

GUIDE TO TRADE ASSOCIATIONS AND FREE COMPETITION

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Guide to trade associations and free competition

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Content / Index

1. Introduction.....	4
2. Trade union practices that generate risks of anti-competitive coordination between associates	8
2.1. Facilitating direct coordination between partners.....	8
2.2. Facilitating exchanges of information between associates.....	10
2.3. Formulating anti-competitive decisions or recommendations	13
3. Trade union practices that generate risks of exclusion from competition	17
3.1. Unjustifiably excluding certain competitors from joining or remaining in the association.	17
3.2. Unjustifiably denying or conditioning the provision of services to members and non-members.....	19
3.3. Promotion of technical standards	20
4. Recommendations.....	21
4.1. Recommendations to Associations.....	21
4.2. Recommendations to Associates.....	22
5. Contact the Authority.....	23

1. Introduction

1.1. Purpose

The purpose of the Guide is to promote the circulation of and compliance with the rules of free competition in the context of Trade Associations and to formulate recommendations so that associations, their management or representative bodies and their associates can detect and minimize the risks of incurring illegal actions, in particular, in the form of coordination, decisions or recommendations to limit competition between themselves or to harm their competitors.

This Guide recognizes the importance of associations in promoting efficiency in different sectors of the economy and in channeling the legitimate interests of their members (companies and professionals). However, it also recognizes that there are scenarios in which associations can act as platforms that facilitate or promote anti-competitive behavior, particularly cartels, to the detriment of consumers and users who purchase goods and services from their members.

In this sense, this Guide explains simply the usual ways in which associations can facilitate or participate in the commission of practices harmful to competition, as well as how they can reduce these risks and promote respect for the rules of free competition. In doing so, the Guide seeks to reinforce and contribute to the role of associations in channeling the legitimate interests of their members and promoting the free and competitive performance of the sectors in which they operate.

1.2. Importance of the Defense of Free Competition

Like most countries with market economies, Peru has as its central economic policy the promotion of sustainable development through open markets, competitive industries and systems of economic and social inclusion. These policies assume that free and deconcentrated markets can foster economic efficiency, promoting innovation and generating savings for citizens. To achieve this purpose, the State has implemented and continuously strengthens a set of mechanisms that facilitate trade, access to markets, innovation and the defense and promotion of competition.

In this context, INDECOPI is one of the main bodies in charge of promoting competitiveness, using procedures to secure intellectual property rights, facilitate transparency and suitability in consumer relations, eliminate barriers to access to markets that are illegal or irrational, and defend the competitive process against anti-competitive and unfair behaviors that unduly restrict it.

Concerning the protection of the competitive process, the Technical Secretariat of the Commission for the Defense of Free Competition of INDECOPI (from now on, the Technical Secretariat) is in charge of investigating and prosecuting anticompetitive behavior: anticompetitive agreements and abuse of the dominant position. For its part, the Commission for the Defense of Free Competition of INDECOPI (from now on,

the Commission) is the autonomous organ in charge of declaring the administrative responsibility of the infringing companies, imposing fines and dictating corrective measures. In general, the decisions of the Technical Secretariat and the Commission that put an end to the procedure can be reviewed in a second administrative instance by the INDECOPI Tribunal and, through a contentious process, by the Judicial Branch. The Commission also has prior evaluation powers for merger operations, limited to the electricity sector.

As a result of a growing interest in expanding the application of competition rules to the most critical sectors of the national economy, those related to products of the index basket, in the last few years, the Technical Secretariat has shown a strong emphasis on the prosecution of cartels in these sectors. Cartels, as is known, are agreements between competitors whose objective is to eliminate competition among them and replace it with coordination on the prices of their products, as well as on the quantities sold, the customers of each company and the quality of these products or the marketing areas, for instance¹.

Likewise, INDECOPI has promoted the use of the Leniency Program, an effective collaboration system aimed at maximizing the detection and elimination of infringements by encouraging the active and full collaboration of one or more participants in a cartel in exchange for incentives (discounts on fines applicable for their participation in such infringements)².

These efforts have made it possible, on the one hand, to strengthen INDECOPI's presence as a competition agency, not only at the local but also at the regional level, giving clear signals to the markets and discouraging the formation of new cartels. On the other hand, the elimination of cartels in various sectors has resulted in significant savings for consumers³.

1.3. Advantages deriving from respect for the rules of free competition

From a business perspective, antitrust rules play two particularly essential roles. On the one hand, they promote creation and efficiency, encouraging companies to improve their production processes and innovate in products and services, increasing

¹. In the last two years, the Commission has sanctioned cartels in sectors such as the distribution of pharmaceuticals and related products in pharmacy chains, distribution of bottled LPG, delivery of fuel in service stations and international maritime transport of vehicles, among others.

². INDECOPI recently reported on the success of the Clemency Program in cases involving the marketing of toilet paper and other tissue products, as well as in the international maritime transport of vehicles. It is worth mentioning that the Clemency Program Guide was awarded at the 2018 Antitrust Awards as one of the best Guides of 2017 worldwide.

³ Concerning the toilet paper cartel, INDECOPI calculated a potential saving for consumers between 2015 and 2018 of S/. 1144.40 million. Source: INDECOPI GEE-INDECOPI. https://www.indecopi.gob.pe/documents/20182/2748605/20181018_Documento+de+Trabajo_PH_dise%C3%B1ado.pdf

their chances of success in scenarios of growing competitiveness. On the other hand, the elimination of restrictions on competition allows new firms to access markets that they would otherwise not have been able to enter, as well as to prevent a dominant firm or a group of coordinated firms from using strategies that unduly limit their growth possibilities or expel them from the market.

In this way, respect for the rules of free competition should not be perceived as compliance with the regulation that may otherwise be highly demanding, but as a condition of participation in economic activity and an opportunity to improve the chances of success. Proof of this is that many companies are voluntarily and preventively adopting Compliance Programs, aimed at fostering an internal culture of respect for the rules of free competition, as well as detecting risks of non-compliance or correcting possible improper practices.

1.4. Free Competition and Associations

In various sectors, trade associations play a fundamental role in integrating companies and serving as a platform for discussion of common interests, allowing their members to channel those interests vis-à-vis other private sector actors, but above all to the public sector. In this way, trade associations play a significant role in informing the State and other actors about legitimate concerns and expectations, representing and guaranteeing such legitimate interests, mediating in the flow of information and even promoting research and the strengthening of the industries in which they operate.

However, due to their role as platforms for discussion and information exchange, associations are also frequently linked to the formation or facilitation of cartels. Indeed, within their regular activities (general meetings, roundtables, analysis of information and formulation of recommendations or binding policies for members), associations may be voluntarily or involuntarily used to coordinate, decide or facilitate the formation of agreements and other practices harmful to competition, becoming platforms aimed at eliminating competition among their participants or excluding or harming third-party competitors.

1.5. The scope of the Guide

This Guide applies to all forms of a trade association, understood as any organized interaction platform that associates independent companies that are linked by the commercial activity they carry out, the goods they produce or the sector to which they belong, among others.

For this Guide, associations may exist and operate irrespective of their name (e.g. "Society", "Guild", "Association", "Chamber", "Confederation"), the sector they represent (e.g. fishing, transport, manufacturing, retail, health), their geographical scope (e.g., provincial, regional, national), their internal organization, representativeness or legal personality (e.g. registered or informal association). Finally,

for this Guide, the meaning also includes professional associations and other platforms for interaction between independent professionals.

By its nature, this Guide does not apply to labor unions, associative contracts (e.g. joint ventures, consortia) or other forms of association or contracting that generate legal relationships of dependence between companies.

Likewise, although this Guide focuses mainly on the association's relations with its associates, the recommendations contained herein may even apply to non-associated companies or professionals (e.g. recommendations that also guide the behavior of the latter).

Finally, although this Guide is not obligatory, its content is indicative for economic agents, as well as for the Technical Secretariat and the Commission on compliance with the rules of free competition in the frame of trade associations.

1.6. Definitions

This Guide considers the following definitions, including the definitions established in the Law on Free Competition:

- **Trade association:** any organization that relates a group of companies because of the sector to which they belong or the economic activity they carry out and which is used as a platform to discuss and channel legitimate sectoral and commercial interests.
- **Associate or member:** The natural or legal person who is a member of the association and has the right to participate in some or all of the association's activities, with voice and/or vote, regardless of the condition that may correspond according to the rules of the association (e.g. full member, accessory, associate, overseer, applicant, etc.).
- **Cartel:** Infringement typified in article 11.2 of the Law on Free Competition, consisting of agreements between competing agents to limit among themselves competition over prices, quantities or conditions of commercialization of their products in the markets in which they compete, including restrictions on competition in public selection processes. Also considered under this definition are decisions or recommendations issued within the framework of trade associations that have the same object or effect.
- **Exchange of information:** Anticompetitive coordination modality that consists of exchanging information relevant to the competitive process (e.g. prices, contracting conditions and future actions), eliminating all or part of the uncertainty between competitors, and thus facilitating conscious adherence to a common anticompetitive scheme, without the need for an express agreement.

- **Law on Free Competition:** The Law on Repression of Anticompetitive Behavior, approved by Legislative Decree 1034 (2008) and modified by Legislative Decrees 1205 (2015) and 1396 (2018).
- **Anti-competitive practices:** The infractions typified in articles 10 (abuse of dominant position), 11 (horizontal agreements) and 12 (vertical agreements) of the Law on Free Competition.
- **Compliance Program:** Programs implemented by companies that seek to prevent, detect and eliminate risks of non-compliance with the Law on Free Competition, as well as promote knowledge of the rules established in that Law.

2. Trade union practices that generate risks of anti-competitive coordination between associates

Within the framework of the development of their activities, consciously but also inadvertently, trade associations can promote the formation of cartels and other illegal forms of coordination among their associates, as well as between the latter and other competing agents. Below will present common scenarios in which such risks are generated.

2.1. Facilitating direct coordination between partners

Naturally, associations call their members to various assemblies or meetings, some of a general nature; others aimed at a particular group of members. Frequently, particularly the larger associations, they also hold meetings in committees or working groups, in which the discussions are usually more specialised and punctual. These meetings are generally planned and recorded, which facilitates transparency in the association's decision-making. Sessions can also be held in person or using any other form of real-time communication (e.g. teleconference, video call, instant messaging).

When these meetings are aimed at discussing the legitimate concerns and interests of the association, disseminating general knowledge of the sector or carrying out sector research or promotion activities, such exchanges generally do not give rise to significant risks of anti-competitive behaviour. On the contrary, such discussions can foster market efficiency and competitive performance.

On the other hand, when these meetings have as their object, express or implicit, the coordination of actions or the joint taking of decisions among the associates on variables that determine competition among them, these constitute illegal platforms for the celebration and monitoring of cartels and, therefore, they will be prohibited. The principal competitive variables whose discussion is generally prohibited among associates are the following:

- Current and future prices of the products or services.
- Lists of current or potential clients.

- Current and projected marketing areas.
- Conditions or main variables on which the negotiation and contracting of goods or services are carried out: benefits, discounts, volumes, terms, the form of payment, among others.

As can be presumed, there is no valid reason or justification for an association to convene its members to discuss any of the aspects listed above. It may even happen that a meeting has not been held with an anti-competitive objective, but that during its development it becomes illegal if the discussions deal with some prohibited matter.

Thus, even when a participant might not have anticipated the offence at the time the meeting was convened, he or she may be involved in the infraction if, in changing the topics discussed, he or she participates in, adheres to or is aware of such illegal coordination, without expressing his or her rejection in an express, clear and timely manner.

RECOMMENDATIONS FROM INDECOPI

Because of the problems and risks described above, it is essential that throughout the process of determining the need for meetings, their purpose, calling, development and registration, the following guidelines are respected to avoid the risks of engaging in anti-competitive actions:

- **Motivation.** The body responsible for deciding on the need for a meeting, or for convening a meeting, must record that decision, specifying the reason or reasons justifying the meeting. As far as possible, these reasons should be preset or framed in the activities foreseen in the statutes or regulations of the association or be endorsed by a specialised advisor.
- **Summons.** The call must clearly state the reason for the meetings and the points for discussion. This call, as well as any document that accompanies it, must be duly registered and sent through means that allow the date and content of the sending to be guaranteed.
- **Specialized consultancy.** It is recommended that the meetings be held, whenever possible, with the presence of a skilled advisor or an official or person responsible for ensuring compliance with the rules of free competition. The Technical Secretariat has learned that there are currently unions that have already implemented this practice.
- **Registration and minutes.** Minutes of attendance and meetings will be taken to allow knowing the full content of its development, attendees (face-to-face or not), decisions made, as well as any other relevant incidence. The association shall ensure that meetings are also recorded in audiovisual media.

- **The conduct of the meetings.** The meetings must only deal with the reasons specified in the call and, when it is necessary to deal with issues other than those announced, this situation must be recorded in the corresponding minutes. Under no circumstances the topics discussed may deal with competitive variables or otherwise develop or encourage anti-competitive coordination. Attendees should be prepared to contribute to the reasonable conduct of meetings and eliminate any risk of anticompetitive coordination.
- **Express refusal to participate in illegal coordination.** If the meeting deals with aspects that may constitute infringements of the rules of free competition, members have the right and duty to record their refusal to continue participating in it, specifying such circumstance, as well as the time of retirement. Any measure of threat or punishment against the non-participating member of these coordinations is incompatible with the Law on Free Competition and may be immediately reported to INDECOPI.

To implement these recommendations, as well as others that may be applicable according to the activities of the association and the characteristics of the sector, is advisable to have specific advice, internal or external, on respect for the rules of free competition. The association or its members are always able to formulate general and orienting (although not binding) consultations to the Technical Secretariat on the scope of the Law on Free Competition.

2.2. Facilitating exchanges of information between associates

The anti-competitive coordination that can take place between competitors is not only a consequence of the discussion and formation of express agreements, negotiated directly by their participants. Participants in a cartel may seek to eliminate the need to discuss openly and directly with each other relevant aspects of an anti-competitive agreement and thus reduce possible scrutiny by the competition authority.

To this end, it is possible for the participants in these offences to resort to indirect mechanisms for the exchange of sensitive information to eliminate the uncertainty inherent in the competitive process, and thus promote or facilitate an anti-competitive balance between them. In other words, once competitors are aware of the decisions and strategies that their competitors will implement (e.g. increases in their prices, customer selection and contracting conditions), they can adjust their own choices and strategies to avoid competing with each other, and they can also monitor the development or "compliance" of their competitors' advertisements, and organize themselves as a cartel without the need to communicate directly with each other.

As an example, the relevant or sensitive information that promotes the formation of these illegal structures may consist of the following⁴:

- The announcement of immediate or future prices.
- The announcement of volumes to be produced imported or marketed.
- Disclosure of cost structures.
- Disclosure of customer lists.
- Disclosure of business strategies, expansion plans, investment or contracting with the public sector.
- Disclosure of trading and contracting terms, including discounts, payment terms.
- Other sensitive information that may facilitate illegal conduct.

On the other hand, during the analysis and publication of information relevant to their members, associations usually require from their members data on their business performance, future plans, expectations of the sector and other information of a commercial or strategic nature, which may include sensitive information that may eventually be used to promote or facilitate the operation of a cartel.

Example of legal information requirement⁵

The College of Nurses of Peru, in response to concerns raised by the health sector about the low number of nurses in some regions of the country, has commissioned the Empresa de Consultoría Médica to conduct a nationwide survey. The purpose of this survey is to learn about the conditions under which nurses provide their services in each region and to learn about the incentives and problems faced by them. The consultant will keep the information provided confidentially and will only publish its results in aggregate form in its final report.

Example of a potentially undue request for information

The Chamber of Heavy Machinery Importers of Peru requires its members (which groups all participants in the sector) to report their plans to import heavy machinery in its various forms (trucks, backhoes, tractors, etc.) for the following year. Although the objective of the requirement is strictly statistical, the sustained increase in the prices of the products offered by the associates could be a consequence of the adoption of strategies of limitation of the imports facilitated by the publication of said information.

⁴ This enumeration is not exhaustive. Depending on the particular characteristics and practices of the sector concerned, there may be other types of information whose exchange has the purpose or effect of eliminating or reducing the intensity of competition between competitors, allowing agreements to be made and facilitating their monitoring.

⁵ Unless otherwise indicated, the examples presented in this Guide are hypothetical and do not reflect any actual situation or event of knowledge of the Technical Secretariat.

As can be seen, associations can be used as platforms to promote or facilitate the exchange of sensitive information among their members. Under certain circumstances, such interactions are as effective in aligning their interests and actions as direct agreements (cartels). In this way, exchanges of sensitive information through associations, when they promote or facilitate anti-competitive balances among their members and to the detriment of consumers, constitute an infringement of the Law on Free Competition.

RECOMMENDATIONS FROM INDECOPI

In this regard, it is essential that the associations ensure that, in carrying out their activities, their functional bodies, as well as their members, comply with the following guideline to avoid the risks of engaging in anti-competitive actions:

- **Sensitive information.** The association or its members must not require or exchange sensitive information or any other information that encourages or contributes to the formation of cartels or anti-competitive schemes with its members. Associations should evaluate the possibility of substituting this information with historical, public, aggregated or other information that is not sensitive under the rules of free competition. In case of doubts about the sensitivity of the data, the association may resort to specific advice before requesting it from its members.
- **Historical information.** Whenever possible, the association should request, centralize and disseminate only historical data, that is, on past actions of its members, and not on future operations or conditions. The dissemination of factual information should not be accompanied by other data or annotations that predict the competitive strategies that the members will implement.
- **Aggregated information.** The association should seek to disseminate only information of an aggregated nature, that is, general information on the sector that does not individualize the behavior, performance or strategies of a particular competitor. The description of the information presented (e.g. size of companies, products or services offered, or their geographic location) should not, as far as possible, identify any particular company.
- **Transparency.** The process of gathering, analyzing and disseminating information should, as far as possible, be motivated, transparent and predictable. The organs of the association, the associates, their legal advisors and any interested party (including the authority, if applicable), must be able to determine the purpose of the delivery of information, the treatment that will be given and the type of results that are expected to be obtained. It is recommended that the association approve a protocol on the processing of information received from its members that is compatible with the rules on free competition.

- **Volunteerism.** The provision of information by associates should be considered voluntary, i.e. free from sanctions, corrective measures or any other form of undue pressure by the association, its officers or other associates.
- **Processing outsourcing.** Whenever possible, but particularly in cases where it is deemed necessary to require specific information that may be of a sensitive nature, the collection, processing and dissemination activities should be entrusted to companies or entities independent of the association or its members. These companies must guarantee the confidentiality and protection of the information, and that the results of the processing of the information provided and its dissemination are not incompatible with this Guide and the rules of free competition.

As noted, as far as possible, the implementation of these recommendations should be accompanied by specific advice, internal or external, that promotes respect for the rules of free competition taking into account the particular activities of the association and the characteristics of the sector. Likewise, the association or its members are always able to formulate general consultations, orienting (although not binding) to the Technical Secretariat on the scope of the Law on Free Competition.

2.3. Formulating anti-competitive decisions or recommendations

As has been pointed out, associations play the role of platforms for discussion of common interests among their members, and also, through their governing bodies, can centralize these interests, assume a position that represents their members and take specific actions to materialize the decisions or recommendations of these bodies, both within the association and vis-à-vis third parties.

Decisions or recommendations differ in the degree to which they are binding. While decisions are formally binding (because this is established by the statutes of the association or the characteristics of its issuance), recommendations lack this compelling character, being voluntary compliance by members.

However, for the Law on Free Competition, both the decisions and the recommendations receive the same treatment, since both are capable of decisively influencing the behavior of the members of an association. Indeed, although members are not formally obliged to respect the recommendations (i.e. they will not be subject to fines or loss of certain benefits), they are complied with because it is in the interest of the members of the association to meet with them or because of the "moral" reproach of not respecting them.

Example of an anti-competitive decision

Announcement from the Association of National Vegetable Wholesalers:
 "The Board of Directors has determined that, from the first working day of next month, the members of the Association will respect a list of minimum

and maximum prices for the products included in the following list, with a warning to impose disciplinary sanctions in the event of non-compliance".

Example of an anti-competitive recommendation

Last minute news: "After evaluating the market conditions and, in particular, the increase in risks (accident rate) currently faced by members, the Presidency of the Personal Insurance Association suggests that, as of January 1, 2019, personal insurance policies of any category be increased by 10%".

However, according to the prohibition established in Article 11.2 of the Law on Free Competition, decisions or recommendations whose sole purpose is to reduce or eliminate rivalry between members (or even with competitors outside the association) to the detriment of consumers will always be illegal. Specifically, the authority will always to consider unlawful decisions or recommendations aimed at influencing the most relevant competitive variables for its members, for example:

- To increase, standardize or otherwise affect the prices of the goods they produce or the tariffs of the services provided by the associates.
- To standardize other relevant conditions such as the benefits to be offered, the applicable discounts, terms and payment terms, among others.
- To define, ration, limit or condition the amounts that members offer in the market.
- Dividing the market or markets among the associates, distributing them by geographical areas, by suppliers, by customers, or by any other similar characteristic.
- To predetermine, condition, ration or otherwise influence the positions and abstentions of members in public selection processes.

Example of an absolute prohibition: Following discussions among its members in the context of meetings called for this purpose, the Association of Bond Paper Producers of Peru has established a "role", which indicates which members are "authorized" to participate in selection processes or contracts with the country's various public entities. The Association expects to achieve "order" in the market, for the benefit of all members.

2.4 Codes of conduct

When associations acquire a secure positioning in the sector in which they operate or by their nature incorporate all the agents in the sector (e.g. professional associations), they can influence the way in which business activities are developed in that sector. These associations may recommend the adoption of sector standards and practices (e.g. codes of conduct), generally aimed at ensuring the development of the industry

ethically, that is, under a set of values generally accepted by society⁶. These Codes are positive when they provide members with knowledge of and respect for the laws and regulations applicable to the sector.

Example of pro-competitive self-regulation: The President of the Association of Packers announced the results of the work table that aimed to recommend the use of a single measure (centimeters, inches, feet) for the rate that each member defines independently for their services depending on the size and weight of each product. The objective of this regulation is to make it easier for customers to choose between the different offers of the partners, avoiding confusion as to the measures or volume of packaged products.

After an evaluation of this measure, the Technical Secretariat determined that the recommendation allowed consumers to make consumer decisions with better information because it allowed comparison of the prices offered by the different packers.

On some occasions, however, the Codes of Conduct and the regulations established by the associations may impose or recommend to the associates the adoption of conduct contrary to the Law on Free Competition. In this sense, professional associations and other associations are exposed to sanctions for developing, disseminating and monitoring compliance with Codes of Conduct with anti-competitive objectives.

Example of anti-competitive self-regulation: The President of the Association of Professional Scissors Dancers of Peru celebrated in a ceremony the publication of the new "Tariff of the Peruvian Scissors Dancer 2019". It establishes the tariffs according to criteria such as the time, duration and type of event, the place where it is held, selected dates and ticket prices if applicable. As he explained, the tariff will solve the claims of various partners on the differentiation in payments they receive for their services and will encourage greater appreciation for the work of the Professional Scissors Dancer. The President remarked that compliance with the Tariff is mandatory and subject to penalties for non-compliance.

⁶ Thus, for example, the Code of Ethics and Self-Regulation in Advertising, Marketing and Commercial Conduct signed in November 2017 by the manufacturers of alcoholic beverages belonging to the Guild of Importers and Traders of Wine, Liquors and other beverages of the Lima Chamber of Commerce (CCL) and the Wine, Pisco and Beer Committees of the National Society of Industries (SNI), aimed to reinforce the restrictions established by Law 28681, in particular, which refers to minors' access to advertising on alcoholic beverages. In this regard, see: <https://gestion.pe/economia/empresas/sni-ccl-firmaron-codigo-etica-autorregulacion-publicidad-comercializacion-comportamiento-comercial-150278>

An association could also promote potentially risky conduct in violation of the Law on Free Competition, which is based on alleged ethical or "dignity" reasons of the profession. For example, the prohibition of any type of advertising among its associates⁷.

RECOMMENDATIONS FROM INDECOPI

Given the previous considerations, it is essential that, in the process of developing and issuing decisions and recommendations, associations respect the following guidelines to avoid the risks of engaging in anti-competitive actions:

- **Purpose.** The bodies responsible for the association must analyse the purpose of the decision or recommendation to be developed, to verify that it complies with the Law on Free Competition. In particular, if the primary objective of the decision involves a limitation of competition among members through an increase in the fees to be charged or the standardization of other competitive variables, the distribution of markets or the predetermination of positions or abstentions in public selection processes, such decision or recommendation will always be illegal, regardless of any other aim that may seem desirable or legitimate for the association.
- **Volunteerism.** Considering that each member may have different interests and competitive strategies to develop in the market, associations should prefer to promote voluntary compliance with the guidelines they issue, instead of forming compliance through fines and other pressure instruments. The adoption of such coercive mechanisms should only be in response to actions that are seriously incompatible with the legitimate objectives of the association or with the laws applicable to the sector.
- **Alternatives.** Before issuing a particular decision or recommendation, the bodies responsible for the association must analyze the existence of choices or alternative proposals that could be equally effective in guaranteeing the legitimate objectives of the association and that generate less risk of non-compliance with Free Competition.
- **Specialized advice.** Whenever possible, in the process of developing and issuing decisions or recommendations, associations should have a specialized advisor or an official or responsible for ensuring compliance with the rules of free competition. Likewise, the association or its members are always able to

⁷ On the role of advertising for the promotion of competition, the competition advocacy for the market for notarial services, approved by the Commission in December 2014, can be reviewed (pages 51 and 53). Available at: https://www.indecopi.gob.pe/documents/20182/143803/ABOG_001_2014_ST_CLC.pdf

formulate general, orienting and non-binding consultations to the Technical Secretariat on the scope of the Law on Free Competition.

3. Trade union practices that generate risks of exclusion from competition

Associations are not only able to affect competition by diminishing rivalry between associates, or between associates and other competitors in the market. Associations may also disturb competition by unjustifiably promoting the foreclosure of some competitors to the benefit of others. The following are possible scenarios of practices developed in the context of trade associations that can unjustifiably foreclose one or more competitors, inside and outside the association.

3.1. Unjustifiably excluding certain competitors from joining or remaining in the association.

A common purpose of the associations is to achieve a significant positioning in the market, insofar as this can facilitate the development of their activities and the achievement of their legitimate objectives. Indeed, the growth of an association involves greater access to financing, economies of scale, access to relevant information, media and higher capacity to influence the performance of the sector.

However, the growth of an association can also involve risks for competition when, using this positioning in an unjustified manner, it promotes differentiated treatment between members and non-members, or between different types of members. In these cases, the association serves as a means to maintain or strengthen the positioning of some competitors at the expense of others without a valid reason or justification. When this type of practices involves significant risks for the development of the competitive process, INDECOPI can investigate and sanction the association, its representatives and any associate that may be responsible.

When an association with a particularly important position establishes unjustified conditions and requirements for affiliation or exclusion of members, these may constitute barriers to market access, insofar as they prevent specific competing agents from entering the affected market, benefiting some or all of the members and ultimately harming consumers.

Example of a requirement or possibly unjustified condition: Following the Regulations for Affiliation to the Land Transporters Guild of Peru, as of next year only those transport companies that have a minimum fully paid share capital of 15 million Peruvian soles will be allowed to join the guild. The representatives of the Guild have indicated that this requirement seeks to guarantee the eventual compensations that correspond to be assumed by the associates in future accidents. Some specialists have observed, however, that the existence of insurance policies (obligatory or voluntary) are more suitable mechanisms for this purpose, and that this requirement would respond instead to the interest of some principal associates in

stopping the growth of some smaller transport companies that have introduced more efficient and less polluting vehicles.

RECOMMENDATIONS FROM INDECOPI

Because of the concerns raised, it is essential that, when determining the requirements, conditions or criteria for membership or exclusion of members, the association consider the following recommendations:

- **Purpose.** The process of defining membership requirements and the situations that determine the imposition of disciplinary measures, in particular, expulsion, must fulfill a function compatible with the legitimate objectives of the association and with the rules of free competition.
- **Objective criteria.** The requirements or conditions of membership and expulsion of members cannot be arbitrary, but must meet objective criteria and must be reasonable, i.e. proportional to the intended purpose. Whenever possible and able to fulfil the same legitimate objective, the association should prefer the establishment of requirements or conditions less onerous or restrictive of competition. Where the adoption of subjective criteria is indispensable (e.g. recommendations from former members), these should respond to legitimate interests of the association and should not facilitate or disguise an anti-competitive exclusion strategy.
- **Transparency and predictability.** The requirements or conditions of affiliation and expulsion must be known in advance by the associates and be publicly available with the statutes or by-laws of the association. Besides, any interpretation of these requirements or conditions must be reasonable, public and maintain a high degree of predictability.
- **Competitive Effects.** In defining the requirements or conditions of membership and expulsion of members, the association must consider the effects of such decisions on the market or sector in which they operate. To the extent possible, these conditions, as well as other rules established by the association, should be aimed at promoting the competitive performance of its members.
- **Specialized advice.** Whenever possible, in the process of defining the requirements or conditions of membership and expulsion of members, the association should follow the recommendations of a specialized advisor or an official or responsible for ensuring compliance with the rules of free competition. The association or its members are always able to formulate general, orienting and non-binding consultations to the Technical Secretariat on the scope of the Law on Free Competition.

3.2. Unjustifiably denying or conditioning the provision of services to members and non-members.

Another way in which an association with a particularly important position in the market may generate or promote unjustified barriers to entry or permanence in the market is an unreasonable refusal to provide certain services that it allows for, provided that these are decisive for competition in the sector and the denial does not meet objective and reasonable criteria.

Example of a refusal to provide anti-competitive services: The Commission sanctioned the Asociación de Productores Agrícolas del Mercado de Santa Anita – APAMSA (Association of Agricultural Producers of the Santa Anita Market) for having denied access to the Santa Anita Market to a competitor in the rice market. In their decision, the Commission and the Tribunal considered the particular importance of the Santa Anita market for the wholesale distribution of rice and the absence of a reasonable justification for the refusal (arising from reprisal by a manager against the competitor concerned).

Source Decision 002-99-CLC issued by the Commission

RECOMMENDATIONS FROM INDECOPI

Given the concerns raised, it is essential that, when determining the requirements, conditions or criteria for access to their benefits or services, the association considers the following recommendations:

- **Purpose.** The definition of terms of access to the provision of services to members and non-members (e.g. tariffs, requirements, preferences) must fulfill a function compatible with the legitimate objectives of the association and with the rules of free competition.
- **Objective criteria.** The requirements or conditions of access to the provision of services to members and non-members cannot be arbitrary, but must meet objective criteria and must be reasonable, that is to say, proportional to the intended purpose. Where there is differentiated treatment between members and non-members, this must be justified (e.g. the nature of the service, the rights of members, the disincentive to opportunistic behavior or free riding). In no case should these requirements facilitate or disguise an anticompetitive foreclosure strategy.
- **Transparency.** The requirements or conditions of access to the provision of services to members and non-members must be known in advance by the interested parties.

- **Competitive effects.** In defining the conditions of access to the provision of services to members and non-members, the association must consider the impact of such decisions on the market or sector in which they carry out their activities. To the extent possible, these conditions, as well as other rules established by the association, should be aimed at promoting the competitive performance of the sector, in particular of its members.
- **Specialized advice.** Whenever possible, in the process of defining the requirements or conditions of access to the provision of services to members and non-members, the association should follow the recommendations of a specialized advisor or an official or responsible for ensuring compliance with the rules of free competition. The association or its members are always able to formulate general, orienting and non-binding consultations to the Technical Secretariat on the scope of the Law on Free Competition.

3.3. Promotion of technical standards

Associations may have justified reasons for promoting the use of specific rules aimed at ensuring a minimum degree of quality or generally accepted characteristics of the products or services offered by their members. In fact, under certain conditions, technical standards reduce the asymmetry of consumer information and search costs, generating efficiency in commercial transactions. However, it is possible that, by promoting the adoption of specific standards, associations may cause an unjustified restrictive effect on the market.

Example of promotion of an unjustified technical standard: The National Association of Hen Egg Producers of Peru is promoting within a Technical Committee for Standardization a draft of the "Technical Standard on Peruvian Hen Eggs", which aims to determine the minimum characteristics of weight, size, color and diameter that must respect a product to be considered "egg". Among the characteristics, only brown eggs can receive this denomination.

However, Indecopi has just received a complaint signed by a group of small producers of white eggs, belonging to the central region of the country. According to them, if approved, the technical rule will only benefit the large producers of the coast, because the coastal area is the only place in the country or habitat where hens that lay brown eggs can be reared. Finally, they point out that the quality of the eggs responds to criteria other than color and that the possible approval of the standard would force them to create an alternative denomination, given that supermarkets and wholesalers require that the products comply with the technical standards of the sector.

To determine the legality of these types of actions the authority will analyze whether they involve, introduce or promote significant restrictions on competition and if so,

will verify whether the reasons for their implementation offset these restrictions more efficiently in business relations or sector performance.

4. Recommendations

The recommendations set out in this Guide are summarized below. For a more detailed explanation, we refer to the sections previously developed.

4.1. Recommendations to Associations

- i. Know, adopt and disseminate the rules of free competition.** The officials and governing bodies or representatives must know the rules and prohibitions established in the Law on Free Competition. It is also recommended the advertisement of these rules among the associates to avoid risks of non-compliance. The decisions and regulations issued by the association and its bodies must ensure objectives compatible with the Law on Free Competition.
- ii. Do not promote, adopt or impose actions that are harmful to competition.** None of the association's activities should infringe the recommendations contained in this Guide or other provisions established in the Law on Free Competition. In particular, do not promote meetings or contacts between associates that have the purpose or effect of limiting competition, raising prices, limiting production, distributing markets or determining positions or abstentions in public selection processes. Do not require, process or publicize sensitive information. If in doubt, consult your compliance officer or advisor.
- iii. Appoint an Advisor or Compliance Officer.** Designate an internal or external advisor to control the compliance with the Law on Free Competition. This advisor must have sufficient influence to ensure that all association practices conform to this regulatory framework.
- iv. Keep a reliable record of the association's activities.** It is essential to keep an accurate and updated record of all meetings of members, association bodies, decisions and recommendations of the association, as well as processes for issuing or amending regulations, research activities or other projects of the association.
- v. Promote the transparency and predictability of the association's actions.** Allow all members to know the rules of the association, both regarding access, permanence or separation, as well as the development of activities, meetings, services and regulations. Promote predictability in decision-making and avoid the adoption of unjustified, unnecessary or arbitrary decisions or statutes.
- vi. Promote the implementation of compliance programs for the association and codes of compliance with the rules of free competition.** Disseminate the

importance of associates independently and continuously implementing compliance programs aimed at eliminating risks of non-compliance with free competition rules. Establish and publicize minimum standards that guarantee that the interaction between its associates does not involve a threat of non-compliance with said regulations.

- vii. **Consult the authority.** In case of doubts about the legality of any action, decision or recommendation, before its adoption and implementation, the association is always able to formulate general, orienting and non-binding consultations to the Technical Secretariat on the scope of the Law on Free Competition.

4.2. Recommendations to Associates

- i. **Train your representatives in compliance with the rules on free competition.** Ensure that your representatives, particularly those who participate in discussions in the context of associations or have contact with competitors, are fully aware of the scope of the Antitrust Law.
- ii. **Define a compliance officer or specialized advisor.** Appoint an internal contact point, responsible for routinely monitoring compliance with the Law on Free Competition, as well as an external advisor responsible for periodically reviewing and recommending the implementation of measures to minimize risks of non-compliance with such regulations.
- iii. **Implement a free competition compliance program.** Entrust a risk specialist with the implementation and monitoring of compliance programs with free competition regulations, and make sure to comply with the recommendations that this specialist transmits to you.
- iv. **Record any incidence in the development of meetings within the framework of an association and any other meeting with competing agents.** Establish as a business policy that the members of your company who participate in the association's meetings or have contact with competitors should record any incidence during such interactions. Consult your advisor or compliance officer if you have any questions about the development of these contacts.
- v. **Do not solicit or submit sensitive competitive information without an objective and legitimate reason.** Determine, in line with section II of this Guide, which competitive information is sensitive. Try not to request or submit such information. Consult your advisor or compliance officer if you feel it is necessary to require or provide information that may be of a sensitive nature.
- vi. **Consult the authority.** In case of doubts about the legality of any action, decision or recommendation within the framework of an association, any company or professional, associated or not, is always able to formulate general, orienting and

non-binding consultations to the Technical Secretariat about the scope of the Law on Free Competition.

5. Contact the Authority

In any of the following circumstances, as well as in others that you consider necessary, do not hesitate to contact the Technical Secretariat:

- You or your company are invited to participate in a meeting at which prices, production, customers or other sensitive competitive information will be discussed.
- Although the meeting did not initially have such purpose, you or your company become aware of discussions about prices, production, customers or other sensitive competitive information.
- You or your company receive a request for sensitive information from an association, or the association sends you, by any means, information that may influence the decisions of your company or other associates about prices, production or customers or additional sensitive competitive information.
- You or your company become aware of decisions or recommendations issued by an association that has the purpose or effect of influencing the prices, production or competitive behavior of associates.
- You or your company take notice of actual or potential changes in the rules of access to the association, as well as in the situations and procedures of sanction or expulsion of associates, which may be unjustified or excessively unreasonable.
- You or your company become aware of the implementation of discriminatory or unfavorable treatment within the framework of an association, which puts some associates at a disadvantage compared to others, or which establishes conditions that prevent certain associates or non-associates from operating effectively in the sector.
- Any other action by an association or one or more of its associates that may involve a decrease in competition in the market or sector in which it operates.

Contact Information

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