

Unclassified

English - Or. English

14 May 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 2 on Competition and Regulation

Competition and Regulation in Professional Services – Note by Brazil

10 June 2024

This document reproduces a written contribution from Brazil submitted for Item 8 of the 77th meeting of Working Party 2 on 10 June 2024.

More documents related to this discussion can be found at
www.oecd.org/competition/competition-and-regulation-in-professional-services.htm

Federica MAIORANO
Federica.Maiorano@oecd.org

JT03543578

*Brazil*¹

1. Competition Defence and Regulation of Professional Services in Brazil

1. In Brazil, the right to free enterprise also applies to professional services in any kind of economic activity. That is, people can conduct any professional activity, except when the law provides specific requirements for it (Article 170, sole paragraph of the Brazilian Federal Constitution).

2. A profession is regulated when the law defines its attributions, duties, criteria for professional qualification, and expectation of monitoring the professional services. Usually, the regulation of professions in the public sphere is supported by arguments of ethical control and quality promotion, especially in services in which the consumer lacks the ability to properly evaluate the service. The regulation is used by organisations that defend professions as a platform to reach higher socioeconomic status for the professionals they represent.

3. The Brazilian organisations for the defence of professional categories are classified as: unions, professional councils, and common associations. Unions are associations with special powers to represent professionals, especially in collective bargaining for working conditions, acting under the authorisation of the Brazilian Ministry of Labour. The professional councils are usually autonomous agencies, legal persons of public law created by law to promote and regulate the quality of the services provided, including ethical requirements, in activities that entail special asymmetric information. In general, the registration in these agencies is a requirement to provide certain services (such as legal or medical ones), even if there are areas in which their effectivity might be low. Associations originate from the right to associate and unite professionals engaged in defending their common interests, with no involvement of other powers.

4. The associative nature of these organisations does not include the profit objective and, since they are not businesses, when under antitrust scrutiny, they declare not to be subject to economic regulations. However, these arguments are not supported by the case law of the Brazilian antitrust authority, the Administrative Council for Economic Defense (CADE). According to the Article 31 of the Brazilian Competition Defence Law no. 12529/2011, the antitrust law applies to “individuals and legal persons governed by public and private law, or associations of entities or individuals, whether de facto or de jure, even if temporarily established, incorporated or not, regardless of operating under a legal monopoly regime.”

5. Regardless of their format or public duties, professional organisations tend to have the professional appreciation and improvement of the work conditions of the category they represent as a common goal. This objective can encourage them to come into conflict with the Brazilian Competition Defence Law because, eventually, the protection of the working conditions and the professionals’ income, especially the incumbents, are likely to create entry barriers with harmful effects in the supply of services in the market. When ill-founded, even the regulation of certain professions that do not present information

¹ This document was written by Alden Caribé de Sousa, Head of Antitrust Analysis Unit, CADE. It was translated from Portuguese into English by Karine Neumann Gonçalves and Nathalia Oliveira Silva, in-house translators at the International Unit of CADE.

asymmetry to the end consumers can be defined as harmful to competition. When the entry barriers are established by law, they have antitrust immunity. That is, CADE cannot challenge legislative measures because the Brazilian Competition Defence Law is a statutory law. However, they can undergo some analyses of regulatory impact promoted by regulatory agencies of competition defence or that foster competition.

6. On the other hand, regulations issued by organisations are subject to CADE's control. The following cases are some examples of these practices.

2. Anticompetitive Conducts in the Service Markets of Regulated Professions

2.1. Fee Schedules of Real Estate Brokerage Services and Influence on the Adoption of Exclusivity Agreements

7. According to the Brazilian Law no. 6530/1978, a real estate broker is a professional that is responsible for intermediating the sale, purchase, exchange, and rental of real estate, in addition to being able to opine on real estate negotiations. The professional category has a federal structure for supervision and scrutiny. The federal council issues general rules and the state councils register the professionals in their territorial bases.

8. In 2015, CADE launched an investigation to assess the competition effects of two practices carried out by the federal council, 22 state councils, and 10 unions of real estate brokers, as follows: (1) imposition of minimum fees established by unions and ratified by the state councils and (2) imposition of exclusivity clauses to clients (Case no. 08700.004974/2015-71). These conducts were documented in charts and the recommendations found on the website of the defendants. In some cases, even documents of disciplinary proceedings for non-compliance with the recommendations were found, indicating that there was more than a simple influence on the adoption of concerted practices. CADE's investigative bodies argued that some measures are likely to reduce transactions in the market. Imposing minimum fees increases costs and discourages transactions with real estate. The imposition of an exclusivity clause that prioritises the interest of a specific real estate broker over real estate transactions discourages competition and transactions of other professionals of the category.

9. Given the anticompetitive potential, the investigation was suspended with the signature of a Cease and Desist Agreement in which the parties agreed to cease the conduct and make financial contributions. However, 10 unions and the council of real estate brokers of the state of Mato Grosso do Sul did not comply with the agreement. As a result, in 2023 they were fined BRL 825 thousand.

2.2. Excessive Fees for New Providers of Port Labour

10. The service of longshoreman, a professional who transports cargo in vessels and terminals, is provided only by companies associated with organizations called *Pool of Port Workers* (OGMOs) in Brazilian public ports. The longshoremen are linked to the companies that provide labour and the OGMOs bring these companies together.

11. On several occasions, CADE sanctioned excessive fees for the entry of new companies in the market of port labour. Such admission fees, which are a financial obligation and a condition to associate, often had their value established on the previous costs of the incumbents or were a strategy used to create entry barriers in the market. Therefore, CADE sanctioned the conducts (see, for example, the proceedings no. 08700.008751/2015-83, 08700.008897/2015-29, and 08700.005326/2013-70).

2.3. Medical Fee-For-Service

12. CADE has had a long experience in adjudicating practices related to the adoption of price fixing agreements in medical fee-for-services by professionals, medical clinics, and hospitals. According to them, such fees aim to value the medical profession, which would not have social recognition if the minimum fees per procedure were not paid. They were used especially in the market of private health insurance services, and, for a long time, the medical service providers used these fees as leverage to negotiate with health insurance companies. According to a 2021 survey, 81 defendants were found guilty of antitrust practices in the market of medical services. Also, according to the study, there is a higher tendency for the adoption of standard fees by hospitals, clinics, and unions than by individual professionals².

2.4. Practices with Concluded Investigations and Pending Trials

13. Regarding practices of organisations of regulated professions that underwent investigations and are pending a final decision by the Tribunal of CADE, there are two distinct groups that are worth mentioning: (1) fees for advocacy services; (2) refusal to register professionals that graduated in distance learning courses, as well as threats of disciplinary actions against professionals who teach those courses.

14. The first case seems to be like many other proceedings handled by CADE: by recommending minimum fees according to the service, the Brazilian Bar Association (OAB) would influence the adoption of concerted practices among the professionals registered (Administrative Proceeding no. 08012.006641/2005-63). However, the Brazilian Bar Association states that the federal law requires establishing fees to pay the wages of court-appointed attorneys.

15. The second group of cases is related to the educational development of some newcomers in the market. Following a global trend in education, the Brazilian Ministry of Education allows accreditation for distance learning in higher education. Most of the content available for the students and their exams are online. The distance learning courses cover several fields and the organisations that represent professionals, which are usually led by agents that have been graduated for a longer period, have shown they are opposed to licensing the former students from those courses.

16. Thus, the professional councils either edited the regulations to reject the registration of former students from those courses, or opened a disciplinary procedure against professors who gave lectures on online classes. Some measures could reduce the labour supply for regulated professions, so they were challenged by the Office of the Superintendent General at CADE in the Tribunal of the agency. Some Brazilian Councils, such as the Dental, Veterinary, Pharmacy, and Architecture and Urban Planning Councils have all been subject matter of administrative proceedings. However, the Tribunal has not issued a final decision on the administrative proceedings.

² https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/Caderno-Saude-Suplementar_Conduitas_Atualizado-VFinal.pdf

3. Review of Current Regulations

17. Finally, it is important to highlight that there are 80 regulated professions in Brazil, and at least 17 of them were sanctioned between 2000 and 2024. There are few cost-benefit analyses regarding socioeconomic conditions, which are created after editing those regulations. CADE is one of the agencies that carried out some of those scarce analyses. There were studies on the maritime pilot and port labour markets — this one was made with the OECD during the analysis of the regulation of port services — and auctioneer markets.

3.1. 3.1. Review of the Regulation of Piloting

18. Maritime pilots are responsible for piloting vessels in areas with geographical features that hinder a safe navigation. Usually, those manoeuvres happen in the port terminal areas and the approach phase.

19. In 2022, the OECD and CADE published an in-depth competition assessment of the legislation in force for the sector in Brazil³. They recommended a regulatory agreement, a reassessment of some requirements that lacked adhesion to the goals of public policies, and that resulted in supply and competition restrictions:

- maritime pilots must be Brazilians;
- lack of a maximum number of professionals for each piloting zone;
- cancellation of the single rotation shift, resulting in a division of the current demand, instead of a dispute for it, creating artificial monopolies;
- if the rotating schedule is maintained, a price regulation is defined by independent regulators;
- having a new responsible authority and more accessible rules to issue certificates, and exempting the need of piloting for commanders who could prove they have enough technical capacity.

20. On 15 January 2024, the Law 14813/2024 was published, making some changes in the service regulation. However, the Brazilian Port Authority remains responsible for the service regulation. Thus, there was no transfer to the Brazilian Agency for Waterway Transportation (ANTAQ), as originally intended.

21. The regulatory body is linked to the Brazilian Marine Corps, and it can fix prices for up to 12 months, in case an abuse of economic power is proved, or if a gap in the value of maritime port services is identified.

22. The issuance of an exempt certificate for procurement of maritime port services, which is still carried out by the Port Authority, is also possible for Brazilian pilots from ships carrying a Brazilian flag (up to 100 meters in length) and a crew comprised of, at least, 2/3 of Brazilians. The client is not exempt of paying the wages owed to the local maritime pilots for a permanent service availability, except for small vessels.

³ https://www.oecd-ilibrary.org/sites/d1694e46-en/1/3/3/index.html?itemId=/content/publication/d1694e46-en&_csp_=120940c4376c28994d68acc4c4f24172&itemIGO=oced&itemContent Type=book

23. The work distribution with a single rotation shift established by the Port Authority has been maintained.

3.2. Review of the Regulation of Labour Supply for Port Services

24. In addition to the administrative proceedings to punish the OGMO, there was a careful assessment of the market for cargo loading and unloading of vessels in Brazilian port terminals, which was made with OECD in 2022, due to the regulatory impact assessment that could adopt a more friendly competition⁴.

25. As required by law, the OGMOs hold a monopoly of qualified labour to provide services in public ports. There are 30 of those organisations across Brazil. The OECD recommended the elimination of this monopoly to provide freedom of labour hire, similarly to what happens in other countries or even in private terminals operating in Brazil.

26. They also pointed out that there are rules for rotation shifts of port workers and strict rules regarding the number of workers needed to perform the activities of stock items. The workers' training management would be exclusively led by the OGMOs. Those rules would give less flexibility and adaptability to the port workers regarding the needs of maritime carriers, resulting in resource waste and low competition.

3.3. Review of Regulations for Auctioneers

27. The occupation of auctioneer is allotted and supervised by law in Brazil since 1932. The regulation for auctioneers can be considered anachronistic, as it is related to a previous time, and it has suffered a few changes since that period.

28. The auctioneer is responsible for the disposal of goods to attribute credits in public auctions or reverse auctions, as requested by their owners or under a court order. The professional develops an activity taken under personal responsibility, so the possibility of the professional organisation turning into a business is questionable.

29. In the Administrative Enquiry no. 08700.002582/2020-35, the Department of Economic Studies of CADE states that it is necessary to have unequivocal legal provisions to allow business to perform auction services. There was no prejudice to the customers of this service: "This measure would neither result in any warranty losses to the principal contracting parties of the auction services, nor to the buyers of goods in auctions. Firstly, we are neither suggesting the end of the auctioneer as a specialised professional, nor interfering with the elements required for the regular registration of this occupation. Secondly, companies that are legally registered can offer guarantees that are similar or better than the ones provided by current auctioneers".

30. In addition, there is potential growth of the supply, since the companies comprise joining forces and eliminating the risks that come with the limitations of individual's professional activities:

"The potential investment growth due to the expansion of service provision, as well as more quality and innovation in the services provided, is another positive effect that results from free competition in the auction market. The companies are more

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https://www.oecd-ilibrary.org/sites/d1694e46-en/1/3/3/index.html?itemId=/content/publication/d1694e46-en&_csp_=120940c4376c28994d68acc4c4f24172&itemIGO=oecd&itemContentType=book

qualified to attract investors to their activities, either for the merging companies with several investors that provide capital contribution in their establishment, or for the attraction of investors in the capital market (investment funds, opening of capital in the stock market, etc.).

Therefore, there are more opportunities of investment in logistics and infrastructure, as well as advertising the auctions. The increase of online auctions is a point that should be highlighted. Services based on the digital economy are more likely to introduce innovations and demand more investment in information technology and communications, so they need to have scale gains to enable such investments economically.”

31. Other points regarding mobility and freedom of choice of the agents suggested a regulatory review.
32. According to the Brazilian law, there is a restricted selection of auctioneers to in-person auctions, since those professionals need to be registered in the federative unit where the good in auction is located. However, in case of online auctions, this is not required, so the principal contracting party is free to select the auctioneer. The Department of Economic Studies of CADE (DEE) states that the contracting party is free to select an auction service provider, regardless of where the good is located.
33. Such suggestions are considered in competition advocacy and those convergent changes require normative innovation.

4. Final Considerations

34. In conclusion, this contribution summarised initiatives that repress anticompetitive practices and competition advocacy initiatives from Brazil to foster competition in regulated professional markets. There were several sectors affected, including medical services and port work labour. Although there were more cases of repressive control against anticompetitive conducts, there is an increase in the assessments of regulations.