

New guide on competition law compliance for trade associations, business chambers and professional associations

I. Introduction

On December 11, 2018, the National Commission for the Defense of Competition published a guide for trade associations, business chambers and professional associations (the "Guide").

The main goal of the Guide is to set the boundaries between the constitutional right to associate and the duty to avoid incurring in behavior contrary to the Competition Act No. 27,442 (The "Act").

The Guide provides tools for the careful evaluation of the practices linked to price-fixing and market allocation; the exchange of information between competitors; decisions about entry and exit of companies; the determinations on standardization and the decisions on advertising, circumstances in which these associations can be considered responsible for engaging in anti-competitive behavior.

II. Trade associations, business chambers, professional associations and competition law.

a. Pricing and market allocation.

Pricing or market allocation are two of the most important risks that can be presented to these associations.

Thus, the Guide states that it is essential to ensure that the commercial strategy of the members of these associations is always set independently and that such associations shall protect such autonomy and independence.

The fixing of minimum or maximum prices, the determination of conditions of sale or the establishment of criteria to determine when a company or group of companies can be submitted to a tender or other similar cartelization practices, will be considered as practices absolutely restrictive of competition under the Act.

b. Information exchange between competitors

One of the purposes of these associations is the exchange of information that allows requests to be made to governmental authorities or, for example, the negotiation of collective labor agreements.

However, exchange of sensitive information between competitors, or any information that may determine that decisions are not made individually and freely by the members of the association, should not be shared.

Thus, among competitors, the factors that must be taken into account when analyzing whether the information to be exchanged or disseminated has the potential to be used to facilitate a collusion agreement are:

- A) *The nature of the information*: exchange of information on prices, production volumes, business plans, has a high collusive potential, but not information referring to general market conditions.
- B) *The age of data*: the collusive potential diminishes the older the information is, the information related to future plans is the most dangerous;
- C) *The level of aggregation*: aggregate information has a low collusive potential, while the individualized information per company can be used directly to implement collusive agreements.
- D) *The request for information*: the Guide recommends that the request of information to the associates shall be of a reduced frequency indicating explicitly that its delivery is voluntary.

E) *The access to the information:* the Guide recommends that any disclosed information shall be accessible to non-associated third parties interested in it.

c. *Decisions on entry and exclusion of companies.*

Another important risk dealt with by the Guide is the management of decisions related to the entry and exclusion of companies from the relevant market. For example, the establishment of quotas or restrictive conditions to be considered member or partner, can be a way to limit the number of competitors in the market.

The same happens when these associations can expel a member and this expulsion has the effect of excluding a player from the market. Likewise, a measure adopted by the association that would imply a refusal to deal with a specific client or group of customers (boycott) could lead to restrictive effects of competition, since the aggregate volume that all bidders trade jointly could decrease.

Within the parameters of self-regulation that may serve to prevent the occurrence of situations that conflict with the principles of the Act, there are the following: (i) that the codes of conduct of these associations are transparent and objective; (ii) that they do not impose policies for prices, fees or commercial conditions; (iii) that there is an independent and transparent body to evaluate compliance; (iv) that arbitrary or discretionary measures are not applied; and (v) that the codes themselves are not exclusive or restrictive of competition.

d. *Standardization decisions*

Decisions about standardization can be defined as the set of characteristics or requirements that a product or service must have to be included in a certain category.

It is usual for these associations to participate in the creation of safety, technology or quality standards. Without prejudice to the pro-competitive benefits that arise from the standardization of products or services, the setting of standards might significantly increase the barriers to the entry of new competitors or that, due to the excessively strict standards, a certain product valued by consumers stops being produced.

Decisions about standardization should be made only in those cases where they are necessary to provide information to consumers and avoid creating barriers to entry and / or restrictions on innovation.

Some factors which facilitate that the established standards are considered to be lawful and do not result in a restriction to competition are: (i) that if the standard is determined by companies that are jointly dominant, the standard is accessible to those who do not show the condition of dominant and be applied in a clear and non-discriminatory way; (ii) that the standard is the result of a broad discussion in the industry and holds relevant consensus; and (iii) the more severe the problem of information asymmetry between final consumers and producers of a good or service, the more pro-competitive a standard can be, as it can serve as evidence of product quality which is valuable to consumers.

e. *Decisions about advertising*

The advertising carried out directly by these associations can promote competition, since it serves to disseminate and publicize the products and services marketed by its members. However, when entities issue guidelines to restrict the possibility for their members to advertise their products or establish penalties for advertising not following their guidelines, there may be a limitation or distortion of competition.

III. General recommendations

a. Towards the end of the text, the Guide offers a series of additional recommendations to reduce the risk that these associations are penalized by the Act. As follows:

- (i) Report to the enforcement authority if in the presence of an anticompetitive behavior.
- (ii) Establish internal policies, compliance programs and promote the adoption of these policies among the associates.
- (iii) Ensure the principles of impartiality and non-discrimination in filiation conditions.
- (iv) At the time of holding meetings, try to record them, keep a detailed agenda of the topics to be discussed, leave the meeting if you understand that any conversation or subject matter could lead to violations of the law, have the advice and the assistance of specialized professionals; and maintain the same principles for virtual and face-to-face meetings.
- (v) Avoid purchases, sales, management, collections and other similar activities on behalf of associate members.

b. It also brings a list of practices that entities should avoid:

- (i) Not to establish rules that avoid the independence in the decision making of the members.
- (ii) Intervene in the negotiation of prices and / or commercial sales conditions of its associate members.
- (iii) To be a channel to exchange sensitive information between members.
- (iv) Issue recommendations on prices, discounts, commercial conditions, quantities to market or production.
- (v) Agree on or exchange information about prices, areas, customers, exclusive areas.
- (vi) Develop rules that prevent members from advertising their prices, discounts or business practices.
- (vii) Require members to share sensitive information.
- (viii) Discuss or encourage discussions on public tenders in which members can participate or agree on positions of partners in public bids, or in bids called by private or state companies.
- (ix) Use association or membership requirements as an element to exclude or discriminate against competitors.
- (x) Prohibit associates from dealing with non-associated competitors.
- (xi) Use the association or business chamber as a means to boycott a supplier or client.
- (xii) Impose adhesion to standard contracts that affect the contractual freedom of the members.
- (xiii) Establish standards for the industry without technical support that artificially exclude competitors from the market.
