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TRADE ASSOCIATIONS AND COMPETITION LAW CHALLENGES FOR IN-HOUSE COUNSEL

Trade associations fulfil a significant role for industries and the members they represent. They are also risky territory from a competition law compliance perspective as in most of the times competitors are gathering together. Therefore, it is essential that it is clear what the boundaries are of what can be done together, and which safeguards are required. In the usual “10 practical questions” format, our competition experts examine some key elements which trade associations members should take into consideration of from a competition law compliance perspective and share valuable insights on competition law challenges for in-house counsel in the context of trade association meetings attendance.

1. Does the trade association have a legitimate objective?

By nature, trade association activity is risky from a competition law compliance perspective as in most of the times it regroups competitors. In the past, trade associations have been a forum for many cartel cases, and therefore, they are regarded with suspicion by competition authorities. The first question one should ask is what the objective of the trade association is, and whether a company has an objective and legitimate purpose to participate in the trade association's activity. In general, most trade associations pursue legitimate common industry objectives including awareness raising, industry monitoring and advocacy.

2. Why is it not always easy to correctly capture all competition law risks that might come along with trade association activity?

First, there might simply be a difference in competition compliance risk awareness within the trade association. In addition, the borderline between legitimate discussions and anti-competitive behaviour is not always obvious, resulting in innocent legitimate conversations easily turning into illegal behaviour. Mere passive presence at an anti-competitive meeting is sufficient to be held liable for a competition law infringement. Furthermore, less obvious anti-competitive behaviour can include for instance discriminatory trade association membership rules, anti-competitive provisions in code of conducts, insufficient number of members increasing the risk of collusion, poor payers' blacklists, etc...

3. What should be verified before joining a trade association?

Several questions should be reflected on before joining a trade association. Are the trade association's activities legal? Is the trade association aware of competition law (does it have a compliance guide or statement at the beginning of the meeting, is an external lawyer attending the meetings)? Is membership open to all those who meet non-discriminatory, objective, and uniformly applied criteria? It is also important to check whether the trade association is disseminating any statistics, and to assess the nature of the data and the mechanism to collect such data.

4. What should we do before and after a trade association meeting?

Before the trade association meeting, one should check the purpose of the meeting and the written agenda.

After the meeting, one should immediately review the minutes for accuracy, and correct any inaccuracies promptly.

5. What to monitor during a trade association meeting?

Participants should first check the reading out of a competition compliance reminder at the beginning of the meeting. Discussions should stick to the agenda, and participants should be vigilant as to what is discussed and be particularly cautious when it comes to more informal discussions in subcommittees, fringe meetings or in social setting. There should be no exchange of commercially sensitive information, but what can be discussed for instance are non-confidential technical or regulatory issues relevant to the industry, industry public relations or lobbying, trends in public opinion on product concerns or industry image, as long as all this does not result into an alignment of competitive behaviour.

6. What should not occur during a trade association meeting?

The classic competition law rules apply: no exchange of competitively sensitive information between competitors, and therefore no discussions on e.g. prices or price elements, company costs, sales volumes, future business plans or any other confidential information.

7. What should one do if, despite the fact that all precautions are taken, one finds himself all of a sudden steering to a risky discussion?

One should make it immediately clear that such matters cannot be discussed, insist that these discussions stop and ask to change the subject. If the conversation continues, one should leave the meeting and ensure that the departure – and the reason for it – is noted in the minutes of the meeting. The participant's legal department should be informed immediately of what has happened.

8. Is it OK to receive industry statistics from my trade association?

Trade associations can disseminate statistics provided that the required competition compliance safeguards have been put in place such as the fact that an independent company or a trade association staff member without connection to the members confidentially collects and disseminates the statistics, that the statistics are sufficiently aggregated and the underlying data are sufficiently historic (as a rule of thumb older than 1 year). And the statistics disseminated should not be accompanied by comments or recommendations.

9. How to deal with lobbying initiatives?

Lobbying is one of the key activities of trade associations as it is a legitimate means to influence proposed or existing legislation. The basic rule is that all information legitimately shared needs to be directly related to the joint lobbying initiative and strictly limited to what is required to undertake it effectively. If an exchange of commercially sensitive information is absolutely required, safeguards should be put in place to avoid any information spill over between the members both at the stage of collecting and disseminating the information. Finally, joint advocacy should in practice never result into an alignment of the trade association's members commercial behaviour or marketing strategy.

10. What should in-house counsel monitor?

1. Map out current trade association attendance and keep track of new memberships within your organisation, check the membership rules and the purpose.
2. Make a compliance risk assessment by reviewing the by-laws, any codes of conduct, disseminated statistics etc..
3. Train attendees and create a culture of competition compliance and risk awareness within your organisation.



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