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Trade Associations in Asia: A Predictable Focus of the Authorities

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I. INTRODUCTION

Trade and industry associations² may be formed by businesses for legitimate reasons that enhance competition: Small businesses may find increased bargaining power when negotiating as part of a trade association, and an association may develop and enforce trade standards and best practices. However, such associations may also provide a forum for industry players to conduct themselves in potentially anticompetitive ways. For example, businesses in an industry association may collectively decide to set prices or exchange commercially sensitive information.

It is perhaps because of the proliferation of trade associations in Asia, and their propensity to be used as a vehicle for anticompetitive behavior, that trade associations have been an enforcement focus of antitrust authorities in Asia, particularly in China, in recent years. While price-setting has been the main condemned activity of anticompetitive behavior in trade associations, other—more subtle and controversial—practices have been in the spotlight in jurisdictions with more mature competition law regimes.

II. PRICE-SETTING—ANTICOMPETITIVE BEHAVIOR THAT IS EASIER TO DETECT

In many jurisdictions, particularly those with newer competition law regimes, price-fixing behavior in trade associations features more heavily in investigations and actions by antitrust authorities. As price-setting activities tend to be relatively easy to detect and enforce against, they are frequently the first port of call for enforcement by the antitrust agencies.

A. China—Anticompetitive Behavior In Prevalence Of Trade Associations

Many of China's trade associations were formed with regulatory or administrative duties in addition to the advancement of interests of the relevant industry, the commonly understood purpose of a trade association. Given their quasi-governmental genesis, Chinese trade associations appear to be able to exert a greater influence over the market competition than their counterparts in mature market economies, and therefore they can detect and punish deviations

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² This article will use the term "trade association" and "industry association" interchangeably to mean any association or body formed by businesses in the same sector or industry: the term also includes professional associations.

from potential anticompetitive behavior more easily.³ Anticompetitive practices are also sometimes expressed in regulatory language, such as "self-regulatory" or "self-discipline."

It is perhaps unsurprising, therefore, that trade associations have been featured in a number of investigations by antitrust authorities in China. Out of 17 investigations for non-price related anticompetitive behavior published by the State Administration for Industry and Commerce as at November 2012, 16 were reportedly related to trade association activities, while 22 of the 29 investigations opened by the State Administration for Industry and Commerce ("SAIC") in 2013 are reported to have been organized or assisted by industry associations. Although there are no similar figures for investigations into price-related violations of China's Anti-Monopoly Law ("AML") by the National Development and Reform Council ("NDRC"), 2013-2014 saw enforcement actions by the NDRC and its local arms against a gold and jewelry trade association in Shanghai, several tourist associations in Yunnan province, driving school associations in southern China's Guangdong province, and insurance associations in Henan and Zhejiang provinces, all involving price-fixing practices.

Trade associations have also been in the spotlight for private antitrust litigation. In November 2013, a local seafood industry association in Beijing had anticompetitive provisions in its association manual struck down after a local seafood merchant took the association to court. In this case two provisions in the manual stated explicitly that members were prohibited from competing with each other on prices for scallops or from selling them to non-members of the association, with penalties for deviation and rewards for informing on non-compliance. The Beijing Second Intermediate People's Court held that the provisions violated the AML and declared them invalid, a decision which has recently been upheld in the Beijing Higher People's Court. The lawsuit was the first reported private litigation case against a trade association in China, and the first case after the Supreme People's Court published guidelines on civil disputes relating to monopolistic conduct in May 2012 in which "articles of association in violation of the AML" had been listed as a possible cause of civil action against trade associations.⁴

B Outside China—Some Price-Setting Through Trade Associations, Some Other Types Of Cartels

Unlike China, most jurisdictions in Asia do not have many trade associations that can trace their roots back into government or regulatory functions. As such, the trade associations in these jurisdictions do not seem to be as prevalent or powerful as their Chinese counterparts. While some trade associations may be formed by legislation or government regulations, some of the trade associations are formed by businesses' initiatives. However, such trade associations seem just as susceptible to being used by some businesses as a means to promulgate anticompetitive conduct.

Some Asian jurisdictions have seen price-fixing activities by trade associations. In Singapore, for example, a group called the Association of Modeling Industry Professionals collectively raised prices for hiring models; although an appeal in April 2013 saw the fines of

³ Please see more details on trade associations in China in Hao Qian, *Trade Associations and Private Antitrust Litigation in China*, 4(1) CPI ANTITRUST CHRON. (April 2013), available at

<https://www.competitionpolicyinternational.com/trade-associations-and-private-antitrust-litigation-in-china/>

⁴ <http://www.chinacourt.org/law/detail/2012/05/id/145752.shtml>

some modeling agencies reduced, the Competition Commission of Singapore asserted that the association was merely a "front" for its members, and was engaged in price-fixing more than in fighting for better terms for local models.

In Malaysia, professional associations have come under scrutiny. In August 2013 the Malaysian Competition Commission ("MyCC") published a report on price-setting behavior by professional bodies in 34 sectors. It found that, although many professional associations were authorized by law to set price scales for their members, some professional bodies in five sectors (namely company secretaries, arbitrators, mediators, landscape architects, and dental practitioners) had set fee scales when in fact they had no authorization to do so. The MyCC noted that the prohibition of horizontal agreements under Malaysia's Competition Act applied to all commercial activities, including professional services, and that any price-setting by professional bodies without the requisite legal power or an exemption is prohibited under the Competition Act.

In South Korea, trade associations have been implicated in both price-setting and other categories of infringement. In July 2014, the Korea Fair Trade Commission ("KFTC") fined ready-mixed concrete associations in connection with the imposition of fixed-price increases for sales to particular classes of customer. Industry associations were also among the parties fined in connection with bid-rigging in contracts for the supply of electricity meters in September 2014.

In other jurisdictions with comparatively newer competition law regimes, businesses have engaged in price-setting activities without forming a trade association; in these jurisdictions collusion and price-fixing between businesses seems more common than those carried out under the umbrella of a trade associations. Indonesia, for example, has seen alleged "cartelization" of many agricultural products in 2013, including garlic, beef, chicken, soybeans, rice, and eggs, according to Indonesian antitrust authorities; investigations are planned or underway in several of those products.

III. MORE CONTROVERSIAL BEHAVIOR—INFORMATION EXCHANGES

In jurisdictions with more mature competition law regimes, trade associations have appeared to engage in potentially anticompetitive conduct that is more controversial than price-fixing—probably because there is a greater awareness among businesses that price-setting is a blatant infringement of the relevant antitrust law, or because the relevant regulator has already prosecuted price-fixing cases, which are "easy-kills" for regulators overseeing incumbent regimes.

Trade associations in these jurisdictions may then need to be aware of other activities that may also be regarded as anticompetitive, such as sharing business information. For the regulators, these practices may be more difficult to detect and take action against, as clear evidence is often lacking in such cases or their effects on competition may be harder to prove.

South Korea—Exchange of Information Within Trade Associations

In October 2013, BMW Korea, Mercedes-Benz Korea, and the Korean Automobile Importers and Distributors Association faced allegations at a parliamentary inquiry that, through events they called "workshops," they exchanged sales information. The parties denied that they exchanged information on sales strategies or know-how, instead claiming that only information on "events schedules" was shared to avoid clashes between events.

Similarly, when some doctors of the Association of Korean Medicine were accused of exchanging information about prices and services on an online, doctors-only social club in August 2013, the KFTC was of the opinion that the doctors shared the information as individuals, rather as a group, and that the information exchanges on the club did not appear to be collaborative action by the association.

Information exchanges within trade associations appear to be difficult to identify as they often take place in informal settings and orally, and harder still to take action against. What may look like an exchange of commercially sensitive information between businesses in a trade association might be claimed to be an innocuous exchange of technical schedules or best practices. There is also a debate (at least in Asia) as to where the line is between a perfectly legitimate conversation between industry players and an anticompetitive information exchange, and whether information exchange can be an object infringement without the burden on the regulator to prove effects. Consequently, antitrust actions against these practices appear to be more rare in Asia (as compared to, for instance, the European Union).

IV. CONCLUSION

Trade associations are currently, and are likely to remain, a key focus of the antitrust enforcement agencies in Asia. As competition law regimes mature and develop in jurisdictions across Asia, cartels and other "classic" anticompetitive behavior, such as bid-rigging by trade associations, are expected to be exposed by antitrust regulators, and trade associations may come under increased scrutiny by regulators. However, after the "easy targets" like price-fixing have been pursued by antitrust authorities, other anticompetitive activities conducted via trade associations will become harder to detect and prosecute.