

Kluwer Competition Law Blog

Beware your associations

Henry Wheare, PJ Kaur (Hogan Lovells) · Friday, December 2nd, 2016

On 28 November 2016, the Hong Kong Competition Commission (“**HKCC**“) published an *advisory bulletin* calling upon the Hong Kong Institute of Architects and the Hong Kong Institute of Planners to take appropriate action to remove or amend certain provisions in their respective codes of conduct which raised competition concerns.

While such associations, as statutory bodies, may be exempt under the Competition Ordinance, their members are not.

This latest advisory bulletin highlights HKCC’s ongoing concern with possible price-fixing by trade associations as a serious form of anti-competitive conduct under the “First Conduct Rule” of the Competition Ordinance.

Price recommendations and fee scales

During its first year of full operation, HKCC has reviewed the published practices of more than 350 associations and identified and engaged with over 20 associations whose practices placed them at risk of contravening the Ordinance. It has also published a guidance pamphlet specifically for trade associations.

The HKCC Guideline on the First Conduct Rule makes it clear that that “recommended fee scales and “reference” prices of trade and professional associations are decisions of associations of undertakings which the [Competition] Commission would likely consider as having the object of harming competition.”

HKCC considers that price recommendations issued by trade associations are issued with a view to members charging similar prices for their goods or services and that price recommendations are made with the expectation that members will follow them. If price recommendations are allowed, it would enable competitors to indirectly fix prices through trade associations to overcome the prohibition on directly fixing prices.

Whilst it may be argued that a true recommended fee scale or mere guide not generally adhered to by members may not be in breach or may otherwise be justified (where for example the fees represent an upper level or are considerably lower than would be the case if normal rates were to be charged), such arguments need to be looked at in context, including any regulatory background to the association in question.

Other trade association activities

Under the Competition Ordinance, trade associations should exercise caution when carrying out activities which, although intended to assist the members of an industry group, may amount to or encourage anti-competitive activity. Such activities and practices should be reviewed and appropriately modified – sometimes by taking simple steps – to minimize any risk of contravening the law.

- **Exchanges of information** – anti-competitive effects of information exchanges will be assessed on a case-by-case basis, in particular given the characteristics of the relevant market. Less likely to raise competition concerns would be exchanges of “historical, aggregated and anonymised data,” general market information or publicly available information.
- **Association meetings** – anti-competitive conduct may take place under the veil of trade association meetings, but risks may be minimized by circulating a clear agenda in advance and accurate minutes afterwards. Potentially, the presence of competition counsel at meetings can also minimize risk.
- **Certification standards and standard terms** – while clearly serving an important purpose, these could be deemed problematic if they significantly restrict price or product competition. For example in respect of fees charged or products and services supplied.
- **Membership and event participation criteria** – where membership or participation in an event are essential for competing in a market, if the terms upon which a business can join a trade association or participate in an event exclude the entry of a new member, this may be anti-competitive. For example, a minimum turnover threshold requirement for membership may be viewed as anti-competitive.

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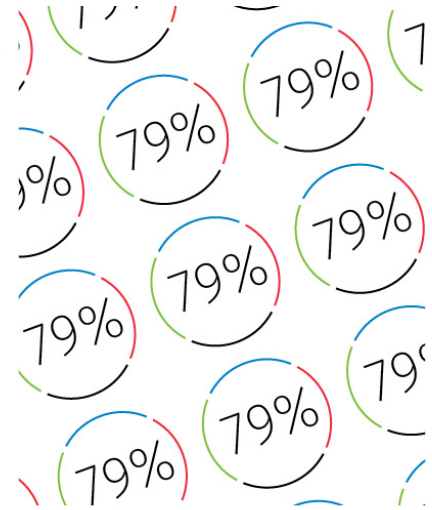
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