**Annex B**

**COMPETITION LAW Q&A FOR ASIFMA STAFF, COMMITTEES AND WORKING GROUPS**

**JURISDICTIONAL SCOPE OF COMPETITION LAW**

**1. Does the Hong Kong Competition Commission (HKCC) and the Competition and Consumer Commission of Singapore (CCCS) have jurisdiction in relation to conduct which occurs outside of Hong Kong and Singapore and/or by firms based outside it?**

Yes, both the HKCC and the CCCS have jurisdiction over conduct which occurs outside of Hong Kong and Singapore as well as firms based outside these jurisdictions - provided the conduct impacts on local markets.[1]

For example, section 6 of Hong Kong's competition law (the Competition Ordinance (Cap 619) or **CO**) prohibits anti-competitive agreements, concerted practices and decisions by undertakings if these prevent, restrict or distort competition in Hong Kong. In a similar vein, section 34 of Singapore's competition law (the Competition Act (Chapter 50B) or **CA**) prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect, the prevention, restriction or distortion of competition within Singapore.

**2. What considerations are relevant when assessing whether a trade association is likely to be fined for anticompetitive arrangements entered into by its members?**

Trade associations are at risk of being fined for anticompetitive arrangements as "facilitators" of cartel conduct between its members. A trade association could be regarded as a facilitator of cartel conduct where members make or give effect to trade association decisions **which harm competition.**

Decisions by trade associations include:

- the constitution of the association;
- rules of the association;
- resolutions;
- rulings
- decisions;
- guidelines or recommendations of the association (whether made by the board, members, a committee or an employee of the association).

In addition, decisions of trade associations which are not binding (for instance recommended fee scales and "reference" prices) could be decisions by trade associations which fall under the ambit of scrutiny under the Hong Kong and Singapore competition laws.

Trade associations have on previous occasions been investigated by each of the HKCC and CCCS for their involvement in collusion among members, particularly where the trade association has itself played a key role in facilitating cartel conduct.

[1] In December 2020, the HKCC brought proceedings against a medical gas supplier for allegedly abusing its substantial degree of market power. Proceedings were brought against not only the Hong Kong entity of the supplier but also its overseas parent. We expect this case to provide some guidance as to the extent to which parental liability could extend beyond Hong Kong.

Examples of trade association activity which have previously justified either the commencement of an inquiry or the imposition of a fine on the trade association itself in Hong Kong and Singapore include:

- where the trade association facilitated price fixing conduct through hosting regular meetings between members specifically to discuss the conduct;
- where the trade association proposed "guidelines on fees" to be dispersed to its members; and
- where the trade association published a code of practice to be dispersed to its members.

**INFORMATION EXCHANGE**

**3. At what point do discussions concerning cost increases resulting from regulatory changes stray into an illegitimate exchange of information concerning costs?**

The role of trade associations as an industry forum for firms to exchange views regarding industry initiatives or developments in applicable regulation is a common feature of many industries, and frequently leads to pro-competitive efficiencies.

However, this role must be balanced against the fact that the exchange of competitively sensitive information may be regarded as a means of implementing an anticompetitive agreement and may also be treated as an independent breach of the competition rules. Competitively sensitive information may include, in particular, the following (where such information is not already publicly available):

- Prices or other terms offered to customers;
- Factors relevant to the setting of prices, including costs of business;
- Customers, contracts, locations, regions or services;
- Capacity, and levels of capacity utilisation;
- Strategic intentions, business plans, budgets or marketing initiatives;
- Locations of electronic trading; and
- Market shares or market share estimates.

General discussion of the fact that an increase in the regulatory burden faced by operators on a market is likely to lead to an increase in the costs of doing business, for firms and consumers, is unlikely to be problematic. However, it is important that such discussions remain general as any exchange of views which provides the participants with insight into one another's individual pricing intentions, their intentions concerning whether or not such increased costs will be passed through to customers, or strategic measures which one or more participants may implement to try to off-set additional regulatory costs, has the potential to reduce strategic uncertainty and to constitute anticompetitive collusion and should therefore be avoided.

**4. Do concerns surrounding discussion of costs extend to future costs, i.e. industry changes which are proposed but not yet in force?**

Discussions regarding industry changes which are proposed but not yet in force are necessarily further removed from current conditions of competition on the relevant market, and as such are less likely to have the effect of restricting competition between the participants.

Speculation in general terms concerning the possible impact of potential developments in the regulatory environment is likely to be permissible but, as in the case of question 3 above, participants should avoid sharing any specific information regarding how they might choose to respond to proposed changes in regulation. In particular, they should avoid discussing where the costs of any future regulatory compliance might fall. In the event that the changes in question are in fact introduced, the exchange of information of this nature could provide the recipients with insight into other firms' planned strategic conduct, with the result that competition on the market is less vigorous than it might otherwise have been.

**5. Is discussion among ASIFMA members regarding how to interpret or deal with regulatory requirements permissible?**

In the case of regulation which is clearly intended to apply to or be applied by undertakings in a uniform manner, the pro-competitive efficiencies achieved through an exchange of views among market participants, designed to arrive at a common interpretation of the law, are likely to outweigh any resulting restriction of competition, provided that the information exchanged for this purpose is limited to that strictly necessary to arrive at a common position. Market participants should, however, avoid discussing their individual plans as to how they intend to respond to proposed regulatory requirements.

In the case of regulation which is not necessarily intended to be applied in a uniform manner (for example, recommendations, quality standards and best practice guidelines published by a regulatory authority), the decision as to whether and how to comply with the relevant regulation should be a unilateral decision by each member. Accordingly, members should avoid discussing or agreeing a common position on such regulation. For example, a member may legitimately decide to offer its customers a lower-priced product which does not comply with a non-mandatory standard, and should not be prevented from doing so as a result of coordination with other members; preventing such a product from being offered to customers in these circumstances may be considered to restrict consumer choice.

**6. Is it permissible to discuss legislative proposals if the outcome may lead to certain members being in an advantageous position vis-à-vis others?**

Regulatory developments frequently have the potential to favour certain operators on a given market over others. Provided that discussions of such developments do not involve any exchange of specific information regarding the manner in which one or more firms may respond, general discussions of the advantageous (or disadvantageous) impact of regulatory developments on certain categories of firm are unlikely to be problematic.

Care should be taken to ensure that any submission by ASIFMA in response to a consultation on proposed regulatory changes has regard to the interests of its membership as a whole, and does not discriminate, without objective justification, in favour of some members over others. In certain circumstances, it may be advisable for ASIFMA to refrain from adopting a position with regard to the proposed change: instead, it could set out in its submission (if any) an assessment of the likely impact of the proposal (or failure to implement the proposal) on the interests of all of its members. At other times, it may be appropriate for ASIFMA to adopt a position with regard to regulatory changes that is likely to favour certain members over others – but only after it has followed a thorough process of internal consultation to arrive at a majority view. In the

latter situation, it may be advisable for ASIFMA final submission to note that it reflects the view of the majority (but not all) of its members, and provide an overview of the reasons for opposition of the proposal by a minority of its members.

**ASIFMA INITIATIVES**

**7. Is it permissible for ASIFMA to participate in developing industry best practice?**

Participation in developing best practices or quality standards is a normal aspect of trade association activity, which frequently enhances the efficient functioning of the industry overall and improves the quality of goods or services offered to consumers. Best practices or quality standards may be considered pro-competitive where they are objectively justified, for example by being transparent, fair and non-discriminatory.

However, when conducting such activities, it is important that the trade association ensures, as far as possible, that its members remain free to conduct themselves in a manner which does not conform with the relevant best practices, or offer goods or services which do not meet the relevant quality standard, should they choose to do so. For example, trade associations should not make compliance with their best practices or quality standards a condition of membership or otherwise seek to penalise members for non-compliance, unless this is objectively essential for the effective functioning of the trade association's activities. If they are likely to be implemented, such recommendations could be considered anti-competitive even if they are non-binding. Standards should therefore be non-binding, open, transparent, fair and non-discriminatory.

**8. Is it problematic for ASIFMA to commission reports or surveys of the market, or respond to consultations by regulatory authorities?**

Commissioning market reports or surveys and/or responding to regulatory consultations is a normal and permissible aspect of the activities of ASIFMA and many other trade associations. However, market reports or surveys and/or responses to consultations should not be used by ASIFMA (whether expressly or inadvertently) to distort the conditions of competition on the market(s) in which its members operate. Consistent with ASIFMA's role as a representative of the interests of its members, its submissions in response to consultations should, where possible, present a view in the interests of all of its members.

**9. How should ASIFMA go about conducting market surveys?**

Where ASIFMA decides to conduct a market report or survey itself, such report or survey should be conducted by suitably skilled personnel within ASIFMA and such personnel must be independent of any of its members.

Where ASIFMA commissions a third party to conduct the report or survey, such third party should also possess relevant expertise and its interests should not be aligned with or unduly influenced by any particular category of ASIFMA member.

The manner in which ASFIMA commissions market reports or surveys from third parties should be neutral vis-à-vis the eventual outcome of the report or survey. It is also advisable for ASIFMA to document this process properly, including all communications with the third party which is to produce the report or survey, as this may constitute evidence of the independence and impartiality of the final work product. Provided that

market reports and surveys are carried out in this manner, this aspect of ASIFMA activities is relatively low risk from a competition law perspective - in particular where the eventual work product is shared with the relevant regulatory authorities as part of a contribution by ASIFMA to general industry developments.

**CONDUCT OF MEETINGS**

**10. Would ASIFMA be implicated in arrangements entered into by its members outside the context of ASIFMA meetings?**

Provided that ASIFMA is not itself in any way involved in anticompetitive collusion among its members, the mere fact that competitors which are members of ASIFMA enter into an anticompetitive arrangement is insufficient to constitute evidence of ASIFMA participation in such conduct. However, even the passive attendance of an ASIFMA representative at a meeting where anticompetitive discussions do take place could be sufficient for liability to be attributed to ASIFMA. ASIFMA should therefore positively and affirmatively distance itself from such discussions, and ensure that its position is recorded.

Moreover, trade associations have in numerous cases been used by competitors to conclude, implement and/or monitor anticompetitive arrangements, especially where such arrangements involve a large number of firms. In particular, a trade association could be used to facilitate anticompetitive arrangements, for example, by acting as a conduit for the exchange of commercially sensitive information. ASIFMA should therefore be alive to the possibility that the competition authorities may seek to implicate it in any anticompetitive agreement or practice concluded or conducted by its members and should ensure, as far as possible, that it is well-placed to resist any attempt to assert that ASIFMA has itself participated in such activities.

Evidence upon which ASIFMA may seek to rely, for this purpose, includes:

- An internal competition law compliance policy and accompanying documents, explaining applicable competition law and how ASIFMA may comply with it (such as the present Q&A).
- Documentary evidence regarding the conduct of ASIFMA meetings, including written agendas and minutes of meetings (which should record periodic reminders provided to members at meetings of the need to avoid any form of potentially anticompetitive discussion).
- Records of competition law compliance training provided to ASIFMA staff.

**11. What should be done if a potentially anticompetitive topic is raised at an ASIFMA meeting?**

ASIFMA should seek to minimise the potential for legitimate discussions to stray into potentially anticompetitive territory over the course of its meetings by circulating a written agenda in preparation for meetings and providing an oral reminder to attendees at the start of each meeting (or as appropriate) to the effect that discussions should be limited to those listed in the agenda and members should under no circumstances discuss potentially commercially or competitively sensitive issues which could result in an anticompetitive exchange of information.

ASIFMA representatives responsible for chairing meetings attended by members should be provided with appropriate training with regard to permissible/prohibited topics for discussion. If there is any doubt regarding whether initially-legitimate discussions may be

venturing into a commercially or competitively sensitive area - i.e. with the potential to influence the conditions of competition among attendees - the relevant ASIFMA representative should immediately end the discussion and seek advice internally or from external lawyers before allowing such discussions to continue (for example, at the next meeting).

**12. What records should be kept of meetings?**

Records should be kept of attendance at meetings of ASIFMA committees and working groups.

Where meetings are held by telephone, steps should be taken to maintain a record of who has participated (for example by taking a roll call at the outset, or by means of electronic records of those joining the call).

March 2022