

Competition and regulation of the legal sector in Denmark

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9 April 2015

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Executive summary

This note contains an English translation of the executive summary of the Danish report “Konkurrence og regulering i advokatbranchen”, dated 02 December 2014.

An inter-ministerial committee set up by the Danish government as part of Growth Package 2014 is analysing the legal profession. The purpose is to examine whether changes in the regulation of the legal profession create more competition and lead to lower prices of legal assistance, inter alia, to ensure the competitiveness of the legal profession.

The Danish Bar and Law Society and the Association of Danish Law Firms have asked Copenhagen Economics to examine the regulation of the legal profession and assess advantages and disadvantages of liberalising the legal profession further.

Liberalisation can benefit competition in the legal profession, lead to lower prices and thus economic gains. However, it is also important to ensure that liberalisation does not lead to harmful consequences, which can counteract or completely neutralise the possible gains. A balanced liberalisation to the advantage of the Danish society will therefore require exact balancing of advantages and disadvantages.

Liberalisation can benefit consumers through increased competition. This happens when liberalisation removes barriers that make it difficult to establish a business or when removing other barriers that restrict law firms. The specific conditions of the business in question will determine to what extent liberalisation will increase competition. A number of circumstances of the Danish legal profession indicate that the potential gain from liberalisation is limited. The reason is twofold:

Firstly, there is a greater potential for enhancing competition through liberalisation if competition is weak. However, there is no indication of weak competition in the legal profession. There is a large number of law firms in Denmark. These firms compete both amongst each other, against other advisers and against foreign lawyers. Furthermore, law firms compete with in-house lawyers in private corporations and organisations. The number of in-house lawyers has more than tripled in the last ten years. Law firms have consequently experienced increased competition.

Secondly, there is a greater potential for increasing competition through liberalization, if consumers are very concerned about the price and therefore react to price competition. Indications show increased price competition, especially with large business clients. However, indications also show that customers are more concerned with quality than with price, which means that further liberalisation will probably not lead to significant price reductions.

However, liberalisation could also damage consumers and society. It is already difficult for the clients to assess the quality of legal services. Therefore, if liberalisation reduces the requirements for legal advisers, it could affect the quality of the lawyers' work. In particular, the problem will hit private clients and small enterprises, which find it most difficult to assess the quality of the lawyers' work and therefore have a higher need for protection.

Liberalisation could also have damaging consequences if it decreases the independence of the lawyers or the quality of their court work. The citizens' access to independent lawyers is a prerequisite for ensuring access to justice and furthermore the lawyers' work in court contributes 'case law' to the benefit of the whole society.

We have examined the economic consequences of five possible initiatives:

Firstly, we have examined the consequences of liberalising the ownership rules. Today, law firms can only be owned by people who work in the firm, and lawyers must own at least 90 percent. A liberalisation can consist of (i) increasing the limit of how much non-lawyers can own; (ii) opening up for external owners who do not work in the firm; and/or (iii) making it possible for foreign law firms to own law firms in Denmark.¹

The advantages of modifying the rules of ownership are that the new owners can add other competences and create another pressure from the owners and thereby increase the productivity of the law firms. We conclude that the advantages are limited. Partly because only one law firm has made a non-lawyer a co-owner. Partly because we conclude that external owners can only create limited additional value because external owners can hardly run a law firm much more effectively than lawyers. Partly because we conclude, based on a number of interviews, that the Danish market is too small and uninteresting for foreign law firms. This modest market foundation has meant that foreign establishments in Denmark have been unsuccessful.

The disadvantages of modifying the rules of ownership are that the lawyers' independence can be challenged. The clients can, therefore, not be sure that the lawyers only represent the clients' interests. This creates a risk of lower quality in the legal advice, which is harmful to society. The risk is especially high in the case of external owners, because external owners increase the risk of conflicts of interest. Therefore, a modification of the rules of ownership will require the implementation of new regulation to protect consumers. This has happened in Sweden (which allows foreign law firms to own law firms in Sweden) and in England and Wales (which allow external owners).

¹ Today foreign law firms can meet the ownership rules by registering the foreign lawyers as lawyers in Denmark or by letting the Danish department be owned by Danish partners.

Secondly, we have examined the possibility of modifying the lawyers' monopoly of representing a client in a court of law further. In most cases, only lawyers can represent others in a court of law. However, since the lawyers' monopoly on representing clients in court was modified in 2008, it has been possible for other advisers than lawyers to represent their clients in court in a number of smaller cases.

The direct advantages of modifying the lawyers' monopoly of representing a client in court are increased competition from other advisers than lawyers, which could in principle lead to lower prices. However, we conclude that the lawyers' monopoly of representing a client in a court of law hardly has any real effect on competition. Experience shows that consumers still use lawyers for less complicated cases. In Sweden, almost only lawyers represent clients in court, even though there is no – and never has been – any monopoly on representation in Swedish courts. We therefore conclude that further modifications will have a limited effect.

The disadvantages of modifying the lawyers' monopoly of representing a client in a court are the risk of wrong counselling and less effective case handling, if less experienced advisers represent others in court. This can lead to significant economic losses. Not only to the client who risks losing in court, but also to society. The case handling can be slower and more expensive. Moreover, an error done by an adviser can lead to a wrong court ruling. This will harm the parties of the specific case, but may also affect parties in future cases due to precedence.

Thirdly, we have examined the consequences of modifying the education requirements. The advantage of modifying the education requirements is that it can increase the number of lawyers. However, there is no lack of educated lawyers. Actually, the number of lawyers has increased even though the education requirements were strengthened in 2008. Therefore, the competitive effect of a modification will probably be modest. The disadvantage of modifying the education requirements is the risk of a lower quality.

Fourthly, we have examined whether the rules for code of conduct (ethical rules for lawyers adopted by the General Council of the Danish Bar and Law Society) restrict competition. The present regulation of the code of conduct is characterised by quasi-regulation: Public legislation determines the overall frames of the code of conduct while the daily and more detailed regulation is made within the framework of the Danish Bar and Law Society (The Disciplinary Board) and ultimately in the courts. We conclude that quasi-regulation is appropriate for the legal profession. We also conclude that the present structure of regulation does not restrict competition in the legal profession. Therefore, a modification of the present code of conduct will not have any effect on competition.

Fifthly, we have examined the possibility of stimulating the clients to more actively examine their options before choosing a lawyer. One possibility could be a price portal. However, we conclude that the possibilities of creating a well-functioning price portal are limited. There are already portals, which make it possible to obtain offers from several lawyers. However, it is difficult to get lawyers and clients to invest the necessary time. On the other hand, we see a potential in increasing and improving the rule regarding price information, which only few consumers are aware of. The rule means that lawyers must state how they will determine the price before taking on an assignment for private clients. This makes it possible for consumers to obtain several proposals, where, for example, the lawyers' expected workloads and hourly rates are specified. If knowledge of the price information rule is strengthened, it can lead to more active clients, which will benefit competition.