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# THAILAND

## Newsletter

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## Trade Associations and Cartel Risks

### Introduction

Three trade associations in the same industry recently announced that they will collaborate with one another and establish a common service fee system. Under this system, all vendors from their respective trade associations will charge the same fees for the same types of services. As of the date of this newsletter, we are not aware of any response by the Trade Competition Commission of Thailand (the "TCCT") to the establishment of a common fee arrangement by these trade associations, or whether the TCCT is aware of the discussions that have taken place.

The Trade Competition Act of 2017 and its supplements (the "**Trade Competition Act**") prohibits agreements and arrangements between competitors, with some notable exceptions that are rarely applicable. Arrangements for common fee systems between trade association members likely fall under prohibited activities under the Trade Competition Act, as this is the most common type of price fixing arrangement. Common fee systems are specifically mentioned and exemplified under Thai law. This newsletter will provide a brief overview of activities that may give rise to violations of the law, and actions that may trigger the cartel provision under the Trade Competition Act.

### What discussions may take place at association meetings?

The main question that many operators and many industries have pushed forward is what types of topics may be discussed at trade association meetings if the Trade Competition Act prohibits agreements and arrangements between association members.

#### a. Prohibited topics

The Trade Competition Act broadly prohibits agreements and arrangements that concern the following:

- prices (including commercial conditions that have impact on prices);
- volume;
- areas and identifying designations;
- bidding;
- quality;
- appointment of sole distributorship; and
- trade practices.

These issues cover most of the traditionally available discussion topics at trade association meetings.

b. Permissible topics

Prior to commencing any discussion at an association meeting, the members must thoroughly and carefully handpick the topics for discussion. Examples of low-risk topics include the following:

- economic and consumer trends;
- shift in government policy;
- labor relations;
- management lessons;
- generic welfare and promotion of the industry; and
- common risks, etc.,

## Mitigating risk of violating the law

To mitigate against the risk of violating the law during trade association meetings, business teams should consider the following steps:

- a. consulting with internal or external legal counsel on topics of discussion;
- b. follow internal procedures on discussions with competitors or other association members prior to meetings;
- c. ensure proper creation and retention of evidence of compliance;
- d. representatives at meetings must protest discussions related to prohibited topics; and
- e. representatives should leave a meeting, in severe cases, and file an internal report if discussions on prohibited topics persist.

Operators must not use any sensitive information inadvertently obtained at an association meeting to their advantage. Any suspicion of activities that may qualify as a cartel, as defined under the Trade Competition Act, whether due to an intentional action or innocent use of sensitive information volunteered or disclosed by other association members, can lead to an investigation by the authorities. Investigated parties carry the burden to prove their innocence.

## What is a cartel under Thai law?

A cartel is loosely defined under the Trade Competition Act as any type of prohibited joint arrangement, whether written, oral, express, or implied. Even conscious parallelism or tacit arrangements may, depending on the available evidence and circumstantial results, fall under the definition of a cartel. Operators should be vigilant about not breaching the cartel provision under the Trade Competition Act, as there is no leniency or whistle-blower program as of the date of publication of this article. As such, misconduct that qualifies as operating a cartel in Thailand, once committed, is not subject to any mechanism to qualify for an exemption or fine reduction even if a party cooperates with the authorities.

In practice, the lack of a leniency program puts the operators in a disadvantaged situation whereby any mistake, whether intended or unintended, will not be absolved. An operator who has committed a breach of anti-trust regulations will either be at the mercy of the TCCT if it decides to come forward, or that operator can carry on its operations with the uncertainty as to whether co-conspirators will remain quiet about the violations being committed by the cartel. The best course of action for

given the lack of leniency, is to avoid any activities that may be regarded as concerted actions. Note that Chandler MHM has advocated promulgation of a leniency program to the TCCT, but this has yet to be put into any legislation.

## Trigger-down effects

Managers and executives of local subsidiaries of multinationals must be aware of trigger-down effects. Often managers and executives in Thailand will follow instructions of headquarters outside of Thailand. Instructions may include matters on pricing or volume, and sometimes these instructions can include actions that may qualify as an unlawful arrangement. Note that cartel activities in Thailand are prohibited, regardless of whether they are the result of the Thai subsidiaries' own arrangement or those of offshore parents. The issue of knowledge will come into play in the case of investigation.

## Conclusion

Local managers and executives should educate themselves about cartel provisions and understand that certain activities that were traditionally prevalent and acceptable may not be lawful due to the existence of the Trade Competition Act.

To discuss the legal topics included in this briefing in further detail, please contact the authors listed in the left-hand column.

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