

TIC Council

TIC COUNCIL COMPETITION COMPLIANCE POLICY

1st Edition

1. Introduction

- 1.1 This document sets out TIC Council's policy on competition law issues and provides guidance to TIC Council, TIC Council member companies and their staff to ensure compliance with competition law in relation to TIC Council activities. It contains rules on legitimate and potentially illegitimate conduct related to trade association work.
- 1.2 Trade Associations like TIC Council exist for the mutual benefit of their members and also perform functions which can be useful to the business community as a whole by, for example, fostering the improvement of technical standards. Government authorities generally recognise and encourage these beneficial functions.
- 1.3 However, trade associations must always act within the framework of the laws and regulations which exist to preserve freedom of competition. It is crucial for TIC Council, its Member companies and their employees not to infringe competition law rules. Infringing competition law may result in the imposition of significant fines, damages claims by customers and other third parties, damage to reputation and probably even criminal penalties for employees and agents. It is therefore the policy of TIC Council that TIC Council and all of its Member companies and their employees and agents who represent them on TIC Council Committees or in any other TIC Council activities shall refrain from any conduct which may restrict, or may be considered to restrict, TIC Council members' freedom of competition between themselves, or the freedom of competition between members and non-members of TIC Council.

2. General information on competition law

a) Anti-competitive Agreements

- 2.1 In the EU, Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits "*agreements*" and/or "*concerted practices*" which have the object or effect of preventing, restricting or distorting competition within the EU.
- 2.2 "*Agreement*" has a wide meaning and covers all kinds of agreements, whether written or oral, and whether or not legally enforceable. "*Concerted practices*" are prohibited even if there is no specific agreement or decision.
- 2.3 The prohibition also applies to "*decisions by associations of undertakings*" which may include a recommendation made by a trade association to its members, even one which is not binding on the members or has not been fully implemented, leading to what can be construed as a concerted practice.
- 2.4 Article 101 contains the following list of examples of the kinds of agreements which could be caught by the prohibition. These are agreements which:
 - (a) *directly or indirectly fix purchase or selling prices or any other trading conditions;*
 - (b) *limit or control production, markets, technical development or investment;*

- (c) *share markets or sources of supply;*
- (d) *apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (e) *make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”*

2.5 In the United States, section 1 of the Sherman Act prohibits contracts, combinations or conspiracies in restraint of trade. The following practices have been found to be illegal which are relevant to the actions of trade associations: agreeing to raise prices, agreeing to restrict output, agreeing to boycott a company, agreeing to “carve up” a market, agreeing to suppress competitors or suppliers, and supporting technical standards that are a sham for raising price or excluding competitors.

b) Information exchange and sharing experiences

2.6 The exchange of technical information, for example about new legislation, between members is one of the primary functions of trade associations like TIC Council, and generally has no implications regarding competition. However, in some circumstances the exchange of information within a trade association could raise concerns regarding competition law if the information exchange leads to a level of transparency between competitors which allows for the identification of confidential competitive information relating to individual undertakings or transactions.

2.7 Information about prices is the most obvious example. The exchange of information about prices charged or intended to be charged, or information relevant to pricing policy (e.g. discounts, costs, terms of trade and rates and dates of change) should always be avoided.

2.8 The exchange of information on sales figures and market shares should also be avoided.

2.9 In general, any exchange of information which results in co-ordinated market conduct by the members of the trade association (e.g. identical prices) may give rise to competition concerns.

3. TIC Council Meetings

a) Legitimate topics for discussion

3.1 Legitimate topics of a meeting include the following:

- General legal and economic information (for example views and experiences regarding laws, decisions of courts and authorities) may be shared, provided such information is not liable to affect the competitive conduct of TIC Council member companies or third parties
- Discussions on the results of joint statistics / market studies may also be permissible, provided that no sensitive individualized/identifiable business information is exchanged and that the members refrain from drawing joint conclusions on future market conduct.
- Discussions on lobbying activities of TIC Council are permissible.

3.2 Discussions on the creation of guidelines or codes of conduct for purposes of promoting safety or improving technical or ethical standards which are objectively justified and are beneficial for end-users should be permissible, provided that such codes of conduct do not lead to the effect of preventing companies from selling services when they fail to meet the criteria.

3.3 In the United States as well as in the EU, the antitrust authorities will assume the law has been violated when current competitive information is exchanged and the parties engage in parallel conduct. Therefore, information exchanges should be limited to historical data, and in some cases a neutral third party should be used to collect the information which will be reported in the aggregate, keeping the identity of individual companies confidential. In the USA specifically, development of technical standards should follow the requirements of the National Cooperative Research and Production Act of 1993, as amended by the Standards Development Organization Advancement Act of 2004.

b) Illegitimate topics for discussion

3.4 Members of TIC Council must avoid any discussion, communication, agreement, practice or recommendation which may violate competition laws by exchanging commercially sensitive information such as:

- Prices and price components
- Terms and conditions (other than in the context mentioned in section 4 below)
- Rebates
- Costs
- Sales figures
- Relationships to individual customers or suppliers
- Intentions to participate in tender
- Business strategies and future market conduct
- Boycotts

3.5 Members must also avoid discussions which may lead member companies to:

- Align their competitive conduct in the market
- Shut out competitors from the market
- Adopt non-binding decisions, standard setting measures or recommendations which may in practice lead to an alignment of the competitive conduct
- Modify their conduct or terms and conditions regarding commercially sensitive issues.

c) Rules for Conduct of Meetings

3.6 All meetings of TIC Council Committees or groups of TIC Council Member representatives shall follow a written Agenda, which shall be prepared and provided prior to the respective meetings. Outcomes shall be recorded in written Minutes. No “rump sessions” shall be permitted.

3.7 Every meeting of an TIC Council Committee or other TIC Council body should be led by a Chair who should (if he or she is not an TIC Council representative) be accompanied by one TIC Council representative. The Chair should remind the participants to act within competition law requirements at the beginning of the meeting. All those in attendance shall be required to sign a statement confirming that they understand and will comply with their obligations in respect of anti-trust and competition laws, and that the meeting shall be conducted in accordance with TIC Council’s Competition Compliance Policy.

3.8 If discussions on initially legitimate issues develop into a competition law risk area, the Chair, supported by the TIC Council official and all participants of a meeting shall

terminate the discussion. In case of doubt, discussion on the topic should be stopped and legal advice shall be sought prior to continuation.

- 3.9 If a representative of TIC Council or a TIC Council Member company has the opinion that a discussion is developing in a competition law risk area he/she should request the discussion to be stopped immediately. This request should be recorded in writing. In case the discussion continues despite the request to stop he/she should leave the meeting and request to record the leaving including the leaving time. The circumstances should be reported as soon as practicable to the relevant TIC Council member's Compliance Officer.
- 3.10 Any informal discussion, telephone call, email exchange or other communication between representatives of TIC Council Members shall also be conducted under the same conditions, even if no similar written statement (as referred to in 3.7 above) is produced.

4. Terms and Conditions of business

- 4.1 If a trade association imposes on its members an obligation to use common terms and conditions of business, this may have the effect of restricting competition, especially if the standard terms have an effect on prices or result in concerted market practices. TIC Council publishes a set of recommended general terms and conditions (with no pricing element) but members remain free to adopt different conditions, or to modify the TIC Council conditions, if they so wish.
- 4.2 Openness and access to general terms and conditions are key. This appears in the standards setting arena in the US and applies to standard terms and conditions established by trade associations. The effect of such standard agreements cannot carve up markets, set prices or set up barriers to market entry.

5. Bulletins, Rules, Codes of Practice and Membership

- 5.1 Bulletins, Rules or Codes of Practice which govern TIC Council Members' conduct of their business shall be drawn up in terms which do not have anti-competitive effect. In particular they shall be non-discriminatory and transparent and shall be publicly available via the TIC Council website or other methods of publication.
- 5.2 The Regulations governing applications for membership of TIC Council shall be based on clear, objective and transparent criteria, shall not be applied in such a way as to violate anti-trust and competition laws, and shall be publicly available via the TIC Council website or other methods of publication.

6. Training and Communication

- 6.1 TIC Council Member Companies should ensure that their representatives who attend TIC Council meetings or are otherwise involved in the activities of TIC Council are made aware of this Competition Compliance Policy and receive suitable training in the requirements of anti-trust and competition law.

7. Further Information

7.1 Further information on this subject is available on the following websites:

- In the EU:

http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf

- In the UK, from the Competition and Markets Authority:
<https://www.gov.uk/government/organisations/competition-and-markets-authority>
<https://www.gov.uk/government/publications/competition-law-dos-and-donts-for-trade-associations>
- In the USA, from the Federal Trade Commission: “Dealings with Competitors: Spotlight on Trade Associations,”
http://www.ftc.gov/bc/antitrust/trade_associations.shtm
<http://www.ftc.gov/opa/2004/06/sdoaa.shtm> guidelines for Standards Developers to File with the FTC and US Dept. of Justice.

7.2 Please be aware that this policy provides a high level overview of competition law related issues that may be relevant to trade associations such as TIC Council and its member companies, but it is not possible to anticipate all possible issues that may arise. Therefore it is advised that if any doubt exists as to whether any activity or discussion or recommendation could have implications with regard to competition law, Members may consult the Secretariat and/or their own legal departments at the earliest opportunity for guidance.

Approved by TIC Council, November 2019