

HONG KONG COMPETITION COMMISSION URGES TRADE GROUPS TO REVIEW MEMBERSHIP RULES

Most industry associations well-versed in competition law have compliance policies against members sharing commercially sensitive information or adopting decisions that may be considered anti-competitive. However, an often overlooked aspect of compliance is the association’s policy on membership admission and/or expulsion. In this briefing, we take a quick look at the Hong Kong competition agency’s recent guidance on this topic, and discuss practical tips for reviewing membership policies with a view to ensuring compliance with competition law in Hong Kong.

At a glance - what the HKCC looks for in rules for admission/expulsion

The Hong Kong Competition Commission (HKCC) recently published an [Advisory Bulletin and FAQ](#) on admissions criteria and rules of trade associations (**Advisory Bulletin**). Associations of all kinds (including trade, sporting, professional and industry associations/bodies) are called upon to review their membership policies to ensure compliance with the city’s competition rules. While the Advisory Bulletin is directed at trade groups in Hong Kong, the HKCC’s guidance is broadly in line with international standards - similar associations in other jurisdictions can also look to it as recent reference.

The key message of the Advisory Bulletin is that the rules for admission to a trade association (i.e. admission criteria and admission procedures) should not be used to arbitrarily exclude competition in the market, and should therefore 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. While such requirements have already been crystallised in the HKCC’s [Guideline on the First Conduct Rule](#), the Advisory Bulletin elaborates on how the HKCC interprets such requirements and sets out specific guidance on how to comply with each requirement.

	The HKCC’s view on what the requirement entails on rules for admission	The HKCC’s guidance for trade associations
Transparency	<ul style="list-style-type: none"> Admission criteria that are exhaustively listed out in advance and sufficiently determinate Admission procedures that are predictable and transparent Admission criteria and procedures that are readily and freely accessible to members and aspiring members 	<ul style="list-style-type: none"> Use specific criteria (e.g. character references, no criminal convictions) instead of vague criteria (e.g. “good morality and character”) Set out clearly the specific steps, formalities and deadlines in the application process Publish admission criteria and procedures on the association’s website, or promptly provide them upon request
Proportionality	<ul style="list-style-type: none"> Substantive criteria that are reasonable and proportionate to the activities and objectives of the association Procedural requirements or administration fees that are reasonable and not prohibitive 	<ul style="list-style-type: none"> Avoid setting requirements so high that existing members would not be able to meet if they were to reapply for admission Set administration fees that are reflective of actual costs incurred and affordable for prospective applicants

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Non-discriminatory	<ul style="list-style-type: none"> Admission criteria that are not applied in an arbitrary manner, and consistently and fairly applied to all applicants that meet admission criteria 	<ul style="list-style-type: none"> Admit all applicants that meet admission criteria Provide rejected applicants with the reasons for refusal
Objectivity	<ul style="list-style-type: none"> Admission rules that are unbiased, fair, have a legitimate aim (i.e. to safeguard the quality and standards of the trade, profession, or sporting or other activities they deal with), and not used to exclude competitors or limit competition 	<ul style="list-style-type: none"> Avoid criteria that are entirely subject to the discretion of those reviewing the application Assess objectiveness by articulating the justification for each aspect of the admission criteria and procedures
Avenue of appeal	<ul style="list-style-type: none"> Procedures that provide reasons for refusal to rejected applicants and an option to appeal the decision to an appeals body 	<ul style="list-style-type: none"> Constitute the appeals body with individuals who have not participated in the initial rejection decision, and/or ideally are not members of the association or competitors of the applicant

The Advisory Bulletin warns that, for trade associations whose membership can significantly impact competition on the market, membership policies that do not satisfy the above requirements may be viewed as having the object or effect of harming competition. Such associations with admission policies falling short of the HKCC’s requirements may find themselves the subject of an investigation if the matter comes to the attention of the HKCC.

The HKCC’s requirements above are also applicable to the trade association’s rules for suspension, expulsion and withdrawal of existing members.

Helpful guidance for industry groups

The Advisory Bulletin provides welcomed guidance and details on the HKCC’s expectations on trade associations. The HKCC’s Guideline on the First Conduct Rule covers trade association admission rules in a few short paragraphs; a [Brochure for Trade associations](#) merely advised against using “arbitrary rules to admit and/or expel members”. The HKCC’s past engagements with trade groups did not focus specifically on rules for admission/expulsion (see the HKCC’s [Report on Trade associations](#) and [Advisory Bulletin](#) on two specific Codes of Conduct in 2016). The Advisory Bulletin therefore elaborates on the implications of the HKCC’s past guidance that may not be immediately apparent to the average reader.

Here are a few practical tips for trade associations’ review of membership rules in view of the HKCC’s guidance:

- Is membership to the association needed to compete?** The HKCC’s guidance applies particularly to associations whose membership is essential to compete on the market. This is not necessarily true for all industry sectors - if the services or benefits of membership are actually not competitively significant or can be easily sourced elsewhere by non-members, then competition concerns should not arise. Therefore, it is important to analyse the importance of membership from a competition perspective - e.g. with reference to the effects of its services to members, the availability of such services to competing non-members, and the importance of the association on the market.

The HKCC recognised that “accreditation, Government subsidies or other advantages which are available to members” may not be available to businesses excluded from membership to a trade association. Such factors should therefore be taken into account when assessing the potential impact of membership exclusion on a market player’s ability to compete on the market.

- **Benchmark membership criteria against existing members.** If the current membership criteria are so demanding that even existing members may no longer meet such requirements, then the HKCC may consider that fact as an indication of the requirements being disproportionate and anti-competitive - especially if the requirements apply to new members only. Before implementing amended membership criteria, it would be prudent to double-check whether existing members can really comply with the new requirements.
- **Be cautious of what to specify if reasons are provided for refusal/expulsion.** Providing the reasons for refusal/expulsion is an important element of procedural transparency - the lack of which will be considered conducive to discriminatory treatment, and may therefore raise concerns. If reasons are provided for rejecting an admission application or expelling a member, the reasons should clearly show that the decision was firmly based on the trade association's membership rules, and such rules have been applied fairly and objectively.
- **Be prepared to justify each membership criteria.** The HKCC considers that the only legitimate objective of membership criteria is to ensure the quality and standards of the trade, profession, or sporting or other activities of the association. Associations with membership criteria that do not fit squarely within such purpose should therefore consider whether such criteria can be otherwise justified or should be amended to avoid accusations of excluding, or having the effect of excluding, competitors operating in the relevant industry.

What lies ahead

While the Advisory Bulletin is primarily addressed to trade associations, the HKCC also calls on businesses and professionals to report trade groups or professional bodies with membership policies that may raise concerns.

Industry associations in Hong Kong are advised to review their membership policies soon. The HKCC has so far taken a relatively light touch approach towards trade associations generally - but this may change, as the HKCC noted that, in the course of its investigatory work, the HKCC encountered situations where trade groups had rules for admission that gave rise to competition concerns. This increases the risk of the HKCC taking formal enforcement action against trade associations going forward.

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