

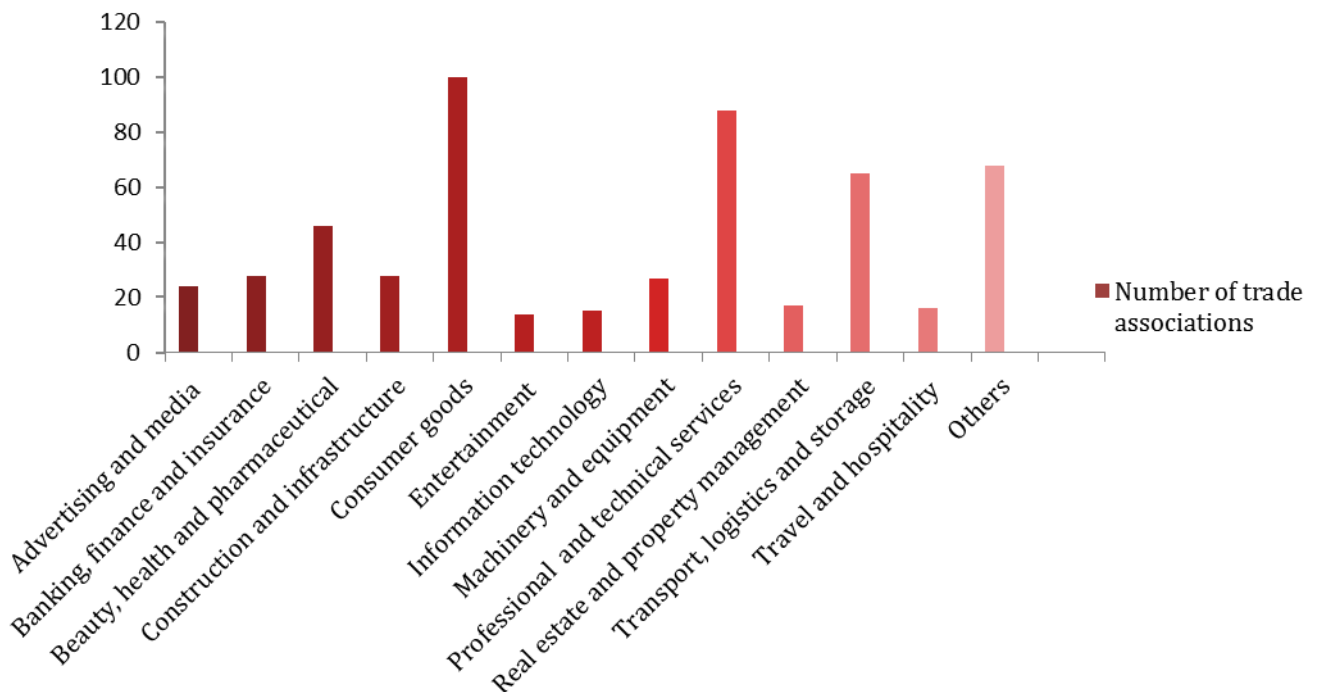
Competition Commission

Report on Trade Associations in Hong Kong and the Competition Ordinance

1. Introduction

The Competition Commission (“Commission”) estimates that there are more than 500 trade associations and professional bodies¹ in Hong Kong.

Trade associations across different industries



These associations have a significant role in the economy, with their members representing the vast majority of Hong Kong’s businesses. Trade associations have a positive impact on the Hong Kong economy by encouraging best industry practices, providing training to members, as well as promoting their industry’s interests. However, as these associations facilitate interaction between competitors, they must be careful not to be a source of, or provide support for, anti-competitive arrangements.

If members of associations agree not to compete with each other on key parameters of competition such as price, entire sectors of the Hong Kong economy and its customers will not realise the full benefits of competition.

As such, the Commission considers that these associations have a vital role in promoting a pro-competitive culture in Hong Kong.

1. The Commission uses the terms “trade associations” and “associations” to refer to associations of undertakings including professional societies and bodies which represent the interests of competing undertakings.

2. Trade associations and their members' compliance with the Competition Ordinance

It was clear from publicly available information that, prior to the full commencement of the Competition Ordinance ("Ordinance") on 14 December 2015, a number of associations were engaging in conduct that placed their members at risk of contravening the Ordinance if it was in full effect.

In particular, price fixing between competitors is regarded as a form of serious anti-competitive conduct under the First Conduct Rule of the Ordinance. A number of associations had fee scales or imposed other price restrictions on how their members may compete, which are likely to reduce competition in their sector. The Commission has made it clear in its Guideline on the First Conduct Rule (the "FCR Guideline") that fee recommendations and fee scales set by associations of undertakings are likely to have the object of harming competition.

Given the significance of trade associations to Hong Kong's economy, the Commission initiated a compliance project in 2015 aiming to ensure that trade associations and their members were ready, willing and able to comply with the Ordinance.

This report outlines:

- The steps taken by the Commission to encourage associations and their members to comply with the Ordinance;
- The response of trade associations and their members, including the changes to conduct witnessed to date; and
- What further actions may be taken by the Commission.

3. Encouraging compliance – publicity, guidance and direct engagement

From 2014, a number of trade associations began to approach the Commission to discuss their compliance with the Ordinance. To gain a better insight on issues relating to trade associations across different industries, in April 2015 the Commission initiated a project to educate trade associations and review their activities in Hong Kong with a view to encouraging compliance with the Ordinance.

Education and outreach

On 16 June 2015, the Commission launched via a press conference and media release a brochure called “The Competition Ordinance and Trade Associations” (the “TA Brochure”). The TA brochure provides clear, practical guidance on what associations should and should not do to ensure the associations and their members comply with the Ordinance, using an easy-to-understand approach with hypothetical examples and illustrations.

The Competition Ordinance & Trade Associations

Dos

1. Continue to help members understand developments relevant to their industry and promote their industry's interests to government and customers.
2. Educate members on the Competition Ordinance.
3. Establish a Competition Ordinance compliance policy for the association, appoint or nominate an officer to oversee the compliance efforts of the association.
4. Exercise care when collecting information from members and avoid facilitating the sharing of competitively sensitive information (see also point 6 under 'Don'ts'). Information should be handled by the staff of the association or a third party, independently from members' information which is received and disseminated in an aggregated, anonymised format to less likely to be problematic. (See Example 1)
5. Ensure that membership of the association is based on clear, objective and qualitative criteria, set up an appeal procedure for refusal to grant or suspension of a membership.
6. If your association certifies or awards quality labels to members to recognise that they have their own industry standards, ensure that such certifications are based on objective and reasonable quality requirements and available to all that meet those requirements. (See Example 2)
7. If your association is involved in setting standard industry terms relating to the supply of products or services, ensure that any standard setting process is open and that the terms do not affect the price charged to customers. The standard terms should also be non-binding and effectively acceptable to members and non-members. (See Example 4)

Don'ts

1. Don't recommend or require that members set particular prices for their products or particular fees for their services.
2. Don't impose restrictions on members with regard to the other terms and conditions on which they sell their products (for example, by fixing credit terms of sale).
3. Don't help members divide up their sales territories, including by geographic areas, types of customers or types of products.
4. Don't set or recommend production targets for members.
5. Don't coordinate or facilitate collective tendering by members.
6. Don't help members share competitively sensitive information, i.e. strategic information that businesses normally doesn't want its competitors to know, with each other. Generally, information relating to the price including future pricing intentions and quantities of members' products or services is the most competitively sensitive. (See Example 3)
7. Don't organise or encourage a boycott by members against targeted individual businesses. (See Example 5)
8. Don't have rules or codes restricting or restricting competition among members, for example, imposing terms that members should not subcontract employees from competitors, or rules linking members' discounts/ promotional activities.
9. Don't use arbitrary rules to admit and/or expel members.
10. Don't prevent members from developing alternative standards or providing products that do not comply with the association's standards.

Hypothetical Example 1

The only five suppliers of pre-packaged fresh fruit in Hong Kong are facing considerable wastage of unsold products, as demand is unstable over seasons. To address the issue, they ask their trade association to hire an independent market research company to collect unsold fruit data. Each week, the company publishes on its website the consolidated data on its other suppliers to better predict demand. Individual suppliers or the staff of the trade association are not able to identify a particular supplier's competitively sensitive data.

The trade association asks the Competition Commission if there is any problem with members exchanging information in this way.

The Commission is **unlikely** to consider that this information exchange harms competition. The aggregated and historic nature of the information exchanged, and the fact that the information is exchanged in a non-real time basis, may mean it is less likely that harmful effects will arise.

Hypothetical Example 2

Companies active in a particular manufacturing industry in Hong Kong rely on a variety of specialist recruitment agencies to source staff from overseas. HEMs Ltd recently entered the market with a new and innovative business model. HEMs acts as an intermediary consolidating the services of the different specialist agencies, giving its clients the option of a "one-stop shop".

After HEMs entered the market, a trade association which includes many specialist recruitment agencies in Hong Kong as members (but not HEMs) arranged a meeting to discuss the impact of HEMs in the market. During the meeting, members agreed to immediately terminate all existing contracts, and to refrain from entering into further contracts, with HEMs. They agreed to ensure that their overseas branches do likewise.

In other words, the trade association has organised a **coordinated boycott** against HEMs, which is **prohibited** under the Ordinance. The Commission would have serious concerns with this conduct and likely to consider it to be a trade association and its members.

In July 2015 the Commission and Communications Authority published the final FCR Guideline, which also addressed competition concerns which may arise from activities relating to trade associations and industry bodies. In particular, paragraph 6.14 of the FCR Guideline provides information on price fixing which may arise through the activities of trade associations (e.g. recommended fee scales) and paragraphs 6.56 to 6.68 of the FCR Guideline provide a detailed analysis on issues relating to terms of membership of associations, certification practices and standard terms.

As 14 December 2015 approached, the Commission held two public seminars in October and November 2015 focusing on issues relating to trade associations. Throughout 2015, the Commission also actively participated in events and seminars organised by trade associations.

This focused outreach was supplemented by a number of other seminars, exhibitions and campaigns designed to make businesses more broadly aware of the impending full implementation of the Ordinance. While addressing a number of issues relevant to trade associations and their members, the primary focus of these campaigns was to make it clear that the Commission will not tolerate cartel conduct in Hong Kong, emphasising what it refers to as the Four Don'ts:

Don't agree with your competitors to:

1. fix prices



2. share markets



3. rig bids



4. restrict output



Reviewing the practices of trade associations and their members

On 21 July 2015, the Commission announced that, as the date of full commencement approached it would, in appropriate cases, contact organisations directly if the Commission considered that their conduct or practices may be anti-competitive and, therefore, likely to contravene the Ordinance after full commencement.

One focus of the Commission's 21 July 2015 statement was on the potentially anti-competitive practices being publicly implemented by a number of trade associations in Hong Kong.

As there was no comprehensive list of trade associations in Hong Kong, the Commission first set about identifying such associations. This process identified the name and contact details of over 500 trade associations who were sent a copy of the TA Brochure.

The Commission then undertook a comprehensive review of the published practices of trade associations. From June to October 2015, the Commission reviewed the information available on the official websites of over 350 trade associations. Based on risk factors outlined in the TA Brochure and the FCR Guideline, the Commission categorised the conduct outlined on the websites into different risk categories.

Based on this review of publicly available information, the Commission identified over 20 trade associations that appeared to fall within a high risk category. Examples of practices carried out by trade associations in this category included:

- (i) price recommendations and/or fee scales, including in some cases terms of membership which indicated that failure to follow a fee scale would result in disciplinary action by the associations;
- (ii) codes of conduct or rules of trade associations that may restrict competition between their members. For example, some trade associations include restrictions on price competition in their codes of conduct, such as restrictions on members undercutting fee quotations of other members for the same service.

At the same time, the Commission worked with a number of associations who had proactively approached the Commission to discuss compliance with the Ordinance.

In addition to associations with whom the Commission was already in discussions, the Commission wrote to a number of trade associations it considered were engaging in high risk conduct in November 2015 to ensure that these trade associations were aware of the Commission's concerns.

4. Changes to the conduct of trade associations and their members

The Commission has received a positive response to the Commission's engagement overall. Notably, some of the trade associations started to review their practices and have either revised or are in the process of revising their conduct as a result of the engagement with the Commission.

In particular, while recognising some of these processes remain under review by the associations, the Commission notes that the following associations indicated publicly that they had revised their conduct or were in the process of doing so before or shortly after the full commencement of the Ordinance to remove one or more price restrictions / fee scales:

- Hong Kong Container Tractor Owner Association
- Hong Kong Real Estate Agencies General Association
- Hong Kong Society of Notaries
- The Association of Accredited Advertising Agencies of Hong Kong
- The Hong Kong Federation of Insurers
- The Hong Kong Institute of Surveyors

- The Hong Kong Jewellers' & Goldsmiths' Association
- The Hong Kong Jewellery & Jade Manufacturers Association
- The Institution of Fire Engineers (Hong Kong Branch)
- The Kowloon Pearls, Precious Stones, Jade, Gold & Silver Ornament Merchants Association
- The Law Society of Hong Kong
- Travel Industry Council of Hong Kong

The Commission emphasises that it did not conduct a detailed investigation or conclude that the previous practices of these associations contravened the Ordinance. Nonetheless, if fee scales or other price restrictions are removed by associations, the Commission considers these steps are good for competition. The Commission therefore welcomes steps taken by associations to remove price restrictions.

5. Further work underway

The Commission will continue its engagement with trade associations with the aim to educate associations and their members to encourage compliance with the Ordinance.

While we have seen positive engagement and changes, a number of associations are still engaging in conduct that places their members at risk of contravening the Ordinance. The Commission also notes that, in addition to its review of publicly available information, it has received confidential complaints and enquiries relating to the (non-public) practices of some trade associations and their members.

The Commission will also be alert to changes in published practices which are not translated into actual changes to the underlying agreement between competitors to restrict competition.

As the Ordinance is now in effect, the Commission will take whatever action is necessary to ensure compliance with the Ordinance. In particular, associations and their members who are involved in or engage in cartel conduct, by giving effect to decisions of associations or otherwise, now risk enforcement action by the Commission.

14 March 2016