

October 2018

Hong Kong's First Decision on the Exclusion of Competition Rules

The Hong Kong Competition Commission has recently published its first **decision** on the exclusion of the competition rules under the Competition Ordinance. The Commission found that the **Code of Banking Practice** is not excluded from the prohibition against anticompetitive arrangements as it is not legally required under Hong Kong law.

The decision is obviously of particular note for the financial services sector. However, it is of wider significance to businesses in Hong Kong in illustrating how the local competition authority narrowly interprets and applies the Competition Ordinance's statutory exclusions.

Specifically, industry codes or arrangements that are merely encouraged by government entities are still likely to fall within the ambit of the competition rules. Whilst some sectors may have a close relationship with Government, mere oversight of an industry or encouragement of a practice by the Government is insufficient to exclude its arrangements from scrutiny.

The Decision sought under the Application

In December 2017, 14 financial institutions applied to the Hong Kong Competition Commission ("**HKCC**") to obtain clarity as to the exclusion of the Code of Banking Practice ("**Code**") from the First Conduct Rule (the provision of the Competition Ordinance dealing with anti-competitive arrangements).

The Code is a non-statutory, voluntary and self-regulatory set of practices for financial institutions active in Hong Kong. It is published jointly by the Hong Kong Association of Banks ("**HKAB**") and the DTC Association whose membership reflects most of the financial services sector in the city. It was first adopted in 1997 and the current version has been drafted in cooperation with and is fully endorsed by the Hong Kong Monetary Authority ("**HKMA**"). The Code is stated to have been established for the purposes of treating customers fairly and most of its provisions are aimed at consumer-protection considerations.

However, the Code also contains a range of provisions requiring banks to adopt common approaches to the setting and level of fees for certain retail services. These include requiring banks to not charge a fee or charge in particular circumstances, that customers should not be charged multiple fees in respect of credit cards, the setting of upper limits on the level of fees charged to customers and the setting of ceilings on the amount of customer debt for credit cards.

Shortly before the Competition Ordinance entered into force in December 2015, some within the industry expressed a concern that there was legal uncertainty as to whether those provisions would give rise to a contravention of the competition rules. As a result, with a view to avoid any risk of non-compliance with the Competition Ordinance, those provisions of the Code were “suspended” by the HKAB. Subsequently the HKMA indicated that notwithstanding the Competition Ordinance, it continued to expect full compliance with the Code – putting financial institutions in the middle between two potentially contradictory regulatory systems.

Under the Competition Ordinance, the HKCC does not have the power to make a determination as to whether a contravention of the competition rules has occurred (only the Competition Tribunal does). However, the HKCC is empowered to decide whether a statutory exclusion provided for under the Competition Ordinance is applicable in the circumstances of a particular conduct. One of these exclusions, the “legal requirement” exclusion set out in Schedule 1(2) of the Competition Ordinance, provides that the First Conduct Rule is not applicable if the arrangement in question is made for the purpose of complying with a legal requirement.

The applicants (supported by the HKMA) sought confirmation from the HKCC that the Code is a “legal requirement” under the Banking Ordinance. Although the Code is not mentioned in that legislation, the applicants referred to the HKMA, the specialist financial regulator, having an expectation of banks’ compliance with the Code as a sufficient basis for exclusion from the competition rules.

HKCC’s reasons for refusing the application

Despite the applicants having engaged with the HKCC for over a year before making the application, on 19 October 2018 the HKCC concluded the Code had a number of key aspects which indicated that it was not a legal requirement imposed “by” or “under” the Banking Ordinance.

The HKCC conducted a **public consultation** – with submissions received from the HKMA, the Consumer Council, the Hong Kong Federation of Insurers and a number of members of the public. The HKCC decision took all views into consideration – confirming that a well-reasoned and substantiated submission during the consultation process is capable of carrying significant weight.

The legal requirement exclusion under the Competition Ordinance is a concept adopted from analogous competition laws in the UK and European Union. In those jurisdictions, the authorities have considered that exclusion to apply only in a very narrow set of circumstances. In effect, it is reserved to scenarios where businesses are “compelled” to act in a particular way “under” domestic legislation. Overseas competition authorities have indicated that where there is a margin for autonomy of action by a business, it cannot be said to be “required” to undertake such conduct. The purpose of such an exclusion is to address potential conflicts of laws within a jurisdiction – and even so, such exclusions

are tightly construed to avoid a “defence” to anti-competitive arrangements being too easily raised.

The HKCC’s starting point for its analysis was based on that approach – as had been already outlined initially in the [Guideline on the First Conduct Rule](#). The HKCC, however, gave further detail in its decision on its views as to the proper scope of the legal requirement exclusion with the following general principles of wider applicability:

- **Express language in the relevant industry code and/or legislation will be crucial in determining the applicability of the exclusion.** If the industry code itself provides that the code is voluntary and non-statutory, it will be taken as a strong indication that compliance with it is not a legal requirement under the relevant legislation. The text of the legislation at issue is also relevant. If the industry code is not referred to in the relevant legislation, and the compliance with the industry code is not a condition in the legislation, the code is unlikely to be considered as a legal requirement.
- **Consequences for non-compliance with an industry code have to bite.** If non-compliance with the industry code merely raises “doubt” as to whether a regulated body had fulfilled its legal obligations, which may be determined by a subsequent decision by an official government body, the industry code may not constitute a legal requirement for purposes of the exclusion.
- **Mere government endorsement is insufficient.** In the absence of a direct legislative basis, or a direct link to the conduct being undertaken “under” a legislative provision, mere endorsement or encouragement by a public or government authority may not amount to a legal requirement.
- **A mere “expectation of compliance” does not amount to legal requirement.** Even if the Government closely monitors the compliance of an industry code and has an expectation that compliance with such code is mandatory, that alone would unlikely be sufficient to render the code a legal requirement for purposes of the exclusion.

HKCC’s enforcement priorities – the Code will not be investigated further

In reaching its decision, the HKCC also confirmed that it has no current intention to investigate whether the Code may contravene the Competition Ordinance. The potential consumer protection interests that drove the adoption of the Code were seen to be particularly relevant in the HKCC’s assessment of enforcement priorities and whether an investigation would be warranted into the potential anti-competitive impact of the Code. The drafting process of the Code heavily involved public bodies, such as the HKMA and the Consumer Council, and the intention of the Code was to promote good practices by setting minimum standards.

Wider lessons for Hong Kong businesses and trade associations

The consequence of the decision for the financial services sector has been immediate in that HKAB has now lifted its suspension of the provisions of the Code that had been suspended since December 2015. Although HKAB did not obtain the legal certainty it was hoping for in the form of an exclusion, it appears to have found sufficient comfort in the HKCC's indication that it does not intend to investigate the Code further.

More importantly for businesses and trade associations outside the financial services sector, the HKCC's decision should be taken as a strong warning for careful scrutiny of any industry codes or self-regulatory standards in Hong Kong. Any previous expectation that arrangements may be excluded from the Competition Ordinance based on the "legal requirement" exclusion should be reviewed based on the principles set out in the decision.

Last week's decision also provides helpful insight into the procedural framework for the HKCC's handling of such applications:

- **An application is not an "one-shot" game.** Lengthy consultation before filing an application to the HKCC is likely – but as shown here, it is no guarantee of a successful outcome. Even after the formal filing, applicants may be involved in rounds of meetings with and written submissions to the HKCC. For example, in this case, the applicants received requests for information from the HKCC which were so extensive that it took the applicants two-months to respond. Public consultation is also an important part of the process; the HKCC will review submissions in detail and seek to address those in its decision.
- **Overseas similar industry codes will be valuable reference for such applications.** It is noteworthy that the HKCC also requested for information relating to the banking regulatory approaches of other major jurisdictions in the US, UK, Singapore and Europe. The HKCC requested for such information to get a broader picture of the equivalent regulations from a comparative perspective.

Authors: Clara Ingen-Housz, Marcus Pollard, Alexander Lee

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

© Linklaters. All Rights reserved 2018

Linklaters Hong Kong is a law firm affiliated with Linklaters LLP, a limited liability partnership registered in England and Wales with registered number OC326345. It is a law firm authorised and regulated by the Solicitors Regulation Authority. The term partner in relation to Linklaters LLP is used to refer to a member of the LLP or an employee or consultant of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications. A list of the names of the members of Linklaters LLP and of the non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ, England or on www.linklaters.com.

Please refer to www.linklaters.com/regulation for important information on our regulatory position.

We currently hold your contact details, which we use to send you newsletters such as this and for other marketing and business communications.

We use your contact details for our own internal purposes only. This information is available to our offices worldwide and to those of our associated firms.

If any of your details are incorrect or have recently changed, or if you no longer wish to receive this newsletter or other marketing communications, please let us know by emailing us at marketing.database@linklaters.com.

Contacts

For further information please contact any of the following or your regular point of contact at Linklaters:

Clara Ingen-Housz
Partner

(+852) 2901 5306

cih@linklaters.com

Marcus Pollard
Managing Associate

(+852) 2901 5121

marcus.pollard@linklaters.com

Alexander Lee
Associate

(+852) 2901 5287

alexander.lee@linklaters.com