

Competition concerns regarding certain admission criteria and procedures of trade, sporting, professional and industry associations/bodies

Background

- 1.1 In the course of its investigatory work, the Competition Commission (“**Commission**”) has encountered a number of situations where trade, sporting, professional and industry associations/bodies (collectively, “**trade associations**”)¹ have admission criteria and admission procedures (together, “**rules for admission**”) in place which may give rise to competition concerns under the Competition Ordinance (Cap. 619) (“**Ordinance**”).
- 1.2 With this Advisory Bulletin, the Commission aims to increase awareness of how the Ordinance applies to trade associations and their members, in particular insofar as rules for admission are concerned. This Advisory Bulletin should be read in conjunction with the Commission’s Guideline on the First Conduct Rule² (“**FCR Guideline**”) and the Commission’s previous advisory publications relating to trade associations.³

Application of the Ordinance to trade associations

- 2.1 Trade associations can have a positive impact on the Hong Kong economy, by developing industry standards and best practices, providing training to members, as well as promoting their industry’s interests. In doing so, their activities bring benefits to their members and would not give cause for concern under the Ordinance.
- 2.2 However, the decisions⁴ of a trade association may give rise to competition concerns in certain circumstances. For example, the Commission would likely consider recommended

¹ For the purposes of this Advisory Bulletin, “trade associations” are defined broadly and include, but are not limited to trade, sporting, professional and industry associations/bodies.

² [FCR Guideline](#), in particular paragraphs 2.32 to 2.37 and 6.53 to 6.68.

³ Competition Commission [Report on Trade Associations in Hong Kong and the Competition Ordinance](#), issued on 14 March 2016 (“**2016 Trade Associations Report**”); Competition Commission Advisory Bulletin, [Competition concerns regarding certain provisions in the Codes of Conduct of the Hong Kong Institute of Architects and the Hong Kong Institute of Planners](#), issued on 28 November 2016 (“**2016 Trade Associations Advisory Bulletin**”).

⁴ As noted in the FCR Guideline, paragraph 2.35, a “decision” of a trade association may include, without limitation, the constitution of the association, rules of the association, resolutions, rulings, decisions, guidelines, recommendations of the association, whether made by the board, members, a committee or an employee of the association.

fee scales and “reference” prices of trade and professional associations as having the object of harming competition, as outlined in its previous advisory publications.⁵ The admission criteria and admission procedures of trade associations may also give rise to competition concerns, as will be further explained below in this Advisory Bulletin.

- 2.3 Where members of a trade association which are undertakings make or give effect to an anti-competitive decision of the trade association, the members and the association may both incur liability under the Ordinance. Even where a trade association has statutory or regulatory functions, or is accredited or in any other way supported by public funds, it does not mean that its decisions do not have the object or effect of harming competition under the Ordinance.
- 2.4 It is important to note that although some trade associations are statutory bodies that are exempted from the application of the Conduct Rules,⁶ members of these associations implementing anti-competitive decisions of the associations could be placing themselves at risk of falling foul of the Ordinance.

Admission criteria and admission procedures of trade associations

- 3.1 Membership of a trade association can, in some cases, be an essential pre-condition for competing in a market. In such circumstances, exclusion from membership can significantly impact an undertaking’s effectiveness as a competitor and might be equivalent in terms of effect to an anti-competitive boycott.
- 3.2 For example, exclusion from membership may deprive the excluded competitors of accreditation, Government subsidies or other advantages which are available to members. In addition, membership of a sporting association may entitle its members access to certain sporting facilities or participation in international sporting events. If membership is essential to compete on equal grounds, for instance in the case of registered professionals, anti-competitive conduct such as the imposition of unreasonable and unjustifiably strict membership criteria or procedures may be especially damaging.
- 3.3 As such, trade associations should ensure that the rules for admission serve only to safeguard the quality and standards of the trade, profession, or sporting or other activities

⁵ 2016 Trade Associations Report, section 2; 2016 Trade Associations Advisory Bulletin, paragraphs 3.1 to 3.5. See also FCR Guideline, paragraph 2.36.

⁶ Under section 3 of the Ordinance, Part 2 (The conduct rules), Part 4 (Enforcement powers of Commission), Part 6 (Enforcement before Tribunal), and Schedule 7 (Mergers) do not apply to a statutory body. The Conduct Rules comprise the First Conduct Rule and the Second Conduct Rule. This is subject to the Competition (Application of Provisions) Regulation (Cap. 619A), according to which these provisions of the Ordinance apply to six specified statutory bodies.

they deal with. They should admit any business or individual which meets the admission criteria and complies with the admission procedures.

- 3.4 Based on this, the FCR Guideline provides that the rules for admission of a trade association should be:
- (a) transparent;
 - (b) proportionate;
 - (c) non-discriminatory;
 - (d) based on objective standards; and
 - (e) subject to appeal in the event of a refusal to admit a party to membership.
- 3.5 The Commission may view rules for admission which do not satisfy these requirements as having either the object or effect of harming competition. This Advisory Bulletin provides further guidance on how each of these requirements is interpreted by the Commission.

Transparent

- 3.6 It should be clear to aspiring members which admission criteria they must meet in order to be admitted as a member, as well as which steps and deadlines (if any) they will encounter in the admissions procedure. The rules for admission should therefore be certain and transparent and must be set by the trade association in advance of the application being made.
- 3.7 Based on this:
- (a) Admissions should be assessed on the basis of a specified and exhaustive list of criteria. The criteria should not be vague and open to discretion, but sufficiently determinate.
 - (b) The procedure for the application should be predictable and transparent. The rules for admission should clearly set out procedural formalities such as the information which must be submitted with the application, deadlines for the trade association to review the application, mechanisms to hear applicants upon their request and the appeal procedure.
- 3.8 The rules for admission must be readily and freely available to all members and aspiring members. As a best practice, they should be published in a prominent and publicly

accessible part of the trade association's website. If they are not publicly available, the trade association should share them in a timely manner upon request.

Proportionate

- 3.9 Rules for admission must be reasonable and proportionate to the activities and objectives of the association. They should be set at a level that is feasible and not disproportionately onerous for prospective applicants to fulfil. This applies to the substantive criteria, procedural requirements as well as the admission fee. The fee for instance should be reasonably reflective of the actual costs incurred in processing applications and not prohibitively high. If the rules for admission are set at a level that is disproportionately difficult or impossible for applicants to meet in practice, for example where existing members would no longer be able to meet them if they were to reapply for admission, this may suggest that the rules for admission are inherently exclusionary in nature and as such anti-competitive.

Non-discriminatory

- 3.10 Trade associations should ensure that their rules for admission are non-discriminatory and not applied in an arbitrary manner. They must be applied consistently and uniformly, meaning that similar applications for membership should be treated in a similar manner. Admission must be open to all applicants which meet the admission criteria. In order to safeguard against discriminatory treatment, the trade association should provide a reasoned decision to the applicant if it decides to refuse an application.

Based on objective standards

- 3.11 A further safeguard against discriminatory treatment is that the rules for admission are objective, unbiased and fair. They should have a legitimate aim and should not be used to exclude specific (groups of) competitors or otherwise limit competition. A good way for a trade association to gauge whether the rules for admission are objective is to assess whether they can articulate the justification for each aspect of the admission criteria and admission procedures.

Appeal procedure

- 3.12 All applicants which are refused membership should be provided with reasons for the refusal and have the option to appeal the trade association's decision to an appeals body. The appeals body should be subject to the same requirements of transparency, proportionality, non-discriminatory treatment and objectivity. Ideally the appeals body should be, at least partly, made up of individuals who are not members of the trade

association or competitors of the applicant. At a minimum, individuals who are part of the body that makes the initial decisions on applications for membership should not also be part of the appeals body and vice versa.

Rules for suspension, expulsion and withdrawal

- 3.13 To the extent applicable, the guidance in this Advisory Bulletin is equally relevant to the criteria and procedures for suspension, expulsion and withdrawal of existing members. For example, a member should only be expelled by a trade association on the basis of transparent, proportionate, non-discriminatory and objective criteria and procedures, and the member should be provided with reasons for the expulsion and have the possibility of appeal.

The Commission's advice and further actions

- 4.1 The Commission encourages trade associations to actively review their admission criteria and procedures and to make changes where needed in accordance with the guidance provided in this Advisory Bulletin, to ensure compliance with the Ordinance.
- 4.2 Parties which have information about anti-competitive rules for admission, or other practices, of a trade association or its members are encouraged to report this by contacting the Commission by telephone (3462 2118), email (complaints@compcomm.hk), post (Competition Commission, 19/F, South Island Place, 8 Wong Chuk Hang Road, Wong Chuk Hang, Hong Kong), completing an [online form](#) on the Commission's website or visiting the Commission's office in person (by appointment only). Where parties believe their business may have contravened the Ordinance, they may benefit from lenient treatment if they come forward and cooperate with the Commission in its investigations.
- 4.3 Where the Commission has reasonable cause to suspect that any trade association or its members have been engaging in anti-competitive practices in relation to admission criteria or procedures, the Commission will take the appropriate enforcement action in accordance with the Ordinance.

Questions and Answers

Question 1: I am a board member of a sporting association. We have rules for admission in place for applicants for membership, which consists of a set of specific criteria. While the board decides on admission by properly applying the criteria, it does not provide reasons to unsuccessful applicants. It considers this reduces the administrative burden on the association and enables them to keep fees for applications low. Will this raise issues under the Ordinance?

Answer 1: If unsuccessful applicants are not informed of the reasons for the refusal, it is impossible for them to verify the basis on which their application is denied and whether the criteria in the rules for admission have actually been applied fairly and objectively. The procedure is not transparent and is conducive to discriminatory treatment, and may on that basis raise concerns under the Ordinance.

Question 2: I am the owner of a sports club and have been a member of a sporting association for many years. Recently the association introduced new conditions for membership – specifically a requirement for applicants to have a minimum number of club venues and students. The minimum numbers are set at a high level compared to the typical number of club venues and students in the industry. I do not meet these requirements and had concerns about possibly being expelled. The association assured me that this would not be the case and the new rule would only apply to new members, not existing ones. Is this unfair to new members?

Answer 2: The sporting association only requires new members to meet the requirement of having a minimum number of club venues and students. However, the fact that the minimum is set at such a high level that even existing members may not meet the requirement could suggest that the change to the rules may be disproportionate. In turn, this may suggest the amended admission criteria are aimed at excluding new members and as such anti-competitive.

Question 3: I own a business and have applied for membership of the main trade association for my industry. My application was recently denied. They told me that I can appeal the decision. However, the administration fee is so high that I cannot afford it. The association would not explain why the fee is so high and cannot be lowered. Can they do this?

Answer 3: The fee charged for an appeal should be reflective of the administration costs of the appeal and the trade association should be capable of substantiating the level of the fee. If the amount is disproportionately high and cannot be justified, it is effectively a barrier for applicants to appeal and may raise concerns under the Ordinance as being potentially anti-competitive.

Question 4: We are the board of a professional body accredited by the government to administer a register for qualified professionals. We require professionals to meet very strict admission criteria in order to become a registered member, such as having relevant academic degrees and a considerable level of professional training. How do we ensure that we do not contravene the Ordinance?

Answer 4: The admission criteria must be proportionate in light of the legitimate objective of guaranteeing the quality of registered professionals and should not go beyond what is necessary to achieve this. Furthermore, the criteria should not be intended to exclude, or have the effect of excluding, certain (groups of) professionals operating in the relevant industry (who would otherwise be sufficiently qualified) and should not be subjective, discriminatory or applied arbitrarily. If an applicant fails to meet the standards, the board must provide reasons for the refusal of membership as well as the opportunity for appeal.

Question 5: I am a coach/trainer and applied for membership of a sporting association. One of the conditions listed in the association's rules for admission is that applicants for membership should be of "good morality and character", which is not explained any further. When I asked the association what is required specifically in order to meet this condition, the contact person told me that this will be up to the judgment of the admissions committee. Is this allowed under the Ordinance?

Answer 5: Applicants should know in advance what criteria they are expected to meet. These criteria should be sufficiently specific. For instance, where a sporting association wishes to assess the character of an applicant, they could require applicants to show that they have no prior criminal convictions or ask them for a character reference. However, the requirement described in this instance is entirely up to the discretion of the individual(s) reviewing the application and cannot be considered an objective criterion. The requirement is not transparent and is capable of leading to discriminatory treatment. On that basis it may raise concerns under the Ordinance.

Question 6: We are a professional body accredited by a Government department to set up and regulate a register for qualified professionals. We are authorised to determine the requirements for admission of professionals to the register. Although most professionals have registered as members, professionals are not required to do so in order to practise their profession. That being said, as non-registered professionals do not have to meet the same standards as our registered members, we intend to approach all our members' clients (current and potential) to inform them they should only work with our registered members going forward. Can we do this?

Answer 6: The professional body should refrain from doing so as this may be considered anti-competitive. In the scenario described, non-registered professionals are legally allowed to practise freely and without limitations and as such they are competing with registered members. The professional body should not restrict competition by preventing non-members from gaining access to potential clients. By doing so, non-registered professionals may no longer be able to obtain the business necessary to practise their profession, and may have increasing difficulty getting clients.
