

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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DISRUPTIVE INNOVATIONS IN LEGAL SERVICES

--BIAC--

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More documents related to this discussion can be found at www.oecd.org/daf/competition/disruptive-innovations-in-legal-services.htm

Please contact Ms. Ania Thiemann if you have any questions regarding this document
Ania.THIEMANN@oecd.org

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**PROTECTING AND PROMOTING COMPETITION IN RESPONSE TO
“DISRUPTIVE” INNOVATION IN LEGAL SERVICES**

1. The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee’s Working Party No. 2 for its session on protecting and promoting competition in response to “disruptive” innovation in legal services.

1. Introduction

2. In many countries legal services are an important sector of the economy. In addition, legal matters and disputes may significantly affect both individuals and corporations. Indeed, for individuals, buying a house, getting a divorce, or solving a serious dispute in court are important matters which might have significant consequences for them. For corporations, which face increasing regulatory and compliance obligations, administrative and criminal investigations present an opportunity to defend themselves and protect their rights. In sum, at one point or another any individual or company may become an acquirer of legal services. As such, choosing the right lawyer with the right expertise at the right price is important for all.

3. In recent years, the legal services sector has witnessed substantial changes. This is due to different and evolving requirements by customers, to technological innovation in relation to the provision of these services and to the unbundling of certain services. This paper will examine those changes, as well as the potential impact of legal professional bodies on innovation and on competition.

2. Definitions

4. First of all, it is helpful to define the term “legal services”. This notion is in fact used to include a large number of different services. Simplifying one can describe “legal services” as the provision of legal advice for different matters or assistance in court in connection with a legal dispute. And in general, practicing law means the application of legal knowledge in a personalised way in a particular situation.

5. BIAC identifies two main categories of purchasers of legal services, each of them with different characteristics (although both of them have an interest in a well-functioning market): large corporates on one side and SMEs and individuals on the other.

6. Large corporates are likely to require legal services frequently. When it comes to high-stakes cases or litigation, major companies still seek out prestigious and large law firms. In addition, most large corporates will have a legal department and a general counsel. Today many competent lawyers happily leave major firms to join the general counsel's office. They are themselves lawyers and as purchasers of legal services on the corporate side tend to have all the information needed on quality and costs to make an informed choice with regard to the legal services they require.

7. This is not the case for individual consumers or SMEs, who tend to be more infrequent users of legal services. Some of them are discouraged from procuring legal services, in particular by the unpredictable costs of the traditional hourly rate model. To meet their needs, new models of legal services are being developed with innovative ways of charging customers or offering services. But in many instances individual consumers might not have the information needed to make an informed choice in relation to quality and costs. In order to protect them, laws or professional bodies have introduced regulations and restrictions on practicing law.

8. The rationale for regulating legal services is that consumers often have difficulties assessing the quality of the services they purchase. In order to protect consumers, such services are regulated and there are a number of requirements, for instance regarding the necessary education and qualifications and continuing professional education requirements to ensure minimum service standards. But in addition there are restrictions on who may supply legal services, what legal service providers are permitted to offer and the business models permitted. Many of the regulations that apply to legal service providers are primarily designed to protect consumers. However, in some instances these regulations may have an impact on competition by raising barriers to new entrants and restricting the ability of all players to innovate.

3. Innovation

9. If one looks at legal services today, it is obvious that the legal services sector is undergoing substantial changes and that the sector is characterized by considerable innovation. One could argue whether this innovation is ‘disruptive’ or not. There are arguments both ways but one aspect is clear: the new models use new technology to reduce costs and streamline delivery, offer unbundled services and seek to provide a more efficient service.

10. Online legal research provides an example of a sustaining innovation in the legal industry. When introduced, it represented a radical new technology for delivering legal information. In the early 1970s the advent of online law libraries may have been disruptive: small law firms unable to sustain the cost of a large print library now could compete with larger firms in access to recent cases, law reviews, and other material of legal research. But it also allowed big law firms to do better what they were already doing.

11. Leaving aside whether new business models are disruptive or not, one can identify two main tendencies: 1) large established firms embracing new technologies to deliver their services and 2) new businesses offering unbundled services or new business models.

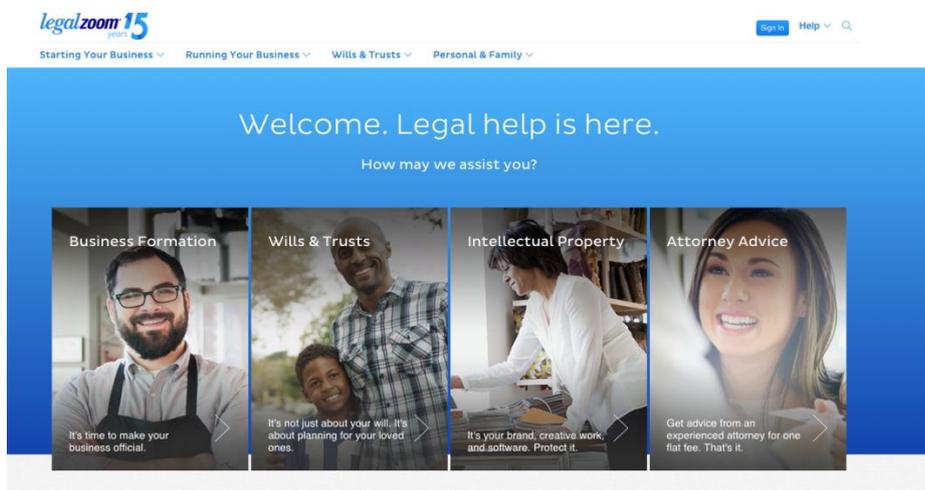
12. For example, once upon a time massive document production and review was typically done by large law firms. As corporate clients have become accustomed to massive document productions in connection with more litigation and corporate transactions, the view that only a few elite law firms were competent to handle these matters has waned. The shift provided an opportunity for legal process outsourcing firms to come into the market with a good enough, and lower cost offering.

13. The OECD paper describes several new models. But if one looks at what is available, many more could be included. We have listed some of those:

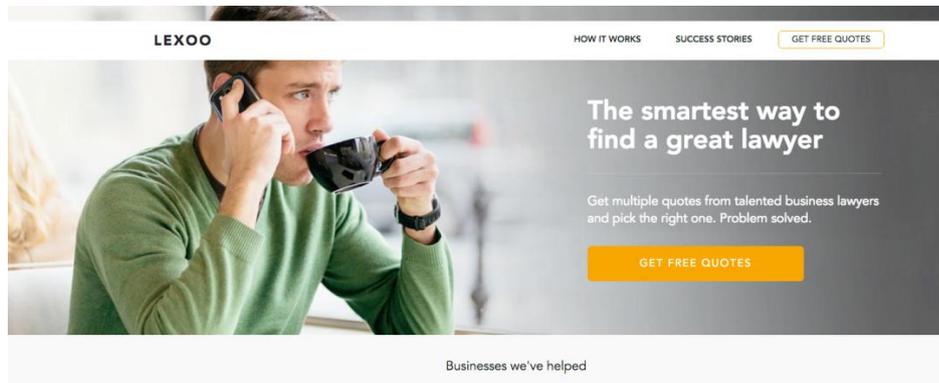
- Secondment firms that place lawyers in-house typically to work at a client site either on a temporary basis or part-time.
- Law and business advice companies which combine legal advice with general business advice of the type traditionally provided by management consulting firms (although in many countries regulation precludes lawyers from sharing fees with non-lawyers).
- Virtual law firms that have attorneys working from home. Often lawyers don't need much more than a PC, an Internet connection and a few online legal database subscriptions. Virtual law firms dispense with the physical infrastructure of large offices and allow lawyers to work from home or from low-cost temporary serviced office spaces. Virtual firms are unlikely to affect the high-value corporate end of the market but small to medium-size law firms that undertake highly commoditized volume work will face competition from these service providers.

- Other models which include a wide variety of different business models. For example, a new generation of online marketplaces is arising that specifically allows consumers to submit a legal problem and helps match them with lawyers who have the requisite expertise and time to address the issue.
- Process standardization such as web-based services that produce bespoke documentation and create a standardized online procedure for legal processes are a relatively recent entrant to the market. While databases of document precedents have been around for a long while, this new type of services seeks to accomplish two things. Firstly, they create tailored and bespoke documents online in response to user inputs, and secondly they provide a streamlined and standardized platform for a specific legal process to which users of the service agree to abide.

14. In the United States, businesses like legalzoom.com and rocketlawyer.com have partially disrupted the legal marketplace by offering relatively cheap and easy access to legal documents. While these services are valuable for some clients, corporate clients and even SME businesses tend to find little value in what these services offer because the offering is not sophisticated or tailored. In fact, it's arguably not legal advice but just easy access to templates of certain legal documents.



15. In the UK, lexoo.co.uk is an online platform where people who need legal work can receive quotes from high quality, pre-screened solicitors. It exists because arguably large law firms are not set up to cater for the needs of small businesses and these days, there are plenty of very competent lawyers available outside the larger firms or who used to work for the big firms who need only a laptop and a Wi-Fi connection to service clients. Again, this business is not a law firm and doesn't itself offer legal services, but it does improve the accessibility and affordability of legal services, at least for small businesses.



16. As in a time of evolution, it can be expected that many companies and business models will fail. An example of an interesting and innovative business which did not survive is quibbly.com. This was a service that offered mediations and arbitrations online via a digital forum where the adversaries could submit evidence and seek to resolve small disputes before arbitrators or mediators.



4. American Bar Association and Innovation

17. The American Bar Association (ABA) conducted a national summit on innovation legal services in May 2015. It challenged participants to embrace technology and design concepts to improve the way the legal profession serves all those who depend on it. First, it was a call to break from precedent and tradition and identify ways to deliver legal services differently. Secondly, it provided powerful evidence of the need for change. Many Americans do not access the legal services they need. At the meeting, proposals included expanding the range and number of professionals authorized to deliver legal services, changing the legal service business model, making access to the judicial system easier and more understandable to citizens, and neighbors in concrete ways to use technology to improve and reduce the cost of legal services.

18. Technology has fuelled the growth of alternative sources of legal services and there appears to be growing acceptance of less traditional approaches. Many of these alternatives are more efficient and less costly than those offered by traditional law firms.

5. Professional Bodies

19. At present, the professional services sector is characterized by either state regulation or self-regulation by professional bodies.

20. As mentioned earlier, there are reasons for this regulation of professional services, in particular:

- "Asymmetry of information", i.e. the difference in the information available to consumers and service providers: a defining feature of professional services is that they require practitioners to possess a high level of technical knowledge. Consumers may not have this knowledge and therefore find it difficult to judge the quality of the services they purchase.
- "Externalities": the provision of a service may have an impact on third parties. Rules are therefore needed to ensure that both service providers and purchasers take proper account of these external effects.
- The concept of "public goods": certain professional services are deemed to be in the public good since they are of value for society in general, for example, the correct administration of justice or the development of high-quality urban environments.

21. While some regulation in this sector is justified, depending on the circumstances BIAC observes that there could be restrictions of competition which, depending on the circumstances, are not fully justified, including:

- Fixed prices: These are probably the regulatory instrument likely to have the most detrimental effects on competition, eradicating or seriously reducing the benefits that competition on price may bring.
- Recommended prices: These may have a significant negative effect on competition since they may facilitate the coordination of prices between service providers and/or mislead consumers about reasonable price levels.
- Advertising restrictions: Advertising may facilitate competition by informing consumers about different products and allowing them to make better-informed purchasing decisions. In some countries advertising of legal services is prohibited or only some forms are allowed.
- Entry restrictions and reserved rights: The legal profession is subject to qualitative entry restrictions. In addition, in some cases, quantitative restrictions exist. For instance, in some countries the notaries are subject to quantitative entry restrictions based on demographic or geographical criteria. While these restrictions seek to ensure that only practitioners with appropriate qualifications and skills can carry out certain tasks, it has an impact on the way services are offered.
- Regulations governing business structure and multidisciplinary practices: Some countries prevent lawyers and others (such as accountants) from providing integrated legal and accountancy advice for tax issues or prevent the development of one-stop shops for professionals.

22. Despite some initial resistance, it is now widely accepted that professional bodies are subject to competition law¹. And if one looks to Europe, pursuant to the “Wouters” case², it is firmly established that not every decision of a professional body restricting competition is necessarily a breach of competition law. Three criteria come into play:

- Account must be taken of the objectives of professional regulation, which are connected with public interest goals;
- It must be examined whether the anti-competitive effects are inherent in the pursuit of the public interest objectives (the necessity test) and;
- The anticompetitive effects must not go beyond what is necessary in order to ensure the proper practice of the profession (the proportionality test).

23. Over time, many competition authorities have investigated professional bodies charged with the supervision of the legal services sector for matters such as minimum fees or bans on advertising. For instance, there is currently a case pending in front of the Competition Appeal Tribunal in the UK by a provider of online anti-money laundering training for conveyancing firms against the Law Society which offers similar training (which is compulsory) and which requires firms to purchase it from itself³.

24. Apart from possible breaches of competition law, it has been argued that regulation can slow down the formation and provision of innovative services. If that is true, this tends to be the unintended consequence of some regulation (by the state or self-regulating bodies) rather than a conscious decision by the professional body.

6. Conclusion

25. BIAC fully subscribes to the observation made in the excellent OECD Secretariat Background Paper that competition authorities should have a key advocacy role in ensuring that the market for legal services develops properly especially when new legislation or new professional rules are introduced that might hinder or stifle the development of the market.

1 In the USA, this was confirmed by the landmark Goldfarb case [REF]. In Europe this principle was confirmed Case 309/99, Wouters and others.

2 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (2002) [C-309/99](#) is an important decision of the [European Court of Justice](#) concerning competition law and the freedom of establishment. In both of these areas, the ECJ held that restrictions could be justified on the grounds of legitimate [public policy](#), in this case ensuring the impartiality of the [legal profession](#), if the measures taken were both necessary and proportionate (and in the case of restrictions on competition, purely ancillary) to that objective.

3 Case no. 1249/5/7/16. The Law Society has developed a number of paid-for accreditation schemes for firms of solicitors, including the “Conveyancing Quality Scheme” (CQS). The claimant, Socrates Training Limited, and the Law Society both offer online anti-money laundering (“AML”) training for law firms on a commercial basis and also online training which helps property lawyers to avoid mortgage fraud and other financial crime. Conveyancing firms have a statutory duty to provide their staff with AML training. In early 2015 the Law Society started to require that as a condition of a law firm maintaining its CQS accreditation such a firm must buy both AML online training and mortgage fund training from the Law Society. Socrates claims that the requirement that firms buy their AML, mortgage fraud or other financial crime training from itself rather than others, the Law Society is abusing a dominant position by the inclusion of a tying clause of this type.

26. It is obvious that new services and new ways of delivering legal assistance are developing rapidly. It will be important for professional bodies to evolve and adapt to the changes in the legal services sector so that innovation, which will benefit all users of legal services, can continue to flourish.