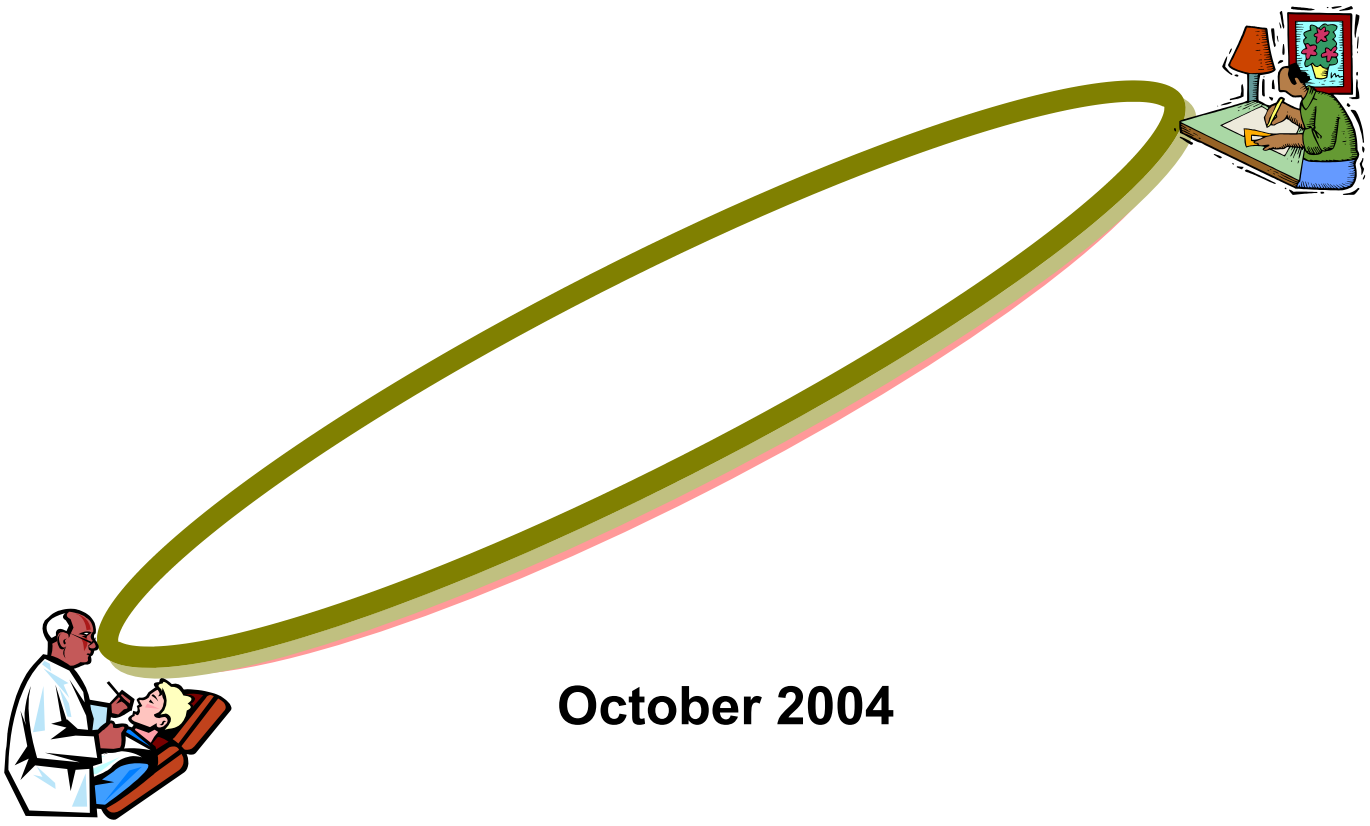
Fair Trading Commission

FEE SETTING
IN THE PROFESSIONS

(Preliminary Report)



October 2004

Table of Contents

Executive Summary

Fee setting in the context of professional services occurs where members of a profession, usually through their association, agree to charge a specific set or range of fees for the services they provide. These agreements may take several forms; they may be fees starting from a minimum upwards, or less than some maximum. They may be mandatory or voluntary.

In agreeing to all charge a specific fee for the same services these individual members, rather than determining the price of their services independently, according to their respective costs and existing demand, rely on the rates fixed by the association. In effect therefore the members of the profession agree not to compete among each other on price. The more efficient and innovative among them therefore have little incentive to reduce their charges in the interest of consumer welfare.

The objectives of the Fair Competition Act CAP 326C; (the "Act") enacted on January 3rd 2003, are to:

- promote, maintain and encourage competition;
- prohibit the prevention, restriction or distortion of competition; and
- ensure that all enterprises, irrespective of size, have the opportunity to participate equitably in the market place

The decision to introduce such legislation was taken because it was recognised that properly competitive markets are a key determinant in fostering economic growth and in promoting the interests of businesses and consumers alike. Anti-competitive conduct represents a threat to the attainment of such goals, and key among such practices is price fixing.

The Fair Competition Act[1] explicitly prohibits price-fixing (including fee setting), which it considers to be agreements that directly or indirectly prescribe purchase or selling prices. These agreements are generally considered to be the worst form of anti-competitive practice and directly contradict the goals of the Fair Competition Act.

Professional associations that enter into price-fixing agreements without statutory authority are likely to breach the Act. Where, however, the conduct of the professional association is permitted by statute, the said conduct is unlikely to be considered an "agreement" entered into by the members of the association and would not, therefore, constitute a breach of the Act. Nevertheless, fee setting that has been enshrined in the law is still likely to have the anti-competitive effects which deny consumers the benefits of competition.

Our research finds no definitive merit in any of the more common justifications for retaining fee setting. In particular:

- there is no clear link between fee setting and the maintenance of quality standards either on theoretical or empirical grounds.
- fee setting is unnecessary to provide consumers with advanced notification of the eventual charge for a service;
- maximum fees do not prevent overcharging, rather agreements of this nature may be used to justify lifting prices above competitive levels and may effectively protect inefficient operations;

[1] Section 13(3) of the Fair Competition Act states, inter alia:

'Without prejudice to the generality of subsection (2) agreements preventing competition referred to in that subsection include agreements containing provisions that

(a) directly or indirectly fix purchase or selling prices or determine other trading conditions'

Alternative and less anti-competitive means, which include litigation, consumer reports and the competitive effects of a bad reputation, have been identified as being more effective in curtailing inappropriate conduct within the professions.

Section 3(1)(g) of the Fair Competition Act exempts "activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public" from its provisions. This stipulation in our view does not include fee setting since the practice is not considered necessary for developing or enforcing professional standards of competence.

It should be mentioned also that empirical evidence demonstrates that where fee setting is practiced, the incomes of the professionals concerned tend to be higher than under a competitive arrangement, and such restrictions could lead to an increase in prices.

Prohibiting fee setting in the professions is likely to be beneficial both socially and economically by:

- encouraging businesses to improve efficiency, be innovative and introduce products that are desirable to consumers;
- ensuring that an independent pricing mechanism operates within markets for professional services;
- ensuring that inefficient and incompetent service providers are not shielded from the forces of competition;
- promoting efficient allocation of resources;
- reducing the incentive to increase prices when costs have not risen.

The Fair Trading Commission considers that the act of fee setting is diametrically opposed to the principles of competitive conduct which the Act is designed to promote and is contrary to public interest. In this regard, it is recommended that such conduct, where it is practised, be discontinued.

1 Introduction

The term profession is commonly used to refer to a specialised work function within society. In a more restrictive sense, the term profession often refers to fields that require extensive study and mastery of specialised knowledge, such as law, medicine, accounting or engineering. In this sense, *profession* is distinct from *occupation*, which generally refers to the nature of a person's employment.

Fee setting, in the context of professional services, occurs where the members of professional associations come together to set the fees which members of that association may charge for their services. Fees may be set in various forms, including, but not limited to: maximum fees, minimum fees, mandatory fees, voluntary fees, hourly rates, absolute fees, relative fees and fees calculated as a percentage of the value of a transaction.

Fee setting places restrictions on the ability of the members of professional associations to compete with each other and conflicts with the goals of the Fair Competition Act CAP. 326C, which are directed towards:

i) promoting, maintaining and encouraging competition
ii) prohibiting the prevention, restriction or distortion of competition and
iii) ensuring that all enterprises, irrespective of size, have the opportunity to participate equitably in the market place

This report will address fee setting within the professions in Barbados. It examines the policies with respect to fee setting across the range of professional associations in Barbados. The analysis is intended to apply to all associations and any other representative bodies where such arrangements are in place. It looks at the practice in relation to the relevant provisions found in the Fair Competition

Act and makes certain recommendations with regard to the continuance of such practices.

The report is set out as follows:

- Section 2 discusses the methodology utilised by the Commission to conduct its preliminary enquiry
- Section 3 considers the benefits that can be gained from promoting competition and prohibiting fee setting
- Section 4 outlines the prevalence of fee setting in Barbados
- Section 5 considers the provisions in the Fair Competition Act that relate to price-fixing (which includes fee setting)
- Section 6 addresses common justifications for fee setting

2 Methodology

The Commission commenced an inquiry into the practices of professional associations pursuant to section 5 of the Fair Competition Act.

The Commission's initial research involved the examination of the laws which govern the legal profession in Barbados, in particular the Legal Profession (Attorneys'-at-Law Remuneration for Non-Contentious Business) Rules 1983. Research was also conducted into the manner in which other jurisdictions have applied their competition legislation to the legal profession.

The Commission's initial research identified a schedule of minimum fees in the Legal Profession Rules. Additionally, it was ascertained that several territories with competition legislation had already dealt with issues pertaining to fee setting both in the legal profession and across the entire range of professional services. Consequently, the Commission decided to extend the ambit of its enquiry to include the fee setting practices of all of the professional associations in Barbados.

The next stage of the Commission's enquiry involved the examination of the laws which the professional associations in Barbados operate under. In recognising that agreements and arrangements relating to fee setting may not be formally laid out in legislative measures, the Commission decided to request further information from all of the professional associations that were subject to its enquiry. The Commission's request for information sought to ascertain whether the associations in question had any agreements or arrangements (including rules, regulations or guidelines) prescribing the fees that their members may charge for the services they provide.

This preliminary report sets out the initial findings of the Commission. The report will be submitted to professional associations and interested parties for comments. The Commission will review the comments received and submit a final report outlining its recommendations to the Minister responsible for Competition Policy.

In the future, the Commission may consider reviewing other areas of restrictions on competition in the professions such as advertising.

3 Fee Setting in the Professions in Barbados

Within the various professions in Barbados, there are usually numerous prescribed standards of professional conduct, performance and accreditation which delineate what existing individual suppliers can do and how they should deliver their services[2]. These self-regulating restrictions are generally adopted to protect the integrity of these professions. They may be set out in statute, in rules set by the professional bodies or from custom and practice.

The Commission, in an attempt to determine the extent of fee-setting within the professions in Barbados, conducted an enquiry into the matter. Information regarding the practices of these organisations with regard to fee setting was requested of a selected number of professional associations[3]. The Commission's request for information sought to ascertain whether the associations in question had any agreements or arrangements (including rules, regulations or guidelines) prescribing the fees that their members may charge for the services they provide.

[2] The Fair Trading Commission examined the legislation which the professional associations in Barbados operate under. These pieces of legislation included:

i) Dental Registration Act CAP. 367
ii) Dental Registration (Technician) Rules, 1976 CAP. 367
iii) Dental Registration Rules, 1973 CAP. 367
iv) Dental Registration (Amendment) Rules, 2002
v) Medical Regulations, 1972 CAP. 371
vi) Architects Registration Act, 2003-5
vii) Land Surveyors Act CAP. 370
viii) Land Surveyors Rules, 1985 CAP. 370
ix) Engineers (Registration) Regulations, 1976 CAP. 368B
x) Legal Professions Act CAP.370A
xi) Legal Profession (Attorneys'-at-Law Remuneration for Non-Contentious Business) Rules, 1983

[3] Information was requested from the Barbados Association of Quantity Surveyors; the Barbados Estate Agents and Valuers Association; the Barbados Association of Medical Practitioners; the Barbados Association of Professional Engineers; the Barbados Association of Professional Valuers; the Barbados Bar Association; the Barbados Institute of Architects; the Barbados Land Surveyors Association; the Institute of Chartered Accountants of Barbados; the Barbados Dental Association; the Barbados Association of Podiatrist; the Barbados Association of Insurance and Financial Advisors Inc

The responses to the Commission's preliminary enquiry revealed that fee setting in the professions can be categorised into the following areas:

(a) no fee restrictions;
(b) recommended fee scales;
(c) mandatory fee scales; and
(d) statutory fee scales.

No fee restrictions

Of those professional associations responding, the majority stated that they did not have any agreements, arrangements, rules, regulations or guidelines pertaining to the fees that their members should charge for services rendered.

These associations all tended to carry legislated rules[4] that sought to ensure that the image and standards of their respective professions were not compromised by less than professional members. These rules relate to issues which include, but are not limited to:

- Qualifications for registration;
- Conditions for registration;
- the Powers of the associations to make regulations applicable to the profession;
- Procedures for appointment of the members of the association's board
- Offences; and
- Disciplinary proceedings

[4] For example the Dental Registration Act CAP 367, the Engineers (Registration) Act CAP. 368B, the Land Surveyors Act CAP. 370, the Legal Profession Act CAP 370A, the Architects Registration Act 2003-5 and the Medical Registration Act CAP. 371

The regulations of these particular professions, however, did not include fee schedules as a means of ensuring that their standards were maintained, which tends to be a common justification for engaging in fee setting. The ability of these professions to emphasise standards of discipline and veracity appeared not to suffer as a result of not having any fee scales.

The Barbados Association of Professional Engineers is an example of the type of association that does not engage in fee setting in order to promote quality standards. The association operates under the Engineers (Registration) Act Cap 368B. This Act provides for the registration and discipline of engineers and for connected purposes. Engineers, after academic qualification, work under supervision for a four year period after which they must register with the Engineer Registration Board in order to practice as independent engineers on the island. The Barbados Association of Professional Engineers is mandated to ensure continued competence and ethical standards are followed by the engineers. If engineers do not abide by the Continued Professional Development Programme of the Engineer Registration Board, they may be de-registered.

In addition to the Barbados Association of Professional Engineers, the following associations do not engage in fee setting of any form:

- Barbados Association of Quantity Surveyors;
- Institute of Chartered Accountants of Barbados;
- Barbados Association of Medical Practitioners; and
- Barbados Association of Podiatrists

On the basis of the information provided to the Commission, it is reasonable to assume that the members of these professions compete on price. The professions concerned have shown no ill-effects as a result of this practice.

Mandatory Fee Scales

The Barbados Land Surveyors Association and the Barbados Estate Agents and Valuers Association indicated that they issued mandatory fee scales, where deviations from these scales could attract penalties.

The Barbados Land Surveyors Association has indicated that its mandatory fee scales form part of the Association's Code of Conduct. Specifically, Rule 13 of the Code of Conduct in the Association's Revised Byelaws of 1998 states:

"A member shall not hold himself out or allow himself to be held out directly or indirectly by name or otherwise as being prepared to do professional business and shall not directly or indirectly do any do any professional business at less than the scale of fees derived from the Association's approved Minimum Scale of Fees; provided that a member shall be entitled to waive the entire scale at any time without reference to the Committee of Management".

Consequently, a land surveyor who prices below the schedule of minimum fees has breached the Code of Conduct and may be brought before the Association's disciplinary committee. The disciplinary committee has the power to expel parties found to be in breach of the Code of Conduct from the Association. Where serious breaches of the Code of Ethics occur, the individual in question may be brought before the Land Surveyors Board. The board has to power to recommend that the Minister revoke the licence of the party breaching the Code of Conduct.

The mandatory fee scales issued by the Barbados Land Surveyors Association and the Barbados Estate Agents and Valuers Association did not originate from

statute but were developed by the representative associations of the professions. The scales described the specific tasks that would be performed by the members of the profession in the delivery of a named service and itemised the related fee that the provided service should attract. Persons, especially those new to the profession, could refer to these scales and be immediately aware of what fees they ought to charge for the delivery of a given service. Within these professions, fee scales were seen as an important tool in ensuring the maintenance of standards. Among these professions there is, therefore, no competition on prices.

Recommended Fee Scales

In other associations, for example the Barbados Institute of Architects, fee scales are applied on a voluntary basis. The Institute has issued recommended fee bands which specify a range of percentages that should be charged for services based on the value of the transaction. In such instances, these fee scales served the same purpose as those that were considered mandatory, in that they were intended to guide members of the association as to the fees that should be charged for each specific service. In these professions, however, no penalties were enforced as a result of not abiding by the guidelines set. The members of these professions were free to compete on price and could, therefore, offer substantially lower prices than those authorised in the scales if they felt that the cost of a service warranted such.

Statutory Fee Scales

Of the professional associations in Barbados, only the Barbados Bar Association has the statutory authority to set the minimum fees which members may charge for certain types of work.

At present attorneys-at-law in Barbados are subject to both the Fair Competition Act and the Legal Professions Act. In exercise of the powers conferred to it by section 35(1) of the *Legal Profession Act CAP 370A of the Laws of Barbados* "Legal Profession Act" and with the approval of the Judicial Council, the Barbados Bar Association has published and enforced the *Legal Profession (Attorneys'-at-Law Remuneration for Non-Contentious Business Rules, 1997.* The "Legal Profession Rules" prescribe, amongst other things, a schedule of minimum fees that attorneys-at-law in Barbados may charge in respect of non-contentious business. The schedule of minimum fees identifies the types of non-contentious services which attorneys-at-law may provide, such as debt collection, obtaining land tax certificates and preparing and completing mortgages, and suggests the minimum fees that may be charged for these services either in terms of dollars or percentages or on the basis of the amount of time spent to provide the service in question.

The implementation of the Legal Profession Rules was guided by a need to:

(a) provide guidance to consumers on the minimum fees applicable to the services they purchase;
(b) keep attorneys in line in terms of the standard and quality of their work; and
(c) provide guidance to new attorneys on the fees they should charge for their services.

4 Fee Setting and the Fair Competition Act CAP. 326C

In this section, the issues that must be considered in determining whether fee setting by professional bodies constitutes a breach of the Fair Competition Act will be considered.

Statutory Provisions

Section 13 (1) of the Act reads

> *"All acts or trading practices prescribed or adopted by*
>
> *(a) an enterprise*
>
> *(b) an association of enterprises*
>
> *… that result or are likely to result in the disruption or distortion of competition are prohibited".*

Professional associations would fall under section 13 (1) (b) since they are associations of enterprises. This implies that all acts or trading practices prescribed or adopted by the professional association that result or are likely to result in the disruption or distortion of competition are prohibited.

Section 13 (2) of the Fair Competition Act states that:

> *"Subject to the provisions of this section, all agreements between enterprises, trade practices or decisions of enterprises or organisations that have or are likely to have the effect of preventing, restricting or distorting competition in a market are prohibited and void".*

In addition, subsection 3 further provides inter alia that

(3) *"Without prejudice to the generality of subsection (2) agreements preventing competition referred to in that subsection include agreements containing provisions that*

(a) directly or indirectly fix purchase or selling prices or determine any other trading conditions;"

Further to Section 13, Section 34(1) of the Fair Competition Act states:

"(1) No person shall conspire, combine, agree or arrange with another person to:

(b) prevent, limit or lessen, the manufacture or production of any goods to enhance unreasonably the price thereof….
(e) otherwise unduly restrain or injure competition"

These sections prohibit persons or enterprises (individuals, partnerships and corporations) from engaging in any type of practice, agreement or arrangement which has the effect of restricting competition through price fixing schemes that seek to increase prices to, or maintain prices at, certain levels.

Section 13(2) is very wide and includes any agreement formally or informally determined that has the effect of distorting or restricting competition. Subsection 13 (3) speaks specifically of fixing prices as a type of agreement that directly prevents competition.

The practice by an association of setting fees is considered to be a form of a horizontal[5] agreement, which restricts competition among those who would

[5] Horizontal agreements generally occur between actual or potential competitors

otherwise be competitors. In this regard this practice is prohibited by the Act and may attract the related sanctions.

The Fair Competition Act gives the word "agreement" a broad meaning.

Section 2 of the Fair Competition Act states inter alia that

> *""agreement" includes any agreement, arrangement or understanding, whether oral or in writing or whether or not it is or is intended to be legally enforceable."*

Relevant Case Law

In the 1995 Jamaican case of the General Legal Council v. The Fair Trading Commission[6] the court looked at several issues including whether the Legal Profession (Canons of Professional Ethics) Rules were inconsistent with the Fair Competition Act in particular sections 17 and 35 (which are equivalent to sections 13 and 34 of the Fair Competition Act of Barbados).

Of particular relevance to fee setting within the professions, Canon IV of the Canons of Professional Ethics specifies, inter alia, that:

"… (f) The fees that an Attorney may charge shall be fair and reasonable and in determining fairness and reasonableness of a fee any of the following factors may be taken into account…
(ix) any scale of fees or recommended guide as to charges prescribed by the Incorporated Law Society of Jamaica, the Bar Association, the Northern Jamaica Law Society or any other body approved by the General Legal Council for the purposes of prescribing fees."

[6] Suit No. 35 of 1995

These provisions imply that fee scales or recommended guides as to charges would have the backing of statute when they are promulgated by any body approved by the General Legal Council for the purposes of prescribing fees.

In the case of General Legal Council v. The Fair Trading Commission, one of the issues which the learned Chester Orr, J. discussed was whether the statutory rules made under the Legal Profession Act constitute "an agreement" within the meaning of that term as used in the Fair Competition Act.

The court construed the word "agreement" in its ordinary or popular meaning and declared that the Canons do not constitute an agreement within the meaning of the Fair Competition Act. Chester Orr J. indicated

> *"The ordinary meaning of "agreement "is that stated in the Shorter Oxford dictionary supra*
>
> > *'a coming into accord or a mutual understanding'*
>
> *or as in Webster's New Universal Unabridged Dictionary-*
>
> > *'An understanding or arrangement between two or more people, countries, etc. bargain, compact, contract.'*

The Court held based on the foregoing definitions that for a Canon to constitute "an agreement," it must be the result of an understanding between two or more people. Chester Orr J. stated that the Council, a statutory body, cannot agree with itself. Further there was no statutory requirement or any evidence to support an agreement by the Council with any other person or body, for example, the Bar Association.

The definition of agreement, however, has been construed in other jurisdictions to include agreements within associations. In contrast to the Jamaican case, in the 1975 landmark case of Golfarb v. Virginia State Bar[7] it was held by the United States of America Supreme Court, that a minimum fee schedule for lawyers enforced by a State Bar association was considered an illegal price fixing "agreement" and thus in violation of Section 1 of the Sherman Act.[8] Section 1 of the Sherman Act reads

> *"Every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is declared illegal."*

This section of the Sherman Act is similar to section 13(1) of the Fair Competition Act. Although the provisions in the two acts are not identical they are intended to have the same effect. Specifically, both sections are meant to promote, maintain and encourage healthy competition between independent business enterprises that operate in markets for goods and services.

It should be noted, however, that the respondents in the Golfarb case were unable to identify any Virginia Statute or Act which required them to impose a

[7] 421 U.S.773 (1975)

[8] In this case, the petitioners, a husband and wife contracted to buy a home and the financing agency required them to secure title insurance. This required title examination, and only a member of the Virginia State Bar could legally perform that service.

The petitioners contacted a lawyer who quoted the precise fee suggested in a minimum fee schedule published by the respondent the Fairfax County Bar Association. The lawyer told them that it was his policy to keep his charge in line with the minimum fee schedule which provided for a fee of 1% of the value of the property involved. The petitioners tried to find other lawyers who would examine the title for less than the fee fixed by the schedule. No other attorney indicated that they would charge less than the rate fixed by the schedule.

minimum fee schedule, which is the one important factor that distinguishes that case from the Jamaican case and the Barbadian situation as far as the legal profession is concerned.

Chief Justice Burger said that

> *"Respondents have pointed to no Virginia Statute requiring their activities. It is not enough that as the County Bar puts it, anticompetitive conduct is prompted by state action; rather anticompetitive practices must be compelled by direction of the state as a sovereign."*

He further stated that

> *"The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action has voluntarily joined in what is essentially a private anticompetitive activity and in that posture cannot claim it is beyond the reach of the Sherman Act."*

The Court was of the view that had the Virginia State bar been compelled by statute to enforce the prescribed fees then it would not have been in breach of the Sherman Act. In making its decision, the Court examined the principle of anti-competitive state action which is exempt from the Sherman Act. This principle was first established by the Supreme Court in Parker v. Browne[9]. In that case the Court held that an anticompetitive marketing programme which "derived its authority and its efficacy from the legislative command of the state" was not a violation of the Sherman Act because the Act was intended to regulate private

[9] 317 U.S.341 87 L.Ed. 315 (1943)

practices and not to prohibit a state from imposing a restraint as an act of government.

This principle enunciated in Parker v. Browne and later in Golfarb is known as the state action or regulated conduct defence and has been upheld in many courts over the years as demonstrated at "Annex A".

5 Addressing Common Justifications for Fee Setting in the Professions

From the perspective of professional associations, restrictions placed on the level of fees that may be charged by their members are generally guided towards protecting the interests of the consumers of the professional services concerned. However, it is sometimes difficult to draw direct causal links between the restrictions imposed and the effects which they are intended to have, either on theoretical or empirical grounds. Where it is impossible to make credible causal links, it is difficult to envisage why such practices should be retained.

i) Maintenance of Quality Standards

Fee setting by professional associations is commonly justified as necessary to maintain professional standards and the quality of professional services provided within the community.

This argument relies on the fact that consumers may not be adequately able to gauge the quality of the professional service they have purchased because of technical complexity and/or the significant degree of judgment involved, possibly beyond the buyer's experience. Further, in relation to some services, there is an ambiguous relationship between the quality of the service provided and the outcome[10].

The disparity between information held by the service provider and that held by the consumer could lead to a market failure where the former has strong

[10] 'Competition in Professions – A Report by the Director General of Fair Trading', Office of Fair Trading, March 2001

incentives to cut quality without a corresponding reduction in price. The proponents of fee setting argue, therefore, that the practice is necessary to prevent a 'race-to-the-bottom' in the provision of professional services.

Price competition, they argue, will lead to service providers lowering standards, which consumers are unable to discern due to the information asymmetry between producers and consumers, in an attempt to maintain or increase incomes while charging consumers the same for their services.

This argument fails to take into account, that any service provider who is inclined to lower his/her service standards will do so regardless of restrictions on price competition. In a perverse manner, service providers have an incentive to lower standards while prices are fixed so that their incomes are supplemented. Therefore, restrictions on fee setting are not defensible as addressing a market failure arising from asymmetric information due to the absence of a clear link between fee setting and service quality. There is little or no evidence that the setting of fees is necessary to or will have the effect of ensuring certain standards of quality.

A service provider who decides to lower standards, regardless of whether or not fees are set, will face losing market share as a result of the negative effect on his reputation. This reputation effect of providing a low quality service should, in and of itself, be sufficient to deter service providers from taking this course of action. Fee setting is, therefore, superfluous to the maintenance of service standards.

Support for the view that fee setting is unnecessary in the maintenance of quality standards comes from various competition agencies throughout the world. The Competition Authority in Ireland, for example, states '[n]or do we believe that fee-fixing leads to the maintenance or improvement of the quality of the service, but rather that fee competition can improve standards quite considerably. We disagree in particular with those professions which claim that fee competition will inevitably result in reduced standards'[11].

Further, the Monopolies and Mergers Commission in the United Kingdom, in response to the argument that price competition might create serious dangers in relation to quality of services of a particularly personal nature or of whose quality the public is generally incapable of judging, argued that dangers of such kinds are likely to be exceptional and most unlikely to occur when the unqualified are (or should be) free to practice in competition with the qualified[12].

A Supreme Court decision in 1978 in National Society of Professional Engineers v United States[13] reaffirmed the position that price competition would not necessarily lead to a decline in quality of service. The Society had agreed to an ethical rule that the members would not compete with each other on price before the client had selected one of them to carry out the project. The Court rejected the Society's argument that price competition was not in the public interest because it would lead to cost cutting and to inferior and perhaps dangerous work[14].

[11] 'The Professions Study', Indecon – London Economics Report prepared for the Competition Authority Ireland, July 2003
[12] 'Competition in Professions – A Report by the Director General of Fair Trading', Office of Fair Trading, March 2001
[13] 435 U.S. 679 (1978)
[14] 'Competition in Professional Services', Organisation for Economic Cooperation and Development (OECD) February 2000

Alternative Means of Ensuring Standards

Alternative and less anti-competitive means of addressing the market failure issue exist. These include litigation, consumer reports and the competitive effects of a bad reputation, which have been suggested by the Office of Fair Trading (the competition authority in the United Kingdom)[15].

- Professional negligence or incompetence leading to harm can lead to litigation. The threat of action by the courts to compensate a client receiving poor quality advice should in theory provide an incentive for professional service providers to maintain quality standards and thus overcome a potential market failure.

- In some cases, a sufficient proportion of well-informed (and demanding) consumers can ensure that quality is maintained for all potential clients. Consumer Reports providing information on the quality of services of particular providers is one route through which consumers can become well informed.

- As previously mentioned, the reputation of a service provider will be negatively affected when the quality of their product offering is consistently below what one reasonably expects. The fear of what such a bad reputation would do to one's career should be sufficient to deter service providers from unnecessarily lowering standards.

[15] 'Competition in Professions – A Report by the Director General of Fair Trading', Office of Fair Trading, March 2001

ii) Advance Notification of Charges to Aid Budgeting

Professional associations may try to justify fee setting on the basis that the practice provides advance notice of the eventual charge for a service, thereby providing certainty, simplicity and aiding in consumer budgeting. This argument relies on the fact that the service provider may be unable to attach an exact price to the service concerned until its provision has been completed and a cost analysis undertaken.

As argued by the Competition Authority in Ireland, however, this line of reasoning is weak when one considers that an indication can be given of the likely cost of a service, without having the fee determined by a professional association.[16]

Alternative and less anti-competitive means of providing advance notification of fees include the provision of historic surveys of actual fees charged or widespread advertising of fees coupled with active shopping around by consumers. Furthermore, in the Barbadian case, consumers of services from enterprises outside the legal profession are able to budget without having the fees that the enterprises concerned charge for their services set by an association or other external parties.

iii) Maximum Fees Prevent Overcharging

Another argument put forward to justify the maintenance of fees reasons that the setting of uniform authorised maximum fees prevents over-charging. In setting a

[16] 'The Professions Study', Indecon – London Economics Report prepared for the Competition Authority Ireland, July 2003

maximum fee, the association caps the prices that may apply to particular services. The maximum fee is meant to make the particular service concerned available to as wide a demographic (i.e. low, medium and high income earners) as is possible.

In the US, however, maximum fee scales are treated as anti-competitive as they can be used to justify the lifting of prices above competitive levels.[17] Furthermore, it cannot be guaranteed that maximum fees would not be set so high as to accommodate inefficient operations.

Protection of low-income consumers may be better achieved via insurance or via special at-cost arrangements with the professional body than by maximum fee rules. Further, the Competition Authority in Ireland has argued that maximum fees would tend to become fixed charges in the minds of professionals, with the consequent diminution in price competition[18].

iv) Fee Setting: Reasonably Necessary for the Protection of the Public?

Some professional associations may argue that arrangements to set fees under the guise of the practice being beneficial to the consumer in maintaining standards are permitted under Section 3.1(g) of the Fair Competition Act. Section 3(1) of the Act states:

> *'This Act shall not apply to…*

[17] 'Competition in Professional Services', Organisation for Economic Cooperation and Development (OECD) February 2000
[18] 'The Professions Study', Indecon – London Economics Report prepared for the Competition Authority Ireland, July 2003

(g) *activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public'.*

It should be noted that all of the professions in Barbados, with the exception of the legal profession, have been able to develop or enforce professional standards of competence reasonably necessary for the protection of the public without having to resort to fee setting.

Furthermore, there is no evidence of a clear link between the setting of fees and the maintenance of professional standards. Indeed, fee setting is more likely than not to be contrary to the public interest due to the detrimental effects on competition and the lack of evidence of any public benefits. In the UK, for example, fee scales have generally been considered by the Office of Fair Trading (OFT) and the Monopolies and Mergers Commission to be manifestly contrary to the public interest[19].

Fee setting will do nothing to develop or enforce professional standards of competence. These standards may be developed and enforced regardless of whether or not fees are set by a professional association.

Alternative and less anti-competitive means of developing and enforcing professional standards include rules addressing the standards of competence that must be attained to be allowed to practice in the profession and the level of service that should be provided. Procedures for dealing with contraventions of

[19] 'Competition in Professions – A Report by the Director General of Fair Trading', Office of Fair Trading, March 2001

the rules of the professions would do more to maintain quality standards than fee setting.

The maintenance of fees at certain levels or within certain ranges, does nothing to protect the public, but goes a long way in shielding those inefficient members within the profession from the competitive forces that have led to certain benefits to the public in other markets for goods and services.

6 The Benefits of Competition and the Harm of Fee Setting

(i) The Benefits of Competition within the Professions

Competition is a concept which is valuable in fostering economic progress and in promoting the interests of businesses and consumers. In general, the term competition is used to refer to the independent rivalry that exists between separate and distinct enterprises that operate in markets where buyers and sellers continually interact through supply and demand for goods and services. Independent rivalry in professional service markets is manifested in terms of price and quality. Thus, one will find that each enterprise in these markets will try to gain an advantage over the others by adjusting the price and/or quality of the services they offer.

The benefits of effectively functioning markets for professional services are significant and wide-ranging. They include:

- Improved allocation of the resources employed in the provision of professional services such as skilled workers, money and equipment. These resources are likely to be allocated to the service areas where they can be used most efficiently and effectively.

- More efficient and cost effective combinations of resources. In an effort to cut costs, businesses will try to minimise wastage and combine resources in such a way as to maximise the quantity of high quality services that can provided by a given set of inputs.

- Lower prices. Value for money is likely to induce consumers to switch from competing services. Furthermore, efficiency in the provision of

services is likely to result in lower costs which can be passed on to consumers in the form of lower prices.

- More research and innovation in the area of value-added services. Enterprises in competitive markets for professional services will recognise that they must invest more in service innovation and research in order to meet the wants and needs of demanding consumers in ways that are superior to the competition.

- Greater investment in business assets. Investment in the assets of the business may be necessary to reduce costs and consequently lower prices as well as to improve the overall efficiency with which the enterprise provides its services.

- Improved quality of services. Businesses will strive to improve the quality of their services, recognising that today's consumers have become more discerning and demanding and will not settle for services that are of a substandard quality or are below the quality which one reasonably expects.

- Faster and better provision of services to consumers in an effort to meet the demands of today's sophisticated consumers.

As a result of efficiently functioning competitive markets for professional services, there will be overall economic development through increased consumer spending, more investment, increased employment, greater incomes and increased consumer choice. Conversely, restraints on the effective workings of competitive professional service markets, such as anti-competitive

agreements, are likely to frustrate and ultimately derail the fostering of economic progress which the Fair Competition Act has been designed to achieve.

(ii) The Harm of Fee Setting

A mechanism by which providers of professional services set prices independently is the most important feature of an effectively functioning competitive market. When an independent pricing mechanism is absent or does not work effectively, the benefits of a competitive market will not be forthcoming, in that consumers will find that they must pay prices in excess of marginal cost, which reduces consumer surplus (the difference between the price consumers must pay and the price they are willing to pay), while increasing the surplus (net profits) of the providers of the services (to monopoly levels in extreme cases).

Competition in prices is one of the most powerful sources of encouragement to improve productive efficiency, to drive innovative techniques and to introduce products that are more desirable to the consumer. Conversely, any prohibition of, or restraint upon, price competition by a group of persons supplying the same good or providing the same service, or any action or agreement which has the same or a similar effect, is detrimental to the kind of market activity which most benefits the consumer[20].

Where competition in fees is prohibited or restrained, there is protection for the inefficient and incompetent and a reduction of incentives to improve. There is the likelihood that there will be over-charging for some work performed and

[20] 'Report of Study into Concerted Fixing of Fees and Restrictions on Advertising in the Engineering Profession', Restrictive Practices Commission (1987a), Dublin: Stationery Office

undercharging for other work. Since fees are likely to be higher than they would be in a competitive market, the consumers of the service are disadvantaged[21].

Fee setting has the potential to result in a misallocation of society's resources. For example, resources such as labour and capital may be directed to those professions where fee setting has led to high prices or high levels of profitability despite the inefficiency in the operations of those in the professions. In an ideal economy, resources are directed to those activities where they can be used most efficiently and only to the point where the marginal cost in providing a good or service is equal to the marginal benefit to be derived from the provision of that good or service. Where high prices or high levels of profitability encourage entry into already saturated markets for professional services, society's resources are inefficiently allocated and could be better used in other sectors of the economy that are underserved.

Some empirical data exist to support the proposition that fee setting may have significant anti-competitive effects. Arnould and Friedland[22] examined the relationship between the incomes of a sample of lawyers in California and Pennsylvania and (inter alia) the existence of minimum fee schedules (where there was one) for a simple legal transaction. The authors found that lawyers' incomes were higher where fee schedules exist. Their research established a positive relation between the imposition of a fee schedule and practitioner income in the market for the simple legal transaction in question. The authors, however, argued that the influence of fee schedules on incomes may be even

[21] 'Report of Study into Concerted Fixing of Fees and Restrictions on Advertising in the Engineering Profession', Restrictive Practices Commission (1987a), Dublin: Stationery Office

[22] Arnould R.J. and Friedland, T.S., 'The Effect of Fee Schedules on the Legal Services Industry', *Journal of Human Resources,* Vol. 12 Issue , 1977

greater than they demonstrate because high incomes may induce entry into the market, which will moderate the effect on lawyer incomes.[23]

Further, Muzondo and Pazderka[24] found that mandatory fee scales in twenty professions, including law and architecture, had a detrimental impact on competition. In particular, they found that restrictions in price competition lead to a 10.4 % average increase in prices.

Annex B contains examples of jurisdictions that have already prohibited, or have recommended the prohibition of fee setting by professional associations and the rationale behind these decisions.

[23] 'The Professions Study', Indecon – London Economics Report prepared for the Competition Authority Ireland, July 2003
[24] Muzondo T. and Pazderka B., 'Occupational Licensing and Professional Incomes in Canada', Canadian Journal of Economics 1980 Vol. 13 pp659-667

7 Preliminary Findings

This report has considered the case for fee setting, which amounts to a restriction on competition, within the professions in Barbados. Although fee setting is not widespread within the professions in Barbados, the practice nonetheless exists. It may lead to many of the negative effects commonly associated with such anti-competitive practices including:

i) high prices
ii) reduced incentives to improve productive efficiency
iii) reduced incentives to be innovative
iv) protection for the inefficient and incompetent and
v) significant disparities between the costs and prices of providing professional services

If there was no statutory authority governing the conduct of a professional association in Barbados and its members were acting voluntarily in agreeing to collectively set fees, the practice would be seen as an "arrangement" or an "agreement" within the context outlined in the Act and as such would be viewed as anti-competitive.

However, where a professional association in Barbados is granted the statutory authority to set fee schedules; the schedules could be described as conduct prompted by state action as they would have the force of statute. It would be inappropriate to view fee schedules sanctioned in this form as a conspiracy or even an agreement among the members of the association to set fees. They are merely a practice mandated by law.

Fee setting that has been mandated by the law does not, therefore, constitute a breach of the Fair Competition Act as the practice is not considered an agreement to fix the prices charged by those in the professions. Where fee setting does not have the backing of the law, which is the case with mandatory fee scales in Barbados, the practice is likely to be considered to be a contravention of the Fair Competition Act. In particular, the practice is likely to be considered to be a price-fixing agreement.

Although restrictions on competition in the provision of professional services may be justified where the benefits from such a practice can demonstrably outweigh the costs which they impose, our findings suggest that fee setting is unlikely to address many of the issues which it is purported to remedy. In particular, it is suggested that:

i) there is no clear link between fee setting and the maintenance of quality standards either on theoretical or empirical grounds. Furthermore, fee setting is unnecessary in developing or enforcing professional standards of competence reasonably necessary for the protection of the public

ii) fee setting is unnecessary to provide consumers with advanced notification of the eventual charge for a service

iii) maximum fees can be used to justify lifting prices above competitive levels and can be placed so high as to protect inefficient operations

Empirical evidence further demonstrates that where fee setting is practiced, the incomes of the professionals concerned tend to be higher than in those cases where fee setting is not practiced. In addition it has been shown that where fee

setting is practiced, the prices of the services provided are on average ten percent higher[25].

Finally, it is recognised that alternative and less anti-competitive means can be developed to address several of the standards professional associations wish to maintain.

[25] Muzondo T. and Pazderka B., 'Occupational Licensing and Professional Incomes in Canada', Canadian Journal of Economics 1980 Vol. 13 pp659-667

ANNEX A: Cases to Demonstrate the State or Regulated Action Principle

Town of Hallie v. City of Eau Claire

In Town of Hallie v. City of Eau Claire[26] the Court reaffirmed that municipalities are entitled exemptions where they demonstrate that their anticompetitive activities were authorised by the state pursuant to state policy to displace competition or monopoly public service.

Brennan J. one of the learned Judges in the Town of Hallie case, quoting from the case of City of Lafayette, La. v. Louisiana Power & Light Co.[27] stated that

"To determine whether the city acts pursuant to a state policy, it is necessary to examine the statutory scheme under which it acts. Explicit legislative authorization for anticompetitive acts is not necessary: it is sufficient that the state bestows "broad regulatory authority" from which anticompetitive effects would logically result."

Industrial Milk Producers Association v. British Columbia Milk Board

In the case of Industrial Milk Producers Association v. British Columbia Milk Board, Justice Reed stated that it is not various industries as a whole which are exempt under the regulated conduct defence, but merely those activities which are required or authorized by the federal or provincial legislation, as the case may be.

[26] 471 U.S. 34 85 L.Ed. 2d 24, 105 S.Ct.1713 (1985)
[27] 435 U.S.389, 413, 55 L.Ed. 2d 364, 98 S. Ct. 1123 (1978)

Waterloo Law Association v. Attorney General of Canada

In Waterloo Law Association v. Attorney General of Canada, a case concerning fee-setting activities engaged in by a county law association the court held that the association was acting as a voluntary body with no regulatory authority over the profession. Mr. Justice Eberle said that there was no provision in the Ontario Law Society Act which empowered the members of the association to broadly define conduct on becoming a member, or define conduct which they deemed to be contrary to the best interest of the public or of the legal profession. The actions of the law association were thus viewed as restraints on trade of legal services.

Mortimer v. Corporation of Land Surveyors

This view was reinforced by a decision issued by the British Columbia Supreme Court in 1989 in the matter of Mortimer v. Corporation of Land Surveyors of the Province of British Columbia. This case involved an appeal by a land surveyor who had been found guilty by the Board of Management of the Corporation of Land Surveyors for failing to observe the tariff of fees for professional services then in effect. While the Land Surveyors Act empowered the Corporation to pass bylaws, not inconsistent with the Act, but with regard to the tariff of fees for professional services, the bylaw in question required members to observe the standards set out in a booklet containing tariffs of fees for professional services. After a strict construction of the legislation, the Court reasoned that because the tariff of fees was set out in a booklet rather than in the Act it did not make the tariff of fees mandatory.

In allowing the appeal and quashing the conviction, the Court held that

"The Land Surveyors Act was insufficiently clear to allow the imposition of a mandatory minimum tariff of fees, which was the practical effect of the bylaw."

The Court further commented that

"There is much to be gained in giving professional bodies the power to regulate themselves. I do wonder, though, if the common good is served by providing to a professional body (monopolistic in nature) through legislative authority and without limitations, the power to engage in activities which would be illegal if carried out by anyone else. Surely in these circumstances, a strict construction of the legislation is a reasonable approach."

ANNEX B: Practices in other Jurisdictions

Fee setting by the providers of professional services has come under the scrutiny of competition authorities across the world. In this section, we will examine the opinions put forward by the competent authorities in several countries including the US, the UK and members of the Organisation for Economic Cooperation and Development (OECD).

Excerpts in this section are mainly taken from the OECD publication 'Competition in Professions' and the Monopolies and Mergers Commission document 'A Report on the General Effect on the Public Interest of Certain Restrictive Practices so far as they relate to the Provision of Professional Services'.

The provisions on price-fixing contained in the competition legislation of each of the countries identified below are all consistent with those in Barbados' Fair Competition Act.

United States of America

Price-fixing in the US is addressed under Section 1 of the Sherman Act, which reads:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

In the US, the antitrust laws have been applied to the professions since the landmark Supreme Court decision in *Golfarb v. Virginia State Bar. Golfarb*

established that the Sherman Act contained no exemption for the professions. A further Supreme Court Decision in 1978 in *National Society of Professional Engineers v. United States* confirmed the *Golfarb* rule and illustrated what it would mean in practice. The Society had agreed to an ethical rule that the members would not compete with each other on price before the client had selected one of them to carry out the project. The Court rejected the Society's argument, that price competition was not in the public interest because it would lead to cost cutting and to inferior and perhaps dangerous design work. In 1982, the Court in *Arizona v. Maricopa Medical Society* ruled that agreeing to a maximum fee schedule for physicians' services was *per se* illegal.

United Kingdom

Price-fixing in the UK is addressed under Section 188 of the Enterprise Act 2002, which reads:

"(1) An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B).

(2) The arrangements must be ones which, if operating as the parties to the agreement intend, would-

> *(a) directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service…*

(3) Unless subsection (2)(d), (e) or (f) applies, the arrangements must also be ones which, if operating as the parties to the agreement intend, would-

(a) directly or indirectly fix a price for the supply by B in the United Kingdom (otherwise than to A) of a product or service"

In the UK, although the basic legislation on restrictive trade practices does not apply to professional services, professional conduct may fall under the monopoly provisions of the legislation. During the 1970s and 1980s restrictions in

numerous professions were referred to the Monopolies and Mergers Commission (MMC) for investigation after a major report by the Commission in 1970.

In the publication titled 'A report on the general effect on the public interest of certain restrictive practices so far as they relate to the provision of professional services', the MMC was unequivocal in their condemnation of mandatory fee guidance. They were dismissive of justifications in terms of the provision of certainty to consumers – particularly where consumers were also free to purchase services from an unregulated practitioner:

"The introduction of price competition in the supply of a professional service where it is not at present permitted is likely to be the most effective single stimulant to greater efficiency and to innovation and variety of service and price that could be applied to that profession" (paragraph 314).

"We do not regard the arguments that price regulation provides certainty of price or protection for small clients as affording any such powerful justification" (paragraph 316).

"Price competition might create serious dangers in relation to quality of services of a particularly personal nature or of whose quality the public is generally incapable of judging….Such a case would be likely to be exceptional" (paragraph 317).

"Exceptional danger of such kinds [as in paragraph 317] are most unlikely to occur when the unqualified are (or should be) free to practice in competition with the qualified" (paragraph 320).

In the 1970s two cases concerning fee scales were brought to the attention of the MMC. In both cases the MMC found that the fee scales operated against the public interest. The overall result of the Commission's recommendations has been some liberalisation of the practices found to be against the public interest, in particular the use of mandatory scales of fees, so that at the present time freedom to set prices competitively appears to be widely accepted in the professions in the UK.

The MMC called for the abolition of mandatory fee scales in the supply of architect's services but decided that scales offered on a recommended basis would not operate against the public interest, provided that they were determined by an independent, government-appointed committee.

Denmark

Price-fixing in Denmark is addressed under Part 2, Section 6 of the Competition Act No. 539 of 2002, which reads:

"(1) Any conclusion of agreements between undertakings etc., which have as their direct or indirect object or effect the restriction of competition shall be prohibited.

(2) Agreements under subsection (1) may, for instance, be such agreements which

i. fix purchase or selling prices or any other trading conditions"

In Denmark, the professions are subject to the Competition Act 2002. If after investigation practices are found to be against the public interest, the Competition Council may recommend their modification or abolition. The Council has investigated recommended scales of fees in a number of professions.

The Council undertook a cross-profession analysis of competitive conditions in the liberal professions. The Commission concluded that many rules exceeded what was necessary to meet the requirements of sound professional practice. These rules included the marketing of recommended fees. The Council found that there were both statutory rules, which restrained access to the profession and regulated professional activities as well as collegiate rules, which had the effect of supplementing the statutory rules. The Council therefore decided to negotiate with the relevant associations to liberalise the collegiate rules and at the same time approached the public authorities to pay more regard to competitive considerations when regulating the professions.

Ireland

Price-fixing in Ireland is addressed under Part 2, Section 4 of the Competition Act 2002, which reads:

"(1) Subject to the provisions of this section, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which –

(a) directly or indirectly fix purchase or selling prices or any other trading conditions"

In Ireland, during the 1980s and 1990s the Fair Trade Commission (now the Competition Authority) undertook several enquiries into practices in the professions in response to a request by the Minister to undertake a wide-ranging study into the professions. Reports were published on concerted fixing of fees. In

1993, the new Competition Authority took a decision against certain practices of optometrists, including guidelines relating to fee-fixing methods. In the solicitor's profession, the once recommended fee scales for conveyancing have been removed following the Competition Act 2002.

Reports were also issued in relation to practices of architects, surveyors, auctioneers and estate agents and into trademark and patent agents. The general result of these enquiries is that fee scales are only allowed if such scales are used as guidelines and not as minima.

Canada

Price-fixing in Canada is addressed under Section 45 of the Competition Act, which reads:

"(1) Every one who conspires, combines, agrees or arranges with another person…

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof…

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both"

In Canada, the Supreme Court of Ontario in 1988 prohibited two Ontario law associations from agreeing on the fees members would charge the public for legal services related to residential real estate transactions. The orders also specifically prohibited communications among members concerning the fees charged to clients, the promulgation of fee schedules and the formation of committees on fees. This was the first time that a professional association in

Canada had been prevented under the competition legislation from fixing prices on the basis of published fee schedules.

France

Price-fixing in France is addressed under Article L420-1 of the Code de Commerce, which reads:

"Common actions, agreements, express or tacit undertakings or coalitions, particularly when they are intended to:

…2 Prevent price fixing by the free play of the market, by artificially encouraging the increase or reduction of prices…

shall be prohibited, even through the direct or indirect intermediation of a company in the group established outside France, when they have the aim or may have the effect of preventing, restricting or distorting the free play of competition in a market."

In France, the Conseil de la concurrence has made clear that professional organisation rules may not authorise violations of the rules of competition law, notably those against price fixing agreements. The Conseil has condemned a boycott by local architects intended to maintain fee levels. The Conseil has recently challenged three local bar associations' fee schedules, emphasising that they had an anticompetitive effect even when they may not have been adopted for an anti-competitive purpose. The authority for this action was established by a 1987 decision involving fee schedules of architects, which was affirmed on appeal in 1992.

Spain

Price-fixing in Spain is addressed under Title 1, Section 1, Article 1 of the Competition Act 16/1989, which reads:

"1. Any collective agreement, decision or recommendation or any concerted or consciously parallel practice aimed at producing or enabling the effect of impeding, restricting or distorting competition in all or any part of the domestic market, are prohibited, particularly those which:

a) Directly or indirectly fix prices or other trading or service conditions. "

In Spain, the law governing professional associations was modified in 1996 to introduce greater competition. In particular, any economic agreement by professional associations must conform to the laws on competition and unfair competition, and price fixing for professional services is prohibited.

General Actions in OECD Countries

In addition to formal actions and investigations of practices in the professions, many OECD competition authorities have been active in advocating more liberal regimes and intervening in official enquiries to attempt to obtain changes in anti-competitive rules operated in certain professions. For example, since the late 1970s the US Federal Trade Commission staff has submitted over 400 comments or *amicus curiae* briefs to state and self-regulatory entities on competition issues relating to a variety of professions, including accountants, lawyers and architects. Other Member countries whose competition agencies have advocated increasing competition in the professions include Australia, Canada, the Czech Republic, Finland, Germany, Hungary, Ireland, Italy, Japan, Korea, Mexico, Poland, and Sweden.

The OECD has recommended that its Member Countries examine rules and practices to increase economic competition. In particular, governments, especially competition authorities, have been advised to rescind or modify regulations that unjustifiably set fees.

In addition, the OECD recommended that Member countries make competition law applicable to the professions, subject to safeguards to ensure consumer protection. To do this, the OECD recommends that governments rescind or modify exemptions of the professions and their self-regulatory bodies from the generally applicable competition law, consistent with preserving sufficient oversight to ensure adequate quality of service. The OECD recognises that especially for services to individual clients, consumer protection is still necessary. To achieve it, Member countries are encouraged to develop innovative regulatory approaches. Alternative rules, such as insurance, bonding, client restitution funds, or disciplinary control at the point of original licensing should, according to the OECD, provide adequate protection while permitting greater competition.

BIBLIOGRAPHY

LIST OF LEGISLATION REFERRED TO:

- Architects Registration Act, 2003-5
- Dental Registration Act CAP. 367
- Dental Registration (Technician) Rules, 1976 CAP. 367
- Dental Registration Rules, 1973 CAP. 367
- Dental Registration (Amendment) Rules, 2002
- Engineers (Registration) Act Cap 368B
- Engineers (Registration) Regulations, 1976 CAP. 368B
- Fair Competition Act CAP. 326C
- Land Surveyors Act CAP. 370
- Land Surveyors Rules, 1985 CAP. 370
- Legal Professions Act CAP.370A
- Legal Profession (Attorneys'-at-Law Remuneration for Non-Contentious Business) Rules, 1983
- Medical Regulations, 1972 CAP. 371

LIST OF CASE LAW REFERRED TO:

- Arizona v. Maricopa Medical Society 457 U.S. 332 (1982)
- City of Lafayette, La. V. Louisiana Power & Light Co. 435 U.S. 389, 413, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)
- General Legal Council v The Fair Trading Commission Suit No. 35 of 1995
- Golfarb v. Virginia 421 U.S. 773 (1975)
- Industrial Milk Producers Association v. British Columbia Milk
- Mortimer v. Corporation of Land Surveyors of the Province of British Columbia

- National Society of Professional Engineers v. United Sates 435 U.S. 679 (1978)
- Parker v. Browne 317 U.S. 341 87 L. Ed. 315 (1943)
- Town of Hallie v. City of Eau Claire 471 U.S. 34 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)
- Waterloo Law Association v. Attorney General Of Canada

REPORTS REFERRED TO:

- A report on the general effect on the public interest of certain restrictive practices so far as they prevail in relation to the supply of professional services, Monopolies and Mergers Commission 1970
- Competition in Professional Services, Organisation for Economic Cooperation and Development (OECD) February 2000
- Competition in Professions, Office of Fair Trading (OFT). A report by the Director General of Fair Trading, March 2001
- Indecon's Assessment of Restrictions in the Supply of Professional Services March 2003. Prepared for the Competition Authority by Indecon International Economic Consultants – London Economics
- 'Report of Study into Concerted Fixing of Fees and Restrictions on Advertising in the Engineering Profession', Restrictive Practices Commission (1987a), Dublin: Stationery Office

ARTICLES REFERRED TO:

- Arnould R.J. and Friedland T.S., 'The effect of fee schedules on the legal services industry", Journal of Human Resources, Vol. 12 pp 258-65

- Muzondo T. and Pazderka B., 'Occupational licensing and professional incomes in Canada', Canadian Journal of Economics 1980 Vol.13 pp 659-667

Our Mission

- Promoting Competitive Markets
- Safe guarding the Interest of Consumers
- Promoting and Encouraging Fair Competition.

Fair Trading Commission
Manor Lodge Complex Lodge Hill
St. Michael Barbados

Tel: (246) 421-2FTC (2382)
Tel: (246) 424-0260
Fax: (246)424-0300

Email: info@ftc.gov.bb
Website: www.ftc.gov.bb
Our Office hours are Monday to Friday 9:00 am to 4:00 pm