concerns they were intended to address, may vary among legal professions and disciplines.

36. In this balancing process, there is a role for competition authorities to ensure that the positive impacts from disruptive innovations are recognised. These impacts include improvements in the accessibility of previously unaffordable legal services, productivity improvements and potentially even the mitigation of market failures which regulation was designed to address. Consumer protection issues should also be taken to account, given they may persist despite innovation, and new concerns may arise.

37. The tools available to competition authorities to undertake advocacy with respect to legal services markets include market studies (such as the legal services market study currently being prepared by the UK Competition and Markets Authority²¹). Further, authorities can encourage regulators or responsible government departments to conduct a review of how regulations impact competition in legal services markets. The OECD's Competition Assessment Toolkit (OECD, 2011) provides a framework for assessing the degree to which legal services professional regulations affect competition, and whether there are alternative regulatory approaches with fewer competition impacts. In particular, the Toolkit provides checklists to assess the degree to which regulations affect competition by virtue of (i) limitations on the number or range of suppliers, (ii) the ability of suppliers to compete, (iii) the incentive of suppliers to compete, and (iv) the choices and information available to consumers. The Toolkit then provides an approach for conducting an in-depth assessment, similar in its scope to Regulatory Impact Assessment, of those regulations that are found through the checklists to excessively constrain market activity, and to propose alternative regulations that are less restrictive.²²

38. In addition, competition authorities can assume a facilitation role with respect to the interaction of disruptive innovators with policymakers and regulators, as proposed for instance by John Fingleton, former Chief Executive of the UK Office of Fair Trading (Fingleton, 2013). When the legal services professions are self-regulated, and given the potential resulting conflicts of interest, such an interaction may need to be directly with relevant government departments.

39. In order to inform future regulatory advocacy efforts, the following sections will provide a starting point for competition authorities examining recent innovations occurring in legal services. To begin, the rationale for legal services regulations and the scope of these regulations will be briefly summarised. A discussion will follow of the impact of recent innovations on the motivations for, and design of, current regulations.

Questions for delegates on recent competition authority involvement in legal services markets

6. Have any enforcement issues arisen in legal services markets in your jurisdiction, particularly with respect to anticompetitive conduct involving potential new entrants? How did your authority intervene?
7. Has your authority prepared, or is it in the process of preparing, any market studies (or more preliminary analyses) of legal services markets? What was/is the scope of the study? What were/are the findings? Were any changes made as a result?
8. Has your authority been involved in any recent efforts to modify legal professional regulations?

4. Legal services regulations

40. The environment in which the innovations described above are being introduced is extensively regulated. To examine the impact of these innovations on regulatory frameworks, we will first briefly summarise the rationale for, and scope of, legal professional regulations.

41. Under these regulations, legal professions, and particularly lawyers and notaries, enjoy exclusivity in the provision of their services, to the exclusion of all other unlicensed would-be service providers. In return, legal professionals are required to comply with a range of regulations regarding their entry into the profession, training and conduct, among other things. This arrangement is rooted in several objectives, as set out below.

4.1 *Rationale for legal services regulations*²³

42. One of the fundamental reasons for legal professional regulations is market failure in legal services markets. These market failures consist of information asymmetries and externalities which, when left unaddressed, would lead to inefficient market outcomes. Other policy objectives are also reflected in certain features of current regulations.

4.1.1 *Information Asymmetries*

43. Information asymmetries occur in legal services markets when consumers are unable to assess the quality of the services they are procuring. Many services provided by legal professionals can be considered to be experience goods, where quality is not known by a consumer before a service is procured. For instance, a consumer seeking litigation services from a lawyer is generally not able to completely assess the skill of a litigator prior to observing the lawyer's appearances in court (and even then, the outcome of a case may not be an indication of the skill of a lawyer). Other legal services are more appropriately classified as credence goods – goods for which the quality may never be observed. When a lawyer drafts a contract or a notary finalises a real estate transaction, there is a risk that there may be errors or overlooked issues that would undermine the validity of the document or service. These issues may never be discovered, or at least may not be discovered until a contract becomes the subject of a dispute at which point it is too late to rectify them.

44. Because consumers are unable to assess with certainty the quality of legal services they are procuring, they may attempt to identify alternative indicators of quality. This can lead to adverse selection, where legal professionals are chosen by consumers for reasons unrelated, or in fact negatively associated with, quality. For example, consumers may perceive that a legal professional whose services are more expensive may offer higher quality than less expensive peers, even if this is not true. As a result, consumers may pay too much for services that could be procured at a similar, or higher, level of quality for a lower price, leading to an inefficient market outcome.

45. Another problem that can arise out of information asymmetries in legal services markets is moral hazard. Consumers rely on legal professionals to assess the exact nature and extent of services required for their particular situation. This relationship results in what are termed “principal agent” issues – that is, the potential for legal professionals to act against their clients' interest when there is a divergence between the professionals' and clients' interests. For instance, in legal markets, there can be the risk of supplier-induced demand, wherein a legal professional would propose that their clients obtain services they do not require. Clients without legal knowledge would not be well-placed to identify such behaviour. It should be noted that the likelihood of this varies significantly according to the client and service being procured. A sophisticated corporate client that employs legal advisors would be less likely to incur unnecessary costs than an individual. Highly standardised notarial services would be less susceptible to agency problems than technical, contentious areas of specialised law.

4.1.2 *Externalities*

46. The existence of externalities associated with legal services can also lead to inefficient market outcomes. Negative externalities arise when legal services are of sub-optimal quality in a way that imposes costs on parties outside the professional-client relationship. For instance, a lawyer without an understanding of court procedures could negatively impact the productivity of a court, imposing costs in terms of time and resources on judge, courtroom staff and other parties. Further, low quality submissions to a court may result in decisions that do not reflect the underlying reality of a case. Conversely, high-quality legal services can generate positive externalities, including a reduction in the burden on judges in court proceedings and greater legal certainty for parties to a transaction.

4.1.3 *Other policy objectives*

47. There are several other policy objectives that have led to legal services regulations which are not specifically related to market failure. Some regulations are aimed at addressing fairness considerations, ensuring that individuals in all regions of a jurisdiction can access legal services of a certain quality and at a certain price. These objectives have led to, in the case of notaries in some countries, efforts to guarantee professionals a certain level of income in order to encourage them to offer services in less populated areas. Beyond ensuring regional service, other objectives include ensuring low-income consumers can access legal services and ensuring certain fundamental legal principles, such as attorney-client confidentiality, are upheld. These objectives have led to regulations which set pre-requisites for legal professionals to obtain the right to offer legal services, as described below.

4.2 *Scope of legal services regulations*²⁴

48. A range of regulations are applied to legal services markets today which codify the “grand bargain” (as described by Susskind and Susskind, 2015) between legal professionals and society. On one side of this bargain, lawyers and notaries are granted exclusivity to provide a set of prescribed services. Exclusivity is generally enforced through government recognition of the services provided (e.g. a requirement that certain documents are notarised) as well as legal prohibitions on providing services without a license (e.g. court proceedings against parties accused of the unlicensed practice of law).

49. In return for the exclusive ability to provide legal services, professionals are required to comply with regulations seeking to address market failures and policy goals, such as:

- **Qualitative entry restrictions**, which set out minimum requirements for professionals permitted to offer legal services, including education, professional experience, examinations and personal characteristics, such as citizenship, language competence and the absence of criminal or civil convictions. These regulations, sometimes termed input standards, apply to both lawyers and notaries and reflect a desire to address information asymmetries as well as externalities. They supplement remedies available under standard liability laws, which may be insufficient to protect all consumers of legal services (particularly for services that show characteristics of credence goods). Qualitative entry restrictions are used to address market failures because alternative measures, such as minimum quality standards and consumer information regulations, can be impractical to develop due to the diverse and idiosyncratic nature of legal services. Instead, these restrictions attempt to exclude low-quality service providers from accessing the market rather than setting out required characteristics of their output.
- **Quantitative entry restrictions**, meant to ensure service availability, particularly in remote areas, by guaranteeing a certain level of profitability through restrictions on competition. These restrictions apply to the notarial profession in several countries. However, there is debate about whether there are less restrictive alternatives to achieving the same goal, since this type of measure limits supply, increases prices and can create local monopolies.
- **Fee restrictions**, which were introduced in legal professions in order to prevent adverse selection on the basis of price and prevent moral hazard, while also reducing the burden of negotiation on the consumer. Economic theory suggests that price restrictions have an anticompetitive effect, which can be exacerbated by entry restrictions (see OECD 2007). Specifically, fee restrictions can have a negative effect on market efficiency by reducing incentives to innovate and reduce costs. Minimum fees may also not be followed by all market participants, and may be difficult to enforce. Finally, some question whether these restrictions are proportional to the issues they purport to address.

- **Advertising restrictions** in some legal services markets were designed to prevent consumers from making decisions they may not be sufficiently informed to make due to information asymmetry, and to reduce costs for service providers. However, advertising can improve consumer information and reduce search costs. As OECD (2007) notes, there do not appear to be well-founded arguments against permitting advertising that is truthful, and adverse selection does not necessarily become worse with advertising. Further, studies have found that restrictions on advertising lead to higher prices (see OECD 2007).
- **Restrictions on partnerships, ownership and management** consist of prohibitions on partnerships between different legal disciplines (e.g. solicitors and barristers in the UK) as well as restrictions on ownership and management of law firms by non-lawyers.
- **Requirements to provide legal aid** are also generally imposed on lawyers and are aimed at providing low-income individuals with legal services to which they would not otherwise have access. Lawyers are compensated for their services, but often at a discounted rate compared to that which would be paid by other clients.

50. The enforcement and, to some extent, development of these regulations for both lawyers and notaries are generally conducted through professional self-regulatory bodies that are recognised in legislation. This approach reflects the view that members of a profession have information advantages over the lay person, and therefore may be better positioned to enforce certain professional regulations. On the other hand, some have identified concerns that self-regulation is a less rigorous accountability mechanism, and self-regulation can create undue entry barriers while enabling the extraction of rents (OECD 2007).

51. Readers may identify a mismatch between the scope of regulations and the fundamental rationale described here. It is, for instance, not entirely clear that advertising restrictions effectively address information asymmetries (or any other overarching objective). Below, this paper will discuss how recent innovations in legal services are exposing this mismatch, and challenging policymakers to consider whether, and how, current legal services regulatory frameworks should be modified to fit today's reality. First, we will briefly discuss how some governments have already introduced some reforms to modernise legal professional regulations.

4.3 Recent regulatory change

52. Limited regulatory reforms have been introduced in some jurisdictions. In France, the 'Law on economic growth, activity and equal opportunities' (no. 2015-990), commonly known as the 'Macron Law', includes several reforms of the legal profession. These reforms expand competition without an apparent impact on protections relating to market failure, and include (i) the elimination of restrictions on lawyers registered with the bar in one region pleading cases before certain courts in another region, and (ii) permitting lawyers to form partnerships or businesses with members of bars in the European Union or Switzerland (Conseil National des Barreaux, 2015). With respect to France's notarial profession, the reforms are in line with some of the recommendations of the French competition authority. Specifically, the Ministers of Justice and Economy will be able to open regions to new notary entry, while retaining the ability to close entry in regions (Autorité de la concurrence, 2014: 17-18) where it would risk business failure and a resulting compromise in service quality. In addition, the law requires the competition authority to be consulted in the determination of the fee schedule for several regulated legal professions, including notaries, bailiffs and judicial officers. It should be noted that these measures are less extensive than those proposed by the competition authority (Autorité de la concurrence, 2014: 17-18)

53. In the UK, the Legal Services Act 2007 instituted several changes in the self-regulatory system for legal professions. In particular, it established the Legal Services Board to provide oversight over self-

regulatory bodies, which would derive their authority from the Board. In addition, the Office for Legal Complaints and the Legal Ombudsman were established to manage complaints from consumers of legal services (Legal Services Board, 2016).

54. Also in the UK, a 2007 law permitted law firms to be managed by, or have ownership shares held by, non-lawyers or other bodies (including partnerships between barristers, solicitors and conveyancers). These “alternative business structures” (ABS) were expected to bring significant competition into the market, with one headline referencing the potential for competition to come from new sources such as major retailers, declaring: “Wait for ABSs is over: Tesco law is here” (Rose, 2012). However, it appears that growth in ABS firms and entry by new competitors has been limited. In April 2015, only 375 legal entities in England and Wales were ABS entities – less than 4% of all solicitor firms (Sako, 2015). Further, most ABS entities appear to be small-scale, single professional firms, prompting the solicitor’s regulatory body to adopt measures to facilitate the registration of new ABS firms and therefore promote competition (Dakers, 2014). Nonetheless, some innovators are taking advantage of ABS reforms – LegalZoom, described above, was approved in 2015 to operate in the UK as an ABS (LegalZoom, 2015).

55. Australia introduced ABS reforms beginning in 2001, following National Competition Policy reviews in 1993 and 1998 which identified opportunities to improve competition through modified professional regulations (Hilmer et al, 1993; Harper et al, 2015). After these reforms were introduced, three legal services firms under the ABS model were listed on the Australian Stock Exchange (Mercer et al, 2014).

56. In Korea, the Ministry of Justice has been considering potential reforms to the licensing process for lawyers. Specifically, it announced the elimination of bar exams, meaning that prospective entrants to the legal profession would need to undergo formal training through recognised law schools. The implementation of this decision has been delayed to 2021 and may accompany other changes to the law school system (The Korea Herald, 2015).

5. The interaction of legal services disruptive innovations with professional regulations

57. We have identified some recent innovations that are disrupting, or have the potential to disrupt, legal services markets and we have reviewed the regulatory framework in which legal services currently operate. This section will discuss how legal services innovations relate to the market failures and other policy objectives that motivate legal services regulations. Next, we will examine how particular features of regulation may be challenged as a result.

5.1 The impact of disruptive innovations on market failure and policy objectives of existing legal professional regulations

58. Recalling the rationale for regulation described above, we can assess how disruptive innovation, and the potential evolution of legal services that it portends, may lead to a reconsideration of at least some aspects of existing regulatory frameworks.

5.1.1 Information asymmetries

59. The ease with which information is shared is constantly being enhanced, in particular recently through social networking and mobile technology. As a result, the “democratisation of knowledge” is continuing at an increasing rate, including with respect to legal services. How has this reduced the gap in information between consumers and providers of legal services?

60. Consumers are equipped with ever-improving access to knowledge about what goes into the services they acquire. This means that they are less reliant on the legal professionals they retain for this

knowledge, and therefore that the latter have a weaker information advantage over consumers than before. A quick internet search will reveal the extent of the work that goes into services ranging from standard real estate conveyance to complex divorce litigation. As a result of these changes, consumers are less vulnerable to principal-agent problems. In addition, disruptive service providers are encouraging consumers to obtain at least a portion of the services they need from low-cost online platforms. If these disruptors succeed, as some already have, consumers will increasingly use multiple service providers and will therefore be less dependent on a single professional to assess their needs. For instance, a small business owner may use an online service provider for incorporation and a lawyer to prepare a specialised supply contract, rather than have a single “go-to” lawyer on retainer for any potential needs. The commoditisation of routine tasks, including simple notarial services and standard contract preparation, is also causing consumers to question whether they truly need more expensive, customised solutions and, in some cases, increases the certainty regarding the use of these services. As a result, even clients that continue to make use of legal professionals will be somewhat inoculated from procuring unnecessary services.

61. Problems associated with legal services that exhibit the characteristics of experience or credence goods, including adverse selection, are also being mitigated through innovation. Online review services can provide consumers with information about legal service providers that is both objective, such as data regarding senior partner caseload, and subjective, including the observations of previous clients of a notary with respect to their efficiency and client service. In other words, legal service consumers are being offered new information which serves as a proxy for unobservable quality, or quality that can only be observed after acquiring the services. This will allow consumers to learn from the experience of others, avoiding pitfalls and benefiting from hidden quality. This being said, concerns associated with the experience- or credence-good nature of professional services are not fully addressed with these innovations. Overcoming market failures associated with experience-goods by relying on reviews from the first client, or clients, of a service is evidently not optimal for those clients.

62. Continuing challenges related to the assessment of legal service quality by consumers despite increased information availability could lead to changes in market structure. Susskind and Susskind (2015) predict that brands will play an increasingly important role in consumers’ decisions and assessments of quality. McGinnis and Pearce (2014) believe that legal “superstars” will capture increasing market share as information about their performance becomes more widely available and technology enhances scalability. The reach of these superstars will expand through online service provision, and their specialised value as a supplement to automated service offerings will increase. At the same time, McGinnis and Pearce predict that some quality issues may solve themselves, as “nonspecialised lawyers of average or worse than average capability” will lose market share and may exit the market (2014: 3055). Some have questioned whether a focus on reputation would be sufficient in these circumstances, pointing for instance to the case of credit rating agencies, for which reputational concerns were not sufficient to dissuade problematic behaviour (see, for instance, Bonewitz, 2010). However, principal-agent problems in credit rating services are particularly severe because the party that pays for the agency’s services (the issuer) has interests that are averse to the end-user of the agency’s product (the lender) (see, for instance, OECD, 2010). This is not the case for consumers of legal services. Others posit that the need for quality assessment will be mitigated in the future if automation and commoditisation increase, reducing the need for absolute “trust” regarding professional quality (Susskind and Susskind, 2015).

63. New information asymmetries may be introduced into the market by disruptive innovations. Consumers of automated services, including legal professionals, may be unable to assess the quality of algorithms or systems design due to a lack of technical knowledge. Complexity may make it difficult for consumers to manually repeat even a sample of automated tasks to evaluate whether the results are the same. Additionally, public reviews and information could create new information asymmetries related to the accuracy and legitimacy of reviews. For instance, it may not always be transparent whether reviews are

paid advertisements, if a reviewer is withholding information that would be relevant to a consumer's decision, or if reviews are manipulated by service providers.

5.1.2 *Other policy objectives*

64. Policy considerations beyond market failure that motivate certain legal services regulations can also be affected by innovation. Fairness concerns in legal services markets may in some cases completely disappear. The remote digital provision of services can alleviate some concerns about ensuring a minimum service level in potentially under-served regions – there will be less need for exclusive territories if notary services are made available online, for instance. If a policy seeks to maintain income for incumbents in order to preserve current models of service delivery and employment, it will likely be fundamentally challenged by these innovations.

65. Increasing availability of commoditised, easily customisable and low-cost solutions can also substantially improve market access for low-income consumers, going at least part way to addressing the needs of this under-served market segment. Nevertheless, there may continue to be concerns regarding services that are to some extent immune to some of the trends described above, such as court appearances.

5.2 *Implications for current legal profession regulatory frameworks*

66. Having considered the rationale for legal services regulations in the context of recent innovations, it is apparent that new offerings in the market are addressing at least some of the market failure and policy issues inherent in legal service markets. However, many of these innovations are still in their early stages, and there has been no comprehensive answer to all policy concerns. It is difficult to make a general case for the impact of innovations on market failures on legal professional frameworks, particularly given differences across fields of law, professions and legal traditions. For instance, it is clear that criminal law will be less touched by the recent innovations described above than other professions. Like the services they cover, legal profession regulations should be unbundled to determine what is, and is not, necessary to achieve market efficiency and policy goals. The analysis set out below suggests that there may indeed be opportunities for certain elements of legal professional regulations to be modified or eliminated.

Questions for delegates on developments in legal services regulation

9. Are there any indications that disruptive innovations in legal services currently operating in your jurisdiction are in conflict with existing regulations?
10. What responses are available to professional regulatory bodies when regulated legal services are provided by unauthorised parties? Have any of these responses been used with respect to innovations in your jurisdiction?
11. Have there been calls for legal professional regulations to change in your jurisdiction? If so:
 - a. Do they relate to a particular profession or area of law?
 - b. On which areas of regulation are they focused (e.g. professional exclusivity, qualitative entry restrictions, quantitative entry restrictions, self-regulation)?

5.2.1 *Exclusivity*

67. The granting of exclusive rights is an element of current regulatory frameworks in legal professions that is increasingly being challenged by the emergence of new, disruptive competitors from outside of the traditional legal services value chain. In fact, this is reflective of the inherent risks in the granting of exclusive rights through regulation. As the OECD's Competition Assessment Toolkit states, "a fundamental problem with long-term grants of exclusive rights is that technological change can render the initial rationale for the granting of the right redundant long before the right itself has lapsed" (p. 40). Emerging challenges to exclusivity that may illustrate this problem include selective enforcement, blurring lines between professionals and cross-border service delivery.

68. Exclusivity is one of the key benefits granted to legal professionals in return for their compliance with professional regulations. However, this exclusivity appears to have been enforced selectively, and depends crucially on what one defines as providing legal or notarial services. For instance, lawyers are increasingly turning to automated systems to complete tasks that were once carried out exclusively by lawyers, including due diligence, legal research, document generation and searches of litigation document databases. These services are generally provided by non-lawyers, and while their use may be supervised by licensed lawyers, McGinnis and Pearce (2014) argue that the exclusivity of lawyers is being undermined through the extensive use of these systems. Some observers have argued that this type of automation simply allows lawyers to focus on the core activities in the practice of law, such as providing advice (see, for instance, Chui et al, 2015). This argument may not apply to all legal professionals, such as notaries, or to all legal disciplines. Consider, for instance, the difference between the core practice of real estate lawyers specialising in standard residential transactions relative to those specialising in commercial transactions involving negotiations with numerous parties and custom financing arrangements.

69. The provision of case-specific legal advice appears to be a key flashpoint for efforts to maintain exclusivity among professionals. However, even in cases where innovations have been introduced by non-lawyers that provide complete services to consumers, and which could be considered to include advice, there has not been a significant response from self-regulators. Only in a few limited cases have bar associations attempted to prevent certain innovative service providers from operating under rules pertaining to the "unauthorised practice of law". The Texas Unauthorized Practice of Law committee issued an injunction to prevent the sale of software called Quicken Family Lawyer as early as 1999 (McGinnis and Pearce, 2014). LegalZoom has faced legal challenges in several states, including Missouri, North Carolina and Washington (Barton, 2015), but continues to operate after reaching settlements in those cases. Notably, the settlements do not restrict the services LegalZoom offers, but rather the information it provides consumers, including cost comparisons with traditional lawyers contained on the website (Weiss, 2010; Koppel, 2011). The box below describes efforts to regulate the provision of wills in the UK based on an interpretation of exclusive rights granted to legal professionals.

Box 3. The regulation of will-writing in the UK

In 2010, the Legal Services Board, which oversees legal regulators in England and Wales, requested that the Legal Services Consumer Panel examine the consumer experience in the will-writing market. Will-writing is not included in the six "reserved activities" which can only be performed by authorised legal professions in England and Wales. These six activities are (Legal Services Board, 2015):

- the exercise of a right of audience;
- the conduct of litigation;
- reserved instrument activities;
- probate activities;
- notarial activities; and
- the administration of oaths.

The Consumer Panel observed three particular consumer protection concerns in the will-writing market: (i) the fact that most users of will-writing services do not possess sophisticated knowledge of the subject; (ii) will-writing is a sensitive and emotional process and (iii) problems with wills can generally only be identified after a will's subject is deceased. Given the potential seriousness of these issues, the Panel recommended that the practice of will writing be regulated (Legal Services Consumer Panel, 2011). After consultations, the Legal Services Board proposed that will writing be included as one of the reserved activities that are the exclusive domain of authorised legal professionals (Legal Services Board, 2015).

In response to the proposed regulations, the then-Office of Fair Trading advocated for alternative measures to address issues in the market without barring access for alternative will writing services. These alternatives included efforts to inform consumers, the enforcement of consumer protection laws and self-regulation (OFT, 2010).

The recommendation to include will-writing as a reserved activity was not accepted by the UK government, which determined that alternative measures could be employed to address the issues in the market (Legal Services Board, 2015). One such measure – a will writing code developed by the Institute of Professional Willwriters, received the approval of the OFT in 2010, although some have noted that the code covered only 20% of the will writing market at the time (Rayner, 2010). Subsequent consultations have been held by the Legal Services Board to discuss measures to improve will-writing quality (Legal Services Board, 2015).

70. Aside from the examples described above, McGinnis and Pearce observe that exclusivity provisions have not been extensively used to bar automated services or online offerings (including those by non-lawyers). One exception to this may be the efforts by some bar associations to prevent lawyers from adopting “ancillary businesses”, such as obtaining real estate licenses (Randolph, 2003). Further, there does not appear to be a clear line past which legal services regulators have prevented disruptive innovators from providing services, although exclusivity in some areas, such as representation in courts, has not yet been challenged.

71. Lawyers may in the future attempt to make increasing use of legal measures to prevent the “unauthorised” practice of law - particularly in cases where unlicensed providers reach beyond the provision of legal documents, to activities traditionally considered to involve the provision of advice. However, this recourse is not available to all legal professionals, whose services may involve less advice and therefore whose argument in favour of exclusivity in an era of automation may be weaker. Remus and Levy (2015) note a US court of appeals decision that something that can be automated cannot be considered to constitute the practice of law. Susskind and Susskind (2015) emphasise the potential for even non-standard activities to be automated, suggesting that exclusivity with respect to advice may also be tenuous in the future. Further, the professional regulators may encounter difficulty when attempting to enforce exclusivity provisions without clear policy justification (or government approval) in some jurisdictions.

72. Challenges to legal professional exclusivity may also come from pressures to distribute certain tasks among legal professionals. The phenomenon that Susskind and Susskind call “para-professionalisation” is one in which lawyers turn increasingly to paralegals to complete certain tasks for which they are qualified under a professional’s supervision, much as they would use automated services with respect to other tasks. The extent of this trend is unclear – for instance, how will notaries be able to leverage less qualified professionals to achieve scale without significant regulatory change? However, a redistribution of tasks among legal professionals would reflect the trend toward unbundling taking place across the legal services markets. It remains to be seen what will be retained as the exclusive domain of legal professionals once this process is complete, and how regulatory exclusivity will be adapted to reflect this new reality. While exclusivity may well be retained by necessity in some markets, a return to the status quo is increasingly unlikely.

73. Finally, geographic exclusivity is being called into question, as legal services are being provided through online platforms without regard to national borders. Governments and bar associations have sought to maintain exclusivity in the legal profession while enhancing the ability of recognised lawyers to provide services across borders in jurisdictions including the EU (Claessens, 2012) and UK (Goldsmith, 2011) as well as among members of the Association of Southeast Asian Nations (Hsieh, 2014). However, inter-jurisdictional mobility remains a challenge in many countries, in part due to differences in the definition of the practice of law (see Lonbay, 2010) and legal disciplines. This could constitute a significant competitive disadvantage for traditional legal services providers relative to borderless online platforms. Fragmented enforcement of exclusivity across jurisdictions could also undermine it. For example, bar associations in several US states settled on different terms with LegalZoom in their separate efforts to prevent its operation in their jurisdiction (Barton, 2015).

74. While much of the debate among observers in legal services markets focuses on exclusivity, it is apparent that, even if legal professionals were able to maintain exclusivity, the market in which they operate will change dramatically. Some disruptive innovations that will impact the industry are being developed outside existing regulatory frameworks. But even regulatory compliant innovation may challenge market structure. Lawtendr, for instance, simply makes it easier for clients to access a broader pool of lawyers and for lawyers to extend their reach beyond face-to-face interactions. Online service provision also allows legal professionals to scale their service offerings, which could lead to a reduction in the number of professionals serving markets and challenge other regulatory restrictions, such as limits on the number of professionals able to operate within a certain region. Finally, lawyers are taking advantage of reforms in legislation limiting the ownership of law firms to create new partnerships and business models involving other legal professionals or non-lawyers.

Questions for delegates on the granting of exclusivity to legal professionals

12. Is the maintenance of legal professional exclusivity under challenge in your jurisdiction?
13. What is the exact range of legal activities to which exclusivity applies in your jurisdiction?
 - a. Have disputes arisen about the application of this definition?
 - b. Do new disruptive innovations in your jurisdiction fit within this definition?
14. What alternatives to exclusivity have been proposed in your jurisdiction, if any?

5.2.2 *Qualitative entry restrictions*

75. Now that legal professionals no longer fully control access to legal services markets, or are in some cases facilitating efforts to circumvent this control, what will be the impact on consumers? Increased competition in markets is generally positive, but the benefits regulation brings in terms of addressing market failure and protecting consumers should be considered. As noted in Section 0, these issues may be partially addressed by disruptive innovation, but some still remain.

76. The debate about the impact of disruptive legal innovations on service quality is a contentious one. By reducing the potential for human error (which impose costs on the legal system), automation could, for instance, contribute to the quality improvements (McGinnis and Pearce, 2014). Further, trends toward commoditised service offerings could have positive effects in terms of bringing about predictability and consistency in the application of the law while expanding access to legal services for all segments of the population. However, a reliance on automated services that are low quality could impose new costs on

the legal system. Remus and Levy note, for instance, that predictive coding may not identify all relevant documents in a due diligence or litigation discovery search.

77. Susskind and Susskind assert that traditional conceptions of trust in professional service quality, enabled by regulatory frameworks, are giving way to “quasi-trust”. There will not be the same level of interpersonal trust with an online service provider that some clients enjoy with their current legal professional, particularly in the case of “do-it-yourself” solutions. However, consumers will be able to rely on alternative sources of confidence, including brand reputation, past experience and reviews. In other words, the authors believe that restrictions on the basis of education, legal experience and personal conduct to ensure quality can be at least partially replaced by facilitating a better-informed, less trusting relationship between legal service providers and clients. The degree to which this new relationship becomes predominant across all legal services remains to be seen.

78. It is not clear that the availability of information regarding legal services quality is currently sufficient to merit the wholesale removal of qualitative entry restrictions (and a consequent reliance solely on consumer protection laws). The OECD’s Competition Assessment Toolkit notes that qualitative entry restrictions in professional services markets are “legitimate in cases in which consumers are ill placed to make their own judgments as to practitioner competence and where the consequences (i.e. the potential harms to consumers) of making a poor choice are serious and irreversible” (p. 42). The latter risk remains, and while the accessibility of information about legal professional quality can enable greater consumer awareness, there remain gaps in available information. For instance, price comparison information does not appear to have become widely available, although this may change for services that are being commoditised and unbundled from other more customised legal services. Further, consumer review websites may be unreliable due to both the potential manipulation of reviews and the inability of consumers to evaluate the quality of some legal services even after they have been delivered. However, the integrity of the status quo is under pressure from disruptive innovation.

79. In addition, new information asymmetries or externalities may emerge from automation, which may necessitate an adaptation, rather than elimination, of current quality restrictions relating to the education, professional experience, examinations and citizenship of professionals.

Questions for delegates on qualitative entry restrictions in legal services markets

- 15. How do recent disruptive innovations affect the need for, and enforceability of, qualitative entry restrictions?
- 16. Have online reviews and rankings of legal services providers been introduced in your jurisdiction? Are they sufficient to address information asymmetries in the market?
- 17. Could new restrictions be required as a result of automated services?

5.2.3 *Quantitative entry restrictions*

80. The evolution, and disruption, of legal services markets is likely to call into question the need for quantitative entry restrictions, particularly in the notarial profession. First, the establishment of exclusive regional territories is premised on a face-to-face service delivery model that may be at odds with client preferences and offerings in other segments of legal services markets. The demand for notarial services in jurisdictions where quantitative entry restrictions exist is generated by government requirements mandating these services in particular situations. As such, the development of the market is to a significant extent defined by government decisions, and innovations challenging existing business models have been limited

to date. If governments opt to open up the market to new entry, fundamental change could be expected in these markets. Notaries have begun to offer some online services, for instance in France, where consumers can ask questions of notaries online and make use of an alternative real estate sales platform.²⁵ However, a broader opening of quantitative entry restrictions could in fact lead to consolidation in the market, as notarial service providers take advantage of online platforms to offer services remotely across regional boundaries. As a result, the notarial profession in countries with quantitative entry restrictions can be expected to be among the most affected by disruptive innovations, given the impact of restrictions in limiting innovation in those markets and the profession's susceptibility to automation.

Question for delegates on quantitative entry restrictions in legal services markets

18. Are there quantitative entry restrictions on any legal professions in your jurisdiction? If so, have there been any public debates about their efficacy or modification?

5.2.4 Self-regulation

81. The self-regulatory framework that predominates in legal professions today could also be facing significant change in the wake of the market's evolution. In particular, it is unclear how this framework will adapt to the increasing share of legal services provided by those outside the legal professions, and the increasing blurring of the line between professional and non-professional services that will result. For instance, while the American Bar Association has published guidelines for "e-lawyering" (the provision of legal advice and services by online law firms), such offerings are competing with other online services that are not recognised by bar associations. To date, self-regulators have not been aggressive in preventing disruptive innovations from operating, although this may change as these innovations expand their reach and market share. If this occurs, policymakers may be faced with the question of whether a self-regulator is equipped to adapt and propose changes to their regulatory framework due to their inherent conflict of interest. In particular, self-regulators have a vested interest in maintaining market share for incumbent professionals, although oversight regimes such as the one adopted in the UK Legal Services Act 2007 may address these concerns. Generally, however, a self-regulator is unlikely to propose a significant reduction in the scope of its activities or a modification of exclusivity provisions which reflect the status quo. As noted in OECD (2007):

"The resistance to change may be more effective when the rules are promulgated by self-regulation than when they are laid down by governmental regulation. The rents may be used to resist competition from competitors offering more efficient rules (Curran 1993). Even if the rents have been dissipated by competition between the privileged or by newcomers, the artificial restrictions on output give rise to what Tullock (1975) has called a 'transitional gains trap'. It is politically difficult to abolish a policy that is inefficient both from the standpoint of the consumers, who pay artificially high prices, and from the standpoint of the privileged, who no longer make exceptional profits."

82. That being said, self-regulation brings several advantages that may need to be considered in efforts to revise current regulatory frameworks. There is no clear replacement for the industry-led enforcement of ethical codes, for instance, in a post-disruption regulatory framework. Remus and Levy discuss the example of tax law software being used to calculate the chances that a client's non-compliance will be detected, stating that lawyers provide "core professional values" that computers do not (2014: 66). More generally, the loss of self-regulation could mean clients may no longer benefit from the ability to seek recourse for malpractice from legal service providers. Put differently, without a fiduciary duty administered through a professional regulatory framework, it is not clear how online services, automated systems or non-lawyer providing legal services can be held accountable, through consumer protection

laws, for their behaviour to the same standards as current legal professionals. However, as noted above, some believe that “quasi-trust” can replace the certainty of established self-regulatory ethical and legal obligations.

Questions for delegates on self-regulation of legal professions

19. What is the extent of self-regulation in the legal services professions in your jurisdiction? Have there been proposals to change this?
20. What challenges have you encountered in terms of the conduct of legal services self-regulators in your jurisdiction? Has your authority pursued any cases against legal services self-regulators (such as bar associations)?

5.2.5 Consumer protection and other regulations

83. New consumer protection concerns may arise from online legal services offerings. These concerns could include a lack of awareness among consumers regarding whether the online services they are procuring are being offered by licensed professionals or not. In addition, the introduction of legal services by non-lawyers can mean that lawyer-client confidentiality (a fundamental feature of legal systems under which lawyers’ advice is privileged from disclosure in court), could be lost in some cases. The ability to obtain legal advice that is privileged with respect to court proceedings is a key component of the value of legal services and may not fit disruptive business models or regulations adapted accordingly.

84. Data protection concerns may also arise. Consumer data is emerging as a major asset for technology firms, and privacy concerns may be particularly pronounced when online services acquire significant amounts of personal data. In the context of an industry where lawyer-client privilege is a fundamental feature, data protection regulations may need to consider the range of information that can be held by online providers as well as the impact such information can have when improperly disclosed during legal proceedings. Similarly, businesses with offerings beyond legal services may attempt to leverage the consumer information they hold for other purposes, including for sale to other businesses, with attendant implications for legal procedures and consumer privacy.

85. In addition to concerns about consumer protection, regulators may continue to encounter challenges relating to legal service affordability in disrupted markets. Barriers to accessing legal services among low-income consumers may not be fully compensated for by reductions in the cost of these services following disruptive innovation. Given the fair functioning of the legal system is premised on equal access to justice, this may create policy challenges in the future. Adding to these concerns, measures requiring legal professionals to participate in legal aid schemes for low-income individuals may be challenged on the grounds that they impose costs on professionals, who face increasing pressure from disruptive entrants not bound by similar requirements.

86. Regulators may also find that certain other regulatory provisions will be called into question as a result of legal services market innovation. Fee and advertising restrictions, applied in some jurisdictions to avoid market failures such as adverse selection, may no longer be necessary as new quality and price information becomes available. Fee restrictions have limited competition on price, meaning there has been little incentive for traditional firms to innovate. As a result, there is a significant opportunity for low-cost providers to disrupt markets if permitted by regulation, and incumbents not accustomed to pricing pressures may be ill-prepared to respond.

Questions for delegates on consumer protection and other legal services regulations

21. What is the role for consumer protection laws in an environment where legal services regulations are under challenges from innovations?
22. What new policy concerns, including consumer protection concerns, have arisen in your jurisdiction as a result of innovations?
23. What other policy goals underlie the legal professions regulatory framework in your jurisdiction? How are they being challenged by innovations?

6. Conclusion

87. In sum, this paper provides a starting point for examining the questions that legal services regulators will face in the future – questions which competition authorities can play a role in answering. It is clear that some elements of current professional regulations no longer fit market realities, or are at least not being enforced in a consistent way. Competition authorities have an opportunity to help address this situation by undertaking advocacy efforts in both traditional and new ways. These efforts will need to address the unique features of national legal systems as well as the significant differences between legal professions and disciplines. However, the approach in each case need not vary, and can be informed by market studies as well as resources such as the OECD Competition Assessment Toolkit. Competition authorities should analyse legal professional regulations in the context of new market realities, considering both (i) the rationale for the regulations and (ii) their current design. This can set the stage for a reasoned discussion involving policymakers, legal professionals and disruptive entrants in a manner that balances the undeniable benefits of competition with the need to address market failure and policy objectives.

Concluding questions for delegates

24. What are the next steps and biggest challenges facing competition authorities with respect to legal services innovation (for example, ensuring that innovations are not blocked given the challenges of regulatory accommodation)?
25. Other than through market studies and providing comments to regulators in the context of formal review processes, are there any opportunities for competition authorities to foster engagement between policymakers, professional regulators and disruptors?
26. At what stage of regulated market disruption should competition authorities engage in advocacy efforts?

ENDNOTES

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- ¹ The composition of legal professions vary significantly between different countries, legal disciplines and regulatory frameworks. The core of the legal professions considered here consists of lawyers and notaries as well as other licensed, regulated professionals in some jurisdictions that provide services with respect to court proceedings and other legal processes (e.g. bailiffs, commercial court clerks and judicial commissioners in France).
- ² UK: <http://www.bristolpost.co.uk/Experienced-barrister-hits-unaffordable-legal/story-25874247-detail/story.html>; <http://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/affordable-legal-services/>;
- Ireland: <http://www.irishtimes.com/news/crime-and-law/courts/high-court/judge-says-courts-fearfully-expensive-and-accessible-to-few-1.2443096>; http://www.cearta.ie/2015/11/access-to-justice-when-legal-costs-are-high/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+CeartaIE+%28FeedBurner+for+Cearta.ie%29;
- Canada: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2365818;
- US: <http://www.theatlantic.com/business/archive/2014/05/is-there-such-a-thing-as-an-affordable-lawyer/371746/>;
http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_improving_the_delivery_of_affordable_legal_services.authcheckdam.pdf; http://www.law.du.edu/documents/denver-university-law-review/v89-4/HERRERA_FROM_ME_EIC_FINAL_M.pdf;
<https://www.washingtonpost.com/posteverything/wp/2015/06/02/we-dont-need-fewer-lawyers-we-need-cheaper-ones/>;
- Australia: http://www.communitylawaustralia.org.au/wp-content/uploads/2012/07/CLA_Report_Final.pdf;
- ³ <https://apogeelegal.com/>.
- ⁴ <http://www.directlawconnect.com/>.
- ⁵ See <http://www.immobilier.notaires.fr/jahia/Jahia/VenteImmo-Interactif/>
- ⁶ <https://lawtendr.com/>.
- ⁷ <https://www.legalzoom.com/>; <https://www.rocketlawyer.com/>; <http://www.mylawyer.co.uk/>,
<https://legalvision.com.au/>
- ⁸ <https://www.docracy.com>.
- ⁹ <https://www.legalonramp.com/>.
- ¹⁰ <http://modria.com/>; <http://www.resolver.co.uk/>.
- ¹¹ <http://www.sportsjudge.com/>.
- ¹² <http://resolutioncenter.ebay.com/>.
- ¹³ <http://www.advancelaw.com/>.

14 <http://www.avvo.com/>.

15 <https://www.cpaglobal.com>.

16 <http://www.integreon.com/>; <https://www.unitedlex.com/>; <http://www.pangea3.com/>.

17 <http://novuslaw.com/>.

18 <https://kirasystems.com/>

19 <https://www.docketalarm.com>.

20 See, for instance,

http://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/diy_estate_planning.html;

<http://www.forbes.com/2010/09/07/do-it-yourself-will-mishaps-personal-finances-estate-lawyers-overcharge.html>;

<http://zvulony.ca/2010/articles/will-and-estates/disadvantages-of-will-kits/>;

<http://www.tandblawyers.com/blog/news-events/post/why-hire-an-attorney-when-drafting-a-will-or-a-trust>; <http://www.czepigalaw.com/blog/2013/10/09/do-it-yourself-wills-dont-risk-it/>

21 <https://www.gov.uk/cma-cases/legal-services-market-study>.

22 <http://www.oecd.org/competition/assessment-toolkit.htm>.

23 Adapted from OECD (2007). Further discussion on the rationale for legal services regulation, and associated competition considerations, can be found in this paper.

24 Adapted from OECD (2007). Further discussion on the rationale for legal services regulation, and associated competition considerations, can be found in that paper.

25 <http://www.immobilier.notaires.fr/>.

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