Does the law protect incumbents? The case of legal services reform in Ireland

Burren Law School

29 April – 1 May 2016

Isolde Goggin

Chairperson, Competition and Consumer Protection Commission[1]

1 Introduction

In considering whether the law, and in particular the legislative process whereby laws are developed and amended, is adequate to the task of ensuring that the common good prevails over vested interests, the example of legal services in Ireland is an interesting one.

From a competition perspective, the market for legal services presents certain challenges. The conventional or static model of competition, where firms compete on price, quality and output in a relatively open and transparent marketplace, is difficult to apply in markets characterised by severe information asymmetries such as many markets where experts provide services to consumers who are unable to judge the value of the service in terms of their own needs and priorities. Due to the nature of legal services, it is very difficult for clients to judge the quality of many services provided by a lawyer, even after they have been delivered, or to compare the quality of the services offered by different lawyers. It is also difficult for them to assess the value of the service provided or the reasonableness of the fees, whether proposed or actually charged. This is particularly so for private individuals, who will be infrequent users of legal services. More dynamic or Schumpeterian competition, where older technologies and systems are constantly being displaced by waves of innovation, rarely appears to happen – except, possibly, for low value, repetitive services, which are capable of being commoditised through the use of technological solutions.

The reason this matters is that competition benefits everyone – except those who benefit from rents derived from the status quo. In competitive markets, businesses strive to win customers. Purchasers of goods and services – whether individuals or businesses – benefit from competitive prices, more choice and better quality. Competition results in open, dynamic markets featuring increased innovation, more choice, and better value. When consumers benefit from competition, the economy does too – the often-cited example of airlines is a case in point, competition from more suppliers on routes resulting in the price coming down for consumers and industry. This opens up the economy to new opportunities, which in turn supports economic growth and job creation.

There is increasing interest recently in the politics of economic growth. How do theoretical economic concepts translate into the political process? What are the blockages in the system that preserve the status quo and protect sheltered sectors? In a system characterised by extensive and powerful lobbying and privileged access for certain groups to the political system, who represents the

[1] The views expressed in this paper are the author's own and do not represent those of the Competition and Consumer Protection Commission (except where so stated)

interests of consumers? Shouldn't the system be designed to eliminate, or at least counter, the effects of vested interests so that the greatest benefit to the public is achieved?

2 History of legal services reform

The long and tangled history of attempted reform of the legal services sector in Ireland offers an interesting case study. The high cost and antiquated structure of the profession had been of concern for several decades. Independent reports from the Restrictive Practices Commission (1982), the Fair Trade Commission (1990), and the OECD (2001) recommended the removal of anti-competitive restrictions. Their recommendations, however, were largely ignored by Governments and the professions. The reform agenda began to gain some traction in the mid-2000s, with the establishment of the Legal Costs Working Group (2005) and the subsequent Legal Costs Implementation Advisory Group (2006). Also in 2005, the then Competition Authority (now the Competition and Consumer Protection Commission (CCPC) published a preliminary report on Competition in Legal Services in 2005, followed by a final report in 2006 ("Competition in Professional Services – Solicitors and Barristers")[2].

The report found that competition in legal services was severely hampered by many unnecessary restrictions on the commercial freedom of buyers and sellers permeating the legal profession. These restrictions were found to limit access, choice, and value for money for those wishing to enter the legal profession and for those purchasing legal services. They went beyond their stated aim of protecting the public interest, and in reality did more to shelter lawyers from further competition. They were unrelated to the maintenance of standards in legal services and offered inadequate protection to consumers. For example:

- There were restrictions on becoming a solicitor or barrister in Ireland. Those wishing to enter either branch of the legal profession had to do so by way of a training school monopoly, and training formats were limited.
- Competition between lawyers was highly restricted. The legal profession in Ireland was organised into a highly rigid business model: direct access to barristers for legal advice was limited to a few approved clients; barristers could not form partnerships or represent their employers in court.
- Consumers seeking legal services and retaining a lawyer did not have access to relevant information to help them choose services that best met their needs and ensured they got value for money.
- Consumers wishing to switch to another solicitor faced unnecessary obstacles. These restrictions emanated mainly from the regulatory rules and practices of the Law Society, as well as the lien, which entitles a solicitor to retain a client's documents until the solicitor's fees have been discharged, even if there is a bona fide dispute about those fees.
- The regulatory framework for the legal profession raised conflicts of interests. This was because the Bar Council and Law Society have had conflicting responsibilities: on the one hand, they represent the commercial interests of lawyers, while on the other, they have also been charged with protecting the interests of consumers of legal services. These two roles can conflict and housing them in the same organisation lacks transparency and does not engender confidence or trust.

[2] http://www.ccpc.ie/sites/default/files/documents/Solicitors%20and%20barristers%20full%20report.pdf

The fact that regulations which harm consumers have continued despite previous recommendations from independent bodies such as the Restrictive Practices Commission (1982), the Fair Trade Commission (1990), and the OECD (2001), that they be removed, demonstrates that when the interests of the legal profession and consumers collide, consumers have lost out. This complete resistance to change or reform led the Competition Authority to question the whole system of regulation for the profession. The Authority's 2006 report recommended that self-regulation should be replaced by an independent, accountable, and transparent regulatory body with overall responsibility for regulating the legal profession and the market for legal services. It further recommended the separation of representative and regulatory functions within the profession and a greater involvement of non-lawyers in the regulatory framework. The Competition Authority clearly put forward the view that the only way Ireland could drive the fundamental changes necessary to reform competition in legal services was by taking regulation of the legal profession out of the hands of the profession itself.

Of the Competition Authority's 29 recommendations, 10 were implemented in the years following the publication of the report by the Law Society, Bar Council, and Department of Justice. However, while welcome, these changes did not address some of the fundamental issues identified – notably, the requirement for independent regulation and the need to allow new, more innovative business structures.

3 The winds of change: the 2011-2016 Programme for Government and the Troika

When Ireland entered an IMF/ECB/EU bailout in November 2010, the necessity for legal reform was a key element of the package. The Memorandum of Understanding signed between the Government and the Troika in November 2010 included a commitment that, by the end of Q3 2011, the Government would establish an independent regulator and implement the outstanding recommendations from the Competition Authority report. It is arguable that, with the appointment of Alan Shatter in March 2011 as Minister for Justice, the reforms might have happened anyway – it is clear that Minister Shatter was intent on reform – but there is no doubt that the Troika maintained pressure on the Government to continue along that path.

Legal reform was included in the 2011-2016 Programme for Government, and the Legal Services Regulation Bill was published in October 2011, providing a basis for substantial reform of the profession. The Competition Authority and the National Consumer Agency[3] were generally supportive of the Bill, but continued to have concerns, particularly regarding the provisions of the Bill relating to legal costs. Notwithstanding close Troika scrutiny over much of the intervening period, it took more than four years before the legislation was finally enacted, with some highly significant policy changes included at a very late stage in the proceedings. Between the Competition Authority report and the passing of the Legal Services Regulation Act ("the Act") in December 2015, Ireland had six different Ministers for Justice from four different governments[4].

Judging on past performance, the system of legal regulation introduced in the Act is unlikely to change significantly for several decades to come. It seems pointless, therefore, to engage in a detailed analysis of the extent to which the Act, in its final form, followed or deviated from the Competition Authority report: we are where we are. In the remainder of this paper, I propose instead to analyse in more detail the process followed between the introduction of the Bill and the

[3] The Competition Authority and the National Consumer Agency amalgamated to form the Competition and Consumer Protection Commission in October 2014.

[4] Michael McDowell; Brian Lenihan; Dermot Ahern; Brendan Smith; Alan Shatter; Frances Fitzgerald.

signing into law of the Act. It provides a striking, and in my view alarming, example of how vested interests can influence the legislative process in their own interests.

4 Progression of the Bill: the public and private domains

The following is a schedule, adapted from the Oireachtas website, showing the timetable for the various stages of the Bill and the extent of amendments proposed.

Date	Event	Length of amendments (Govt. + Opposition)
9/10/2011	**Dáil Eireann:** **Bill published – 1st stage**	---
16/12/2011 – 23/2/2012	**2nd stage** Referred to Select Committee	---
17/7/2013	**Committee Stage** - List of proposed Committee Stage Amendments	**121 pages in total** 26 pages
15/1/2014	Committee Stage (Resumed) - List of Proposed Committee Stage Amendments - 1st Additional List of Proposed Committee Stage Amendments	 45 pages 3 pages
12/2/2014	Dáil Eireann: Committee Stage (Resumed)	47 pages
11/7/2014	Dáil Eireann: Report and Final Stages	**44 pages in total**
21/4/2015	Dáil Eireann: Report and Final Stages (Resumed) - List of proposed Report Stage Amendments - 1st Addit. List of Report Stage Amendments - 2nd Addit. List of Report Stage Amendments - 3rd Addit. List of Report Stage Amendments - 4th Addit. List of Report Stage Amendments **Bill Passed by Dáil Eireann (3 ½ years after publication) and referred to Seanad Eireann**	 26 pages 1 page 10 pages 6 pages 1 page
13/5/2015	**Seanad Eireann:** **Second stage**	---
19/11/2015	**Committee Stage** - List of Proposed Committee Stage Amendments	**75 pages in total**
26/11/2015	**Report and Final Stages**	**62 pages in total**
1/12/2015	Report and Final Stages (resumed) - List of Proposed Report Stage Amendments - 1st Addit. List of Proposed Report Stage Amends - 2nd Addit. List of Proposed Report Stage Amends - 3rd Addit. List of Proposed Report Stage Amends - 4th Addit. List of Proposed Report Stage Amends	 58 pages 1 page 1 page 1 page 1 page

	Bill Returned to Dáil Eireann to debate amendments made by Seanad	
9/12/2015	**Dáil Eireann:** - Amendments made by Seanad (280 amendments) **Bill returned to Seanad Eireann to debate further amendments made by Dáil Eireann**	**92 pages in total**
15/12/15	**Seanad Eireann:** - List of Proposed Amendments to Amendments made by Seanad Eireann - 2nd List of Proposed Amendments to Amendments made by Seanad Eireann **Bill completed passage through both Houses**	**12 pages in total** 1 page 11 pages
30/12/2015	**Signed into law by the President (Legal Services Regulation Act, No. 65 of 2015)**	

There are two striking points about this chronology. Firstly, there are a number of significant gaps in the process. Seventeen months elapsed between Second Stage in the Dáil and Committee Stage. Nine months elapsed between the time the Report and Final Stages were started in the Dáil, in July 2014, and their resumption in April 2015; another six months elapsed between May and November 2015, when to outward appearances there were no developments. Secondly, an enormous amount of very substantial amendments were introduced at Committee Stage in the Seanad: 157 amendments in a document 75 pages long, which was only published on 18th November, the day before the Seanad had to consider the Bill. At Report Stage, over 300 further amendments were tabled.

Behind the scenes, however, there was an enormous amount of activity. In a response to a PQ[5], Minister Fitzgerald stated that she had met the Bar Council and the Honourable Society of Kings Inns on 22nd May 2014; the Law Society on 16th June 2014; the Bar Council again on 3rd December 2014; the Law Society again on 8th December 2014; and attended a roundtable exchange with the Law Society on 3rd June 2015. Responses to a Freedom of Information Act request from the Irish Times indicate that a delegation from the Bar Council met Minister Shatter on 4th November 2011, and followed up with a note of the meeting and a 63-page "initial submission". The Bar Council wrote again in March 2012 with another 48-page document. Overall, there were 12 formal submissions from the Bar Council. A delegation met Taoiseach Enda Kenny and Martin Fraser, Secretary to the Government, on 28th May 2013. A letter from the Bar Council Director to the Department of Justice in July 2014 indicated that the Bar Council had seen draft amendments to the Bill which had not been published or shown to other interested parties – a fact which he described as "consistent with the spirit of consultation and co-operation in relation to the Bill"[6].

The Law Society was also active in promoting its interests. Ken Murphy, Director General of the Law Society, wrote to the Taoiseach on December 15th, 2011, after they met at a function in Co. Mayo to "summarise the main points which I made when you invited me to brief you on the society's concern

[5] PQ423, 23004/15

[6] "Legal profession waged four-year battle against reform Bill", Irish Times, 12th February 2016.

in relation to the Bill", and was "struck by how engaged and attentive [the Taoiseach was] to what I had to say". A delegation from the Law Society met Minister Shatter and Department of Justice officials on 16th January 2012, and its then President wrote a "private and confidential" letter to Mr Shatter on 17th February 2012, enclosing a 100-page submission. There were 32 separate items of correspondence between December 2012 and November 2015, one of which included a 214-page compendium of 51 e-mails exchanged in the course of 17 months in 2014-2015[7].

The Regulation of Lobby Act 2015 was signed into law in March 2015 but only took effect in September 2015, so that most of the period of the development of the legislation was not covered. From September 2015, however, any party engaged in lobbying of designated public officials was required to keep records of such activity and make a return on a 4-month basis, with the first return required in January 2016. The Bar Council reported the following activities for September to December 2015 alone:

- One meeting to "review amendments to the Legal Services Regulation Bill".

- 2-5 emails providing information on the Professional Indemnity Group Scheme for members of the Law Library and on disciplinary procedures and sanctions for members of the Law Library.

- 2-5 phone calls about "updates on status of legislation".

The Designated Public Official (DPO) lobbied was the Assistant Secretary in the Department of Justice.

The King's Inns made between 6 and 10 phone calls, sent between 2 and 5 e-mails and had between 2 and 5 meetings in that period. The DPOs lobbied were the Assistant Secretary, the Minister and a senator.

The Law Society in its return stated that the intended results of its lobbying were "to assist in a practical and informed policy debate on the future reform of the legal professions and services". The return states, "This return excludes the communications with Designated Public Officials on matters of a purely technical nature and those that relate to implementation. The Society made itself available to supply factual information to officials during the drafting and consideration of various provisions. As a regulator, the Society was statutorily obliged to assist officials from the Department. In mid-October, the Society communicated a composite overview of issues arising from the draft legislation, which were almost exclusively of a technical and factual nature. The document outlined what modifications were likely to arise and be required in respect of the Solicitors Acts 1954 to 2011, following passage of the Legal Services Regulation Bill."

5 Did it work? The last-minute changes to the Bill.

The spate of last-minute amendments was criticised by members of the Seanad at the time. Independent Senator Sean Barrett called on Minister Fitzgerald to withdraw the Bill, calling it "appalling" and "a shambles": he cited page 41 of the Bill, which had just 38 lines on it but had been amended by the Minister 105 times[8]. Seanad leader, Fine Gael Senator Maurice Cummins, said that in his time in the Upper House he had never seen 300 amendments being introduced in the final stages of legislation[9].

[7] "Files reveal campaign by legal professions to safeguard privilege", Irish Times, 12th February 2016.
[8] "Senator claims 'lion' Bill on legal services reform ended up as 'little lamb'", Irish Times, 2 December 2015.
[9] Ibid.

The final spate of amendments included two very significant ones. Independent regulation was to apply only to complaints about general professional misconduct. In the area of financial misconduct, it was proposed that the Law Society retain its traditional role, albeit with an oversight role by the new Legal Services Regulatory Authority (LSRA). This was a considerable row-back from the position in the published Bill, which proposed that the LSRA should have a direct role in dealing with complaints and misconduct in relation to financial matters. The Bill allowed the Bar Council to bar from membership of the Law Library those barristers who wished to participate in new business models (barrister partnerships, legal partnerships and multi-disciplinary practices), effectively marginalising them from the mainstream profession. Both of these represented significant wins for the legal professions. As Minister Bruton pointed out[10], no Regulatory Impact Assessment was performed on amendments and therefore "there is no firm evidence that the major changes to the original Bill will actually reduce costs."

The treatment of the incumbents was in marked contrast to that of others who made representations expressing concerns about legal costs, including both those who were consumers of legal services themselves and those who represented such consumers. The Health Service Executive wrote to the Department of Justice stressing the importance of the original plan in terms of curtailing excessive legal costs[11]. The Director of Corporate Enforcement, Paul Appleby, also wrote to express concerns about Schedule 1 of the Bill, which lists the matters to be considered by a Legal Costs Adjudicator in determining whether the legal costs to be given in a case are reasonable. I myself wrote to the Department of Justice on the same issue on 12th December 2014 and again wrote to the Minister for Justice on this matter in April 2015. The concern of the CCPC was that the twelve factors set out in Paragraph 2 of Schedule 1 involved, in our view, a number of overlapping factors, which were likely to be used as a basis for justifying increases in legal costs, rather than providing a basis for reducing the cost of legal services in Ireland. For example, references to overlapping features such as "complexity", "difficulty", "novelty" and "specialised knowledge", and to factors that do not relate to the quality of the service provided, such as "the importance of the matter to the client" and "the value of the property" were likely to result in higher costs than would be justified by reference to the work actually and appropriately done. No changes were made to the Bill on foot of these submissions until very late in the day, at Report Stage in the Seanad in early December; even then, the changes were minor and did not address the concerns expressed by these public agencies, which are often significant users of the services of the legal profession.

The Competition and Consumer Protection Commission, and its predecessor the Competition Authority, paid close attention to developments in the public domain as the Bill progressed through the Oireachtas. We were formally consulted on a number of occasions, and also had several meetings with the Department of Justice to provide views on various topics. However, a notable feature from our perspective, and particularly as the process drew to completion in November/December 2015, was the very limited time available to comment on what were major policy changes. In particular, we were given less than 24 hours to comment on the very significant changes introduced at Seanad Committee stage, so had effectively no time to consider the impact of such last-minute changes. Thus, despite the fact that the CCPC has a statutory function, under Section 10 of the Competition and Consumer Protection Act, 2014, to comment on draft legislation, our ability to engage with the development of the Bill paled into insignificance when compared with the private and frequent access afforded to the entities it was intended to regulate. This is all the

[10] "Lobbying offensive blunts overhaul of legal services", Irish Times, 20th November 2015.
[11] "Legal profession waged four-year battle against reform Bill", Irish Times, 12 February 2016.

more surprising when one recalls that the Bill was originally designed to implement the recommendations made by the Competition Authority in its 2006 report.

The EU, in its most recent post-bailout report (January 2016) expressed doubts about the effectiveness of the Act:

"However, the concessions granted put the responsibility on the soon-to-be-established Legal Services Regulatory Authority to demonstrate its independence from the legal services profession and to defend the interests of society against vested interests. Close monitoring will be required to assess whether the new regulatory framework lowers costs and delivers improved services."

The CCPC does, however, welcome the fact that, after we had raised concerns about the Seanad Committee Stage amendments via the Department of Jobs, Enterprise and Innovation, another last-minute amendment required the Legal Services Regulatory Authority to commence a review of the operation of the Act, to start within 18 months after establishment day and to conclude within 12 months, with a view to recommending amendments to the Act; and a requirement for the LSRA to consult with the CCPC in conducting this review[12].

6 Conclusions

So where do we stand now? The Legal Services Regulation Act is now law, but the Authority has not yet been established. Legal costs are still a concern: the Medical Protection Society (MPS) published a paper at the end of November 2014, which attributed rising indemnity cover costs to inefficient, non-transparent and overpriced legal services in Ireland. In the report, it was claimed that legal costs in Ireland are higher than in any of the 40 countries the MPS operates in. They have also recently said that the next government must prioritise legal services reform, for the same reasons[13]. The National Competitiveness Council has also commented on the level of legal costs, most recently in their "Cost of doing business in Ireland" report where they indicate that in Q4 2015 legal service prices were 5.8% higher than 2010 levels.

Looking back over the legislative process, while it is inevitable that representative groups will be extremely motivated to protect their interests, the CCPC's main concern is that the rights and interests of consumers were given little or no weight. Successive Governments gave the Competition Authority, the National Consumer Agency and the CCPC statutory functions to provide advice to policy-makers, and while detailed, evidence-based submissions were repeatedly made, it appears that the rights and views of those with vested interests in the status quo were prioritised.

So who is left to pay? The obvious answer is the consumers of legal services. Of these, the State is the largest, following by State Agencies and Semi-States; large, medium and small businesses; and finally individual consumers - you and me, when we need a lawyer in our own personal lives. It is difficult to get an accurate, up-to-date assessment of total expenditure on legal services, but the Department of Public Expenditure and Reform has indicated an estimated figure of €418m for "Legal etc." expenditure[14]. The Public Accounts Committee stated some years ago that "Public bodies are the largest procurers of legal services in the State with an estimated spend of anything up to €500

[12] This was provided for via an amendment to Section 6 of the Bill introduced at Seanad Report Stage.
[13] http://www.imt.ie/news/latest-news/2016/02/next-government-must-prioritise-legal-reform.html
[14] Revised Estimates for Public Services – 2016, Table 7

million[15].” As mentioned above, the National Competitiveness Council found that costs had risen over the past five years.

This adds up to a ‘treble whammy’ as ordinary people pay

1. as citizens through taxation,
2. indirectly through the purchase of goods and services from businesses and
3. directly when we need to hire the legal profession.

Why is it, then, that those who are paying are not centre stage in the consideration, principles, or processes as they should be? It is worth asking what went wrong with this process and how we can prevent it from happening again. We need to restore the values and principles of Better Regulation – necessity, effectiveness, proportionality, transparency, accountability, and consistency – and put them into practice.

And finally, we need to restore faith in the legislative process. Citizens who saw this play out in the media can hardly feel reassured that their interests were being defended. Sunlight is the best disinfectant: we need to bring real transparency to the legislative process so that citizens, and those charged with representing their interests, are kept at the heart of policy formation and implementation.

[15] Third Interim Report on the Procurement of Legal Services by Public Bodies – January 2011. This Report was also cited by the Department of Justice in their Regulatory Impact Assessment on the Bill.