

# COMMERCIALIZING JUSTICE: THE LEGALITY OF LAWYERS' PROFESSIONAL FEE SCHEDULES UNDER THE PHILIPPINE COMPETITION ACT\*

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## ABSTRACT

Because of its origin and nature as a safeguard against restraints of trade, antitrust legislation is largely focused on the regulation of business enterprises. To limit the application of competition law to the traditional sphere of commerce, however, is to disregard the reality that anti-competitive practices exist in areas outside the economic conditions that necessitated its creation. This Article examines the implications of the Philippine Competition Act (“PCA”) on the rules and regulations concerning lawyers’ fees, and explores the legality of prescribed fee schedules vis-à-vis the state of law and jurisprudence in the US and EU on price-fixing within professions, legal or otherwise. In conclusion, the authors posit that the PCA is sufficiently broad as to apply to the practice of law, but that a distinction must be made as to the nature of the entity prescribing fee schedules: price-fixing done by a private entity stands to run afoul of the PCA, but should be taken outside the ambit of regulation by the Executive if sanctioned by a public entity (such as the Integrated Bar of the Philippines) in recognition of the separation of powers and the exclusive authority of the Supreme Court to regulate the practice of law.

## I. INTRODUCTION

With the growing spread of globalization, more developing and transition-economy countries have shifted towards increasingly liberalized

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market policies.<sup>1</sup> In line with such trend, Republic Act No. 10667, more commonly known as the Philippine Competition Act (“PCA”), was signed into law on July 21, 2015. The PCA, through its salient provisions, seeks to penalize all forms of anti-competitive agreements with the objective of protecting consumer welfare and advancing economic development.

One of the classifications of anti-competitive agreements which are *per se* prohibited under the PCA pertains to those restricting competition as to price, where competitors combine, contract, or conspire for the purpose or with the effect of “raising, depressing, fixing, pegging, or stabilizing” market price,<sup>2</sup> a practice more commonly known as “price-fixing.”

But while these price-fixing agreements are expected to exist primarily in and among business enterprises, such agreements may exist in areas far beyond this traditional sphere. Professions, historically distinguished from ordinary businesses or trades,<sup>3</sup> may not be aware of the possible implications of the PCA on their practice.

The Philippine legal profession would, at a cursory glance, appear to be unaffected by the PCA. Borrowing the words of Professor Palmer,

[t]he lawyer is not bartering his services. No professional man thinks of giving according to measure. Once engaged he gives his best, gives his personal interest, himself [...] The real payment is the work itself, this and the chance to join with other members of the profession in guiding and enlarging the sphere of its activities.<sup>4</sup>

Yet in other jurisdictions, such as the United States and member states of the European Union, legal associations and their members have

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<sup>1</sup> See Rafaelita Aldaba, *Emerging Issues in Promoting Competition Policy in the APEC and ASEAN Countries*, Phil. Inst. for Dev. Stud. Discussion Paper Series No. 2008-02 (2008), available at <https://dirp4.pids.gov.ph/ris/dps/pidsdps0802.pdf>.

<sup>2</sup> Douglas Adler, *Antitrust Law – Sherman Act – Attorneys Minimum Fee Schedules – Goldfarb v. Virginia State Bar*, 17 B.C. L. REV. 243, 246 (1976), available at <http://lawdigitalcommons.bc.edu/bclr/vol17/iss2/5>, citing *United States v. Socony-Vacuum Oil Co.* [hereinafter “*Socony-Vacuum*”], 310 U.S. 150, 223 (1940).

<sup>3</sup> See Roscoe Pound, *What is a Profession – The Rise of the Legal Profession in Antiquity*, 19 NOTRE DAME L. REV. 203 (1944), available at <http://scholarship.law.nd.edu/ndlr/vol19/iss3/1>. “Historically, there are three ideas involved in a profession, organization, learning, and a spirit of public service. These are essential. The remaining idea, *that of gaining a livelihood, is incidental.*” (Emphasis supplied.) Citing Professor Palmer, Pound further distinguishes between trade and profession, thus: “A trade aims primarily at personal gain; a profession at the exercise of powers beneficial to mankind[.]”

<sup>4</sup> *Id.* at 205.

found themselves under scrutiny for violation of antitrust statutes similar to the PCA.

Certain widely-accepted practices in the Philippine legal profession may fall under the term “price-fixing” as defined under the PCA. In particular, the issuance of prescribed fee schedules by legal organizations such as no less than the Integrated Bar of the Philippines (“IBP”) and other private lawyers’ associations, as well as the existence of rules such as the Code of Professional Responsibility (“CPR”) which mandate the consideration of the IBP schedule of fees in the determination of legal fees, may be called into question as potentially violative of the PCA provisions. Philippine lawyers should thus ascertain whether or not the PCA applies not only to their clients but importantly to themselves, lest they find themselves inadvertently involved in a case for violation of the provisions of the PCA, not as counsel, but as the defendants.

## II. SCOPE OF THE STUDY AND OBJECTIVES

This Article seeks to determine the applicability of the PCA to the Philippine legal profession. It will first examine the concept of price-fixing as defined under the law of other jurisdictions, as well as its applicability to the legal profession abroad, particularly in the US and the EU.

The authors further explore the concept of price-fixing as practiced in the Philippine legal profession through the schedule of fees prescribed by the IBP and other professional associations such as the Intellectual Property Association of the Philippines (“IPAP”), as well as examine the pertinent laws, codes, and canons as authored by the Supreme Court.

At the end of the Article, the authors will present their conclusions and recommendations as to the application of the PCA to the legal profession.

## III. DISCUSSION

### A. Price-Fixing under the Philippine Competition Act

Section 14(a) of the PCA expressly prohibits anti-competitive agreements. These can be classified into two categories: (i) agreements which are *per se* prohibited; and (ii) agreements which have the objective or effect

of substantially preventing, restricting, or lessening competition.<sup>5</sup> Price-fixing agreements, or those restricting competition as to price, are classified as *per se* prohibited agreements.<sup>6</sup>

With respect to covered entities, the scope of the PCA is generally comprehensive and admits only of limited exceptions with respect to employer-employee arrangements designed for the sole purpose of collective bargaining.<sup>7</sup>

Although other exceptions and qualifications as to the scope of the application of the PCA may be found in the Implementing Rules and Regulations (“IRR”), a review of the same reveals that they are inapplicable to price-fixing agreements. The provisos supplying such exemptions refer to

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<sup>5</sup> Rep. Act No. 10667 (2015) [hereinafter “PCA”], § 14. Philippine Competition Act. Anti-Competitive Agreements. —

(a) The following agreements, between or among competitors, are *per se prohibited*:

(1) *Restricting competition as to price*, or components thereof, or other terms of trade;

(2) Fixing price at an auction or in any form of bidding including cover bidding, bidding suppression, bid rotation and market allocation and other analogous practices of bid manipulation;

(b) The following agreements, between or among competitors which *have the object or effect of substantially preventing, restricting or lessening competition* shall be prohibited:

(1) Setting, limiting, or controlling production, markets, technical development, or investment;

(2) Dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers or any other means;

(c) Agreements other than those specified in (a) and (b) of this section which shall have the object or effect of substantially preventing, restricting or lessening competition shall also be prohibited: *Provided*, Those which contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation of this Act.

An entity that controls, is controlled by, or is under common control with another entity or entities, have common economic interests, and are not otherwise able to decide or act independently of each other, shall not be considered competitors for purposes of this section. (Emphasis supplied.)

<sup>6</sup> *Id.*

<sup>7</sup> PCA, § 3. Scope and Application. — This Act shall be enforceable against *any person or entity engaged in any trade, industry and commerce in the Republic of the Philippines*. It shall likewise be applicable to international trade having direct, substantial, and reasonably foreseeable effects in trade, industry, or commerce in the Republic of the Philippines, including those that result from acts done outside the Republic of the Philippines.

This Act shall not apply to the combinations or activities of workers or employees nor to agreements or arrangements with their employers when such combinations, activities, agreements, or arrangements are designed solely to facilitate collective bargaining in respect of conditions of employment. (Emphasis supplied.)

agreements which fall neither in the category of those which have the objective or effect of substantially preventing, restricting, or lessening competition, nor to those which are *per se* prohibited, but rather to agreements “other than those specified [as falling into the aforementioned categories] which have the object or effect of substantially preventing, restricting, or lessening competition,”<sup>8</sup> as well as those involving abuse of dominant position.<sup>9</sup>

At the time of this writing, the Supreme Court has yet to make any ruling on the application of the PCA, perhaps owing to the fact that, being the first comprehensive antitrust legislation in the country, it is a relatively new law. Prior to the passage of the PCA, competition legislation in the Philippines was widely fragmented, being scattered across provisions in the 1987 Constitution, Revised Penal Code, and Civil Code of the Philippines, among others.<sup>10</sup>

In view of the unavailability of local jurisprudence on competition law, particularly with respect to the issue of minimum price-fixing by associations, it is submitted that resort to foreign legal sources on anti-trust laws and jurisprudence shall be instructive on the issue of the legality of fixing minimum fee schedules in the legal profession.

## B. Price-Fixing in the United States

At the outset, US laws and jurisprudence are especially persuasive authorities in the interpretation of the PCA,<sup>11</sup> along with local competition

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<sup>8</sup> The Implementing Rules and Regulations of Rep. Act No. 10667 [hereinafter “PCA IRR”], § 1(c). Agreements other than those specified in (a) and (b) of this Section, which have the object or effect of substantially preventing, restricting, or lessening competition, shall also be prohibited. *Provided*, that those which contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation of the Act.

<sup>9</sup> PCA IRR, § 12(c). Any conduct which contributes to improving production or distribution of goods or services within the relevant market, or promoting technical and economic progress, while allowing consumers a fair share of the resulting benefit may not necessarily be considered an abuse of dominant position.

<sup>10</sup> *Supra* note 1, at 8.

<sup>11</sup> REV. PEN. CODE, art. 186 (1), which has been recently repealed by the PCA, appears to have been adopted from Section 1 of the United States Sherman Act:

Article 186. Monopolies and combinations in restraint of trade. — The penalty of *prision correccional* in its minimum period or a fine ranging from 200 to 6,000 pesos, or both, shall be imposed upon:

1. Any person who shall enter into any contract or agreement or shall take part in any conspiracy or combination in the form of a trust or otherwise, in

laws in general, as all Philippine competition legislation appears to have been influenced by the Sherman Antitrust Act<sup>12</sup> (“Sherman Act”).

Passed in 1890, the Sherman Act was enacted in an era when the American economy was dominated by perceived cartels and monopolies.<sup>13</sup> It is the oldest federal antitrust law in the United States and continues to cover the same jurisdiction today. Section 1 of the Sherman Act provides:

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.

Following a long line of US jurisprudence, price-fixing among competitors is an unlawful restraint of trade in violation of Section 1 of the Sherman Act, even with respect to the setting of minimum or floor prices. As succinctly stated by the US Supreme Court in *United States v. National Association of Real Estate Boards*:<sup>14</sup>

Price-fixing is *per se* an unreasonable restraint of trade. It is not for the courts to determine whether, in particular settings, price-fixing serves an honorable or worthy end. *An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve.*<sup>15</sup>

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restraint of trade or commerce or to prevent by artificial means free competition in the market; [...]

*See also* the Senate Deliberations on the PCA, 16<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (Aug. 20, 2014). During its first reading, it was admitted by Sen. Paolo Benigno Aquino IV, one of the co-authors of Senate Bill No. 2282 (which eventually became the PCA), that the “*prohibited acts mentioned therein are ‘quite similar’ with those provided under United States anti-trust laws, specifically the Sherman Act and the Clayton Act.*” (Emphasis supplied.)

<sup>12</sup> *Supra* note 1, at 8.

<sup>13</sup> *See* RICHARD POSNER, *ANTITRUST LAW* (2<sup>nd</sup> ed., 2009). *See also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93 (1940). “[The law] was enacted in the era of ‘trusts’ and of ‘combinations’ of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The goal was to prevent restraints of free competition in business and commercial transactions which tended to restrict production, raise prices, or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.”

<sup>14</sup> Hereinafter “*Real Estate Boards*”, 339 U.S. 485 (1950).

<sup>15</sup> *Id.* at 489. (Emphasis supplied.) *See also* *Socory-Vacuum*, 310 U.S. at 221. “Congress has not left us with the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. [...] [T]he Sherman Act, so far as price-

In the landmark case of *United States v. Trans-Missouri Freight Association*,<sup>16</sup> competing railway companies voluntarily entered into an agreement whereby they formed the Trans-Missouri Freight Association (“Association”) and agreed, among others, to establish rates on the traffic subject to the consent of the Association via a committee. Furthermore, any reduction or change in the rates by any of them would be reported to the managers of the Association, who would determine a penalty for the same.<sup>17</sup> The US Supreme Court, in discussing the construction of the Sherman Act, made the following pronouncement:

Where, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is an unreasonable restraint of trade, but *all contracts are included in such language, and no exception or limitation can be added* without placing in the act that which has been omitted by Congress.<sup>18</sup>

US courts consider two categories of price-fixing: vertical price-fixing and horizontal price-fixing. Vertical price-fixing, otherwise known as “resale price maintenance,” refers to an agreement between manufacturers and retailers under which the retailers are obligated to sell that manufacturer’s products to consumers only at or above the prices specified by the manufacturer.<sup>19</sup> Vertical price restraints are subject to the rule of reason, under which all circumstances must be weighed to determine whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.<sup>20</sup>

Horizontal price-fixing agreements are those which operate between two or more competitors<sup>21</sup> and are *per se* illegal.<sup>22</sup> The nature of these

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fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.”

<sup>16</sup> 166 U.S. 290 (1897).

<sup>17</sup> *Id.* at 295-96.

<sup>18</sup> *Id.* at 345. (Emphasis supplied.)

<sup>19</sup> *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.* [hereinafter “*Leegin*”], 551 U.S. 877 (2007).

<sup>20</sup> *Id.* See also *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

<sup>21</sup> *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006).

<sup>22</sup> *Continental Airlines, Inc. v. United Air Lines, Inc.*, 120 F. Supp. 2d 556 (2000). *Per se* unreasonable restraints on competition “have such a pernicious effect on competition and lack of any redeeming virtue that they are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Thus, a court confronted with a *per se* unreasonable restraint on

agreements eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work.<sup>23</sup>

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,<sup>24</sup> Leegin, a leather goods designer and manufacturer, instituted a pricing policy which prohibited retailers from selling their discounted goods below suggested prices. The explained aim of the policy was for retailers to distinguish themselves in the market by selling at specialty stores “that can offer the customer great quality merchandise [and] superb service, and support the Brighton product 365 days a year on a consistent basis.” Leegin stopped selling to a retailer who did not comply with their policy. The US Supreme Court opined that the rule of reason, not a *per se* rule of unlawfulness, was the appropriate standard to judge vertical price restraints;<sup>25</sup> however, horizontal price restraints imposed by competitors were *per se* unlawful.

The trend in US jurisprudence is to move towards strict construction against exemptions from the price-fixing provisions of the Sherman Act. For instance, US courts have held that the mere fact that the business involved is a profession does not exempt it from the coverage of the Sherman Act. In *Real Estate Boards*, members of the Washington Real Estate Board allegedly conspired to fix the commission rates for their services while acting as brokers for real property services in the District of Columbia. The Washington Board adopted standard rates of commissions for its members, and their Code of Ethics provided that their brokers should maintain the standard rates, and no business should be solicited at lower rates. The US Supreme Court, ruling on the issue of whether the business of a real estate agent is included in the word “trade” for the purposes of application of the Sherman Act, stated:

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competition need not study the market involved, the effects of such an agreement on competition, or the purpose for its adoption before concluding that the plaintiff has satisfied the second element of a Section 1 violation.” See LOUIS SCHWARTZ, *FREE ENTERPRISE AND ECONOMIC ORGANIZATION* (4<sup>th</sup> ed. 1972). Such *per se* violations of Section 1 include collective boycotts, divisions of markets, tying arrangements, and *price fixing*. (Emphasis supplied.) See also *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 308-10 (1956). “[P]rice fixing is contrary to the policy of competition underlying the Sherman Act, and [...] its illegality does not depend upon a showing of its unreasonableness, since it is *conclusively presumed to be unreasonable*.” (Emphasis supplied.)

<sup>23</sup> *Leegin*, 551 U.S. 877.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* “While vertical agreements setting minimum resale prices can have procompetitive justifications they may have anticompetitive effects in other cases; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever-present temptation.”



Members of the Washington Board are entrepreneurs. Some are individual proprietors; others are banks or corporations. Some may have no employees; others have large staffs. But each is in business on his own. *The fact that the business involves the sale of personal services, rather than commodities, does not take it out of the category of “trade” within the meaning of Section 3 of the Act.*<sup>26</sup>

Moreover, the Court considered the long line of jurisprudence which consistently applied the Sherman Act to the sale of services and goods,<sup>27</sup> furthermore noting that the range of business activities held to be covered by the Act indicated that the word “trade” in the Sherman Act should be interpreted in a broad sense.<sup>28</sup>

Finally, the Court ruled that the imposition of penalties is immaterial in evaluating the illegality of a restraint of trade;<sup>29</sup> hence, even though the rate schedules were termed as “non-mandatory,”<sup>30</sup> the fixing thereof was still deemed to be a violation of the Sherman Act.

### 1. *The US Legal Profession and the Case of Goldfarb*

The United States does not prescribe a universal code of professional ethics. State bar associations have particular codes of conduct and ethics which apply within their respective jurisdictions. Notably however, the American Board Association Model Code of Professional Responsibility (“ABA Model CPR”) has been adopted in all US states, except California.<sup>31</sup>

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<sup>26</sup> *Real Estate Boards*, 339 U.S. at 490. (Emphasis supplied.)

<sup>27</sup> *Id.* The US Supreme Court noted that the Sherman Act had been applied to transportation services; cleaning, dyeing, and renovating wearing apparel; procurement of medical and hospital services; furnishing of news or advertising services.

<sup>28</sup> *Id.* The US Supreme Court stated: “It is in that broad sense that ‘trade’ is used in the Sherman Act. That has been the consistent holding of the decisions. The fixing of prices and other unreasonable restraints have been consistently condemned case of services, as well as goods.” It also noted that in the previous case of *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 435 (1932), the court rejected the view that “trade” as used in Section 3 of the Sherman Act should be interpreted in the narrow sense which would exclude personal services.

<sup>29</sup> *Id.* “[T]he fact that no penalties are imposed for deviations from the price schedules is not material. Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line.” (Emphasis supplied.)

<sup>30</sup> *Id.*

<sup>31</sup> American Board Association Code of Professional Responsibility Policy Implementation Committee, *State Adoption of the ABA Model Rules of Professional Conduct and Comments* (2011), AMERICAN BAR ASSOCIATION WEBSITE, available at [www.americanbar.org/content/dam/aba/migrated/cpr/pic/coments.Authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/coments.Authcheckdam.pdf).

The ABA Model CPR provides that “reasonable fees should be charged in appropriate cases to clients able to pay them,”<sup>32</sup> but specifically qualifies this by stating that “[a] lawyer should not charge more than a reasonable fee[.]”<sup>33</sup> In determining what may constitute “reasonable” fees, it is provided that all relevant circumstances must be considered.<sup>34</sup>

The ABA Model CPR also makes express reference to the American Board Association Canons of Professional Ethics (“ABA Canons of Professional Ethics”) in the notes and interpretation thereof. The latter provides, among others, that in determining the fees to be charged by lawyers, it is proper to consider “the customary charges of the Bar for similar services[.]”<sup>35</sup> However, it also qualifies such rule by stating that the factors enumerated therein<sup>36</sup> are not controlling, but are “mere guides in ascertaining the real value of the service.”<sup>37</sup>

Notably, Canon 12 of the ABA Canons of Professional Ethics also contains the following proviso:

In fixing fees it should never be forgotten that *the profession is a branch of the administration of justice and not a mere money-getting trade.*<sup>38</sup>

As early as 1917, the Philippine Bar Association adopted Canons 1 to 32 of the ABA Canons of Professional Ethics,<sup>39</sup> including those above-

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<sup>32</sup> AMERICAN BOARD ASSOCIATION MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter “ABA MODEL CPR”], EC 2-16.

<sup>33</sup> ABA MODEL CPR, EC 2-17.

<sup>34</sup> ABA MODEL CPR, EC 2-18. It specifically provides that this shall include those factors “stated in the Disciplinary Rules,” as well as “the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained.”

<sup>35</sup> AMERICAN BOARD ASSOCIATION CANONS OF PROFESSIONAL ETHICS [hereinafter “ABA CANONS OF PROFESSIONAL ETHICS”], Canon 12.

<sup>36</sup> *Id.* “(1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer’s appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client.”

<sup>37</sup> *Id.* Notably, it also provides that “[n]o one of these considerations in itself is controlling.”

<sup>38</sup> ABA CANONS OF PROFESSIONAL ETHICS, Canon 12. (Emphasis supplied.)

mentioned. Since then, said Canons have been cited and applied by the Philippine Supreme Court in cases concerning the professional conduct of lawyers.<sup>40</sup>

Despite the foregoing Canons, the US Supreme Court has ruled that price-fixing under the Sherman Act applies to legal services. In *Goldfarb v. Virginia State Bar*,<sup>41</sup> the Spouses Goldfarb contracted to buy a house and contacted an attorney to have the title examined, a service which could only be legally performed by a member of the Virginia State Bar.<sup>42</sup> The attorney quoted a fee identical to that suggested in the minimum schedule published by the Fairfax County Bar Association, a purely voluntary association of attorneys. Despite contacting 36 attorneys, they were unable to find one who would charge less than the minimum fee set forth in the schedule. Several stated that they knew of no attorney who would do so. The minimum fee schedule referred to a list of recommended minimum prices for common legal services,<sup>43</sup> and enforcement of the fee schedule was done through the Virginia State Bar, the administrative agency through which the Virginia Supreme Court regulated the practice of law.

The Spouses Goldfarb brought a class action suit under Section 1 of the Sherman Act seeking damages<sup>44</sup> and injunctive relief<sup>45</sup> against Fairfax County and the Virginia State Bar, alleging that “the operation of the minimum fee schedule, as applied to fees for legal services relating to residential real estate transactions” constituted price-fixing in violation of the Sherman Act.

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<sup>39</sup> Carmelo V. Sison, *Legal and Judicial Ethics*, 46 PHIL. L.J. 313 (1971), *citing* GEORGE MALCOLM, *LEGAL AND JUDICIAL ETHICS* (1949).

<sup>40</sup> *Id.*

<sup>41</sup> *Goldfarb v. Virginia State Bar* [hereinafter “*Goldfarb*”], 421 U.S. 773 (1975).

<sup>42</sup> *Id.* See *supra* note 2, *citing* Statement of Lewis H. Goldfarb, Hearings on Legal Fees Before the Subcommittee On Representation of Citizens Interests of the Senate Committee On the Judiciary, 93d Cong., 1st Sess., pt. 1, at 884 (1973). Petitioner Lewis Goldfarb was a lawyer for the Federal Trade Commission, but could not perform the service himself since he was not licensed to practice in Virginia.

<sup>43</sup> *Supra* note 2, *citing Goldfarb*, 421 U.S. at 776. The minimum fee for title examinations was set at 1% of the loan or purchase price, whichever was greater, plus one-half of 1% from USD 50,000 to USD 100,000 and one-quarter of 1% from USD 100,000 to USD 1,000,000, above which the amount was negotiable. The fee schedule had been adopted in 1969 by the Fairfax County Bar Association “in conjunction with the bar associations of Loudoun and Arlington counties and the City of Alexandria.”

<sup>44</sup> *Goldfarb*, 421 U.S. at 778-79. See 15 U.S.C., § 15 (1970), which provides for damages for Section 1 violations.

<sup>45</sup> *Goldfarb*, 421 U.S. at 778. See 15 U.S.C., § 26 (1970), which provides for injunctive relief from Section 1 violations.

The US Supreme Court ruled that the minimum fee schedule constituted price-fixing and that the sale of professional services was not exempt from the Sherman Act, stating:

The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public service aspect of the professional practice controlling in determining whether Section 1 includes professions.<sup>46</sup>

The Court noted that the intent of Congress in the creation of the Sherman Act was to “strike as broadly as it could” against combinations in restraint of trade, and that a comprehensive exemption in favor of learned professions would frustrate such intent. It reasoned that such an exemption would allow attorneys “to adopt anticompetitive practices with impunity.”<sup>47</sup>

Respondents argued that the application of Section 1 of the Sherman Act to the practice of law was “inconsistent with the practice of a profession,” as the goal of professional activities was to provide “services necessary to the community,” unlike ordinary businesses which primarily aim to profit.<sup>48</sup> The Court, however, ruled that such an argument “loses some of its force when used to support the fee control activities involved here,”<sup>49</sup> and noted that had it been the main concern of the bar associations to provide necessary services, they would not have prevented competition among attorneys, which could have lowered the costs and increased the availability of such services.<sup>50</sup>

The Court went on to state that the activities of lawyers played an important part in commercial intercourse and that anticompetitive acts by lawyers may exert a restraint on commerce.

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<sup>46</sup> *Goldfarb*, 421 U.S. at 787.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 786. *See also* Northern Cal. Pharmaceutical Assoc. v. United States, 306 F.2d 379, 385-86 (9<sup>th</sup> Cir. 1962). “[T]here is no defense to price-fixing on the ground that it is reasonable or that it is being done by professionals [...] We do not decide that every action of professionals is within the reach of the Sherman Act. We do decide that an agreement among professionals to fix a commodity price is.”

<sup>49</sup> *Id.* at 787.

<sup>50</sup> *Id.* *See also supra* note 2, *citing Goldfarb*, 421 U.S. at 787-88. The Court also noted that “[t]he reason for [the] adopt[ion] of the fee schedule does not appear to have been wholly altruistic,” as the fee schedule report of the Virginia State Bar was introduced with the statement that “[t]he lawyers have slowly, but surely, been committing economic suicide as a profession.”

Whatever else it may be, the examination of a land title is a service; the exchange of such a service for money is “commerce” in the most common usage of that word. It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect[.]<sup>51</sup>

The Court also stated that illegal price-fixing conduct among lawyers may be enforced by informal sources, such as the desire of attorneys to comply with announced professional norms.<sup>52</sup> It considered the fact that “the motivation to conform was reinforced by the assurance that other lawyers would not compete by underbidding”<sup>53</sup> and that the fee schedule was “not merely a case of an agreement that may be inferred from an exchange of price information, for here a naked agreement was clearly shown, and the effect on prices is plain.”<sup>54</sup>

However, the Court also discussed the exception carved out in *Parker v. Brown*,<sup>55</sup> in which it was held that nothing in the language of the Sherman Act or in its history suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature, and that “[t]he sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only ‘business combinations.’”<sup>56</sup>

Under the *Parker* doctrine, restraints of trade are not deemed violative of the Sherman Act where they (i) derive their “authority and efficacy from the legislative command of the state”;<sup>57</sup> (ii) are “not intended to operate or become effective without that command”;<sup>58</sup> and (iii) are adopted and enforced by the State in the “execution of a governmental policy.”<sup>59</sup>

Hence, where the State authorizes a particular activity which it actively supervises or regulates in the interest of the public, there is no violation of the Sherman Act. But such exception does not extend to quasi-governmental agencies created or sanctioned by state law, which are generally considered too remote from state regulation to constitute arms of

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<sup>51</sup> *Goldfarb*, 421 U.S. at 787-88.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (Citations omitted.)

<sup>55</sup> Hereinafter “*Parker*”, 317 U.S. 341 (1943).

<sup>56</sup> *Id.*, citing 21 Cong. Rec. 2562, 2457, 2459, and 2461.

<sup>57</sup> *Supra* note 1, citing *Parker*, 317 U.S. at 350.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 352.

the state.<sup>60</sup> The threshold test in determining whether or not the *Parker* exception applies is “whether the activity is required by the State acting as sovereign.”<sup>61</sup>

The Court ultimately held that the *Parker* doctrine was inapplicable to the bar associations in *Goldfarb*. The Virginia Supreme Court, pursuant to its rule-making authority concerning the conduct of practicing attorneys in Virginia, had empowered and required the Virginia State Bar to investigate violations of court standards and the opinions of the bar on ethical issues.<sup>62</sup> Pursuant to said authority, the county bar associations involved in *Goldfarb* sought implementation and enforcement of their prescribed minimum fee schedules.

While the Court conceded that the *Parker* exemption applied to the judicial actions of a state, and therefore to the Virginia State Bar as created by the Virginia Supreme Court, the same could not extend to the county bar associations, which were private entities not expressly empowered by the Virginia Supreme Court.<sup>63</sup> Nor could they claim that the ethical codes and activities of the Virginia Supreme Court prompted them to issue said fee schedules, as the latter merely mentioned advisory fee schedules in their ethical codes and never approved the fee schedules issued by the bar associations.<sup>64</sup> At most, their activities merely “complemented the objectives” of the ethical codes of the Virginia Supreme Court.<sup>65</sup>

In addition, the Court found that the Virginia State Bar had “voluntarily joined in what is essentially a private anticompetitive activity”<sup>66</sup> by providing a means for the enforcement of the minimum fee schedules, and thus also fell under the provisions of Section 1 of the Sherman Act.

### **C. Price-Fixing in The European Union**

The EU is an economic and political union composed of 28 member states,<sup>67</sup> operating as a single market and allowing the free

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<sup>60</sup> Robert R. Veach, Jr., *Goldfarb Fights the Bar*, 27 SW. L.J. 524, 530 (1973).

<sup>61</sup> *Goldfarb*, 421 U.S. at 790.

<sup>62</sup> *Id.*

<sup>63</sup> *Leegin*, 551 U.S. 877.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> The EU member-countries are: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

movement of goods, capital, services, and people among the included countries.<sup>68</sup> In 1957, the Treaty of Rome was ratified, establishing the European Economic Community. Said treaty provided for a competitive law regime covering anticompetitive agreements, abuse of dominance, and rules governing state aid.<sup>69</sup> Subsequently, the Treaty of Rome was twice renamed and renumbered,<sup>70</sup> and is now known as the Treaty on the Functioning of the European Union (“TFEU”).

The provisions of the PCA on price-fixing, other anti-competitive agreements, and abuse of dominant position are based on the TFEU.<sup>71</sup> Article 101(1)(a) of the TFEU prohibits the fixing of purchase or selling prices or any other trading conditions,<sup>72</sup> and encompasses all interventions in the freedom of an undertaking to independently and autonomously determine its prices and trading conditions *vis-a-vis* third parties.<sup>73</sup> Aside from prohibiting fixed prices, maximum prices, and minimum prices, it also prohibits the laying down of rules for “target prices,” especially where departure from such is followed by sanctions such as expulsion from an industry association.<sup>74</sup>

Price-fixing is considered under the TFEU as one of the most serious distortions of competition because of its nature as a mechanism to protect participants from the insecurity of price and performance on the

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<sup>68</sup> Government of the United Kingdom, *Countries in the EU and EEA*, UNITED KINGDOM GOVERNMENT WEBSITE, available at <https://www.gov.uk/eu-eea> (last accessed Dec. 23, 2018).

<sup>69</sup> See DAMIEN GERADIN, ANNE LAYNE-FARRAR, & NICOLAS PETIT, *EU COMPETITION LAW AND ECONOMICS* (2012).

<sup>70</sup> In 1992, the Maastricht Treaty, which led to the formation of the European Union, renamed the Treaty of Rome (then known as the EEC Treaty) the “Treaty Establishing the European Community” and renumbered the same. In 2007, the Lisbon treaty was signed, renaming it to “Treaty on the Functioning of the European Union” [hereinafter “TFEU”] as it is presently known.

<sup>71</sup> Clifford Chance, *A Guide to the Philippine Competition Act*, CLIFFORD CHANCE WEBSITE, Nov. 21, 2015, available at [https://www.cliffordchance.com/briefings/2015/11/a\\_guide\\_to\\_the\\_philippinecompetitionact.html](https://www.cliffordchance.com/briefings/2015/11/a_guide_to_the_philippinecompetitionact.html) (last accessed Dec. 23, 2018).

<sup>72</sup> Consolidated version of the TFEU, § 1, art. 101.1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly *fix purchase or selling prices* or any other trading conditions; (Emphasis supplied.)

<sup>73</sup> COMPETITION LAW: EUROPEAN COMMUNITY PRACTICE & PROCEDURE 500 (Sacker, Montag & Hirsch eds., 2008).

<sup>74</sup> *Id.*

market which is created by free competition.<sup>75</sup> Consequently, the rule that price-fixing is *per se* prohibited admits only of very few exceptions.<sup>76</sup>

Article 101(1) of the TFEU expressly provides for comprehensive application, including in its scope “all undertakings and associations of undertakings[.]” The term “association” under the TFEU does not distinguish based on the form and objectives of the subject association, “as long as their activity is not entirely non-profit making nor entrusted by the public authorities with the exercise of powers typically belonging to a public authority.”<sup>77</sup> EU competition rules have been applied to several sectors such as transport, energy, banking, and insurance despite objections that said sectors have special characteristics and policy considerations in conflict with the competition law.<sup>78</sup> Even members of liberal professions, formerly held to be sufficiently outside commerce so as to escape classification as an “undertaking,” have more recently been considered covered by EU competition laws.<sup>79</sup>

In *Höfner & Elser v. Macrotron GmbH*,<sup>80</sup> the European Court of Justice (“ECJ”) held that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.<sup>81</sup> In turn, an economic activity is broadly defined as any activity consisting in offering goods or services on a given market.<sup>82</sup>

In *Höfner*, the issue revolved around the applicability of competition rules to the German Employment Office, a public body which supplied employment procurement services. The ECJ found that the employment

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Höfner and Elser v. Macrotron GmbH* [hereinafter “*Höfner*”], ECJ Case C-41/90, ECR I-1979, Apr. 23, 1991, ¶ 21.

<sup>78</sup> *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, Case C 67/96, ECR I-05751, Opinion of Mr. Advocate General Jacobs, delivered Jan. 28, 1999.

<sup>79</sup> Commissioner of the Competition European Commission Mario Monti, *Competition in Professional Services: New Light and New Challenges*, Speech delivered at the Twenty-Ninth Report on Competition Policy (Mar. 21, 2003). “Obviously the Commission’s policy of establishing a level playing field in the internal market applies also to liberal professions. *The Commission’s established policy is to fully apply competition rules to these services*, whilst recognising their specificities and the role they may play in the protection of public interest.” (Emphasis supplied.)

<sup>80</sup> ECJ Case C-41/90, ECR I-1979, Apr. 23, 1991.

<sup>81</sup> *Höfner*, at ¶ 21.

<sup>82</sup> *Commission v. Italy*, Case 118/85, June 16, 1987, ¶ 7; *Commission v. Italy*, Case C-35/96, ECR I-03851, June 18, 1988, ¶ 36.



procurement activities supplied by said office constituted economic activity and that the mere character of the Employment Office as a public body did not take it out of the scope of an “undertaking” covered by competition rules. Also, the mere fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities.<sup>83</sup>

Similarly, the Belgian Architects’ Association, despite being a public body,<sup>84</sup> was considered to be an undertaking by the Commission of the European Communities (“CEC”) and thus subject to the provisions of the TFEU:

The public-law status of a national body such as the Association does not preclude the application of Article 81 of the Treaty. [...] [T]he legal framework within which agreements are made and decisions are taken and the classification given to that framework by the various national legal systems are irrelevant as far as the applicability of the Community rules on competition is concerned.<sup>85</sup>

In *Belgian Architects’ Association*,<sup>86</sup> the subject organization was governed by its National Council, which was empowered to issue ethical rules governing the profession. Said Council adopted “Ethical Standard No. 2,” a scale of architects’ fees that determined the minimum remuneration due to an architect for his services.<sup>87</sup> The scale was published in the website of the Association but with the clarification that the fee scale was merely to serve as a guideline in setting fees.<sup>88</sup>

The CEC ruled that the fee scale had the effect of restricting competition within the meaning of Article 101. *First*, the CEC noted that the fixing of a price, even one which merely constitutes a target or recommendation, affects competition because it enables all participants to predict with a reasonable degree of certainty their competitors’ pricing

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<sup>83</sup> *Höfner*, at ¶¶ 21-23.

<sup>84</sup> Act of 26 June 1963, §§ 37-38. Law establishing an Architects’ Association.

<sup>85</sup> Belgian Architects’ Association, Decision of the Commission of the European Communities [hereinafter “*Belgian Architects’ Association*”], June 24, 2004, ¶ 41.

<sup>86</sup> *Id.*

<sup>87</sup> IDA E. WENDT, EU COMPETITION LAW AND LIBERAL PROFESSIONS: AN UNEASY RELATIONSHIP? 66 (2012). The fee scales which were finally adopted, and later amended, by the national council, had never been approved by the official authorized to do so, i.e. the Minister for Small- and Medium-Sized Enterprises, the Professions and the Self-Employed; In fact, said Minister actually refused to turn it into a royal decree.

<sup>88</sup> *Belgian Architects’ Association*, at ¶¶ 15-20.

policy, especially if the provisions on target prices are backed up by the possibility of inspections and penalties.<sup>89</sup> *Second*, the CEC found that the terms of the decision, the objective aims, the legal and economic context, and the conduct of the parties indicated that the decision had the object of restricting competition. The CEC noted that “the circulation of recommended tariffs by a professional organization”<sup>90</sup> was “liable to prompt the relevant undertakings to align their tariffs, irrespective of their cost prices, and thus creates an artificial advantage for undertakings which have the least control over their production costs.”<sup>91</sup>

Article 101 of the TFEU has also been held as applicable even to non-binding measures imposed by undertakings or associations of undertakings. In *LAZ International Belgium NV v. Commission*,<sup>92</sup> an association of water suppliers recommended that its members connect only to washing machines and dishwashers that had a conformity label supplied by a particular Belgian association which produced the equipment. In noting that the recommendation made parallel imports of washing machines and dishwashers more difficult, if not impossible, the Court found that a recommendation, “even if it has no binding effect, cannot escape [Article 101 (1)] where compliance with the recommendation by the undertakings to which it is addressed has an appreciable influence on competition in the market in question.”<sup>93</sup>

However, decisions of associations will not be considered a “decision” of an undertaking within the coverage of Article 101 if the State merely appointed the association to do so, or the decision-making only relates to a prospective governmental act.

In *Cali e Figli*,<sup>94</sup> the ECJ held that state-owned corporations are not deemed to be in violation of the TFEU when they perform activities in the exercise of official authority, or where the activity performed is “a task in the public interest which forms part of the essential functions of the state and where the activity is connected by its nature, its aims and rules to which it is

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<sup>89</sup> *Vereeniging van Cementhandelaren v. Comm’n of the European Communities*, Case 8-72, ECR 977, Oct. 17, 1972, ¶ 21.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Hereinafter “*NV LAZ*”, Joined cases 96-102, 104, 105, 108 and 110/82, ECR 03369, Nov. 8, 1983.

<sup>93</sup> *Id.* at ¶ 20.

<sup>94</sup> *Diego Cali & Figli Srl v. Servizi ecologici porto di Genova SpA (SEPG)*, Case C-343/95, ECR I-01547, Mar. 18, 1997, ¶¶ 16-17.

subject with the exercise of powers [...] which are typically those of a public authority.”<sup>95</sup>

Such principle may be more clearly understood by drawing a distinction between the *Arduino*<sup>96</sup> and *Belgian Architects’ Association* cases on what would constitute a “decision” relative to such exemption.

In *Arduino*, Italian legislation imposed a compulsory tariff scheme for certain legal services provided by members of the Bar.<sup>97</sup> Under the law in question, the professional association of lawyers in Italy, or the *Consiglio Nazionale Forense*, adopted minimum and maximum tariffs every two years, which were then submitted to the Minister of Justice for approval.<sup>98</sup> Upon approval, national courts were bound to settle fees in cases within the minimum and maximum rates thus prescribed.<sup>99</sup>

In resolving that Italy had not infringed its obligations to respect the competition rules prescribed by the TFEU, the Court in *Arduino* considered the fact that the tariff rates, which were merely prepared by an association to be submitted for approval of the governmental body, were not considered “decisions” of the association within the meaning of Article 101 of the TFEU.<sup>100</sup>

In contrast, in *Belgian Architects’ Association*, the association of architects issued a scale of minimum price fee schedules for its members. On the issue of whether said fee schedules were a decision of the association, the CEC noted that the Association published, updated, and circulated them despite lack of express approval from the State. While the Code of Ethics approved by the State provided for some guidelines,<sup>101</sup> the

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<sup>95</sup> *Id.* at ¶ 23.

<sup>96</sup> Hereinafter “*Arduino*”, C-35/99, ECR I-1529, Feb. 19, 2002.

<sup>97</sup> *Id.*

<sup>98</sup> *Arduino*, C-35/99 at ¶ 38. The CNF based its draft tariff rates on the following criteria: the monetary value of the disputes, the level of the court involved, and, regarding criminal cases, the duration of the proceedings. In the process of approving the draft tariff rates, the Minister of Justice was required to obtain opinions from the Inter-Ministerial Committee on Prices (*Comitato interministeriale dei prezzi*) and the Council of State.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Code of Ethics approved by the Royal Order of July 5 1967, arts. 41-44. Fees are to be determined taking account of the difficulties of the task conferred on the architect, the scale of the work and the architect’s reputation. In the interests of the client and in order to safeguard the dignity of the profession, the architect is at the very least bound to set his fees at a level that allows him fully and honourably to perform all the duties inherent in his task. The amount is to be determined taking account of the rules and practices generally

ECJ found that the Association still exercised a considerable margin of discretion and in no way required the adoption of such a mathematical and detailed scale of minimum fees with no exemption mechanism.

The Commission clearly underlined that, unlike in *Arduino*, the application and effectivity of the fee scale did not depend on the approval of the competent minister, and thus was not a mere preparatory act to a state measure.<sup>102</sup> Hence, the fee schedule was considered a decision of an association of undertakings and covered by competition laws.

### 1. *The EU Legal Profession and the Wouters Case*

While generally not regulated by EU Law, the legal profession in EU member states is particularly regulated at the national level.<sup>103</sup> Several EU countries sanction bar associations that police the practice of law in the country. For example, the Netherlands Bar Association is a public professional body created pursuant to statute and empowered to ensure the proper practice of the profession through the adoption of binding regulations<sup>104</sup> and the conduct of disciplinary proceedings against errant advocates.<sup>105</sup> While no association of lawyers operates on a national scale in France, the country has authorized 161 bar associations, each headed by a chairman and directed by a bar council. Said bar council regulates the proper practice of the profession and ensures that lawyers' rights are protected.<sup>106</sup> In England and Wales, the Bar Council, the governing body for all barristers in England and Wales, has delegated the task of regulating the profession to a Bar Standards Board, tasked to maintain the standards, honor, and independence of the bar.<sup>107</sup>

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accepted by the authorities of the Association. Nor may the architect claim excessive fees that do not take account of these criteria and of the reputation he has acquired.

<sup>102</sup> *Belgian Architects' Association*, at ¶ 66.

<sup>103</sup> *Legal Professions and Justice Networks*, EUROPEAN E-JUSTICE PORTAL WEBSITE, available at [https://e-justice.europa.eu/content\\_legal\\_professions-29-en.do](https://e-justice.europa.eu/content_legal_professions-29-en.do) (last accessed Dec. 23, 2018).

<sup>104</sup> *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* [hereinafter "*Wouters*"], Case C-309/99, I-01577, Feb. 19, 2002, ¶¶ 3-12.

<sup>105</sup> *Legal Professions: Netherlands*, EUROPEAN E-JUSTICE PORTAL WEBSITE, available at [https://e-justice.europa.eu/content\\_legal\\_professions-29-nl-en.do?member=1](https://e-justice.europa.eu/content_legal_professions-29-nl-en.do?member=1) (last accessed Dec. 23, 2018).

<sup>106</sup> *Legal Professions: France*, EUROPEAN E-JUSTICE PORTAL WEBSITE, available at [https://e-justice.europa.eu/content\\_legal\\_professions-29-fr-en.do?member=1](https://e-justice.europa.eu/content_legal_professions-29-fr-en.do?member=1) (last accessed Dec. 23, 2018).

<sup>107</sup> *Legal Professions: England*, EUROPEAN E-JUSTICE PORTAL WEBSITE, available at [https://e-justice.europa.eu/content\\_legal\\_professions-29-ew-en.do?member=1](https://e-justice.europa.eu/content_legal_professions-29-ew-en.do?member=1) (last accessed Dec. 23, 2018).

Under the TFEU, associations of professional workers such as lawyers and architects are considered “associations of undertakings” and covered by competition law.<sup>108</sup> The applicability of EU competition law to the legal profession is best illustrated in the 2002 case of *Wouters v. Netherlands Bar*.<sup>109</sup> The Bar of the Netherlands was established through statute as a public body governed by its General Council, which was authorized to adopt regulations binding on all its members on the condition that these would be consistent with the interests of the proper practice of the profession. Among the regulations passed by the Bar was the 1993 Regulation, which, among others, prohibited all contractual arrangements between members of the Bar and accountants which provided for shared decision-making, profit-sharing or use of a common name.

In 1995, the General Council ruled that a law firm violated the 1993 regulation since it had engaged in a professional partnership with an accounting firm. On appeal, the said firms alleged before the Rechtbank that the 1993 Regulation violated the TFEU provisions on competition. The Rechtbank ruled that the TFEU provisions on competition did not apply to the Bar since it was a body governed by public laws and established by statute in order to further a public interest. Thus, the Bar was not an association of undertakings under Article 101 (then Article 85) of the TFEU.

Rejecting the Rechtbank’s earlier ruling, the ECJ ruled:

Members of the Bar offer, for a fee, services in the form of legal assistance consisting in the drafting of opinions, contracts and other documents and representation of clients in legal proceedings. In addition, they bear the financial risks attaching to the performance of those activities since, if there should be an imbalance between expenditure and receipts, they must bear the deficit themselves [...] That being so, registered members of the Bar in the Netherlands carry on an economic activity and are, therefore, undertakings for the purposes of Articles 85, 86 and 90 of the Treaty. *The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion.*<sup>110</sup>

The ECJ also ruled that the mere fact that a statute entrusts the General Council with the task of protecting the rights and interests of members of the Bar cannot, by itself, exclude that professional organization

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<sup>108</sup> *Supra* note 73, at 484.

<sup>109</sup> Case C-309/99, I-01577, Feb. 19, 2002.

<sup>110</sup> *Id.* at ¶¶ 48-49. (Emphasis supplied.)

from application of Article 101 of the TFEU, even where it performs its role of regulating the practice of profession of the bar. In finding that the Bar should be regarded as an association of undertakings within the meaning of Article 101(1) of the TFEU, the ECJ considered that the governing members of the Bar are elected solely by the profession and the fact that when the Bar adopts measures such as the 1993 regulation the statute merely requires that it be in the proper interest of the profession. The ECJ also considered the influence of the Bar on the conduct of its members on the market for legal services.<sup>111</sup>

But while the ECJ found that the 1993 Regulation adversely affected competition, it ultimately ruled that this did not necessarily mean that it was prohibited under Article 101(1) of the TFEU. The ECJ, in establishing the *Wouters* test, ruled that an anticompetitive practice under Article 101(1) of the TFEU may be tolerated if it provides a necessary means to support a legitimate national policy:

For the purposes of application of [Article 101(1)] to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.<sup>112</sup>

Applying the *Wouters* test, the ECJ found that the 1993 Regulation, despite its restrictive effect on competition, did not infringe Article 101(1) of the TFEU since it was necessary for the proper practice of the legal profession.<sup>113</sup>

Commentators note that *Wouters* illustrates how the application of EU competition law may be suspended when reasonably necessary to uphold other policy objectives, such as the integrity of the national legal

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<sup>111</sup> *Id.*

<sup>112</sup> ALISON JONES & BRENDA SUFRIN, EU COMPETITION LAW: TEXT, CASES, AND MATERIALS 231 (6th ed. 2016).

<sup>113</sup> *Wouters*, at ¶ 110.

system.<sup>114</sup> The *Wouters* test has been applied several times in cases involving professions, such as rules established by an accountants' association with regard to the training of its members<sup>115</sup> and the establishment of professional fees regarding reference fees for geologists.<sup>116</sup>

As the ECJ did not specify criteria to determine whether or not objectives may be deemed "legitimate" within the *Wouters* test<sup>117</sup> and it appears that these are simply evaluated on a case-to-case basis, *Wouters* cannot be deemed to provide a blanket exemption in favor of the legal profession, or to all regulations imbued with public policy considerations for that matter, from the application of the prohibition against price-fixing in the TFEU. The *Wouters* ruling must be considered in light of subsequent cases in which the ECJ ruled that similar fee schedules are not reasonably necessary to ensure the proper practice of a profession and hence cannot be removed from the scope of Article 101(1), TFEU,<sup>118</sup> and that the alleged purposes of such supervisory functions can be achieved through less anticompetitive means.<sup>119</sup>

#### D. The Philippine Legal Profession

The 1987 Constitution vested the Supreme Court with the power to "[p]romulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged."<sup>120</sup>

The 1935 and 1973 Constitutions also granted the Court similar powers; however, these previous Constitutions also granted to the legislature the concurrent power to repeal, alter or supplement such rules. The 1987 Constitution textually altered the power-sharing scheme under the previous charters by deleting the subsidiary and corrective power granted in favor of Congress.

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<sup>114</sup> Giorgio Monti, *Article 81 EC and Public Policy*, 39 COMMON MARKET L. REV. 1057, 1088 (2002); *see also* JONATHAN FAULL & ALI NIKPAY, *THE EU LAW OF COMPETITION* (3<sup>rd</sup> ed. 2014).

<sup>115</sup> *Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência*, C-1/12, EU:C:2013:127, Feb. 28, 2013.

<sup>116</sup> *Consiglio Nazionale dei Geologi v. Autorità Garante della Concorrenza e del Mercato*, C-136/12, ECLI:EU:C:2013:489, July 18, 2013. .

<sup>117</sup> *Id.*

<sup>118</sup> *Belgian Architects' Association*, at ¶ 99.

<sup>119</sup> *Id.*

<sup>120</sup> CONST. art VIII, § 5.

Pursuant to such grant of authority under the 1987 Constitution, the Supreme Court promulgated the Canon of Professional Ethics, the Code of Judicial Conduct, and the CPR to regulate the practice of law in the country. Many of the rules promulgated by the Court for the regulation of the profession were specifically crafted to prevent the practice of law from becoming commercialized.<sup>121</sup>

Canon 20 of the CPR mandates that a lawyer shall charge only fair and reasonable fees, and Rule 20.01 of the same Code provides that a lawyer shall be guided by, among others, the customary charges for similar services and the schedule of fees of the IBP chapter to which he belongs. Rule 2.04 of the CPR also mandates that “a lawyer shall not charge rates lower than those customarily prescribed unless circumstances so warrant,” a rule aimed against the practice of cutthroat competition, such being antithetical to the principle that the practice of law is a noble profession and not a trade.<sup>122</sup>

In line with the principles laid down in said rules, the Supreme Court has consistently characterized the practice of law in the Philippines as a profession, not a business, as exemplified in its ruling in *Canlas v. CA*:<sup>123</sup>

Law advocacy [...] is not capital that yields profits. The returns it births are simple rewards for a job done or service rendered. It is a calling that, unlike mercantile pursuits which enjoy a greater deal of freedom from government interference, is *impressed with a public interest, for which it is subject to State regulation.*<sup>124</sup>

### 1. *The Integrated Bar of the Philippines*

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<sup>121</sup> To illustrate, Rule 2.03 of the Code of Professional Responsibility provides that a lawyer shall not do or permit to be done any act designed primarily to solicit legal business. Likewise, advertisements for legal services are regulated and often limited to reputable law lists and simple calling cards. *See also* *Linsangan v. Tolentino*, A.C. No. 6672, Sept. 4, 2009, where the Court stated: “To allow a lawyer to advertise his talent or skill is to commercialize the practice of law, degrade the profession in the public’s estimation and impair its ability to efficiently render that high character of service to which every member of the bar is called.”

<sup>122</sup> However, it should be noted that the Rule itself does not exactly specify what “those customarily prescribed” means; neither does it indicate the circumstances warranting an exemption in charging rates lower than actually prescribed.

<sup>123</sup> *Canlas v. Ct. of Appeals* [hereinafter “*Canlas*”], G.R. No. L-77691, 164 SCRA 160, Aug. 8, 1988. *See also* *Burbe v. Magulta* [hereinafter “*Burbe*”], A.C. No. 990634, 383 SCRA 276, 278 June 10, 2002: “Lawyering is not a business; it is a profession in which duty to public service, not money, is the primary consideration. The practice of law is a noble calling in which emolument is a byproduct, and the highest eminence may be attained without making much money.”

<sup>124</sup> *Canlas*, 164 SCRA at 179. (Emphasis supplied.)



The IBP is the official organization of all Philippine lawyers whose names appear in the Roll of Attorneys of the Supreme Court. Republic Act No. 6397 confirmed the power of the Supreme Court to adopt rules of court to effect the integration of the Philippine Bar.<sup>125</sup> In 1973, the IBP was constituted into a body corporate and provided with government assistance for the accomplishment of its purposes.<sup>126</sup> The IBP, as a creation of the Supreme Court, is subject to the latter's supervision and regulation.<sup>127</sup>

The Supreme Court has ruled that the integration of the Bar, in accordance with Rule 139-A of the Rules of Court, is intended "to raise the standards of the legal profession, to improve the administration of justice and to enable the Bar to discharge its public responsibility more effectively."<sup>128</sup>

The practice of law is not a vested right but a privilege; a privilege, moreover, clothed with public interest, because a lawyer owes duties not only to his client, but also to his brethren in the

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<sup>125</sup> In September 1971, Congress passed House Bill No. 3277, "An Act Providing for the Integration of the Philippine Bar, and Appropriating Funds Therefor," which was signed by then-President Ferdinand Marcos and took effect as Rep. Act No. 6397 (1971).

<sup>126</sup> *See also* In the Matter of the Integration of the Bar of the Philippines, 49 SCRA 22 (1973), where the authority of the Supreme Court to integrate the Philippine Bar, as well as the constitutionality of such integration, was questioned. The Supreme Court, by a *per curiam* resolution, upheld the constitutionality of the measure pursuant to the exercise of its power to "promulgate rules concerning pleading, practice, and procedure in all courts, and the admission to the practice of law" granted under Article VIII, Section 13 of the 1935 Constitution. It held that "the power to integrate is an inherent part of the Court's constitutional authority over the Bar," and that R.A. No. 6397 "neither confers a new power nor restricts the Court's inherent power, but is a mere legislative declaration that the integration of the Bar will promote public interest."

<sup>127</sup> Pres. Dec. No. 181 (1973).

<sup>128</sup> RULES OF COURT, Rule 139-A, § 4. This provides that each Chapter shall have its own local government as provided for by uniform rules to be prescribed by the Board of Governors and approved by the Supreme Court. Under Section 19 thereof, Rule 139-A may also be amended by the Supreme Court, whether *motu proprio* or by the recommendation of the Board of Governors.

Section 15 of the Integrated Bar of the Philippines ("IBP") By-Laws provides that the Supreme Court may designate an official observer at any election of the Integrated Bar, whether national or local, while under Section 23 of said By-Laws, the IBP requires the Supreme Court's approval before it may increase or reapportion membership dues.

*See also* In Re: Inquiry into the 1989 Elections of the Integrated Bar of the Philippines [hereinafter "*In re: IBP*"], A.M. No. 491, Oct. 6, 1989. The Supreme Court exercised its supervision over the IBP in annulling the results of the 1989 IBP elections and amending its by-laws, in response to the massive electioneering for the top positions of the IBP that "seriously diminished the stature of the IBP as an association of the practitioners of a noble and honored profession."

<sup>128</sup> *In re: IBP*, 49 SCRA at 33.

profession, to the courts, and to the nation; and takes part in one of the most important functions of the State, the administration of justice, as an officer of the court.

Because the practice of law is privilege clothed with public interest, it is far and just that the exercise of that privilege be regulated to assure compliance with the lawyer's public responsibilities.

*These public responsibilities can best be discharged through collective action; but there can be no collective action without an organized body.*<sup>129</sup>

The IBP, through its various chapters, prescribes its own schedule of fees, which serves as a guide to its members in the fixing of rates for legal services. The schedule for minimum fees for the Negros Oriental chapter, for example, may differ from those of the Cebu Chapter. The fees also differ depending on the services to be rendered.

In the IBP Cebu Chapter, it is explicitly provided that the schedule of fees is not to be construed as fixing the standard or reasonable fee to be charged in any given case or situation. However, a member who stubbornly refuses to follow the standard fee schedule is to be reported to the IBP National Office for appropriate disciplinary action.<sup>130</sup>

## 2. *Private Legal Associations*

While membership in the IBP is mandatory under Philippine law, lawyers are also free to form and join associations for their private purposes. The authors will use an example of an existing organization to illustrate the potential application of the PCA to the fee-setting activities of a private legal association.

## 3. *The Intellectual Property Association of the Philippines*

The IPAP is an organization of intellectual property legal practitioners and firms in the Philippines. IPAP prescribes minimum attorney's fees for particular services on its members, such as with respect to trademarks, trade names, and service marks cases, as well as patents, utility models, and designs cases.

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<sup>129</sup> *Id.* (Emphasis supplied.)

<sup>130</sup> Integrated Bar of the Philippines, Cebu Province and Cebu City Chapters, Joint Res. No. 01-2012, Joint Resolution Adopting the 2012 Standard Minimum Attorney's Fees Schedule of the Integrated Bar of the Philippines, Oct. 9, 2012.

Under the rules for membership in the IPAP, charging fees lower than the prescribed minimum rates constitutes grounds for expulsion from the organization. Expulsion carries with it the deprivation of certain privileges, such as the loss of marketing opportunities at international intellectual property conferences, which require attendees to possess membership with a national intellectual property legal association.

#### IV. CONCLUSION & RECOMMENDATION

Based on the foregoing, it is the opinion of the authors that the PCA applies to the Philippine legal profession; however, this is qualified by the exemptions recognized in the US and EU with respect to state-sanctioned activities.

A reading of the provisions of the PCA shows that they are sufficiently broad as to include the practice of law. Following recognized rules of statutory construction, in the absence of an express exception provided in the PCA, no distinction should be presumed with respect to professions, let alone the legal profession specifically. *Ubi lex non distinguit, nec nos distinguere debemus.*

In addition, US and EU jurisprudence ruling that the practice of law constitutes a trade or undertaking which may be regulated by antitrust legislation is persuasive. Notably, both the ABA Model CPR (in relation to the ABA Canons of Professional Ethics) and the rulings of the Philippine Supreme Court prescribe that law is not merely a trade. They characterize it respectively as “a branch of the administration of justice”<sup>131</sup> and a “profession.”<sup>132</sup> Yet despite such classification, the US Supreme Court has still ruled that the provisions of the Sherman Act on price-fixing apply to the legal profession.<sup>133</sup> Similarly, decisions concerning the TFEU have declined to apply a blanket exemption to professions despite “recognizing their specificities and the role they may play in the protection of public interest.” By analogy, these rulings may also apply in our jurisdiction.

Hence, it is the opinion of the authors that fee schedules promulgated by private legal associations such as IPAP may be deemed violations of the provisions of the PCA. The imposition of such minimum

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<sup>131</sup> ABA CANONS OF PROFESSIONAL ETHICS, Canon 12.

<sup>132</sup> *Burbe*, 383 SCRA at 284.

<sup>133</sup> *Goldfarb*, 421 U.S. 773 (1975).

fee schedules, in conjunction with the penalties and enforcement mechanism supporting them, clearly act as a substantial restraint upon competition among lawyers providing intellectual property legal services in the Philippines. Assuming *arguendo* that the IPAP does not exercise its enforcement mechanisms for charging prices lower than its minimum schedule of fees, it is submitted that this would still not remove the schedule of fees from the ambit of the PCA. Nothing in the language of the PCA imposes the requirement of a penalty in order for an agreement to qualify as an anticompetitive agreement. Moreover, both the US Supreme Court and the European Commission have ruled that the imposition of sanctions is immaterial in the determination of violation of anti-competitive laws.<sup>134</sup>

This should be differentiated from the application of the PCA to the fee schedules set by the IBP. Unlike the IPAP, the IBP is a body organized by the State through the Supreme Court. The Sherman Act and the Treaty have both been interpreted as inapplicable to state-sanctioned activities or state-regulated bodies, pursuant to legitimate national policy. Following the US *Parker* test and the EU *Wouters* test, the IBP would clearly be considered as an exception to the coverage of the PCA.

No less than the fundamental law of the land recognizes and authorizes the creation of the IBP. Unlike the exceptions to *Parker* and *Wouter* laid down in *Goldfarb* and *Belgian Architects' Association* respectively, the minimum fee schedules imposed by the IBP Chapters are not creations of private entities subject to the approval of governmental bodies. The IBP Chapters are themselves simply local parts of the IBP, which is an official governmental organization established by the State, expressly empowered by the Supreme Court and confirmed as a body corporate by law.

Even without the application of the exceptions provided in foreign jurisprudence, it is the position of the authors that the publication and enforcement of minimum fee schedules by the IBP would still not be covered by the PCA. To pass a law prohibiting its minimum fee-setting activities would constitute an exercise by the Legislature of the power to promulgate rules concerning the Integrated Bar, authority over which is the exclusive domain of the Supreme Court as provided in the Constitution. In deciding this potential conflict between the Constitution and the PCA, it is the former which must prevail.<sup>135</sup>

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<sup>134</sup> *Leegin*, 551 U.S. 877 (2007); *Real Estate Boards*, 339 U.S. 485 (1950); and *NV LAZ*, Joined cases 96-102, 104, 105, 108 and 110/82, ECR 03369, Nov. 8, 1983.

<sup>135</sup> In *Biraogo v. The Philippine Truth Commission* of 2010, G.R. No. 192935, 637 SCRA 78, 137, Dec. 7, 2010, the Supreme Court noted: "The Constitution is the basic and

A contrary interpretation of the PCA would also lead to a conflict between the powers of the Executive and the Judiciary. The provisions of the PCA are implemented by the Philippine Competition Commission (“PCC”), an agency attached to the Office of the President,<sup>136</sup> vested with original and primary jurisdiction over the enforcement of and implementation of the PCA.<sup>137</sup> To place the IBP under the coverage of the PCA would amount to making it accountable to the Executive Branch rather than to the Supreme Court.

Moreover, the PCA provides that the PCC shall have certain specific powers and functions such as the “institut[ion of] the appropriate civil or criminal proceedings”<sup>138</sup> for violation of the PCA and other existing competition laws or “[u]pon order of the court, undertak[ing] inspections of business premises and other offices, land and vehicles[.]”<sup>139</sup> If the PCC were to exercise such powers and functions as against the IBP, the Supreme Court could be placed in the absurd situation of ruling on whether or not to institute proceedings or enforce orders against itself and its own attached agency. Given the foregoing, the authors maintain that the IBP remains exempt from the coverage of the PCA even in the absence of an express provision in the law. A contrary interpretation would run afoul of the doctrine of separation of powers, which is the very foundation of the Philippine system of government.

In sum, the authors conclude that the prohibition on price-fixing under the PCA applies only to the practice of law as engaged in by private associations of lawyers, and not to the IBP or the Codes issued by the Supreme Court to regulate the legal profession. However, this scholarly exercise engenders an equally important reminder: that while the practice of law is primarily a profession, it can nevertheless be as profitable as any trade or business. The Philippine legal profession, for all its laudable objectives, cannot be divorced from its nature as a lucrative money-making venture for law firms and single practitioners alike, and for so long as it persists to be such, the profession cannot always evade the application of laws and regulations, such as the PCA, that are meant to preserve the economy and

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paramount law to which all other laws must conform and to which all persons, including the highest officials of the land, must defer. Constitutional doctrines must remain steadfast no matter what may be the tides of time.” (Citation omitted.)

<sup>136</sup> PCA, § 5.

<sup>137</sup> § 12.

<sup>138</sup> § 12(a).

<sup>139</sup> § 12(g). (Emphasis supplied.)

protect the interests of both consumers and producers of legal services. This, perhaps, is the inevitable cost of putting a price on justice.

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