



# Toeing the Line

Trade associations can effectively tackle antitrust risks through a compliance programme that defines acceptable and prohibited activities, say *Henry Litong Chen, Joe Winterscheid and Andrea Hamilton.*

**T**RADE OR INDUSTRY ASSOCIATIONS bring substantial benefits to their members and enhance competition in the economic sectors they represent. The flipside, however, is that member activities can also create major antitrust risks that are subject to aggressive enforcement and penalties under China's Antimonopoly Law (AML).

China highly regulates the formation and operation of trade associations. Some of the country's trade associations were spun off from governmental entities and are still quasi-governmental in nature. The Ministry of Commerce views some trade associations as unique organisations for China's transition from a planned to a market economy. In effect, these trade associations function as an extension of governmental authority in the business sectors they represent.

Beyond quasi-governmental associations, prospective members may voluntarily establish their own trade associations. However, this process is still highly controlled by the government and must follow specific steps for formation and operation;

- Before establishment, the association must categorise itself under a certain industry and obtain the approval of the governmental authority overseeing that industry.

- After this approval, the trade association must register with the Ministry of Civil Affairs or its local administrative branch.

- As a non-profit social organisation registered with the government, the association's charter must conform to the model dictated by the Ministry of Civil Affairs. This covers areas such as business scope, membership, structure, administration and use of assets, charter amendment, and termination, but does not provide AML risk management mechanisms.



IMAGINECHINA

The AML warns that industry associations should not engage in monopolistic practices.

- Trade associations must reflect the doctrines of the Communist Party of China. For example, the model charter requires that the association's senior executive adhere to Party guidance and policy with a sense of political discipline.

## AML Impact

Under competition law, trade associations consist of individuals and businesses with common commercial interests who unite to further commercial or professional goals. Typical activities include discussing industry trends and representing members' common interests. This has pro-competitive benefits, which competition law enforcement authorities recognise worldwide and which are

implicitly acknowledged by China's AML. However, these benefits can also create antitrust risks if legitimate activities lead to collusive or exclusionary conduct such as price fixing. The AML warns that "industry associations shall not make arrangements for Operators within their respective industries to engage in the monopolistic practices prohibited by [the AML]."

In April 2009, the State Administration for Industry and Commerce issued draft regulations that implement the AML's prohibition on Monopoly Agreements. Since these regulations offer little practical guidance, Chinese trade associations and their members may not be prepared for AML compliance, or risk severe penalties. For example, if the govern-

ment determines that association members have engaged in price fixing under the AML, the association can be fined a maximum of Rmb500,000, with member companies fined from one per cent to 10 per cent of prior-year sales revenue.

To avoid such potential penalties, associations and their member companies should make their conduct consistent with the AML. However, because the AML has only been in force since 1 August, 2008, there is little precedent on enforcement or interpretation. The most practical alternative is to examine US antitrust law and EC competition law for guidance on conduct that is likely to create risks for associations and their members. Chinese trade associations and member companies that observe the following “dos and don’ts” in four key areas of activity can reduce their AML enforcement risk.

## The Dos and Don’ts

### 1) Association Formation

Associations create antitrust risk if they place certain industry participants at a competitive disadvantage by excluding them. Associations can still choose their members, but should handle admission and other activities using clear, objective criteria that:

- Follow formal, written rules and procedures for membership, voting, appropriate discussion and scope of activities.
- Establish an appeal process for companies that are denied membership or that, once admitted, are expelled or subjected to disciplinary action.
- Receive review by the association’s own legal counsel, who should be familiar with the AML and other competition laws, and who attends association meetings.
- For implementation, rely on those trained in the AML, who can provide effective leadership in avoiding anticompetitive conduct.

Associations should ensure they do not impose excessive fees or create restrictive admission criteria that would unduly restrict membership.

### 2) Conduct of Association Meetings

Association meetings present heightened antitrust risk because discussions between direct competitors can result in market collusion that, if proven, is subject to severe monetary penalties and even prison terms although the AML does not provide for criminal liability for a violation of the AML.

Rules and safeguards must ensure that formal and informal association meetings are strictly limited to appropriate topics that exclude sensitive competitive information. To accomplish this, associations should ensure that they:

- Circulate written, advance notice of all meetings to all members.
- Ask legal counsel to review meeting agendas before distribution to members and to attend each association meeting.

## For implementation, rely on those trained in the AML, who can provide effective leadership in avoiding anticompetitive conduct

- Detailed minutes must be taken and reviewed with legal counsel prior to dissemination.

Adhering to these formal safeguards requires that associations do not:

- Conduct ad hoc, private or informal meetings that are not officially announced in advance.
- Discuss commercially sensitive topics, such as prices, volumes, customers, commercial strategies or any other business secrets.

### 3) Information Exchange

Often, trade associations gather and disseminate market information, but when that material covers prices, production volumes, customers or business strategies, it raises antitrust risk. To avoid this, associations require exchanges of information and should:

- Involve data that is historical, for example, older than three months, and aggregated so no individual contributor can be identified.
- Use an independent party, who is not affiliated with any association member, to gather information from member companies.

On the other hand, associations should not:

- Exchange any information that could be

considered a business secret, such as on current prices, customers, production volumes, capacity, costs or business strategies.

- Disseminate information that can be traced to an individual member(s), or that relates to current or future market conditions.

### 4) Standard Setting

Trade associations often seek to establish quality, environmental, technical or other standards for their industry. Competition law risks arise if an association crafts standards that unfairly place competitors at a market disadvantage. To avoid this risk, standards should be written so that they invite broad, voluntary participation, and establish open, objective, clear and non-discriminatory criteria. To avoid competition law violations, draft standards should not:

- Intentionally exclude certain competitors.
- Arbitrarily promote a technical objective.
- Require the compliance of industry participants.
- Utilise an intellectual property right that all industry participants have to license.

Competition laws encourage but provide no immunity for self-enforcement by trade associations. All activities that are unlawful for individual companies acting together are as illegal when undertaken by a trade association. Ongoing meetings, discussions and information exchanges among association members inevitably create opportunities to violate such competition laws as the AML. However, following the rules of conduct suggested here will show antitrust regulators that a trade association and its members are vigilant about avoiding any inference of involvement in illegal activities. **SBR**

*Henry Litong Chen, a partner at MWE China Law Offices, strategic alliance partner of global law firm McDermott Will & Emery LLP, has extensive international practice experience and has worked with domestic Chinese firms for over a decade. He has handled many significant antitrust and monopoly law issues in China and other countries, and writes regularly about these concerns for publications worldwide. Joseph F. Winterscheid, a partner in the law firm of McDermott Will & Emery LLP based in the Washington DC office, is a member of the Firm’s Antitrust and Competition Practice Group. Andrea Hamilton, an associate in the law firm of McDermott Will & Emery LLP based in its Brussels office, is a member of the Antitrust and Competition Practice Group.*