

Fixing of prices/fees by professional bodies
Under the competition act 2010

A. Definition of “Professional Bodies”

1. There is no legal definition of “professional bodies” in Malaysia. Black’s Law Dictionary defines a “professional” as “*a person who belongs to a learned profession or whose occupation requires a high level of training and proficiency.*” **“Professions” (also referred to as “learned professions”, “liberal professions” or “professional services”) typically has 3 main characteristics:**
 - (a) **Possession and use of expert and specialized knowledge:** The deliverable for a professional service provider is the customized solution to unique sets of factual circumstances by applying specialized expertise.
 - (b) **Strict control of entry into profession:** Professions often have specialized requirements in education, training and accreditation before appropriate licensing and practice qualifications are achieved.
 - (c) **Existence of a professional code or conduct of ethics:** Professions are often highly regulated sectors having code of ethics or practice standards. The profession may be given delegated legal authority to create and enforce such regulations.
2. Traditionally, there are 3 learned professions: law, medicine and religious ministry. However, in modern times, this scope of “professions” has expanded to include other occupations. There is no hard and fast rule on the scope and classification of professions. **Ultimately, for the purposes of Government policy, the scope and classification of “professions” or “professionals”**

depend heavily on the context in which such classification is made, i.e. the scope, content and objectives of the policy in question. Thus, the definition and classification of “profession”/ “learned profession”/ “professional” / “learned profession” differ from one field to another, depending on policy considerations. Examples of such classification are the WTO Services Sectoral Classification List (which adheres more closely to the 3 characteristics of professions) and the Malaysia Standard Classification of Occupations 2013 (which has a wider scope of “professions”).

B. Practice of Price-Fixing by Bodies/Associations in the Services Sectors Malaysia

3. Research was carried out on 131 bodies/ associations that are grouped into 34 sectors. The grouping of these sectors is guided by the relevant law pertaining to the sectors (where available) and the WTO Services Sectoral Classification. The 34 sectors studied are as follows:

- (a) Architects
- (b) Engineers
- (c) Quantity Surveyors
- (d) Land Surveyors
- (e) Valuers, Appraisers and Estate Agents
- (f) Town Planners
- (g) Accountants
- (h) Legal Practitioners
- (i) Company Secretaries
- (j) Medical Practitioners
- (k) Dental Practitioners
- (l) Optometrists
- (m) Pharmacists

- (n) Allied Health Professionals
- (o) Midwives and Nurses
- (p) Chemists
- (q) Scientists
- (r) Veterinary Surgeons
- (s) Counselors
- (t) Alternative Dispute Resolution (ADR) – Arbitrators
- (u) Alternative Dispute Resolution (ADR) – Mediators and
- (v) Miscellaneous:
 - (i) Landscape Architects;
 - (ii) Social Workers;
 - (iii) Logistic and Transport Executives;
 - (iv) Material Scientists/Specialists;
 - (v) Public Relation Executives;
 - (vi) Intellectual Property Practitioners;
 - (vii) Environment Consultants;
 - (viii) Investors Relations Executives;
 - (ix) Life Insurance Advisers and Financial Planners/Practitioners;
 - (x) Actuaries;
 - (xi) Agriculture Specialists;
 - (xii) Forestry Specialists;
 - (xiii) Plantation Managers; and
 - (xiv) Food Analysts.

4. **Finding No. 1 - The following 10 sectors are found to be governed by respective bodies/associations that are empowered by legislation to regulate such sector and scales of fees are established for their members.**

SECTOR / GOVERNING BODY	GENERAL POWER TO REGULATE	SPECIFIC POWER TO FIX SCALE OF FEES	SCALE OF FEES
1. Architects:¹ Board of Architects Malaysia	X S35 of the Architects Act 1967	X S4(1)(d) & (dd) of the Architects Act 1967	Architect (Scale of Minimum Fees) Rules 2010 [P.U.(A) 53/2010]
2. Engineers:² Board of Engineering Malaysia	X S4 of the Registrations of Engineers Act 1967	X S4(1)(d) of the Registrations of Engineers Act 1967	<ul style="list-style-type: none"> ▪ Notification of Scale of Fees [P.U.(B) 548/1998] ▪ Notification of Scale of Fees for Housing Development [P.U.(B) 288/1997]
3. Quantity Surveyors:³ Board of Quantity Surveyors Malaysia	X S26 of the Quantity Surveyors Act 1967	X S 4(d) of the Quantity Surveyors Act 1967	<ul style="list-style-type: none"> ▪ <u>For Government projects:</u> Scale of Fees For Consulting Quantity Surveyor (Revised 2004) issued by the Ministry of Finance, to be read together with the Notification made under the Registration of Quantity Surveyors Act 1967 [P.U.(B) 510/1986].

¹ In Malaysia, there are 1,721 graduate architects, 1,844 professional architects, 175 building draughtsmen and 507 interior designers:

http://vps.lam.gov.my/lam_ims_member/index.php?module=func&op=dispList&dispCode=8&indexStart=0.

² There are 10,932 professional engineers, 69,553 graduate engineers and 24 temporary engineers in Malaysia. The sector is made up of 928 sole proprietors, 941 body corporates, 193 partnerships, 30 accredited checkers and 19 multidisciplinary corporations: <http://www.bem.org.my/v3/index.html>.

³ There are 978 registered quantity surveyors:

http://bqsm.gov.my/index.php?option=com_wrapper&view=wrapper&Itemid=647&lang=en.

SECTOR / GOVERNING BODY	GENERAL POWER TO REGULATE	SPECIFIC POWER TO FIX SCALE OF FEES	SCALE OF FEES
			<ul style="list-style-type: none"> For non-Government projects: Notification made under the Registration of Quantity Surveyors Act 1967 [P.U.(B) 510/1986].
4.Land Surveyors:⁴ (a) The Land Surveyors Board (Peninsular Malaysia & Labuan)	X S21(1) of the Licensed Land Surveyors Act 1958		Regulation 26(1) and 13 th Schedule of the Licensed Land Surveyors Regulations 2011 [P.U.(A) 331]
(b) Sabah Surveyors Board	X S19(1) of the Surveyors Ordinance 1960 [No. 22 of 1960]		The 2nd Schedule of the Surveyors (Registration and Administration) Regulations 1989.
(c) Land Surveyors Board, Sarawak	X S31(1) of the Land Surveyors Ordinance 2001 [Chapter 40]	X S31(2) of the Land Surveyors Ordinance 2001 [Chapter 40]	Rule 36(1) and the 1st Schedule of the Land Surveyors (Conduct of Cadastral Land Surveys) Rules 2003.
5.Valuers, Appraisers and Estate Agents:⁵ Board of Valuers, Appraisers and Estate Agents	X S32 of the Valuers, Appraisers and Estate Agents Act 1981		Rule 48(1) and 7th Schedule of the Valuers, Appraisers and Estate Agents Rules 1986 [P.U.(A) 64/86].

⁴As at 2008, there were 436 land surveyors in Malaysia: http://www.kpwkm.gov.my/documents/10156/190833/17.jad2.6_bi.pdf.

⁵ There are 750 registered valuers, 17 registered appraisers and 1,710 registered estate agents in Malaysia: <http://www.lppeh.gov.my/role.php>.

SECTOR / GOVERNING BODY	GENERAL POWER TO REGULATE	SPECIFIC POWER TO FIX SCALE OF FEES	SCALE OF FEES
6. Town Planners: Board of Town Planners Malaysia	X S8 of the Town Planners Act 1995 [Act 538]	X S8(c) of the Town Planners Act 1995 [Act 538]	Scale of Professional Fees and General Conditions of Engagement 2005
7. Accountants:⁶ Malaysia Institute of Accountants	X S10(a) of the Accountants Act 1967		<ul style="list-style-type: none"> ▪ By-Laws (On Professional Ethics, Conduct and Practice) of the Malaysian Institute of Accountants ▪ The Recommended Practice Guide 7 (Revised): A Guide to Charging for Professional Assurance Services (Circular MF/2010) – non-binding benchmark for professional accountants in public practice services.
8. Legal Practitioners: (a) The Malaysian Bar ⁷	X S6 of the Legal Profession Act 1976	X S113(3) of the Legal Profession Act 1976	Solicitors' Remuneration Order [P.U.(A) 520/2005]
(b) Chief Judge of Sabah & Sarawak + Sabah Law Association	X	X Para.17(c) of the Advocates Ordinance (Sabah Cap. 2)	Advocates' Remuneration Rules 1988 (G.N.S 17 of 1988)
(c) Chief Judge of Sabah & Sarawak	X	X S17(c) of the	Advocates' Remuneration Rules 1988 [Swk. L.N.(F) 72]

⁶ There are 29,652 accountants in Malaysia: <http://www.mia.org.my/new/about.asp>.

⁷ According to the Malaysian Bar website, it has 15,012 members: http://www.malaysianbar.org.my/legal_directory_statistics.html.

SECTOR / GOVERNING BODY	GENERAL POWER TO REGULATE	SPECIFIC POWER TO FIX SCALE OF FEES	SCALE OF FEES
+ Advocates Association of Sarawak		Advocates Ordinance Sarawak 1958 (Sarawak Cap.110)	
9. Medical Practitioners⁸ Malaysian Medical council	X S36(1) of the Medical Act 1971		For medical practitioners in the private healthcare facilities and services, the scale of fees are made under the Private Healthcare Facilities and Services Act 1998 [Act 586]: <ul style="list-style-type: none"> ▪ Private Healthcare Facilities and Services (Private Medical Clinics or Private Dental Clinics) Regulations 2006 [P.U.(A) 137/2006] ▪ Private Healthcare Facilities and Services (Private Hospitals & Other Private Healthcare Facilities) Regulations 2006 [P.U.(A) 138/2006].
10. Dental Practitioners:⁹ Malaysian Dental Council	X S43(1) of the Dental Act 1971		For dental practitioners in the private healthcare facilities and services, the scale of fees are made under the Private Healthcare Facilities and Services Act 1998 [Act 586]: <ul style="list-style-type: none"> ▪ Private Healthcare Facilities and Services (Private Medical Clinics or Private Dental Clinics) Regulations 2006 [P.U.(A) 137/2006]

⁸ As at 2010, there were 32,979 medical practitioners in Malaysia: <http://www.borneopost.com/2011/06/03/more-than-32900-doctors-serving-in-malaysia/>.

⁹ As at December 2012, there were 4,289 active dental practitioners in Malaysia: <http://www.thestar.com.my/news/story/asp?file=/2012/4/5/nation/11051550&sec=nation>.

SECTOR / GOVERNING BODY	GENERAL POWER TO REGULATE	SPECIFIC POWER TO FIX SCALE OF FEES	SCALE OF FEES
			<ul style="list-style-type: none"> Private Healthcare Facilities and Services (Private Hospitals & Other Private Healthcare Facilities) Regulations 2006 [P.U.(A) 138/2006].

5. **Finding No. 2 – There are 3 sectors in which the governing authorities are empowered by a specific provision to fix scales of fees but have yet to do so:**

SECTOR/ GOVERNING BODY	SPECIFIC POWER TO FIX FEES/PRICES	SCALE OF FEES
1. Midwives and Nurses:¹⁰ (a) The Malaysian Nursing Board	X S 5(1)(g) of the Nurses Act 1950 – power to fix fees lies in the Minister through regulations	None
(b) The Malaysians Midwives Board	X S5(1)(f) of the Midwives Act 1966	None
2. Counsellors:¹¹ Malaysian Board of Counsellors	X S 12(h) of the Counsellors Act 1998	None
3. Food Analysts: Malaysian Food Analysts Council	X S5(1)(c) of the Food Analysts Act 2011	None

¹⁰ There are 80,000 nurses in Malaysia as at 2011: <http://www.theborneopost.com/2011/12/01/staff-shortage-makes-nursing-jobs-harder/>.

¹¹ There are 1,604 registered counselors as at 2009: <http://www.kpwkm.gov.my/web/lkm/direktori-lembaga>.

6. **Finding No. 3 – There are 5 sectors in which the governing bodies are given the general power to regulate the sector but no scales of fees have been fixed, i.e.:**

SECTOR / GOVERNING BODY	GENERAL POWER TO REGULATE THE SECTOR	SCALE OF FEES
1. Optometrists: ¹² Malaysian Optical Council	X S42(1) of the Optical Act 1971	None
2. Pharmacists: ¹³ Pharmacy Board of Malaysia	X S22(1)(j) of the Registration of Pharmacists Act 1951	None
3. Chemists: ¹⁴ Malaysian Institute of Chemistry	X S8 of the Chemists Act 1975	None
4. Veterinary Surgeons: ¹⁵ Malaysian Veterinary Council	X S39(1) of the Veterinary Surgeons Act 1974	None
5. Medical Assistants: Medical Assistants (Registration) Board Malaysia	X S22 of the Medical Assistants (Registration) Act 1977	None

¹² There were 717 registered optometrists and 2,587 registered opticians as at June 2009 in Malaysia: <http://blogmoh.moh.gov.my/the-world-council-of-optometry-and-association-of-malaysian-optometrists/>.

¹³ There were 10,250 pharmacists registered in Malaysia as at February 2013: <http://www.nst.com.my/nation/general/ministry-relaxes-pharmacists-training-scope-1.224323>.

¹⁴ There were 2,852 chemists in Malaysia as at 1 January 2011: http://www.ikm.org.my/index.php?option=com_content&view=article&id=50&Itemid=54.

¹⁵ There were 1,604 veterinary surgeons in Malaysia as at 2009: http://www.kpwkm.gov.my/documents/10156/190833/17.iad2.6_bi.pdf.

7. **Finding No. 4 – The following bodies/associations for 5 sectors prescribe fees/prices for their members even though they are not empowered by any law:**

SECTOR / GOVERNING BODY	LEGAL AUTHORITY TO FIX PRICES/ FEES	SCALE OF FEES
1. Company Secretaries The Malaysian Institute of Chartered Secretaries and Administrators (MAICSA)	None	Yes
2. Arbitrators (a) Malaysian Institute of Arbitrators (MIARB)	None	Rule 28.1 of the MIARB Rules 2000 and MIARB Scale of Arbitrator's Fees
(b) Malaysian Institute of Architects (PAM)	None	PAM Arbitration Rules 2010
3. Mediators (a) Malaysian Institute of Arbitrators (MIARB)	None	MIARB Mediation Rules 2003
(b) Malaysian Mediation Centre (MMC)	None	Malaysian Mediation Centre's rate of mediator's fees/
(c) Malaysian Institute of Architects (PAM)	None	PAM Mediation Rules
4. Landscape Architects Institute of Landscape Architects Malaysia (ILAM)	None	Institute of Landscape Architects Malaysia Scale of Fees
5. Dental Practitioners Malaysian Dental Association (MDA)	None	Malaysian Dental Association Recommended Scale of Fees

C. Price-Fixing by Professional Bodies/Associations under the Competition Act 2010 [Act 712]

8. The Competition Act 2010 [Act 712] applies to all commercial activities in Malaysia, including all professional and non-professional services. Thus, the prohibition of (horizontal) price-fixing agreements under Section 4 of the Competition Act 2010 [Act 712] applies to professional services as well, regardless of whether the price is fixed by a body/association. There are only 2 exceptions to the prohibition of price-fixing:

- (a) Where it falls under the exclusions under Section 13(1) and paragraph (a) of the Second Schedule of the Competition Act 2010 [Act 712]; or
- (b) Where an exemption is granted based on Section 5 of the Competition Act 2010 [Act 712].

9. **With regard to exclusions under Section 13 and paragraph (a) of the Second Schedule of the Competition Act 2010 [Act 712]**, a price-fixing agreement/conduct that is engaged in order to comply with a legislative requirement is excluded from the horizontal agreement prohibition under Section 4 of the Competition Act 2010 [Act 712].

- (a) The ordinary meaning of the term “legislative requirement” refers to a stipulation laid down in any written law that is in force in Malaysia that could be in any form or instrument (including statutes, subsidiary legislation and other legislative forms or instruments). Paragraph (a) of the Second Schedule of the Competition Act 2010 [Act 712] should also be interpreted in light of the object and purpose of the Competition Act 2010 [Act 712];

(b) Based on the findings of this study on the 131 bodies/associations in the services sectors, the Malaysian practice in regulating prices/fees appears in several modes, i.e.:

(i) The scale of fees for a sector regulated by law is contained in the statute itself, or any other legal instrument made under any statute or other lawful authority and having legislative effect; and

(ii) A governing body that has regulatory authority over a sector establishes a scale of fees for that sector (either through its specific power to fix prices/fees for that sector, or its general powers to regulate the said sector).

(iii) In the event that a body/association in the services sectors establishes a scale of fees without being empowered by any lawful authority to do so, such conduct of price-fixing is prohibited under the Competition Act 2010 [Act 712] and does not fall within the exclusion under Paragraph (a) of the Second Schedule of the Competition Act 2010 [Act 712].

10. **With regard to an exemption granted based on Section 5 of the Competition Act 2010 [Act 712]**, the enterprise applying for such exemption must prove that:

(a) There are significant identifiable technological, efficiency or social benefits directly arising from the agreement;

(b) The benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;

- (c) The detrimental effect of the agreement on competition is proportionate to the benefits provided; and
- (d) The agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

D. Comparative Jurisdiction Study

11. The table below summarizes the position taken by various competition jurisdictions on anti-competitive professional regulations, including price-fixing agreement/conduct by professional bodies.

JURISDICTION	ANTI-COMPETITIVE PROFESSIONAL REGULATION MADE BY THE STATE/DELEGATED AUTHORITY	ANTI-COMPETITIVE PROFESSIONAL REGULATION MADE WITHOUT LAWFUL AUTHORITY
United States	<p>Allowed in very limited circumstances, i.e.:</p> <ul style="list-style-type: none"> ▪ The trade-restraining regulation must be clearly articulated and affirmatively expressed as State policy; and ▪ The policy must be actively supervised by the State itself. 	<p>Generally prohibited under the Sherman Act.</p> <p>However, the “public service” aspect and other features of the professions should be considered in deciding whether a particular practice, which restrains trade/commerce, could be allowed.</p>
European Union	<p>Allowed in very limited circumstances, i.e.:</p> <ul style="list-style-type: none"> ▪ The professional regulation is suitable for securing the attainment of the objectives pursued (e.g.: consumer protection, proper administration of justice); and ▪ The professional regulation does not go beyond what is 	<p>Prohibited under the EU Treaty.</p> <p>EU made a policy decision to subject professional bodies to the application of competition laws (thus disallowing the possibility of professional regulations being exempted from the general prohibition).</p>

JURISDICTION	ANTI-COMPETITIVE PROFESSIONAL REGULATION MADE BY THE STATE/DELEGATED AUTHORITY	ANTI-COMPETITIVE PROFESSIONAL REGULATION MADE WITHOUT LAWFUL AUTHORITY
	necessary in order to attain the objectives.	
United Kingdom	<p>Allowed, where the professional regulation/agreement is made in order to comply with a “legal requirement” and:</p> <ul style="list-style-type: none"> ▪ It is entered into because of formal directions issued by a sector regulator; or ▪ It is specifically required by legislation to disclose certain information to the public that would otherwise be considered competitively sensitive. 	Prohibited under the competition law.
Singapore	Allowed, where the professional regulation/agreement is made in order to comply with a “legal requirement” (i.e. any requirement imposed by or under any written law).	<p>Prohibited under the Competition Act.</p> <p>The Competition Act provides for block exemptions to agreements that contribute to improving production or distribution or promoting technical/economic progress. Such agreements must not:</p> <ul style="list-style-type: none"> ▪ Impose restrictions which are not indispensable to the attainment of the objectives; or ▪ Afford the possibility of eliminating competition in respect of substantial part of the goods or services in action.
Canada	Allowed. The regulated conduct is excluded from the general competition rules even where it is generally authorized by law through a general mandate to regulate a profession.	<p>Mandatory price-fixing is generally prohibited.</p> <p>However, the publication of non-binding/recommended fee guideline may be acceptable, if:</p> <ul style="list-style-type: none"> ▪ It is intended to be a

JURISDICTION	ANTI-COMPETITIVE PROFESSIONAL REGULATION MADE BY THE STATE/DELEGATED AUTHORITY	ANTI-COMPETITIVE PROFESSIONAL REGULATION MADE WITHOUT LAWFUL AUTHORITY
		<p>descriptive and objective source of pricing information to consumers and professionals; and</p> <ul style="list-style-type: none"> ▪ There is no intention or expectation for members to conform to the guideline.
<p>South Africa</p>	<p>Generally, it is prohibited. However, the Competition Act allows professional rules to be given a special exemption for governing bodies/association of specific professions:</p> <ul style="list-style-type: none"> (a) Accountants and Auditors; (b) Architects; (c) Engineers; (d) Estate Agents; (e) Attorneys and Advocates; (f) Natural Sciences; (g) Quantity Surveyors; (h) Surveyors; (i) Town and Regional Planners; (j) Valuers; (k) Medical; and (l) Any other professional association gazetted. 	<p>Prohibited under the competition law.</p>

E. Conclusion

12. Under Competition Act 2010 [Act 712], price-fixing made by the State (through legislation) or professional bodies specifically empowered by the legislation, would fall under the exclusion under Section 13 and paragraph (a) of the Second Schedule of the Competition Act 2010 [Act 712].

13. Other jurisdictions have adopted varying positions regarding professional regulations (including price-fixing) that are made by the State or professional bodies with legal governing authority. This is apparent from the table in paragraph 14 above. It is noted that the United States, the European Union and the United Kingdom take a strict position on this matter, allowing anti-competitive professional regulations by law or delegated legal authority only in limited circumstances. On the other hand, Canada takes a less rigid approach of allowing anti-competitive professional regulations, even when the professional body only has a general legal mandate to regulate such profession (without the specific power to fix prices/fees).
14. Competition Act 2010 [Act 712] prohibits price-fixing by professional bodies that do not have any lawful authority to do so. However, exemptions may be granted if the Competition Commission is satisfied that the elements in Section 5 (a) – (d) of the Competition Act 2010 [Act 712] are fulfilled. The examination must be done on a case-by-case basis. Factors that may be considered in assessing “technological, efficiency or social benefits” arising from the price-fixing agreement are interests of the consumers, interests of the members of the profession, Government policies, public interests and other historical, cultural, institutional and social factors.
15. It is noted that the strictest position on the prohibition of price-fixing by professional bodies is taken by the European Union. This development, however, took place within a long period of time after numerous consultations with the States, professional bodies, national regulatory authorities and other stakeholders, as well as in-depth analysis on the different professional services markets and practices in the European Union. The reform of legislation and regulations in the professional services sector is also implemented incrementally by individual EU Members, which includes carrying out analytical works on the specific professional services.

16. In general, most jurisdictions prohibit price-fixing by professional bodies that do not have any legal authority to do so. A mandatory scale of fees is often judged more strictly compared to a recommended fee guideline.