Annex A

ASIFMA COMPETITION LAW GUIDANCE

This Guidance is a high-level summary of the application of the competition rules to the activities of industry associations such as ASIFMA. It is not intended as a substitute for legal advice on any specific issue.

Competition Law and Industry Associations

Competition law prohibits certain agreements, concerted practices and other forms of conduct, including information exchanges, which may prevent, restrict or distort competition. It is important, both for companies and individuals, not to infringe the competition laws and regulations; doing so may result in the imposition of significant fines, reputational damage and, in some cases, penalties for individuals.

In addition, where anticompetitive arrangements arise through contacts at industry association or arise through the acts or decisions of industry associations, fines may be imposed by the competition authorities on the industry association itself, even though the association is unlikely to be active on the affected markets.

Agreements or concerted action on price-fixing, production or supply fixing, allocations of sales, territories, customers or markets, and bid-rigging generally constitute the most serious forms of anticompetitive conduct. If either the *object* or *effect* of the agreement or conduct prevents, restricts or distorts competition, an infringement will likely be found.

Industry associations need to be alert to the anti-competitive potential of their activities because anticompetitive agreements between competitors in a market may be concluded, implemented and/or monitored through the medium of industry association contact.

The exchange of information, for example, may result in members becoming aware of elements of pricing, quantities and/or market strategies of their competitors and using such information to facilitate a cartel, adjust their own pricing, boycott common suppliers or customers or take other action with the effect of harming competition.

While the development and use of standard terms, another common activity of industry associations, can generate pro-competitive benefits for industry members and/or their clients or customers, any standard terms that define the scope and nature of product sold which may limit product variety and innovation or relate to pricing could harm competition.

As a general rule, standard terms which do not affect price are unlikely to raise anti-competitive concerns if the participation in the process of developing and adopting the terms is *open*, and the standard terms are *non-binding* and *accessible* to all market participants. Exchanges of publicly available information are also unlikely to constitute an infringement of the competition laws. Publicly available information in this sense is information that is equally accessible in terms of the cost of access to all competitors and customers.

Industry associations should also be careful about their membership admission as membership can be an essential pre-condition for competing in a market. To minimize possible competition concerns, the rules of admission should be transparent, proportionate, non-discriminatory based on objective standards and provide an appeal procedure for those who have been refused membership.

Legitimate Activities of Industry Associations

Certain activities of industry or industry associations, such as ASIFMA, do not normally give rise to competition law concerns. Information and activities which are not commercially sensitive in nature, and which as such are unlikely to give rise to competition concerns, may relate to matters including:

- The interpretation of existing or proposed legislation.
- Preparation of representations to governmental bodies on proposed legislation.
- Consideration of, and provision of guidance on, issues of a technical nature concerning the application of a law or regulation, provided such activities are not liable to affect the competitive behaviour of members or third parties.

However, care should be taken when undertaking such activities to ensure that there is no exchange of commercially sensitive information between members of the industry association.

Separately, exceptions or exemptions based on efficiency arguments may be available to undertakings including trade associations for certain conduct, although these are usually narrowly interpreted by competition authorities and hence should be applied with caution. Pursuant to the Hong Kong competition law, agreements that enhance overall economic efficiency are excluded from the prohibition against anticompetitive agreements, provided sufficient pro-competitive benefits can be shown. Similarly, agreements with "net economic benefits" may also be excluded from the prohibition against anticompetitive agreements pursuant to the Singapore competition law.

Commercially Sensitive Information

Commercially sensitive information typically relates to matters such as:

- prices and other terms of business, including discount and rebate structures;
- customers and a firm's engagement with its customers;
- costs;
- volume or value of sales;
- business strategy such as marketing plans, risks and investment; and
- bidding intentions.

Potentially Anticompetitive Conduct involving Industry Associations

Activities of industry associations which may give rise to a risk of infringing competition law include:

- Discussions at meetings or in online forums hosted by an industry association which may prompt member firms to consider modifying their terms of business or practices with regard to commercially sensitive matters.

- Adoption of non-binding decisions or recommendations which may in practice lead members to align their competitive conduct on the market.

- Adopting best practices and standard-setting measures which may lead members to align their competitive conduct on the market or 'shut out' competitors who do not have access to, for example, a shared technical standard.

- Imposing rules, regulations and/or membership criteria which may have an impact on the ability of operators to compete freely on the market.

Practical Guidance

- Information regarding members that is of a commercially sensitive nature should be **maintained separately** from information which is not commercially sensitive, to ensure that the former is not inadvertently distributed by ASIFMA among its members in the course of other, legitimate business.

- **Meetings** should follow a **written agenda**, prepared in advance, and a **written record** of topics discussed at meetings should be produced. Chairs of an ASIFMA formal meeting should remind meeting participants about competition law compliance in the beginning of the meeting.

- **Online facilities** permitting bilateral or multilateral communication between members should include an appropriate **warning** regarding the need to avoid any exchange of commercially sensitive information, and should be periodically **monitored** for evidence of potentially collusive discussions.

- If there is any doubt regarding whether initially legitimate discussions may be straying, or risk straying, into a commercially sensitive area, **such discussions should be terminated and advice sought** before continuing with them. The assessment of whether or not discussions regarding a particular topic may continue is likely to depend on the surrounding facts.

- **Membership criteria** (for membership of both ASIFMA itself and of its committees) should be **transparent, proportionate, non-discriminatory, based on objective standards and subject to appeal in the event of a refusal to admit a party to membership**. Proposed expulsion or termination of membership must be supported by reasons, objectively justified and subject to an effective right of appeal.

- **Best practices and/or common standards** may be procompetitive where they are **objectively justified**, for example by reference to benefits to end-users. However, such arrangements may infringe competition law where they have the effect of preventing firms from selling products which fail to meet a certain standard, limit technical development or impede imports.

- When conducting **industry surveys**, information circulated to members should be **historical, anonymised and aggregated**. Data should not enable recipients to discern commercially sensitive information regarding their competitors' conduct on the market.

- **Studies** commissioned by ASIFMA and **consultation responses** provided by it regarding, for example, proposed legislative changes should not be used as a means of influencing or disclosing sensitive aspects of members' conduct on the market.

- **Document retention** is not required by competition law, but destroying, falsifying or altering documents once an investigation or litigation is underway or in contemplation may be an obstruction of justice and constitute a criminal offence. It is advisable to adopt a consistent policy to document retention, having regard to the fact that destruction of documents may make it difficult to apply to one or more competition authorities for immunity or leniency in the future, and that documentary evidence may be exculpatory.

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