

# The Balance between Information Exchange and Potential Violations of Competition Law: The Necessity of Certain Exemptions for the Thai Insurance Sector

การสร้างสมดุลระหว่างการแลกเปลี่ยนข้อมูลและความเสี่ยงในการละเมิดกฎหมายแข่งขันทางการค้า : ความจำเป็นที่จะต้อง มีข้อยกเว้นบางประการสำหรับภาคธุรกิจ ประกันภัยไทย

- : Nutavit Sirikan\*
- : ณัฐวิษ ศรีภานุจน์
- : ทนายความ
- : บริษัท ดิลลิกี้แอนด์กิบบินส์ อินเตอร์เนชั่นแนล จำกัด
- : E-mail: Nutavit.S@tilleke.com
- : Athistha Chitranukroh\*\*
- : อธิษฐา จิตราบุเคราะห์
- : ทนายความ
- : บริษัท ดิลลิกี้แอนด์กิบบินส์ อินเตอร์เนชั่นแนล จำกัด
- : E-mail: athistha.c@tilleke.com

\* Nutavit Sirikan, LL.M., MA. Thammasat University, LL.M. (Candidate) Chulalongkorn University; Attorney-at-law, Tilleke& Gibbins.

\*\* Athistha (Nop) Chitranukroh. LL.B. Chulalongkorn University, LL.M., Georgetown University, LL.M., University of Wisconsin; Of Counsel, Tilleke&Gibbins.

## บทคัดย่อ

การแลกเปลี่ยนข้อมูลเป็นแนวปฏิบัติมาตรฐานทางธุรกิจของธุรกิจประกันภัยทั่วโลก การแลกเปลี่ยนข้อมูลอาจนำมาซึ่งผลที่ทำให้เกิดการแข่งขันหรือจำกัดการแข่งขันได้ ขึ้นอยู่กับระดับการแลกเปลี่ยนข้อมูลและชนิดของข้อมูลที่ถูกแลกเปลี่ยน ในทำนองเดียวกัน ภาคธุรกิจประกันภัยไทยก็จำเป็นต้องเป็นที่จะต้องอาศัยการเก็บและแลกเปลี่ยนข้อมูล มาตรฐานการประกอบธุรกิจ และกิจกรรมที่กระทำร่วมกันในภาคธุรกิจเดียวกัน เพื่อการสร้างสรรค์สร้างผลิตภัณฑ์ใหม่ และเพิ่มขีดความสามารถของผู้รับประกันภัย เพื่อให้สามารถตอบสนองความต้องการของผู้บริโภคได้ยิ่งขึ้น อย่างไรก็ตาม การแลกเปลี่ยนข้อมูลอาจส่งผลให้เกิดการจำกัดการแข่งขัน ซึ่งก่อให้เกิดความเสียหายแก่ผู้บริโภคได้เช่นกัน

ในประเทศสหรัฐอเมริกา McCarran Ferguson Act ได้บัญญัติยกเว้นภาคธุรกิจประกันภัยไม่ต้องอยู่ภายใต้การบังคับใช้กฎหมายป้องกันการผูกขาดของรัฐบาลกลาง ซึ่งเป็นการเปิดช่องทางให้เกิดการแลกเปลี่ยนข้อมูลระหว่างผู้ประกอบการธุรกิจประกันภัยได้ในบางกรณี ในขณะที่สหภาพยุโรปมีข้อยกเว้นเฉพาะสำหรับภาคธุรกิจประกันภัย (EU Insurance Block Exemption) อนุญาตให้ภาคธุรกิจประกันภัยกระทำการแลกเปลี่ยนข้อมูลได้ในบางกรณีที่กำหนดไว้ โดยข้อยกเว้นดังกล่าวจะไม่อยู่ภายใต้การบังคับใช้กฎหมายแข่งขันทางการค้าของสหภาพยุโรป

สำหรับประเทศไทย การแลกเปลี่ยนข้อมูลอาจถือเป็นการละเมิดบทบัญญัติมาตรา 27 แห่งพระราชบัญญัติแข่งขันทางการค้า พ.ศ. 2542 ได้ ขึ้นอยู่กับลักษณะของการกระทำ ทั้งนี้ ประเทศไทยไม่มีข้อยกเว้นหรือแนวปฏิบัติที่ชัดเจนสำหรับภาคธุรกิจประกันภัยที่จะเป็นหลักให้ปฏิบัติตามได้ ดังนั้น บทความนี้จึงได้นำเสนอข้อดีสำหรับการมีแนวปฏิบัติชัดเจน เกี่ยวกับการแลกเปลี่ยนข้อมูลในภาคธุรกิจประกันภัย ซึ่งออกโดยหน่วยงานของรัฐที่เกี่ยวข้อง

**คำสำคัญ:** การแลกเปลี่ยนข้อมูล ธุรกิจประกันภัย กฎหมายแข่งขันทางการค้า กฎหมายป้องกันการผูกขาด ข้อยกเว้นการบังคับใช้กฎหมายแข่งขันทางการค้า

## **Abstract**

Information exchange is a standard business practice of the insurance industry worldwide. It can have pro-competitive or anti-competitive effects, depending on the degree of the exchange and type of information. The Thai insurance sector relies heavily on information collection and exchange, industry standard setting, and joint activities within the industry in order to create new products and enhance their underwriting capabilities to better serve the needs of the customer. However, information sharing may have anti-competitive effects, which are detrimental to customers.

In the United States, the McCarran Ferguson Act exempts the insurance sector from federal antitrust laws in particular circumstances, allowing information exchange between insurance operators in certain circumstances. For the European Community, the E.U. insurance block exemptions allow certain information exchange practices in the insurance sector to be exempt from the application of EU Competition law. In Thailand, information exchange could possibly violate Section 27 of the Competition Act, B.E. 2542 (1999), depending on the circumstances. There are no explicit exemptions or guidelines specifically for the industry to follow.

Therefore, the study shows that it would be beneficial to the Thai insurance industry to have guidelines on information exchange established by the relevant government bodies.

**Keywords:** Information Exchange, Insurance Sector, Competition Law, Antitrust Law, Competition Law Exemption

## I. Introduction

### 1. Background

Our research shows that several jurisdictions recognize the significance of information exchange amongst competitors while their legislative bodies remain concerned about trade competition violations. Therefore, as a compromise, partial exemptions from competition regulatory regimes have been developed and made available in some countries, addressing specifically certain industry practices including those in the insurance sector.

Thailand does not have any equivalent exemptions (or prohibitions) on information exchange between competitors or business operators. Absence of exemptions on information exchange may pose risks of violation of competition law to businesses and ultimately could prevent or discourage the overall industry development.

This article is aimed to address specific concerns of the Thai insurance industry and the implication of lacking information exchange regulatory guidelines/exemptions.

### 2. Objectives of the Study

2.1 To analyze possible pro-

competitive and anti-competitive effects of information exchange under antitrust/competition law

2.2 To study the experiences and perspectives from the United States and the European Union on information exchange and their governing antitrust/competition laws as well as relevant guidelines

2.3 To emphasize the necessity for clear laws, regulations, or guidelines on exchange of information for Thailand's insurance businesses.

### 3. Significance of the Study

Information exchange is a fundamental and long-standing standard practice amongst insurance industries because the insurance business relies heavily on data collection and statistics.<sup>1</sup> Statistics such as consumer behaviors, claim histories, and payment behaviors help insurance companies to better provide new products, enable the companies to set the appropriate amounts of premiums that would, in turn, meet the market needs, and ultimately promote the development of the industry as a whole.

To date, the concept of information exchange as opposed to competition

---

<sup>1</sup> Susan Beth Farmer, "Competition and Regulation in the Insurance Sector: Reassessing the McCarran-Ferguson Act," *Oregon Law Review* 89 (2011): 924, accessed 7 May 2016.

restrictions lightly appears in Thai competition law where the general principle is: research collaboration and exchange of business information between rival firms could constitute restrictive or collusive agreement or practice<sup>2</sup> (and thus constitutes a violation of Thai competition law). However, permission could be sought on a case-by-case basis provided that research collaboration or information exchange is aimed to promote efficiency which may encourage a positive effect on an economic system.<sup>3</sup>

Though Thailand is now reforming its competition law in order to strengthen both substantive provisions and enforcement, it was not made apparent to the public that the new competition law will be made to recognize information exchange practices amongst insurance companies. Accordingly, it could result in an industry-wide breach of competition law; prohibition of information sharing; and no joint effort from the insurance industry to create and introduce

new products to the market. One cannot precisely anticipate the result of these direct impacts to the whole industry as well as the possible indirect effects to all the policyholders in Thailand.

## II. The Notion of Information Exchange

### 1. Definition of Information Exchange

The Cambridge Dictionary provides a simple definition of information exchange, which refers to “the act of people, companies, and organizations passing information from one to another, especially electronically, or a system that allows them to do this.”<sup>4</sup>

Specifically, the Organization for Economic Co-operation and Development (OECD) defines exchange of information as “interactions among competitors that, from a competition law perspective, fall between the universally condemned hard-core “naked” cartels and tacit collusion arising from oligopolistic interdependence, generally considered legal”<sup>5</sup>

<sup>2</sup> สำนักงานเลขาธิการสภาผู้แทนราษฎร, วาระปฏิรูปที่ 12: การผูกขาดและการแข่งขันที่เป็นธรรม: การปฏิรูปกฎหมายแข่งขันทางการค้า, สภาปฏิรูปแห่งชาติ (กรุงเทพมหานคร ประเทศไทย: สำนักงานเลขาธิการสภาผู้แทนราษฎร, 2558), 19.

<sup>3</sup> Ibid.

<sup>4</sup> *Cambridge Dictionaries Online*, s.v. “Information Exchange,” accessed 18 May 2016, <http://dictionary.cambridge.org/dictionary/english/information-exchange>

<sup>5</sup> (OECD), “Policy Roundtables, Information Exchange between Competitors under Competition Law,” 9.

In a simple context, we understand the meaning of information exchange as a circumstance where business operators within the same industry and same market location share their business information whether or not through a respective trade association and with or without malicious intent to establish any joint trade collusion.

## 2. Information Exchange in Various Business Sectors

Market information is of value for businesses for the enhancement of effective competition.<sup>6</sup> Companies are able to acquire market information by virtue of market transparency which can be achieved by information exchange.<sup>7</sup> Various businesses

are dependent on exchange of information such as financial institutions,<sup>8</sup> health care,<sup>9</sup> and insurance.<sup>10</sup>

Further, information exchange exists in many jurisdictions including Canada, Chile, Japan, the United States, and the European Union as evidenced by certain regulations governing practices of information exchange amongst firms.<sup>11</sup>

## 3. Information Exchange in Insurance Sectors

Similar to other industry sectors, the insurance sector relies on data collection for the purposes of risk management, and more precisely, screening insurance applicants and monitoring their performance.<sup>12</sup>

---

<sup>6</sup> Michael Bloom, "Information Exchange: Be Reasonable," Federal Trade Commission, last modified 11 December 2014, accessed 21 May, 2016. <https://www.ftc.gov/news-events/blogs/competition-matters/2014/12/information-exchange-be-reasonable>

<sup>7</sup> (OECD), "Policy Roundtables, Information Exchange between Competitors under Competition Law," 21.

<sup>8</sup> Tullio Jappelli and Marco Pagano, "Information Sharing, Lending and Defaults: Cross-Country Evidence," *Journal of Banking & Finance* 26, no. 10 (10// 2002): 2021, accessed 21 May 2016, [http://dx.doi.org/http://dx.doi.org/10.1016/S0378-4266\(01\)00185-6](http://dx.doi.org/http://dx.doi.org/10.1016/S0378-4266(01)00185-6)

<sup>9</sup> Joshua R Vest and Larry D Gamm, "Health Information Exchange: Persistent Challenges and New Strategies," *Journal of the American Medical Informatics Association* 17, no. 3 (2010), accessed 19 May 2016, <https://jamia.oxfordjournals.org/content/17/3/288>

<sup>10</sup> Farmer, "Competition and Regulation in the Insurance Sector: Reassessing the Mccarran-Ferguson Act," 920.

<sup>11</sup> (OECD), "Policy Roundtables, Information Exchange between Competitors under Competition Law."

<sup>12</sup> Donatella Porrini, "Information Exchange as Collusive Behaviour: Evidence from an Antitrust Intervention in the Italian Insurance Market," *The Geneva Papers on Risk and Insurance. Issues and Practice* 29, no. 2 (2004): 220, accessed 11 May 2016, <http://www.jstor.org/stable/41953111>

Information sharing is thus regarded as a part of “standard business practice”<sup>13</sup> in the insurance market. The forgoing statement may be validated by the fact that a considerable number of insurance companies which are participants<sup>14</sup> of the Association for Cooperative Operations Research and Development (ACORD), which is a non-profit organization developing electronic standards, standardized forms, and tools to support information exchange and workflows of its members.<sup>15</sup>

In Thailand, general insurance companies form the Thai General Insurance Association. Life insurers have their Life Insurance Association and even insurance brokers have their Insurance Broker Association. The associations provide a forum

for industry information sharing, in-house trainings to their members, or even joint collaboration to develop and enhance insurance products in the country. It is more than apparent that information sharing is critical to the Thai insurance industry.

#### **4. Benefits of Information Exchange**

Market information is of vital importance for supply chain management in terms of planning, forecasting, production, and replenishment.<sup>16</sup> To elaborate, the management of supply chains demands in-depth knowledge of the market including market trends, demand forecasting to develop market strategies, distribution systems, and the efficiencies of inventory management,<sup>17</sup> “enabling firms to optimize inventories and

---

<sup>13</sup> Farmer, “Competition and Regulation in the Insurance Sector: Reassessing the Mccarran-Ferguson Act,” 924.

<sup>14</sup> Association for Cooperative Operations Research and Development (ACORD), “Participants,” ACORD, last modified 2016, accessed 21 May, 2016. <https://www.acord.org/membership/Pages/OurMembers.aspx#CarriersEtc>

<sup>15</sup> Association for Cooperative Operations Research and Development (ACORD), “Mission,” ACORD, last modified 2016, accessed 21 May, 2016. <https://www.acord.org/about/Pages/default.aspx>

<sup>16</sup> Usha Ramanathan, “Analysing the Role of Information Exchange for Demand Forecasting in Collaborative Supply Chains” (The University of Nottingham, 2010), 22, accessed 22 May 2016, [http://eprints.nottingham.ac.uk/11538/1/Final\\_thesis-hardbound-31Aug2010\\_-\\_Usha.pdf](http://eprints.nottingham.ac.uk/11538/1/Final_thesis-hardbound-31Aug2010_-_Usha.pdf)

<sup>17</sup> (OECD), “Policy Roundtables, Information Exchange between Competitors under Competition Law,” 24; Yu Zhenxin, Yan Hong, and T.C. Edwin Cheng, “Benefits of Information Sharing with Supply Chain Partnerships,” *Industrial Management & Data Systems* 101, no. 3 (2001/04/01 2001): 3, accessed 15 May 2016, <http://dx.doi.org/10.1108/02635570110386625>; Susan Cohen Kulp, Hau L Lee, and Elie Ofek, “Manufacturer Benefits from Information Integration with Retail Customers,” *Management science* 50, no. 4 (2004): 432-34, accessed 15 May 2016, <http://dx.doi.org/10.1287/mnsc.1030.0182>

to avoid shortage or overproduction.<sup>18</sup>

The Health care sector benefits from Health Information Exchange (HIE) in that data and medical histories of patients may be analyzed in order to improve patient safety; ascertain effective and efficient medical treatment; reduce medication and medical errors; dispense with redundancy and unnecessary testing; and enrich quality of public health.<sup>19</sup> Further, sharing information between patients and health care providers may enhance knowledge of patients in relation to self-care.<sup>20</sup>

In financial services, particularly the insurance industry, information on individuals' risks acquired by companies themselves, rather than through unilateral disclosure from consumers, can help mitigate

the predicaments of adverse selection, where firms cannot distinguish between good and bad consumers, and moral hazard, where consumers may behave differently when they are protected as opposed to their full exposure to risks.<sup>21</sup> Moreover, information regarding calculation, table, and studies improves the risk management of the companies.<sup>22</sup> The utility of data on individuals' risk characteristics contributes to the improvement of quality of contract, which will in turn benefit consumers.<sup>23</sup>

Not only do companies need to know their consumers' information, but buyers themselves also require detailed knowledge about sellers in terms of prices, product quality, and characteristics.<sup>24</sup> Increased price transparency, via availability of

<sup>18</sup> (OECD), "Policy Roundtables, Information Exchange between Competitors under Competition Law," 24.

<sup>19</sup> Office of the National Coordinator for Health Information Technology (ONC), "What Are the Benefits of Health Information Exchange?," HealthIT, last modified 15 January 2013, accessed 19 May, 2016. <https://www.healthit.gov/providers-professionals/faqs/what-are-benefits-health-information-exchange>

<sup>20</sup> Gihan Perera et al., "Views on Health Information Sharing and Privacy from Primary Care Practices Using Electronic Medical Records," *International Journal of Medical Informatics* 80, no. 2 (2// 2011): 94, accessed 19 May 2016, <http://dx.doi.org/http://dx.doi.org/10.1016/j.ijmedinf.2010.11.005>

<sup>21</sup> (OECD), "Policy Roundtables, Information Exchange between Competitors under Competition Law," 25; Porini, "Information Exchange as Collusive Behaviour: Evidence from an Antitrust Intervention in the Italian Insurance Market," 220.

<sup>22</sup> (OECD), "Policy Roundtables, Information Exchange between Competitors under Competition Law," 26.

<sup>23</sup> Porini, "Information Exchange as Collusive Behaviour: Evidence from an Antitrust Intervention in the Italian Insurance Market," 220-21.

<sup>24</sup> (OECD), "Policy Roundtables, Information Exchange between Competitors under Competition Law," 27.



information, can diminish buyer's search cost,<sup>25</sup> referring to "the cost incurred by the buyer to locate an appropriate buyer and purchase product ... [including] the opportunity cost of time spent searching as well as associated expenditures such as driving, telephone calls, computer fees, magazine subscriptions, etc."<sup>26</sup>

Therefore, the benefits of information exchange do not just rest with the insurance business operators but also with the insurance consumers.

### III. Competition Law

#### 1. Brief Historical Background of Competition Law and Objectives

The first modern competition statute is the Act for the Prevention and Suppression of Combinations formed in Restraint of

Trade of 1889 of Canada,<sup>27</sup> yet the actual "father" of antitrust law, U.S. Antitrust Law, commenced with the enactment of the Sherman Act in 1890, which is a model for other competition law regimes.<sup>28</sup> As for the European Union, the notion of competition was initially enshrined in the Treaty Establishing the European Coal and Steel Community (ECSC) or the Treaty of Paris of 1951.<sup>29</sup> In Thailand, a couple of laws with regard to price fixing and anti-monopoly had been enacted before the current competition provision, the Competition Act, B.E. 2542, was passed in 1999.<sup>30</sup>

The collective aim of competition law could be to prevent market monopolistic behaviors and enhance economic efficiency as a consequence of fair competition. The OECD also notes that competition law and

---

<sup>25</sup> Organisation for Economic Co-operation and Development (2001), *Policy Roundtables: Price Transparency, Roundtable on Price Transparency* (OECD, 2001), 9.

<sup>26</sup> J Yannis Bakos, "Reducing Buyer Search Costs: Implications for Electronic Marketplaces," *Management science* 43, no. 12 (1997): 2, accessed 16 May 2016.

<sup>27</sup> A.S. Papadopoulos, *The International Dimension of Eu Competition Law and Policy* (Cambridge University Press, 2010), 10.

<sup>28</sup> Gerber, *Global Competition: Law, Markets, and Globalization*, 121.

<sup>29</sup> Alison Jones and Brenda Sufrin, *Eu Competition Law: Text, Cases & Materials*, Fourth Edition ed. (Great Britain, the United Kingdom: Oxford University Press, 2011).

<sup>30</sup> Sakda Thanitcul, *Kham Athibay Lhae Koraneesuksa Phra Ratchabanyati Kamkaenkan Tang Kanka, B.E. 2542 [Commentary and Case Study on Trade Competition Act, B.E. 2542]* (Bangkok, Thailand: Winyuchon, 2010), 28-30.



policy objectives are to promote the public interest, i.e., protecting consumer interest, fostering competitive process, and attaining greater economic efficiency.<sup>31</sup>

## 2. Possible anti-competitive effects of information exchange contributing to competition law infringements

Business operators have an incentive to collude and conform to “industry joint profit maximizing strategy” because they have the same target,<sup>32</sup> especially in the markets where their market shares are distributed among very few operators. Exchange of information can “artificially” enhance transparency, whereby rival firms obtain knowledge from each other,<sup>33</sup> which

may reduce or eliminate strategic uncertainties regarding current or future competitive activities of rival firms;<sup>34</sup> assist firms to anticipate demand and forecast trend of future prices;<sup>35</sup> and facilitate collusion<sup>36</sup> or cartels<sup>37</sup> accordingly.

This market transparency allows operators to reach a common understanding on terms of coordination, though without explicit collusive agreements,<sup>38</sup> which are so-called “tacit collusion.”<sup>39</sup> This transparency also provides tools for concerted operators to monitor adherence to such collusion, and support internal stability of collusive agreements as they can detect and punish deviation companies.<sup>40</sup>

<sup>31</sup> Organisation for Economic Co-operation and Development (OECD), *The Objective of Competition Law and Policy -- Note by the Secretariat, OECD Global Forum on Competition* (OECD, 2003).

<sup>32</sup> Porrini, “Information Exchange as Collusive Behaviour: Evidence from an Antitrust Intervention in the Italian Insurance Market,” 222.

<sup>33</sup> S.M. Colino, *Competition Law of the Eu and Uk*, 7<sup>th</sup> Edition ed. (Oxford University Press, 2011).

<sup>34</sup> United Nations Conference on Trade and Development (UNCTAD), *Guidelines on Information Exchange between Competitors*, Sofia Competition Forum (UNCTAD, 2013), 10.

<sup>35</sup> Bissocoli, “Trade Associations and Information Exchange under Us Antitrust and Ec Competition Law,” 22.

<sup>36</sup> (OECD), “Policy Roundtables, Information Exchange between Competitors under Competition Law,” 28.

<sup>37</sup> (UNCTAD), “Guidelines on Information Exchange between Competitors, Sofia Competition Forum,” 12.

<sup>38</sup> (OECD), “Policy Roundtables, Information Exchange between Competitors under Competition Law,” 29.

<sup>39</sup> Porrini, “Information Exchange as Collusive Behaviour: Evidence from an Antitrust Intervention in the Italian Insurance Market,” 222.

<sup>40</sup> (OECD), “Policy Roundtables, Information Exchange between Competitors under Competition Law,” 28-29.

In addition, members of a group or trade association in which information of relevant market is disseminated gain competitive advantage over competitors who are not members, thereby leading to foreclosure effects,<sup>41</sup> which is “[s]trategic behavior by a firm or group of firms to restrict market access possibilities of potential competitors.”<sup>42</sup>

#### **IV. Conflicts between Information Exchange and Competition Law in Selected Jurisdictions**

##### **1. The United States**

Courts and U.S. Antitrust Agencies recognized pro-competitive advantages of some kinds of information exchange<sup>43</sup> whereas certain practices of information exchange may violate Section 1 of the

Sherman Act, which prohibits “contract, combination in the form of trust or otherwise, or conspiracy”<sup>44</sup> that results in unreasonable restraint of trade.<sup>45</sup>

Several early court judgments were related to exchange of information in trade association,<sup>46</sup> and the traditional *per se* approach was exercised against unlawful price fixing and market allocation.<sup>47</sup> As demonstrated in *American Column and Lumber Co v. US*,<sup>48</sup> the Court reviewed the quantity and quality of information shared and held that members of the association had intention to reduce production and increase prices by sharing substantial information such as details of businesses, future market conditions, and significant suggestions as to both future prices and production. Thus, it constituted cartel-like

---

<sup>41</sup> Ibid., 30.

<sup>42</sup> *Glossary of Competition Terms*, s.v. “Foreclosure,” accessed 17 May 2016 <http://www.concurrences.com/Droit-de-la-concurrence/Glossaire-des-termes-de/Foreclosure>

<sup>43</sup> (OECD), “Policy Roundtables, Information Exchange between Competitors under Competition Law,” 40.

<sup>44</sup> 15 U.S. Code § 1.

<sup>45</sup> The Delegation of the United States, Roundtable on Information Exchanges between Competitors under Competition Law -- Note by the Delegation of the United States, Roundtable on Information Exchanges Between Competitors Under Competition Law (Organisation for Economic Co-operation and Development (OECD) 2010).

<sup>46</sup> (OECD), “Policy Roundtables, Information Exchange between Competitors under Competition Law,” 40.

<sup>47</sup> Bissocoli, “Trade Associations and Information Exchange under Us Antitrust and Ec Competition Law,” 84.

<sup>48</sup> *American Column and Lumber Co v. US*, 257 US 377.



behavior and such practice violated antitrust law.

Later, the Court analyzed information exchange under the rule of reason, “distinguish[ing] legitimate information exchanges from illegal ones by balancing the information exchanges’ anticompetitive effects with their potential procompetitive benefits,” and has taken into consideration the actual effects of information exchange on competition, and also analyzed other indicative factors including the degree of market concentration, the nature of the product, and the characteristics of demand.<sup>49</sup> In *U.S. v. U.S. Gypsum Co.*,<sup>50</sup> the Court clarified that information exchange on prices may not necessarily lead to anticompetitive effects. Even exchange of current price information was not *per se* unlawful, but it potentially constitutes anticompetitive effects, thus violating the Sherman Act.

It is a court precedent that *per se* illegality would apply when the Court findsthat conduct is “manifestly anticompetitive”<sup>51</sup> or “there are certain agreements

or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”<sup>52</sup>

U.S. Antitrust Agencies demarcate so-called “Safety Zones” for some practices of information exchange, namely:

(1) Antitrust Guidelines for Collaborations Among Competitors issued by Federal Trade Commission and the U.S. Department of Justice in 2000, providing analysis guidelines with regard to certain antitrust issues raised by collaborations among competitors including information sharing practices that are deemed procompetitive and anticompetitive;

(2) the FTC/DOJ Health Care Statement (1996), setting out enforcement policy in relation to collective dissemination of health care providers’ fee information to purchasers and exchanges of price and cost information among competing health care service

<sup>49</sup> (OECD), “Policy Roundtables, Information Exchange between Competitors under Competition Law,” 40-41.

<sup>50</sup> *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978).

<sup>51</sup> *Continental Television v. GTE Sylvania*, 433 U.S. 36 (1977).

<sup>52</sup> *Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958).

providers;<sup>53</sup> and

(3) FTC advisory opinions, in which potential participants request the Federal Trade Commission (FTC) to analyze their proposed information exchange and to issue advisory opinions as to whether their intended practices are permissible.<sup>54</sup>

However, specifically for the insurance industry, U.S. Congress enacted the McCarran Ferguson Act in 1945, stipulating that any federal antitrust law does not pre-empt state laws regulating insurance business unless that federal law specifically relates to the business of insurance.

The McCarran Ferguson exemption fosters competition in the insurance market as it allows firms to exchange significant data in connection with loss and other factors.<sup>55</sup>

Our study shows that the exemptions were not made with clear guidelines. It is, however, provided as “criteria considered

in assessing the legitimacy of information exchange.” The criteria are to be applied with discretion of the applicable court and specifically on a case-by-case basis. Samples of the criteria include:

- Nature and quantity of the information as opposed to the level of anticompetitive implications
- How recent the information was shared (old data results in less anticompetitive implications compared to recent data)
  - The intent of information sharing
  - The nature of the industry structure (few plays likely to make anticompetitive implications easier)
- Public availability of information shared

These criteria allow discretion of the competent U.S. courts and the relevant authorities to consider (and provide more justice) on a case-by-case basis, perhaps because this one rule could not fit all circumstances.

---

<sup>53</sup> Department of Justice and the Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care*, by U.S. Department of Justice and Federal Trade Commission (Federal Trade Commission, 1996). available at [https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements\\_of\\_antitrust\\_enforcement\\_policy\\_in\\_health\\_care\\_august\\_1996.pdf](https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf)

<sup>54</sup> States, “Roundtable on Information Exchanges between Competitors under Competition Law -- Note by the Delegation of the United States,” 9.

<sup>55</sup> *The Mccarran-Ferguson Act and Antitrust Immunity: Good for Consumers* (The United States Government Printing Office (GPO), 2007), 97.

For civil law system countries, like Thailand, the downside of criteria (with room for interpretation) may not fit with business operators wishing for a more definite and clear guideline of dos and don'ts when they wish to exchange information. Our research on E.U. law shows different approaches on providing exemptions for information exchange in the insurance industry.

## 2. The European Union

The European Union regards information exchange as a common feature of a competitive market as it helps deal with information asymmetries and make the market more efficient.<sup>56</sup> However, a transparent market in which competitor's strategies are accessible may facilitate collusion between firms when they "use information as signals to influence the terms collusive agreements."<sup>57</sup>

The European Commission recognized

the idiosyncratic characteristics of the insurance industry in that:

[t]he service provided by insurance companies depends on an uncertain factor, i.e., the occurrence of the insured risk. Cooperation amongst insurers can enhance efficiency, for instance by helping insurers to share large and unpredictable risks or to gain better understanding of certain specific risks.<sup>58</sup>

Thus, certain exemptions were pronounced in favor of insurance businesses.

In 1991, the Council of the European Union issued Council Regulation (EEC) No 1534/91<sup>59</sup> to exempt certain categories of agreements between undertakings, decisions of associations of undertakings, and concerted practices in the insurance sector.<sup>60</sup>

<sup>56</sup> The Delegation of the European Union, *Roundtable on Information Exchanges between Competitors under Competition Law -- Note by the Delegation of the European Union, Directorate for Financial and Enterprises Affairs, Competition Committee* (Organisation for Economic Co-operation and Development (OECD), 2010), 1.

<sup>57</sup> Ibid.

<sup>58</sup> Commission, "Insurance."

<sup>59</sup> Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector. L 143, 07/06/1991 P. 0001-0003.

<sup>60</sup> Article 1 of Council Regulation (EEC) No 1534/91.

In 1992, The EC Commission adopted the block exemption regulation for insurance business, Commission Regulation (EEC) No 3932/92<sup>61</sup> (repealed in 2003), which provides for certain criteria for some collaborative practices that are not regarded as violations of competition law. In particular, the determination of insurance premium requires statistical data in connection with, for instance, the frequency and matters of claims in the past.<sup>62</sup>

In 2003, Commission Regulation (EC) No 358/2003<sup>63</sup> (which expired in 2010) exempts certain arrangements including the joint establishment and distribution of calculations of the average cost of covering a specified risk in the past; the joint carrying-out of studies on the potential effect of external conditions on future claims; and the joint establishment and distribution of non-binding standard policy conditions.<sup>64</sup>

To date, the current Commission Regulation (EU) No 267/2010,<sup>65</sup> implemented in 2010, provides exemptions for:

(a) The joint compilation and distribution of information necessary for: (i) calculation of the average cost of covering a specified risk in the past; and (ii) construction of mortality tables and tables showing the frequency of illness, accident, and invalidity in connection with insurance involving an element of capitalization.

(b) The joint carrying-out of collaborative studies on the probable impact of general circumstances external to the interested undertakings, either on the frequency or scale of future claims for a given risk or risk category or on the profitability of different types of investment and the distribution of the results of such studies.<sup>66</sup>

<sup>61</sup> Commission Regulation (EEC) No 3932/92 of 21 December 1992 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector. OJ L 398, 31.12.1992, p. 7–14.

<sup>62</sup> Article 1 and 2 of Commission Regulation (EEC) No 3932/92.

<sup>63</sup> Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector. L 053, 28/02/2003 P. 0008–0016.

<sup>64</sup> Article 1 of Commission Regulation (EC) No 358/2003.

<sup>65</sup> Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector. OJ L 83, 30.3.2010, p. 1–7.

<sup>66</sup> Article 2 of Commission Regulation (EU) No 267/2010.

There are certain types of agreement not covered by the exemptions and also conditions applicable on the exemptions.

It reveals that the approach of the block exemption is to set a clear guideline with less room for interpretation. This enables applicable business operators to identify what can be done without violating E.U. trade competition laws.

The current block exemption will soon expire on March 31, 2017. The Commission recently held a meeting on April 26, 2016, to discuss the report's findings on application of the block exemption,<sup>67</sup> and to determine if the block exemption should be renewed, modified, or allowed to lapse.<sup>68</sup>

## V. The Necessity of Information Exchange Exemptions for the Thai Insurance Sector

In Thailand—a developing country—the insurance industry is one of the key drivers to promote the economy's financial stability and help drive the economy forward.

The insurance industry allows businesses to expand and provide both commercial and consumer business protection in need. The insurance penetration rate in Thailand is very minimal compared to other developed countries and the country relies on the insurance industry to grow in order to increase financial stability and ultimately help the overall expansion of the economy.

The information exchange within the Thai insurance industry is essential. In 2010, the Information Bureau System was established as a centralized data system of the entire insurance industry according to Insurance Development Plan Vol. 2 (2010-2014),<sup>69</sup> for the purpose of developing operations of insurance business and increasing supervision measures.<sup>70</sup> This database was created and developed by the collaboration between The Office of Insurance Commission (OIC), the regulator of Thailand's Insurance Industry, and the Thai General Insurance Association. The data is comprised of information necessary

<sup>67</sup> Commission, "Insurance."

<sup>68</sup> The European Commission, *Antitrust: Commission Publishes Report on Functioning of Insurance Block Exemption Regulation*, European Commission - Press release (The European Commission, 2016).

<sup>69</sup> Office of Insurance Commission, *Insurance Development Plan Vol. 2 (2010-2014)*, by Office of Insurance Commission (OIC) (OIC, 2010), 101.

<sup>70</sup> Office of Insurance Commission (OIC), "Insurance Bureau System," last modified 27 April 2016, accessed 22 May 2016. [http://www.oic.or.th/ibs/Non\\_life/index.html](http://www.oic.or.th/ibs/Non_life/index.html)



in company examination and supervision such as non-life insurance statistics, company profile, premium, nature of loss, and policies. Forms of data submission are accessible to the public through the OIC's website.<sup>71</sup>

The insurance sector cooperates and collaborates through a number of associations and institutions connected to insurance including the Thai Association of Insurance and Financial Advisors, The Society of Actuaries of Thailand, The Insurance Premium Rating Bureau, the Thailand Insurance Institute, the Thai Insurance Brokers Association, the Thai General Insurance Association, and The Thai Life Assurance Association.<sup>72</sup> Some of them may be considered as trade associations akin to those in the United States, by which members share information with one another.<sup>73</sup>

For the non-life insurance industry, the market ranking (as at 2015, published by the OIC) shows that the top 15 companies hold 70 percent of the total market share.

Almost all insurance companies are members of their association.

Thailand needs to expand and develop the insurance industry significantly as the current environment compels the Thai Insurance Regulator to play two major roles in the industry: supervise the industry and promote the insurance industry as a whole. This reason reflects enthusiastic collaboration between the insurance regulator and the trade association on information exchange and strong collaboration between the business operators via the insurance association forum.

In light of past experiences from the U.S. and E.U., their intent to the exemptions is primarily to “support” the development and competition of insurance industry developments. However, as the need is more extreme in Thailand, it is considered that the absence of such equivalent exemptions (which in turn prohibits information exchange of insurance industry) could jeopardize the ability of the insurance industry to effectively survive as a whole. The absolute prohibition

---

<sup>71</sup> Ibid.

<sup>72</sup> Office of Insurance Commission (OIC), “Insurance Association,” accessed 26 May, 2016. <http://www1.oic.or.th/th/weblink/index.php>

<sup>73</sup> Bissocoli, “Trade Associations and Information Exchange under Us Antitrust and Ec Competition Law,” 79-81.



on information exchange will also worsen market efficiency and will disadvantage the status of insured persons.

This research has the following suggestions to address the current situation of Thailand on information exchange in the insurance industry.

(a) Thailand's competent regulators, i.e., the Office of Trade Competition Commission in collaboration with the Office of Insurance Commission, formulate guidelines on information exchange in the insurance sector.

(b) The guidelines should elaborate what kind of information exchange activities are permissible or impermissible under Section 27 of the Competition Act, B.E. 2542 (1999).

(c) The guidelines would allow the insurance industry to adhere to and enable insurance operators to effectively comply with the Competition Act.

(d) The proposed guidelines could be based upon the EU block exemptions because they have clearly stated practices in the insurance sector which are exempted from the application of competition provisions.

(e) Once the guidelines are established, they should be periodically reviewed and updated annually, similar to the review process of the EU block exemptions which have been periodically developed consistent with the findings of the European Commission as to effectiveness and issues on the application of the exemptions.<sup>74</sup>

## Conclusion

Information exchange can both favor and impair competition, depending on a number of factors. Although there is no testimony to information exchange between insurance competitors in Thailand, it is understood that insurance firms undertake such practice as it is a standard practice of business and trade associations to exchange information amongst members. Whether the potential information exchange violates Section 27 of the Competition Act, B.E. 2542 (1999), must be considered and analyzed on a case-by-case basis. Meanwhile, there is no relevant regulation, exemption, or guideline that insurance companies can abide by, all of which emphasize the necessity of exemptions for information exchange between insurance firms, of which business activity is dependent on statistical data to

---

<sup>74</sup> Commission, "Antitrust: Commission Publishes Report on Functioning of Insurance Block Exemption Regulation."

manage risks effectively.

It is proposed that the Office of Trade Competition Commission and the Office of Insurance Commission collaboratively introduce guidelines on permissible and non-permissible information exchange practices in the insurance industry by adopting something similar to insurance block exemptions. Also, the guidelines should be reviewed, modified, and developed like EU block exemptions in response to dynamic changes of situations.

## References

### Journal Articles

- Albery, Michael. "Restrictive Trade Practices and the Conflict of Law." *Transactions of the Grotius Society* 44 (1958): 125-41. <http://dx.doi.org/10.2307/743236>
- Bakos, J Yannis. "Reducing Buyer Search Costs: Implications for Electronic Marketplaces." *Management science* 43, no. 12 (1997): 1676-92. Accessed 16 May 2016.
- Bissocoli, Eugenio F. "Trade Associations and Information Exchange under Us Antitrust and Ec Competition Law." *World Competition Law and Economics Review* 23, no. 1 (2000): 79-106. Accessed 14 May 2016.
- Farmer, Susan Beth. "Competition and Regulation in the Insurance Sector: Reassessing the Mccarran-Ferguson Act." *Oregon Law Review* 89 (2011): 101. Accessed 7 May 2016.
- Jappelli, Tullio and Marco Pagano. "Information Sharing, Lending and Defaults: Cross-Country Evidence." *Journal of Banking & Finance* 26, no. 10 (10// 2002): 2017-45. Accessed 21 May 2016. [http://dx.doi.org/http://dx.doi.org/10.1016/S0378-4266\(01\)00185-6](http://dx.doi.org/http://dx.doi.org/10.1016/S0378-4266(01)00185-6)
- Kulp, Susan Cohen, Hau L Lee, and Elie Ofek. "Manufacturer Benefits from Information Integration with Retail Customers." *Management science* 50, no. 4 (2004): 431-44. Accessed 15 May 2016. <http://dx.doi.org/10.1287/mnsc.1030.0182>
- Lande, Robert H. "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged." *Hastings Lj* 34 (1982): 65.
- Perera, Gihan, Anne Holbrook, Lehana Thabane, Gary Foster, and Donald J. Willison. "Views on Health Information Sharing and Privacy from Primary Care Practices Using Electronic Medical Records." *International Journal of Medical Informatics* 80, no. 2 (2// 2011): 94-101. Accessed 19 May 2016.



<http://dx.doi.org/http://dx.doi.org/10.1016/j.ijmedinf.2010.11.005>

Porrini, Donatella. "Information Exchange as Collusive Behaviour: Evidence from an Antitrust Intervention in the Italian Insurance Market." *The Geneva Papers on Risk and Insurance. Issues and Practice* 29, no. 2 (2004): 219-33. Accessed 11 May 2016. <http://www.jstor.org/stable/41953111>

Vest, Joshua R and Larry D Gamm. "Health Information Exchange: Persistent Challenges and New Strategies." *Journal of the American Medical Informatics Association* 17, no. 3 (2010): 288-94. Accessed 19 May 2016. <https://jamia.oxfordjournals.org/content/17/3/288>

Zhenxin, Yu, Yan Hong, and T.C. Edwin Cheng. "Benefits of Information Sharing with Supply Chain Partnerships." *Industrial Management & Data Systems* 101, no. 3 (2001/04/01 2001): 114-21. Accessed 15 May 2016. <http://dx.doi.org/10.1108/02635570110386625>

### Conference Proceedings

Organisation for Economic Co-operation and Development (OECD). *Policy Roundtables: Price Transparency*. Roundtable on Price Transparency. Edited by Secretary General of the

OECD: OECD, 2001.

Organisation for Economic Co-operation and Development (OECD). *The Objective of Competition Law and Policy -- Note by the Secretariat*. OECD Global Forum on Competition: OECD, 2003.

Organisation for Economic Co-operation and Development (OECD). *Policy Roundtables, Information Exchange between Competitors under Competition Law*. Roundtable on Information Exchange between Competitors under Competition Law. Edited by Secretary General of the OECD: Secretary General of the OECD, 2010.

The Delegation of the United States. *Roundtable on Information Exchanges between Competitors under Competition Law -- Note by the Delegation of the United States*. Roundtable on Information Exchanges Between Competitors Under Competition Law. Edited by Competition Committee Directorate for Financial and Enterprises Affairs: Organisation for Economic Co-operation and Development (OECD) 2010.

The Delegation of the European Union. *Roundtable on Information Exchanges between Competitors under*

*Competition Law -- Note by the Delegation of the European Union.* Directorate for Financial and Enterprises Affairs, Competition Committee: Organisation for Economic Co-operation and Development (OECD), 2010.

### Dictionary and Encyclopedia

Directorate General for Competition, the European Commission, *Glossary of Competition Terms: Concurrences Review*, 2015.

Investopedia, *Investopedia*, 2016.

Cambridge University Press, *Cambridge Dictionaries Online*. Cambridge University Press, 2016.

### Books

Colino, S.M. *Competition Law of the Eu and Uk*. 7<sup>th</sup> Edition ed.: Oxford University Press, 2011.

Gerber, D. *Global Competition: Law, Markets, and Globalization*. OUP Oxford, 2012.

Jones, Alison and Brenda Sufrin. *Eu Competition Law: Text, Cases & Materials*. Fourth Edition ed. Great Britain, the United Kingdom: Oxford University Press, 2011.

Papadopoulos, A.S. *The International Dimension of Eu Competition Law and*

*Policy*. Cambridge University Press, 2010.

Thanitcul, Sakda. *Kham Athibay Lhae Koraneesuksa Phra Ratchabanyati Karnkaenkan Tang Kanka, B.E. 2542 [Commentary and Case Study on Trade Competition Act, B.E. 2542]*. Bangkok, Thailand: Winyuchon, 2010.

Whish, Richard. and David. Bailey. *Competition Law*. Oxford University Press, 2015.

### Official Documents

*The Mccarran-Ferguson Act and Antitrust Immunity: Good for Consumers*. The United States Government Printing Office (GPO), 2007.

*H.R. 99: Health Insurance Industry Antitrust Enforcement Act of 2015*. 114<sup>th</sup> sess., 2015.

Office of Insurance Commission. *Insurance Development Plan Vol. 2 (2010-2014)*, by (OIC), Office of Insurance Commission, 2010.

(UNCTAD), United Nations Conference on Trade and Development. *Guidelines on Information Exchange between Competitors*, *Sofia Competition Forum*. Edited by UNCTAD: UNCTAD, 2013.

Department of Justice and the Federal Trade Commission. *Statements of Antitrust Enforcement Policy in Health*



Care, by U.S. Department of Justice and Federal Trade Commission, 1996.  
สำนักงานเลขาธิการสภาผู้แทนราษฎร. วาระปฏิรูป  
ที่ 12: การผูกขาดและการแข่งขันที่เป็น  
ธรรม: การปฏิรูปกฎหมายแข่งขันทางการค้า,  
โดยสภาปฏิรูปแห่งชาติ, 2558.

### Web Sites

Association for Cooperative Operations  
Research and Development (ACORD).  
“Mission.” ACORD. Last modified 2016,  
2016. Accessed 21 May, 2016. [https://  
www.acord.org/about/Pages/default.  
aspx](https://www.acord.org/about/Pages/default.aspx)

Association for Cooperative Operations  
Research and Development (ACORD).  
“Participants.” ACORD. Last modified  
2016, 2016. Accessed 21 May, 2016.  
[https://www.acord.org/membership/  
Pages/OurMembers.aspx#CarriersEtc](https://www.acord.org/membership/Pages/OurMembers.aspx#CarriersEtc)

Office of Insurance Commission (OIC).  
“Insurance Bureau System.” Last  
modified 27 April 2016, 2016. Accessed  
22 May 2016. [http://www.oic.or.th/ibs/  
Non\\_life/index.html](http://www.oic.or.th/ibs/Non_life/index.html)

Office of Insurance Commission (OIC).  
“Insurance Association.” Last modified  
2016. Accessed 26 May, 2016. [http://  
www1.oic.or.th/th/weblink/index.php](http://www1.oic.or.th/th/weblink/index.php)

Office of the National Coordinator for Health  
Information Technology (ONC). “What  
Are the Benefits of Health Information

Exchange?” HealthIT. Last modified  
15 January 2013, 2013. Accessed 19  
May, 2016. [https://www.healthit.gov/  
providers-professionals/faqs/what-are-  
benefits-health-information-exchange](https://www.healthit.gov/providers-professionals/faqs/what-are-benefits-health-information-exchange)  
Bloom, Michael. “Information Exchange:  
Be Reasonable.” Federal Trade  
Commission. Last modified 11  
December 2014, 2014. Accessed 21  
May, 2016. [https://www.ftc.gov/news-  
events/blogs/competition-matters/  
2014/12/information-exchange-be-  
reasonable](https://www.ftc.gov/news-events/blogs/competition-matters/2014/12/information-exchange-be-reasonable).

Burns, James. “United States: Mccarran  
Repeal Legislation Introduced by  
Congressman John Conyers.” 4 July  
2012 (2012). Accessed 12 May 2016.  
[http://www.mondaq.com/unitedstates/  
x/185046/Insurance/McCarran+Repeal  
+Legislation+Introduced+By+Congress  
man+John+Conyers](http://www.mondaq.com/unitedstates/x/185046/Insurance/McCarran+Repeal+Legislation+Introduced+By+Congressman+John+Conyers)

Commission, The European. “Insurance.”  
The European Commission. Last  
modified 23 March 2016, 2016.  
Accessed 25 May, 2016. [http://ec.  
europa.eu/competition/sectors/  
financial\\_services/insurance.html](http://ec.europa.eu/competition/sectors/financial_services/insurance.html)

### Thesis

Ramanathan, Usha “Analysing the Role of  
Information Exchange for Demand  
Forecasting in Collaborative Supply

Chains.” The University of Nottingham, 2010. Accessed 22 May 2016. [http://eprints.nottingham.ac.uk/11538/1/Final\\_thesis-hardbound-31Aug2010\\_-\\_Usha.pdf](http://eprints.nottingham.ac.uk/11538/1/Final_thesis-hardbound-31Aug2010_-_Usha.pdf)

### **Press Release**

The European Commission. *Antitrust: Commission Publishes Report on Functioning of Insurance Block Exemption Regulation*. European Commission - Press release: The European Commission, 2016.