The Emerging Competition Laws of Hong Kong and the PRC - How Trade and Professional Associations Are Impacted

Trade and professional associations (hereafter, ‘Associations’) play a vital role in the economy. By representing members of particular industry sectors or professions, they provide a platform for the promotion of common interests, and a forum for collective discussions and activities such as lobbying, advocacy, research, education and the promotion and improvement of product or service standards.

However, because Association activities usually involve the interaction of direct competitors, and Associations will commonly be the sole provider of certain services to their members, their activities and operating arrangements regularly raise competition law concerns. This was borne out by the recent Hollywood film ‘The Informant!’, which was based on real life events relating to a global cartel of chemical producers - who were collectively fined in excess of US$100m after using trade association meetings around the world as a forum to covertly discuss and implement price-fixing and output-restriction arrangements.

Despite the lessons from such highly publicised cases, Associations continue to make headlines for competition law violations around the world. For example:

- in March, a Norwegian court upheld a fine imposed by the country’s competition authority on a trade association for charter bus operators, after it was found to have unlawfully advocated that members increase the prices they charged for chartering buses; and
- in May, Portugal’s Competition Authority fined the Portuguese Association of Chartered Accountants (OTOC) €229,300 (twice its annual income) for anti-competitive practices in the accountant training market. Specifically, the authority found that OTOC had unfairly distorted competition in this market, including by stipulating to members that it had the exclusive right to provide certain compulsory education for accountant trainees, and by making other training providers subject to OTOC’s own participation criteria and pay a fee to the OTOC.

Where an Association’s arrangements or activities are found to involve competition law breaches such as the above, it is not just the constituent members who may face prosecution. In some cases, the Association itself can be targeted, even through it may not be directly involved in trade in the relevant sector to which it relates.

Accordingly, as it is proposed that many Associations will be subject to Hong Kong’s forthcoming competition law, and China’s Anti-Monopoly Law (“AML”) expressly applies to specific types of Associations, it is important that Associations operating in this region are aware of their rights and responsibilities under the relevant competition regimes.

In this update, we summarise how competition laws can impact on the activities of Associations, and provide compliance tips of general application.

What aspects of competition laws are relevant to Associations?

In most mature competition law jurisdictions, there are no specific competition law provisions dealing exclusively with Associations other than relevant provisions specifying that the general prohibitions
applicable to business operators apply equally to them. Those general prohibitions will usually include the following (which are commonly referred to as ‘conduct rules’):

• a prohibition of cartel arrangements, which impacts the types of discussions and arrangements that Association members may become involved in through the Association, and what directions or guidance the Association itself may provide to the members; and

• a prohibition of the ‘abuse’ of market power, which may impact the manner in which an Association can provide services to its members - particularly where it is the sole provider of such services.

Both of these types of prohibitions appear in China’s AML, and they are also proposed to be included in Hong Kong’s forthcoming competition law.

China’s AML goes a step further by also including a number of prohibitions and provisions specifically applicable to industry associations. For example, Article 12 of the AML requires industry associations to lead their members to compete according to law, and to maintain competition order in the market, and Article 16 prohibits industry associations from organising their members to engage in certain anti-competitive behaviour, such as cartels. Article 46 provides that associations who breach the aforementioned prohibition can be fined up to RMB500,000 and have their operating licences revoked.

What types of Association activities or arrangements commonly give rise to risks?

The most common sources of competition law risk for Associations relate to the way they are constituted and organised, their manner of admitting members, their work on behalf of members and the way Association meetings are conducted. More specific examples are discussed below, with attendant recommendations.

MEMBERSHIP AND MEMBERSHIP RULES

In some industry sectors, being a member of a relevant Association may be seen as materially advantageous - or even as an essential requirement for competing in that sector. In such cases, membership rules restricting access to an Association may have the effect of restricting competition in a market, thus potentially raising competition law concerns.

Accordingly, it is usually prudent for membership of Associations to be open to all businesses competing in the relevant sector (although membership should always be voluntary), with any carve-outs based on reasonable and objective standards. Similarly, ongoing membership and ‘standards of conduct’ rules for members should be fair and non-discriminatory, and should not unduly restrict the competitive activities of members.

Examples of membership terms which may unduly restrict competition among Association members include a rule restricting advertising by members (whether total or partial) and a rule prohibiting members from soliciting for business from the customers of their competitors. While certain such restrictions may be argued to have valid justifications in particular circumstances, unless such restrictions are mandated by law they are likely to involve significant competition law risks if implemented without proper legal review.

More generally, it goes without saying that Associations should avoid sanctions or forms of coercion aimed at forcing members to obey recommendations that may have an anti-competitive effect (such as those discussed further below in relation to pricing). However, sanctions that are implemented for legitimate purposes (such as for the failure to meet safety standards) will generally not raise competition law issues.
MEETINGS AND DISCUSSIONS

Competition laws such as the AML and the proposed Hong Kong competition law prohibit competitors or potential competitors collectively agreeing to the terms or manner in which they supply (or acquire) goods and services. Amongst other things, this extends to all aspects of future pricing, and which suppliers and customers the business operators deal with going forward. Accordingly, the key principle for avoiding a violation of this aspect of competition laws is ensuring independent decision-making by business operators and avoiding collaboration between competitors.

As noted in our introduction, competition regulators are commonly concerned about the prospect of Association meetings being used as a cover for discussions that lead to - or sustain - cartel behaviour that violates the above-mentioned principle. Many cartel investigations begin with a review of the activities of any Association to which the suspected cartel participants belong, and suspicions may be heightened if relevant Association meetings are not well documented or appear to involve discussion of factors that could facilitate or further unlawful collusion.

In this context, for many Associations it will be prudent for clear agendas to be circulated in advance of Association meetings, and that comprehensive minutes of such meetings be recorded and filed. Issues not on the agenda should not be discussed in such meetings, and members should be advised to avoid ‘sidebar’ discussions. In summary, the key matter will be to ensure that the Association’s records reflect that Association members do not discuss competitively sensitive topics.

Where possible, such Associations should engage legal counsel to review agendas and minutes, and attend all Association meetings - particularly where there is potential for discussion of sensitive subjects. Associations should also ensure they have in place a document retention program setting out what documents (such as meeting guidelines, agendas and minutes) are to be retained and for how long.

FEE GUIDELINES

The setting of industry fee schedules or fee guidelines has been a significant area of enforcement activity for competition regulators in mature antitrust jurisdictions in recent years. While most competition regulators recognise that there can be real benefits realised through the dissemination of information on cross-industry fee levels, particularly in professional services sectors, they are concerned to ensure that such arrangements do not facilitate firm agreements by competing parties on the fees to be charged in the future.

Accordingly, circulating fee guidelines that effectively operate as a direction to members on what prices they should offer going forward may violate competition laws. This also applies to communications that may be in the form of ‘recommendations’, if it is deemed that the relevant communications are disseminated with the intention or expectation that members will adopt the suggested fees. Generally, the safest course of action for an Association is to avoid any form of forward-looking price recommendation to members.

Dissemination of accurate fee data genuinely intended to be a source of information as to historical fees charged in a particular market should not, in and of itself, raise an issue under competition laws - but it could raise issues if it is used to establish or facilitate an agreement on prices or to promote adherence to specified fees going forward. This may require careful case-by-case consideration, but as a general rule it can be stated that historical fee information comprised of statistics gathered and compiled by an independent third party, and independently verified, is usually less likely to raise concerns than otherwise. Perhaps the most crucial aspect is that the dissemination of such data must not be done in a manner that may be interpreted by
Association members as a signal that they cannot deviate from current or past documented fees without fear of recrimination or sanctions.

ESTABLISHING INDUSTRY STANDARDS
Standard setting activities can be highly beneficial, particularly in cases where such activities enhance product safety, make it easier for consumers to compare the offerings of service providers, or ensure the interoperability of components made by different manufacturers (etc). Accordingly, competition regulators recognise that trade Associations may need to be involved in coordinating such activities with their members.

However, standard-setting activities may also give rise to competition law concerns if the standards they establish have the effect of restricting entry into a market, deterring innovation or otherwise inhibiting the ability of persons to compete and those goals are not consistent with legitimate goals recognised by relevant competition law regulation.

Accordingly, it will usually be prudent to involve competition lawyers before an Association commences any activities relating to the establishment or amendments of industry standards (or related matters, such as standardising terms of supply).

INFORMATION EXCHANGES
In the normal course of business, competing business operators may exchange information on a variety of matters legitimately and with no risk to the competitive process. Indeed, competition regulators have long recognised that heightened competition and consumer benefit may result from the sharing of information between competitors - such as where the information facilitates suitable benchmarking, allows suppliers to learn of relevant new technologies, or facilitates prudent risk calculation and management practices in industries such as the insurance sector.

In this context, competition regulators have allowed Associations to facilitate and conduct many forms of information sharing for the benefit of their members.

However, not all forms of information sharing that may be coordinated or facilitated by Associations will be lawful under competition laws. Where competitively sensitive information such as the future pricing intentions or customer-segment focus of members is collected and disseminated, substantial risks may arise. In particular, it may be deemed that the Association is assisting or participating in price-fixing or market-sharing cartel arrangements.

In this context, it is prudent for Associations to obtain legal advice about any information-sharing arrangements they arrange or assist in relating to the business of their members. While this is best done on a case-by-case basis with reference to the particular concerned sector and its competitive characteristics, the following principles will generally assist to reduce competition law risks:

1. Collect only historical information;
2. Disseminate information only in aggregated form - so that recipients cannot identify specific information relating to specific business operators (thus the level of appropriate aggregation may be greater in markets with fewer participants);
3. Engage an independent data collection agency; and
4. Do not require that data be provided by members - make the information supply optional only.

OFFERING SERVICES TO MEMBERS
As mentioned earlier in this update, both China’s AML and the proposed Hong Kong competition law prohibit business operators that hold a sufficiently high degree of market power (‘dominance’ under the AML, and ‘substantial market power’ under the proposed Hong Kong law) from engaging in conduct that amounts to an abuse of that power.
Evaluating whether a particular business operator or Association enjoys the relevant degree of market power can be highly complex and requires significant economic analysis. Further, a very broad range of conduct may be characterised as ‘abuse’ of market power, and it is beyond the scope of this update to delve into the detail of such matters.

For present purposes, the key message for Associations is that when they are providing services to members they may be participating in a market-and thus where they are the sole provider of such services (or one of just a few providers) they may enjoy significant market power. Therefore, Associations need to ensure that their service terms and arrangements do not unduly and unjustifiably restrict competition, to avoid falling foul of relevant competition law prohibitions.

The types of Association activities that can potentially raise ‘abuse of market power’ issues include setting educational, qualification or membership standards that result in impeding entry. An example involving an accountants association was provided at the beginning of this update, relating to the OTOC.

MARKETING FUNCTIONS

Another important and valuable function of many Associations is the marketing of the products and services of its members, through forums such as sponsored trade shows. When undertaking these types of activities, care must be exercised to avoid unlawful anti-competitive behaviour.

The most common competition law risk that can arise from this kind of event is that denying non-members access to participation may be seen as unlawfully restricting competition. However, this will usually only be the case if involvement in the relevant trade show (or similar) can be said to be essential or commercially crucial for market participation - and even in such cases participation of a particular entity may still be restricted if there are relevant objective and valid reasons for doing so. What such reasons may be will need review on a case-by-case analysis.

Additionally, for the reasons discussed further above in relation to the conduct of Association meetings, it is important that any customer-benefits that may be offered to attract patronage to trade shows (or similar) are not implemented in a manner that effectively constitutes unlawful price-fixing. For example, it may be unlawful for Association organisers to organise for all members participating in the event to offer a 10% discount off their prices so that the event can be advertised accordingly.

What steps should Associations be taking to prepare?

Associations play a valuable role in promoting and furthering the interests of members and particular industry sectors. However, as noted above, competition regulators can be wary of their potential to act as a forum for cartels and their tendency to monopolise the provision of certain services to the sectors they represent - and thus their activities are likely to be closely scrutinized once regulatory enforcement of the AML ‘conduct rules’ ramps up (indeed, there have already been reports of AML-related private actions against an association of insurance providers in China) and Hong Kong’s forthcoming competition law takes effect.

Accordingly, it will be prudent for all Associations operating in China and/or Hong Kong to ensure they understand how the region’s existing and forthcoming competition laws impact their operations and members. Ideally, Associations should establish competition law compliance programs to assist them to comply with the requirements of regional competition laws - and they should also consider whether they are an appropriate forum through which to provide competition law training to industry members.
Most importantly, Associations should also ensure they obtain legal advice before engaging in any of the activities mentioned in this update as potentially raising competition law risks. With appropriate guidance and risk management steps, most Associations should be able to continue to serve their members’ needs without undue interference from the region’s competition regulators - but those Associations who ignore the laws will risk exposing their own organisations, and their members, to significant penalties.

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