

**Questions concerning the application of competition law
to professional associations in your country**

1. - Which kinds of professions do professional associations in your country regulate?

According to the Brazilian Federal Constitution of 1988, “freedom of association for lawful purposes is fully guaranteed”. The granting of any governmental authorization is not necessary for the establishment of most of the associations.

There are many professional associations that set out rules for encouraging correct practices by their associates such as the lawyers association, advertisers society, doctors association, , engineers, artists, among others.

These associations are created by law and are empowered to represent their associates in some matters such as court proceedings:

- Lawyer - Brazilian Bar Association (“OAB”) - Law nº 8,906/1994 – Federal and Regional Councils;
- Doctors – Law nº Lei nº 3,268/1957 - Federal and Regional Councils;
- Engineer – Law nº. 5194/1966 - Federal and Regional Councils;
- Musician – Law nº 3857/1960 - Federal and Regional Councils;
- Advertising Executive – Law nº. 4,680/1965.

For purposes of the present work, we will adopt the by-laws of the Brazilian Bar Association as a guideline to answer the remaining questions applicable to professional associations.

2. - What competence do such associations have (authorization to operate; advertising and promotional activities; price fixing; litigation with clients)?

Such associations operate in the selection, discipline, and defense of the class and monitor the exercise of the regulated professions thereby encouraging correct practices. They may also create an ethic committee to evaluate the associates' compliance with the terms and conditions of the statute of the association.

Such committee may apply penalties to its associates, which vary from a warning to a definitive expulsion. The Ethics committee has to comply with the due process of law during the administrative proceedings for punishments.

3. - Are members of the public authorities represented on the governing bodies of these associations?

The Brazilian Federal Constitution prohibits government interference as to the operation of the associations. Such associations are further regulated by the articles of the Brazilian Civil Code (Art. 53 to 61 of Law 10,406 of January 10, 2002) and by the statutes of the association.

Nevertheless, this prohibition does not prevent that public authority be part of the governing bodies of the associations. The statutes usually set out the admission and exclusion of associates.

For example, the current Culture Minister, Gilberto Gil is a musician and therefore a member of the Brazilian Musician Association ("Ordem dos Músicos do Brasil").

4. - Are these associations considered to be "associations of undertakings" in the sense applied in competition law?

The associations usually operate in the selection, discipline, and defense of the associates and their professional class and therefore, monitor the exercise of the correct practices by imposing warnings and sanctions, if necessary. Therefore, they are not in principle "association of undertaking" in the sense applied in competition law.

However, neither the association nor their associates are excepted from the applicability of the competition laws and its penalties.

5. - Does legislation enable these associations to adopt universally binding rules? If so, is the fact that associations adopt such universally binding rules under legislation, together with associations' special legislative status, relevant as regards the application of competition law?

The legislation allows that the association adopt universally binding rules to the associates with the main objective to correct professional practices and value the concerned profession. The associates are usually obliged to follow the terms, conditions and the main purpose of the association.

Therefore, some of the terms and conditions in the statutes may be relevant to the applicability of competition law.

6. - Does national legislation require these associations to observe public-interest criteria when taking their decisions? Which competence of the associations are not public interest/order related?

The associations must have lawful purposes and obey all Brazilian laws, regulations and the public interest. Some of them are specified in articles 53 to 61 of the Brazilian Civil Code, which need to be complied by the association under the penalty of nullity of the act. The same rationale applies to the association's decisions in regard to its associates.

7. - Can the decisions of these associations be revised in the ordinary courts? If so, to what extent?

According to Article 5th, XXXV, of the Brazilian Federal Constitution, no injury or threat to a right can be excluded from the consideration of the Judicial Power. Therefore, ordinary courts can revise any decision issued by Ethic Committees of associations, which infringes in a sense third parties' rights or those of the associates.

8. - Does a legal or de facto exemption for the application of competition law to these associations exist in your country? If so, what are the justifications for these exemptions?

There is no exemption for the non-applicability of the competition law to these associations. According to law n. 8,884 of June, 1994 (Antitrust laws), any act or contract that produces the effects of limiting, restraining or injuring the open competition or free enterprise, to abuse one's market control and increase profits on a discretionary basis are regarded violative of the local antitrust rules and therefore prohibited by law.

9. - Have these associations applied for individual exemptions for their agreements before your national competition authorities? If so, did these authorities clear these agreements? Did they approve the agreements subject to conditions?

Since the competition rules are of public order nature, there is no individual exemption permitted by the local laws. The provisions of Law 8,884/1994 apply therefore to individuals, public or private companies, as well as to any individual or professional associations, established *de facto* and *de jure* even on a provisional basis irrespective of a separate legal nature, and notwithstanding the exercise of activities regarded as a legal monopoly.

10. - Have there been cases in your country where competition law has been applied to these associations? If so, what were the infringements, and what were the remedies or the amount of the fine imposed on the associations?

There are cases where competition law has been applied to these associations. They are mainly issued by the Administrative Economic Protection Council (CADE) and derive from the preliminary investigation and evidence of anti-competitive practices. The decisions applied by CADE to the local associations are mainly related to the attempt to adopt uniform practices that affect consumer rights and the local competition. The most common practice extended to the associates is the "price fixing" of products/services.

According to items I and II of art. 21 of Law 8,884/94, price fixing or uniform concerted business practices are considered infringement of the economic order, as follows:

"The acts spelled out below, among others, will be deemed a violation of the economic order, to the extent applicable under article 20 and items thereof:

I – to set or offer in any way – in collusion with competitors – prices and conditions for the sale of a certain product or service;

II – to obtain or otherwise procure the adoption of uniform or concerted business practices among competitors clauses derive from administrative proceedings for the repression of anti-competitive practices.”

We should point out the following relevant administrative proceedings related to the attempt of standardize prices of the associates for the disposal of services and goods in the market:

- Administrative Proceeding n. 000125/95-02

Plaintiff: Metropolitan transports S/A

Defendant: Sindicato dos Despachantes Aduaneiros de Santos (association of Shipping Forwarders of Santos)

Summary: Administrative Proceedings. Adoption of Minimum fees Schedule. Practice framed in the events of article 20, items I and article 21, and items I e II of Law 8,884/94. Proposal of Cease and Desist Commitment. Application of a fine.

Fine: 5.000 (five thousand) UFIR for the violation of Law 8,884/94 (Judgement date = May 6, 1998.

- Administrative Proceeding n. 145/94

Plaintiff: DPDE “ex officio”

Defendant: Hospital Labor Union of Brasília

Summary: Defense of Competition. Law 8,158/91. Schedule of prices of goods and services. Uniform practice. Cartel by means of association. Violation of free trade.

Fine: 6.000 (six thousand) UFIRs.

- Administrative Proceeding n. 08012.004712/2000-89

Plaintiff: Economy Law Office (SDE)

Defendant: Trade union for the commerce of petroleum of the state of Goiás – Sindiposto and its president José Batista Neto

Summary: Administrative Proceeding. Adoption of uniform commercial practice among competitors. Art. 20, item I c/c art. 21, item II of Law 8,884/94. Immediate cessation of all anti-competitive practices.

Fine 5.000 (five thousand) UFIRs per day until the final decision of the administrative proceeding (art. 52 of Law 8,884/94).

- Administrative Proceeding n. 08012.007620/97-49

Plaintiff: ABRASPE – Brazilian Association of Health Work of Companies

Defendant: UNIMED Campinas and Federation of Medical Association of the State of São Paulo (FISP)

Summary: Administrative Proceeding. Market for the render of services by means of health plans and insurance. Exclusivity clause. Violation of item I, II and IV of article 20 c/c items IV and V of article 21 of Law 8,884/94.

Fine: R\$ 63.846,00 according to item III of art. 23 of Law 8,884/94 and daily fine of R\$ 6.384,00 in case defendant continue the anti-competitive practice

- Administrative Proceeding n. 08000.0015515/97-02

Plaintiff: Committee for the Integration of the Health Assistance Association

Defendant: Labor Union of Physicians of the state of Mato Grosso do Sul, Medical Association of Mato Grosso do sul and Regional Council of Medicine of Mato Grosso do Sul

Summary: Administrative Proceeding. Accusation of cartel and creation of barriers to the entry of newcomers to the market. Price fixation by competitors.

Fine: Payment of a daily fine in the amount of R\$ 10.640,00 according to the text of article 25 of law 8,884/94.