

A Competition Compliance Guide for Trade Associations and Chambers of Commerce

A Consultation Paper

Competition Committee
Board of Trade
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Consultation

The Competition Committee of the Board of Trade is conducting a consultation on its proposed Competition Compliance Guide for Trade Associations and Chambers of Commerce (attached).

We are keen to hear from everyone with an interest in fair trade and fair competition. Although you may respond in general terms to this proposed guide, we would particularly welcome your views on the specific questions highlighted in this consultation document (page 13).

When responding, please say whether you are responding as an individual, or representing the view of your organization. If you respond on behalf of your organization, please specify the name of our organization.

The consultant period begins from 18 December, 2006 and will run until 19 March, 2007.

We will collate responses and publish a formal response to the consultation exercise during the second quarter of 2007. This will set out our finalized version in the third quarter of 2007. The final version will be available on the BOT website, www.thaiechamber.com

The Committee would like to express its sincere thanks to all committee members, working group members, and professionals who participated in its preparation.

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1. Introduction

The Board of Trade is committed to help members of association and businesses to understand the benefits and responsibilities associated with the Thailand Trade Competition Act 1999 (TCA).

Although trade associations and chambers of commerce make some pro-competitive contributions to the Thai economy, the very fact that trade associations and chambers of commerce bring competitors together presents a risk that agreements will be made which may arise anti-competition concerns. Executive officers, board members and members of trade associations and chambers of commerce should exercise a great deal of care when carrying on certain activities so as to avoid any violation of the TCA.

The Competition Compliance Guide has been designed to provide guidance to the members of Board of Trade to minimize the risk of violation of TCA. It helps to create an environment of certainty by preventing any business, large or small, from gaining an unfair advantage over its competitors through misleading or anti-competitive behavior.

The Board of Trade encourages members to think of the TCA as an important management tool. Compliance with the TCA is a good business practice that can lead to success and profitability.

2. Objectives of the Competition Compliance Guide

The Competition Compliance Guide has five main objectives:

- Disseminate knowledge of what constitutes an illegal behavior
- It strives to prevent law breaking.
- Facilitates the early detection of violations, possible to reducing fines and minimizing claims for damages in lawsuits.
- Create culture of the need to obey the Competition Law.
- Stimulate good corporate governance.

This Competition Compliance Guide is specially designed to address key aspects of competition issues of trade associations/ chambers of commerce. It does not cover the corporate/ company level of competition analysis, such as vertical agreements, M&A, etc. This Competition Compliance Guide may be stand alone, or be part of an association's overall legal compliance strategy to assess and minimize risk. However it cannot give legal advice, and does not purport to do so. When a specific issue arises, legal advise should be obtained. Reference of this Guide cannot be used as a defense in any trade practices litigation.

The generic nature of this Compliance Guide means that it will not, by itself, constitute the optimum trade practices compliance education for your

association. They are recommended as the baseline for the development of an effective competition compliance program for particular associations. The BOT also recognizes that compliance program must be tailored to meet the specific needs of each association, given the nature of different businesses and industries.

3. Purpose of the Thai Trade Competition Act 1999

The chief purpose of the Thailand Trade Competition Act 1999 (TCA) is to protect and foster the efficient operation of the Thai free enterprise system by assuring the preservation of competition among business firms at all levels of trade. The TCA presents a framework for promoting free and fair trade and preventing unfair trade practices under competitive environment. The Act are primarily based on the theory that the consumer benefits by getting the best product at the lowest price through competition and that society's productive resources are best allocated and utilized by subjecting business firms to the rigors of a competitive market.

Thai firms desperately need to develop world-class competitiveness. To do this, trade associations and chambers of commerce must play a key role to promote competition policy and regulation of Thai government.

4. Penalties for Violation of the Thailand Trade Competition Act 1999 (TCA)

The consequences for violating the Thailand Trade Competition Act 1999 (TCA) can be severe. The involvement of an association/ chamber of commerce of undertakings in an infringement of TCA may result in financial penalties being imposed on the association/ chamber of commerce itself, its members, or both.

Pursuant to the TCA, the maximum penalty for an individual convicted of a violation of the law is a fine of baht 6 million and /or in a jail term of up to 3 years. In case of the repeated violation of the Act, the violator shall be liable to the double penalty.

5. Agreements and coordinated activities that eliminate, reduce or restrict competition

The TCA is designed to prevent contracts or other private agreements that "restrain trade." Competition analysis views some types of behavior, such as price fixing, as inherently bad and therefore per se illegal. However, in many

other circumstances TCA takes into account whether the behavior in question has some legitimate purpose that justifies the constraint that it may impose on competition. Good intentions alone are not sufficient, but conduct that in some respects restrains trade can nevertheless be legal if one balance it has the effect of promoting rather than suppressing competition. What follows is a brief overview of some of the key aspects of competition analysis to keep in mind in the association related activities.

5.1. Per se Competition Violations

Certain types of conduct are considered to be “per se” illegal under the Thai Trade Competition Act (TCA section 25 and 27). This means that the conduct is strictly illegal – there is no defense. Per se illegal conduct can result in criminal as well as civil sanctions. The most important of these per se illegal practices are discussed below. Absolutely no discussions that fall within these categories can be held at association’s function.

5.1.1. Price Fixing

Agreements among competitors on the price at which they will sell their products or services are called “price-fixing” (TCA section 27.1 & 25.1). Any agreement between or among competitors with the purpose of increasing or affecting the price of a product or service will violate the TCA.

Price fixing might include agreements among competitors on price ranges, pricing formulas, commission rates, the size of price spreads, discounting policies, kickback, rebates, credit terms, common list or dealer price, etc.

Agreement on costs (include labor, salary, equipment, overhead, etc) and other matters that necessarily have an impact on price may be considered as price fixing.

The mere discussion of these subjects at associations’ meeting may be interpreted as price fixing.

Note: Discussion about pricing strategy for foreign markets may not be covered by the TCA, but could violate competition law of other countries.

5.1.2. Bid - Rigging

”Bid rigging” is an area closely related to price fixing and is also per se illegal (TCA section 27.4). The objective of bid – rigging is to eliminate or reduce price competition, or to assure that, over time, each

competing bidder receives a “fair share” of total business awarded. Bid –rigging takes many forms, but bid –rigging conspiracies usually fall into one or more of the following categories:

Bid Suppression – One or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor’s bid will be accepted.

Complementary Bidding – Also known as “cover” or “courtesy” bidding. It occurs when some competitors agree to submit bids that either is too high to be accepted or contain special terms that will not be acceptable to the purchaser. The intent is to give appearance of genuine competitive bidding to conceal secretly inflated prices.

Bid Rotation - In bid rotation schemes, all conspirators submit bids but take turns being the low bidder.

Subcontracting - Subcontracting arrangements are often part of a bid-rigging scheme. Competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder.

Almost all forms of bid-rigging schemes have one thing in common: agreement among some or all of the bidders (competitors) which predetermines the winning bidders and limits or eliminates competition among the conspiring vendors.

5.1.3. Customer Allocations

Another per se illegal violation concerns any agreement to divide or allocate customers among competing entities (TCA section 27.5). It is illegal, whether based upon specific customers or classes of customers. For example, an agreement between competitors pursuant to which one competitor agrees not to pursue to A group of customers, if the second competitor agrees not to pursue B group of customers.

5.1.4. Geographic / Product Market Allocations

Agreement among competitors which divide or allocate business on the basis of Thailand geographic or product markets are per se unlawful. For example, agreements among firms in different regions of the country not to enter each other’s geographic territories are illegal, (section 27.5), as are agreements with competitors allocating certain products or investments vehicles among themselves. Discussions concerning plans to expand into or withdraw from certain geographic or product markets should be avoided.

Note: Discussion about dividing or allocating business in foreign markets may not be covered by the TCA, but could violate competition law of other countries

5.1.5. Group Boycotts

A group boycott exists when a group of competitors agrees to take some form of joint action to exclude someone from the market (TCA 29, 27.5 & 27.6), such as by agreeing to refuse to deal with another competitors, or with a supplier or customer. Group boycotts are per se illegal.

Members of association cannot use trade association as a tool to suppress competition by refusing to deal with non-members, or refusing to deal with those who deal with non-members. Accordingly, an association and its members must not enter into any agreements to refuse to deal with certain competitors, customers or suppliers.

Membership criteria must be carefully established with a view toward avoiding anti-competition problems. Assuming that the members of an association derive economic benefits from membership, the denial of membership to an applicant might constitute a restraint of trade if such a denial limits the ability of the applicant to complete effectively with members of the association. Likewise, an association cannot deny services to non-members if those services confer important competitive or economic advantages which would impair the ability of non-members to compete with members.

5.2. Conduct Subject to Rule of Reason analysis

The conduct discussed below is subject to a competition analysis under the “rule of reason.” This means that the conduct may or may not be permissible, depending on the circumstances. Legal counsel should be consulted if you think that any association related activity might fall within the areas described below, or if you are otherwise uncertain.

5.2.1. Standard Setting

Product standards development refers to the process of identifying and agreeing upon a specific set of criteria to which a particular type of product should conform. In many situations, product standard are developed by private industry and are often spearheaded by trade association.

Standard development may create competition problem where, for example, they preclude certain entities from competing in the sale of

that product, or features are added to a product for no reason other than to increase the price of the product. Care must be taken to ensure that any such standards can be supported by legitimate business justifications.

Associations may engage legally in setting product standards. Standardization can benefit consumers, but can also have a detrimental impact on competition. The benefit of the standard must outweigh any competitive harm that the standard might conflict. There must be a legitimate need for the standard and no anti-competitive purpose such as an intent to eliminate a competing product from the market. The processes by which standards are created must be fair and open enough that all points of view can be made known. Any inquiry to competition must be minimum necessary to accomplish the purpose of the standard.

It is not possible in a short space to specify all of the dimensions that must be considered in the area of product or services standards. Legal counsel should be consulted whenever standardization is undertaken.

5.2.2. Information Exchanges

Information concerning matter such as prices charged for services rendered, business plans, marketing plans, new product development, costs and profits, that is not already publicly available, and which is competitively sensitive, can raise competition questions.

While some types of information exchange, such as stock quotes and spreads, are clearly pro-competitive and raise no concerns, other types of information sharing could raise questions as to whether the exchange of information suggests an agreement to restrain trade. Some of the factors that are important to consider are whether the information is being collected by association or another third party and will be disseminated in such a way that the data providers are anonymous; whether the information is historical data or projected prices or costs, whether the data providers constitute a significant share of the market; and whether the data is already publicly available.

Associations may conduct certain economic surveys and exchange information regarding costs and how to accurately determine the cost of doing business. So long as the data are more than three months old, and are gathered from more than five anonymous members. Any survey that collects current data may create major anti-competition issues and must be reviewed by legal counsel prior to circulation.

5.2.3. Best Practices

It is not unusual for trade associations, particularly professional associations, to promulgate standards of conduct or code of

professional responsibility for members of associations. To the extent these standards are designed to protect the public from clearly unethical, fraudulent, unfair or deceptive practices, there are substantial business justifications to support the standard of conduct under the TCA.

Care must be taken, however, to ensure that standards of conduct, such as “Best Practice” standards, do not have the purpose or effect of reducing or eliminating competition in the pricing of products or services provided by associations’ members. Accordingly, a code of ethics or professional standards of conduct should seek to discourage practices that would have a clear detrimental effect on consumers.

5.2.4. Agreement to control production

Agreements among competitors to increase or restrict services or production levels are always problematic under the TCA section 27.7. & 27.8, which is considered illegal. The same is true of agreements among competitors to limit the quality of production, restrict the products or services sold to a particular customer, refrain from introducing new products and services or eliminating old ones, or accelerate the introduction or withdrawal of a product or service.

6. How to avoid violation of the competition law

The Board of Trade suggests the following guidelines in order to ensure against unintentional violations of the competition law:

6.1. General Operation Procedure

- 6.1.1. Issue a statement of the association’s intention to comply fully with the Thailand Trade Competition Act 1999 (TCA).
- 6.1.2. All board of directors of the association receive a copy of the Competition Compliance Guide which details what can and cannot be done.
- 6.1.3. The board updates members concerning competition problems periodically and if possible, formalized an association’s competition compliance program.
- 6.1.4. Association meeting are regularly scheduled, agenda is prepared for each meeting, and competition sensitive issues should be avoided. If necessary, legal counsel should be consulted.

6.1.5. The minutes of all board of directors' meeting should reflect the association's guideline of complying with the TCA.

6.2. Membership Policy

Associations should not:

6.2.1. exclude certain competitors from membership in the association when the applicant meets all bylaw requirements of the association.

6.2.2. restrict members from dealing with non-members

6.2.3. prevent non-members from obtaining access to information which, if denied would limit the ability of the applicant to complete effectively with members of the association.

6.3. Topics of discussion should be avoided in meeting of association and chamber of commerce:

6.3.1. Past, current or future price

6.3.2. What constitutes a "fair profit" level

6.3.3. Pricing policy and actual costs of individual companies

6.3.4. Possible increases or decreases in prices

6.3.5. Bidding prices for projects

6.3.6. Standardization or stabilization of prices

6.3.7. Collusive tendering (bid – rigging)

6.3.8. Standardization of credit and trade terms

6.3.9. Control of production

6.3.10. Control of Supplies

6.3.11. Division or allocation of markets or customers

6.3.12. Select customers to deal or refuse to deal with because of the above reasons

7. Conclusion

The above guidelines are not to be regarded as covering all competition issues that can arise for associations/ chambers of commerce. They are intended to alert the associations'/ chambers' board members, officers and members to some of the more common situations in which legal counsel should be consulted.

8. Consultation Questions

We are keen to hear from everyone with an interest in fair trade and fair competition. Although you may respond in general terms to this proposed guide, we would particularly welcome your views on the below specific questions:

1. Are the guidelines realistic and achievable? If not please suggest how they can be improved.
2. Are the guidelines sufficiently self-explanatory? If not please identify those areas which require clarification.
3. Are the guidelines comprehensive and clear enough to follow? If not please indicate how they can be improved.
4. Are there any additional guidelines you think should be added?
5. How relevant are the guidelines to individual industry sectors? Can they be easily modified for sector specific associations? If not please explain why? Please also give examples.
6. Are there any additional matters you consider that should be included in or deleted from this Competition Compliance Guide?

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