



# **FAIR TRADING COMMISSION**

**FAIR COMPETITION ACT, CAP. 326C**

## **Fee Setting in the Professions II**

**FOLLOW-UP REPORT**

**14 June 2007**

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## **PART I           Background**

### **Introduction**

Since October 2003, when the Fair Trading Commission (Commission) formally launched its campaign to develop a greater awareness of competition policy, it has been faced with a number of complaints of alleged anti-competitive fee setting among professional associations. These complaints were initially directed at the legal profession, but have in time mushroomed to include all types of professional associations.

The Commission under the Fair Competition Act, (FCA) is responsible for the promotion of competition and as such the Commission undertook an investigation into this issue. In October 2004 the Commission having completed an initial examination of the matter, released its first report on the subject.

The Commission's initial report examined the practice of fee setting in the professions, and concluded that certain of these practices were in fact a breach of the competition rules as set out in the FCA. Having concluded this, the report advised that all professional associations should discontinue such illegitimate practices.

This report now represents the second initiative of its type. It is being undertaken by the Commission as part of its overall effort to ensure the development of a vibrant competitive climate among the providers of professional services in Barbados.

This follow-up report coming some two years after the release of the first, seeks to assess the extent to which the associations guilty of adopting the type of anti-competitive fee setting practices identified in the first report, have taken deliberate initiatives to discontinue such practices. In addition it looks

at the extent to which they have sought to introduce more competition compliant methods of fee determination. In this regard the report also specifically revisits fee setting as authorized by statute in the legal profession. Here though there is yet to be an attempt to revise the legislated statutes, there is growing disquiet by certain members of the fraternity to have such schedules revised to be more compliant with the tenets of competition law.

The initial report focused primarily on fee setting as perpetrated through fee schedules laid down in statute, in bylaws or in an association's constitution. This report goes a step further than the first in identifying additional types of fee setting practices all of which similarly contravene the rules of competition and in so doing are also likely to result in diminished consumer welfare.

In addition this second report seeks to identify for the associations, more competition compliant means by which information regarding fees can be communicated to their members without compromising the competitive spirit in the delivery of their professional services.

### **Commission's Initial Report**

In October 2004, the Commission published the report 'Fee Setting in the Professions'. That report proceeded to identify the key professional associations in Barbados and sought to determine whether fee setting as practiced by these associations was a breach of the FCA. The professional associations identified in the report were:

1. Barbados Association of Quantity Surveyors
2. Institute of Chartered Accountants of Barbados
3. Barbados Association of Medical Practitioners
4. Barbados Association of Professional Engineers
5. Barbados Association of Podiatrists
6. Barbados Bar Association

7. Barbados Land Surveyors Association
8. Barbados Association of Professional Valuers
9. Barbados Estates Agents and Valuers Association
10. Barbados Institute of Architects
11. Barbados Dental Association
12. Barbados Association of Insurance and Financial Advisors Inc.

The report categorized these associations as having either:

- (a) no fee restrictions
- (b) recommended fee scales
- (c) mandatory fee scales
- (d) statutory fee scales

The relationship between the FCA and the application of these types of fee setting arrangements was then examined. The report also addressed the common justifications for fee setting, looking specifically at the maintenance of quality standards and prevention of overcharging. These were proffered as the major reasons why fee setting could be considered necessary. Finally the report considered the harm of fee setting versus the benefits of competition.

The 2004 Report concluded that all professional associations which set mandatory fees were in breach of the Act. It further recommended that consistent with the tenets of the Act such practices should immediately cease. Those professions that were subsequently found to be maintaining restrictions were called upon to justify them or to remove them. Those restrictions that had their origin in statute, such as the Legal Profession fee schedules, were addressed separately. The report found that the statutory fee setting schedules did not constitute a breach of the Act. It agreed that they were a source of conflict in regards to the ideology of the fair competition, but recognized that being enshrined in statute, gave them a measure of

legitimacy. The report however agreed that the conflict between the two pieces of legislation needed to be resolved.

## PART II Revisions to Bylaws

### Actions taken by the Associations

Of the associations surveyed in 2004, eight had no fee scales, two had mandatory fee scales, one had recommended fee scales and only the Barbados Bar association had their fee scales formalized in statute.

The report condemned only those associations with mandatory fee scales. Only these were determined to be in breach of the law. It was only necessary that these with mandatory fees take immediate remedial action.

	Type of Fee Restrictions	Number of Associations	Percentage of Associations
A	No fee restrictions	8	66.7
B	Recommended fee scales	1	8.3
C	Mandatory fee scales	2	16.7
D	Statutory fee scales	1	8.7
	<b>Total</b>	<b>12</b>	<b>100.0</b>

The eight associations with no fee restrictions were the; Barbados Association of Quantity Surveyors, Institute of Chartered Accountants of Barbados, Barbados Association of Medical Practitioners, Barbados Association of Professional Engineers, Barbados Association of Podiatrists, Barbados Dental Association, Barbados Association of Professional Valuers and the Barbados Association of Insurance and Financial Advisors Inc. None of these were expected to revise their bylaws.

The Barbados Institute of Architects employs a recommended fee scale. This type of fee scale is intended to guide members of the association in

determining the fees to be charged for a specific service. The Commission was informed that the Institute of Architects does not enforce any penalties for not adhering to the fee guidelines. Members are free to compete on price and could, therefore, offer lower or higher prices than those authorised in the scales if they so choose. When practiced in this way, there is little immediate harm or anti-competitive effect from this practice. Associations with recommended scales were not required to revise their bylaws.

In regard to associations with mandatory fee scales, since the issue of the 2004 report, encouraging progress has been in reforming their bylaws to make them less restrictive of price competition.

*Barbados Land Surveyors Association*

From research garnered for the first report, it was determined that the Barbados Land Surveyors Association was one of the associations which adopted mandatory fee scales. Their bylaws made reference to the Association's Minimum Scale of Fees and stated at Rule 13 that:

*"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 professional business at less than the scale of fees as derived from the Association's approved Minimum Scale of Fees..."[Emphasis Added]*

The bylaws further stipulated that any deviations by members should be sent to the Association in writing and the Committee of Management would adjudicate the matter and make a decision which will be final and binding.

The mandatory fee scales of the Land Surveyors were developed by the association. They are not enshrined in statute. Given the conclusions of the first report they were clearly in breach of the Act and needed to be revised.



Since publishing the 2004 Report the Barbados Land Surveyors Association has revised their bylaws to reflect the absence of any type of price fixing arrangement. Rule 13 of their Code of Conduct in the Revised Bylaws of 2006 now 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”*

There is no mention of the previous provision which directed members to adhere to the Association’s Minimum Scale of Fees document. That provision has now been withdrawn.

*Barbados Estate Agents and Valuers Association*

The Barbados Real Estate Agents and Valuers Association have also amended their by-laws. The bylaws in place before the release of the Commission’s report included mandatory fee scales

The revised document now incorporates a scale of fees provided purely for guidance. Every member of this association should now appreciate that the respective fees do not have to be applied unerringly. Any member of the profession instituting a different fee level based on his or her fee unique costs cannot be penalized or eschewed in any way.

The association’s new rule pertaining to the scale of fees now declares:

*“The Committee of Management shall from time to time publish scales of fees for the guidance of the members of the Company and to amend the same. Members of the Company shall not be bound by such scales of fees but rather shall refer to them as guidelines indicative of current practices.....”.*

The Commission is satisfied with this initiative taken by the Barbados Real Estate Agents and Valuers' Association. These provisions as outlined do not contravene the provisions set out in Section 13 of the Act.

### **Developments re Legal Profession Rules**

Since the release of the Commission's initial report, no changes have been made to the statutory provisions which detail the schedule of fees to be charged by attorneys. There has also been no concerted debate undertaken by the members of the profession with a view to revisiting these provisions. In the interim however there has been some public discussion and rhetoric in support of a change.

#### *Views of Bar Association*

The publication of the Commission's report led to a meeting between representatives of the Bar Association and the staff of the Commission, on October 6<sup>th</sup> 2005. The meeting was held to discuss the issue of competition within the legal profession as detailed in the report.

At the meeting the Commission communicated that, in order to be compliant with the Fair Competition Act the provisions regarding the schedule of fees would have to be revised. The Commission advocated that to be consistent with the Act, it would have to be made clear that the said fees were there for the purpose of reference only, and any departure there from by members of the profession would not attract any penalties. The members of the Bar present agreed that this was a reasonable alternative to the present mandatory scales.

This view was quite common among a small sample of attorneys contacted following the release of the first report. These attorneys generally agreed that

quite often attorneys ignored the schedule of fees and performed substantial work 'pro bono', or for amounts way less than the stipulated minimum fee. They indicated that this was often done because the client was unable to afford the standard fee, or because the minimal amount of work done in delivery of the service could in no way be valued at the prescribed minimum fee. Of course these attorneys indicated that they ensured that their actions were never known to persons outside of the clientele to whom the reduced fee was charged.

Alternatively attorneys pointed out that on occasions given the degree of research and time required to conduct a standard service the fee quoted had to be well above the minimum. This however was perfectly acceptable given the fact that the schedule was for minimum fees, with no upper limit.

It was clear to these attorneys therefore that the fee schedule was generally used only for guidance purposes, for new professionals to get an idea of the average value of certain services.

Those persons who stuck with the fee unerringly were those who were simply wary of being reprimanded by the bar and were therefore unwilling to charge below the prescribed minimum even if they felt that fee was not a fair amount.

On the other hand some lawyers were often happy for the minimum prescribed rate to justify to their clients a fee they knew was not justified based on the time and expenses incurred in the delivery of the service.

Herein lies the dilemma that the minimum schedule creates in a fraternity which in part, quietly seems to agree that the mandatory minimum schedule has outlived its usefulness. Persons willing to offer the consumer a 'fair' price below the minimum must do so secretively or run the risk of being

sanctioned, whilst those bent on exploiting the consumer by charging well above the minimum, can do so with impunity.

The view of those in the profession is well summed up in the remarks made by the President of the Bar Association in an address to the Rotary Club of Barbados on June 1<sup>st</sup> 2006. The president speaking on the behalf of the Bar suggested that the lawyers wanted the Scale of Fees by which they operate removed so the true value of their services would be reflected.

He stated that:

*“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 reduce 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 services.”*

### Public sentiment

Concerns in regard to the excessiveness of attorneys' fees and the manner in which they are set constitute a common subject of letters to the press and complaints to the Commission.

In 2005 public statements and letters to the press criticised the fees charged by attorneys for 'simple property transfers'. The letters indicated that because the fee schedule sets the minimum charge for a property transfer as a percentage of the value of the transaction, those fees were increasing at an alarming rate relative to the price of property in Barbados<sup>1</sup>.

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<sup>1</sup> Daily Nation June 27, 2005: Senator challenges Government to address lawyer fees

These letters suggested that when these fee scales were drafted several years ago, the value of land was a small fraction of what it is today, hence the problem of affordability of the present fees has come into question<sup>2</sup>.

It was disclosed in the said letters that the costs are increased if the purchaser has to obtain a mortgage, because the purchaser (mortgagor) has to pay his own legal fees and the mortgagee's, and all the associated Government stamp duty<sup>3</sup>.

The Barbados Chamber of Commerce (BCCI) in writing to the Commission was in full agreement with the arguments spelt out by the Commission against the practice of fee setting in the professions. It accepted the finding that fee setting did not address adequately any of the issues it purported to remedy. They agreed that the statutory right of the legal profession to set fees should be removed.

Other commentators on the report, agreed in principle with the major findings of the Commission's initial report, suggesting that regardless of whether the practice of fee setting was sanctioned by statute it should still be considered price fixing under the FCA. One respondent indicated that some services for which the legal profession had the statutory monopoly right to perform such as conveyances and certain other kinds of legal work should be opened up to competition.

The Institute of Chartered Accountants of Barbados (ICAB) also in their communication to the Commission agreed with the major recommendations of the Commission's report that all associations found in breach should be so notified.

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<sup>2</sup> Daily Nation February 14, 2006: Banks not only stumbling block

<sup>3</sup> Daily Nation June 27, 2005: Left of Centre - Property prices too high

International experience of the USA, the United Kingdom, France, Ireland, Jersey and several others as set out in Annex A, also suggests that statutory minimum fee scales having been tested, have been found not to provide the quality standards and informational benefits that they were instituted to deliver, and therefore should be discontinued.

The Bar Association has not yet begun to formally implement its reform, but the sentiment within and outside of the profession is that the mandatory minimum scale of fees is inappropriate, and inconsistent with the rules of fair competition, and need now to be set aside.

## **PART III            Additional forms of fee setting practices**

The Commission's initial report focussed on formal fee setting arrangements such as those set out in statute, or specified in an association's constitution and bylaws. It is important however to recognise that other less formal forms of fee setting are also covered by the provisions of Section 13 (1) and (2) of the Fair Competition Act.

### **Informal Fee Setting Agreements**

This section of the report therefore will address these less obvious forms of fee setting to determine their legitimacy in regard to the FCA.

At Section 13 (1) and (2) of the Act says specifically that:

- 13. (1) All acts or trading practices prescribed or adopted by*
- (a) an enterprise;*
  - (b) an association of enterprises; or*
  - (c) a group of affiliated companies*

*that result or are likely to result in the disruption or distortion of competition are prohibited.*

- (2) 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.*

It is clear from this wording that whether an association's fee setting agreements<sup>4</sup> are instituted through a formal decision making process, or are reached informally through discussion, or by other less formal means, they all may potentially be viewed as anti-competitive. To the extent that the members of an association have intentionally communicated to each other a plan on how they intend to conduct themselves in regard to the fees for a particular service, they may be held to have infringed the Act.

The rules in regard to price fixing applies to all professional associations similarly as it does to any grouping of independent businesses. Membership of an association does not absolve one of the obligation not to enter into either formal or informal fee setting agreements. All groupings of commercially independent enterprises undertaking fee setting agreements are similarly prohibited under the Act.

In this context therefore the basic measure of an agreement by the members of an association can be defined as "a common policy, regardless of how communicated, intended to put into operation a specific course of action with respect to pricing in the market".

This interpretation is consistent with established case law on this subject which establishes the standard by which an agreement is measured. In *Bayer v Commission*<sup>5</sup> the Court at First Instance defined an agreement in the following manner:

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<sup>4</sup> Section 2 of the Fair Competition Act defines an "agreement" to include – "*any agreement, arrangement or understanding, whether oral or in writing or whether or not it is or is intended to be legally enforceable*".

<sup>5</sup> Case T-41/96 *Commission v Bayer* [2000] ECR II-3383, on appeal Case C-3/01P *Commission v Bayer* (6 January 2004)



*“The proof of an agreement between undertakings within the meaning of Article 85(1) of the Treaty (now Article 81(1) EC) must be founded upon the direct or indirect finding of the existence of the subjective element that characterises the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed”.*

It should be noted that the text of Section 13 of the FCA is similar to that of Article 81 of the European Community Treaty, and hence the relevance of the associated case law. The interpretation adopted by the Court suggests that the proof of an agreement lies not in the form in which the ‘concurrence of wills’ occur but in the finding of that concurrence of wills direct or indirect between economic operators.

### **Circumstances constituting an Agreement**

It is necessary therefore to understand the type of practical circumstances which are likely to be interpreted by the Commission as anticompetitive agreements pursuant to the Fair Competition Act.

Firstly, meeting(s) involving discussion on fees to be charged, whether or not a binding agreement was drawn up but where there was obviously some consensus on the approach expected to be followed, are likely to be viewed as anti-competitive.<sup>6</sup> Here to the extent that an incomplete discussion is still likely to have the effect of preventing, restricting or distorting competition in a market such practices represent an infringement of the Act.

Secondly, there may be instances where outside of a meeting, members may, by deliberately disseminating or communicating information, allow other

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<sup>6</sup> PVC Cartel (II), OJ [1994] L 239/3

members to know their intended or actual pricing policy with a view to influencing the rates or prices to be charged on the market. This is also likely to be construed as an agreement to fix prices. In such cases even though there is no formal discussion or agreement, there is obviously an attempt to collude thereby reducing the uncertainty as to the future prices to be charged in the market<sup>7</sup>.

Information on prices as defined in the context of fee setting would include minimum, or maximum prices or rates to be charged, allowances, discounts, costs, payment terms, dates of price changes etc. any information which when shared is likely to encourage or force members to cease from independently determining their own pricing policy.

The common thread which defines these practices and puts them in breach of the Act is not the modus of communication, but communication nevertheless between members of the profession with the intention of agreeing future prices in the market.

There is no defence for members to suggest that they did not know that they were committing an offence<sup>8</sup> or that one did not comply fully with the terms of the agreement. The Courts<sup>9</sup> have stated that it is not sufficient to say that one had not subscribed to the plan. If there is nothing in the minutes to formally reflect one's reservations it may be concluded that the member was a party to the undertaking. Even when the member's conduct does not reflect coordination, mere subsequent protest of disagreement would not suffice. Proof would have to be provided that the member had no intention of participating in the plan when they attended the meetings.

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<sup>7</sup> Polypropylene OJ [1986] L 230/1

<sup>8</sup> Case 246/86 BELASCO v Commission [1989] ECR 2117

<sup>9</sup> Cement [2000] 5 CMLR, paras 147-149, Case 2/89 Petrofina SA v Commission [1991] ECR II-1087 para 128

Most professional associations examined had no rules in their bylaws governing the level of fees to be charged by their members. Most of these associations therefore assumed that automatically their practices were beyond reproach in regards to the FCA. However given the commonality of their rates it is more than likely that at some level there was or continues to be communication of fee levels. This has in some professions meant that in spite of the absence of mandatory fee scales there is no competition on fees.

It is necessary therefore that all associations and other professional groupings refrain from establishing those commercial arrangements involving some joint level of fee standardisation.

## **PART IV      Types of Fee Setting Arrangements Permitted**

Since the Commission's initial report was released there have been questions raised by the members of some professional associations as to just what in particular can be done by an association in regards to the identification of fees that would not constitute a breach of competition law. The initial report these practitioners opined, clearly indicated what was not permitted by way of fee setting arrangements, but gave little direction as to what exactly was permissible.

Questions were raised in particular with regards to recommended fee scales, rate calculation formulae, oral communications, indirect and informal communication, etc. These were all different means of fee identification, communicated to the Commission as possible alternatives that might be consistent with the provisions of the Act.

This section of the report therefore will address the type of information and arrangements which would be permitted under the Act.

### **Rules governing information to be communicated**

As agreed in the first report, the members of a professional association will periodically need to meet and exchange information on technical, ethical, and commercial developments affecting the common delivery of their services. At some level communication on the valuation of certain services may also be necessary. It is important however that associations, when disseminating any information among their members, ensure that such information does not suggest the likely rates to be charged by individual members.

It would therefore be wise to avoid as far as possible all communication on prices to be charged. If there has to be communication in regard to prices the basic rule of thumb which should guide professional associations when

seeking to determine whether a specific set of information should be communicated to its membership, is whether pursuant to Section 13 (4) of the Act that information:

- (i) *contributes to the improvement of production or distribution of goods and services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit;*
- (ii) *imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of the objectives mentioned in subparagraph (i); or*
- (iii) *does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.*

If these questions can be answered in the affirmative, then the information can be released.

#### Historical Information

Information on historical prices or other statistical information presented for general information and explanation would be excluded from the Courts' interpretation of an anti-competitive agreement. Such information does not reveal the intended or current price of a member, and is not circulated for the purpose of fixing of target prices.

All non-price statistical and research information resulting from industry studies is acceptable because such information is unlikely to have an appreciable negative effect on competition within a profession.

### **Independent fee determination**

Fees for services delivered should be set independently by the individual business unit, whether that unit is a single professional, partnership or company, whatever is the commercial structure through which the service is offered. The fees should simply be determined by the 'fair' value of the service offered and the inherent cost of its delivery.

Within this approach professionals may similarly rely on an independent appraisal of the value of their services, which could drive their prices to the same basic range. These services however will at times be performed to different stages of completion depending on what is desired or fashioned to suit the customer needs. These should all be reflected in different prices. In addition the unique cost-structure of every organisation should dictate the degree to which prices will again be different and efficiency cost savings can be passed on to the customer.

Where the associations' members need help on how to set their own fees, the associations can provide this help to their members to set their fees independently. They can do this by publishing information (e.g. formulae) that would allow individual members to set their own fees independently given their own costs and expected level of profit.

### *Adapting pricing policy to Competitors*

It should be noted that the circumstances constituting anti-competitive agreements outlined earlier do not restrict in any way individual professionals from intelligently adapting their pricing policy to counter that of its competitors<sup>10</sup>.

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<sup>10</sup> John Deere Ltd v Commission of the European Communities. Appeal - Admissibility - Question of law - Question of fact - Competition - Information exchange system - Restriction of competition - Refusal to grant an exemption. Case C-7/95 P.

If certain technological developments in an industry allows one to reduce the cost of providing the service or affects the value of the service then it would be prudent once informed to incorporate such progressive developments in one's pricing policy. If such developments allow for variations in the manner in which the service is delivered in terms of packaging, then again it makes sense to copy an intelligent approach. This could not be viewed as collusive fee setting.

### **Recommended Fee Scales**

The Commission generally advocates that associations avoid discussions on fees to be charged by their members. However in its first report the Commission agreed that the recommended fee scales are permissible. It is likely that to institute a recommended fee scale some discussion on fees would be necessary. It is important therefore to clarify the context in which recommended fee scales would be acceptable.

#### *Arguments for Recommended Fee Scales*

Professional associations have argued that recommended fees provide consumers with useful information about the average costs of services. They have also suggested that recommended prices reduce the cost of setting or negotiating fees on an individual basis and serve as a guide for practitioners who lack experience in determining fees. In markets where search costs are high, it may indeed be advantageous for consumers to have access to accurate information about typical prices.

#### *Arguments against Recommended Fee Scales*

Recommended fee scales however, have in the past often led to the development of common fees across a profession. In certain cases 'recommended' fee schedules when they are understood to be the fees that everyone will charge are also likely to be classified as price fixing or collusion.

To cite an example, the Office of Fair Trading (OFT) in the United Kingdom argued that The Royal Institute of British Architects (RIBA)<sup>11</sup> who issues fee guidance to clients in the form of recommended fee scales, were facilitating collusion which could act to restrict or distort price competition. The RIBA sought to justify the existence of the fee guidance on the basis that the fee schedule is merely indicative and is used only as a yardstick by which a client who may be ignorant of what a reasonable charge is, can forecast the cost of the service. This reasoning was not sufficient enough to prevent OFT from stating that this type of fee guidance may hinder the ability of efficient firms to compete by reducing price to reflect their lower costs.

There are alternative less anti-competitive methods of providing price information, without the application of fee scales. For example, the publication of historical or survey-based price information by independent parties (such as consumer organization) would provide a more trust worthy price guide for consumers and distort competition to a lesser extent.

Professionals do not need to rely on recommended prices in order to set fees. Professionals, like other service providers, generally gain, or hire, the business experience needed to set fees.

For these reasons a number of countries have removed recommended prices for professional services in the last two decades. In the late 1980s, for example, the Finnish Competition Authority instigated the removal of recommended prices in the legal, architectural and other professions. In the late 1990s, recommended prices were removed for lawyers in the Netherlands and for architects in France they were removed within the last two years. Recommended prices have also been abolished for architects and construction companies in the United Kingdom.<sup>12</sup>

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<sup>11</sup> Office of Fair Trading - Competition in the Professions Progress Statement 2002

<sup>12</sup> European Parliament resolution on market regulations and competition rules for the liberal professions, 16.12.2003.



### Commission's View

Under the FCA recommended fees communicated purely for the purposes of guidance and information would not constitute an agreement likely to restrict competition. Though history has shown that these guidance scales can in certain cases reduce competition, where countries have experienced a lessening of competition, one can argue that the practice was not implemented in accordance with the agreed rules.

The Commission therefore agrees that where, pursuant to Section 13 (4) of the FCA, a legitimate case can be made for fee guidance, recommended fees would be acceptable on a basis where there are specific assurances associated with the fees. Such assurances being that:

- there is no obligation to comply with the recommendations made
- any member not following the recommended fees will not be the victim of reprisal
- No attempt is made to control and monitor the recommendations made
- Individual members have no direct hand in the calculation of the recommended fees
- Fees are recommended on the basis of costing or other calculations by an outside party.

The Commission therefore while remaining cautious in regard to recommended fee scales; because of their potential to result in common fees, agrees that they can be adopted provided that they are imposed only for informative purposes, with all the assurances outlined.

### **Fee Setting Recommendations**

In summary the Commission advocates in regard to fee setting that:

- Discussions on fee setting should as far as reasonably possible, be avoided by associations;
- Information communicated on fees should be of a historical or research nature and shared for informative purposes only;
- Each professional business unit should set their fees independently, given their unique costs;
- If fee guidance can be justified as necessary under the circumstances identified in the Act, fees should be determined through objective research, by a body with the appropriate expertise, that is independent of the association;
- Any fees provided for guidance must be provided with clear non-binding assurances, confirming the individuals right to deviate there from without reprisal;
- Professionals who are not members of the main associations should nonetheless refrain from undertaking formal or informal agreements that seek to set the prices at which they intend to offer their services;
- Any association that has statutory provisions setting out mandatory fee scales should seek to have the same revised to be consistent with the rules of fair competition;

These recommendations are intended to define a competitive process of fee determination among the providers of professional services in Barbados. It is important therefore that associations ensure their adoption.

### Monitoring

The Commission in its attempt to ensure the compliance of professional associations with these recommendations will periodically require associations to:

- a) Produce their by-laws for examination, including all recent and proposed amendments.
- b) Respond to oral and written queries explaining their fee determination practices and;
- c) Produce documented evidence in support of their fee setting policies.

These initiatives will be undertaken to verify that professional associations have not undertaken discussions or other communication in regard to the setting of fees except in accordance with the above recommendations. It is hoped that ultimately these steps will yield a more competitive climate among the providers of professional services in Barbados.

## **ANNEX A: 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.