

19 October 2018

Competition Commission publishes Decision in respect of the Code of Banking Practice

The Competition Commission (Commission) today published a decision (Decision) under section 11 of the Competition Ordinance (Ordinance) finding that the Code of Banking Practice (Code) is not excluded from the first conduct rule by the legal requirements exclusion¹ in the Ordinance. The Commission has at the same time confirmed that it has no current intention to pursue further investigative or enforcement action in respect of the present version of the Code. The Commission has published a Statement of Reasons, which sets out the reasons for its Decision.

The Commission made the Decision in response to an application (Application) received last December from 14 parties (Applicants), all of which are institutions authorised under the Banking Ordinance (Cap. 155) (AIs). The Applicants sought a decision that the first conduct rule does not apply to the giving of effect to the Code by the Applicants by virtue of the legal requirements exclusion.

Code of Banking Practice

The Code is an industry code of practice jointly issued by the Hong Kong Association of Banks (HKAB) and the DTC Association² (DTCA), and endorsed by the Hong Kong Monetary Authority (HKMA). It relates to AIs' provision of services to customers in Hong Kong who are private individuals, and sets out recommendations on banking practice covering various services. The Code is stated to be voluntary and non-statutory.

Certain provisions of the Code relate to the imposition and level of fees, interest rates and charges set by AIs. These provide that AIs should not in specific circumstances (i) impose particular fees or charges, (ii) charge customers multiple fees in respect of credit cards, (iii) charge customers more than particular amounts (for example in relation to specific interest rates), or (iv) permit customer debt for credit cards to exceed certain amounts. These provisions were suspended by the HKAB and the DTCA prior to the full commencement of the Ordinance.

Handling of the Application

In accordance with section 10 of the Ordinance, on 5 January 2018, the Commission invited interested parties, including those it considered likely to be affected by the Application, to make representations about the Application. The Commission received six representations, from the Investor Education Centre, the HKMA, the Hong Kong Federation of Insurers, the

¹ Under the legal requirements exclusion, the first conduct rule does not apply to an agreement to the extent that it is made for the purpose of complying with a legal requirement. The exclusion is set out in section 2 (*Compliance with legal requirements*) of Schedule 1 to the Ordinance.

² The DTC Association is also known as the Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies (DTCA).

Consumer Council and two individuals, all of which have been published on the Commission's website.

During the process, the Commission also liaised closely with the Applicants, the HKAB and the DTCA. This included holding meetings, issuing a request for information, and discussing the Commission's preliminary views on the Application.

The Commission has carefully considered all of the representations and submissions received, and it is grateful for the assistance provided by the relevant parties.

The Commission's findings

In reaching its Decision, the Commission noted a number of key aspects of the Code, which suggested that it was not a legal requirement imposed 'by' or 'under' the Banking Ordinance within the meaning of the legal requirements exclusion. While the monitoring and other processes in place suggested that compliance with the Code is taken seriously by AIs and the HKMA, these were not in the Commission's view sufficient to demonstrate there was a legal requirement to comply with the Code for the purposes of the exclusion.

Although the Commission has found that the Code is not excluded by the legal requirements exclusion, it has not come to a conclusion on whether the giving of effect to the Code (including the suspended provisions) has the object or effect of harming competition under the first conduct rule, as this falls outside the scope of the Application.

The Commission has also confirmed that it has no current intention to pursue further investigative or enforcement action in respect of the present version of the Code. As explained in the Statement of Reasons, the Commission's Enforcement Policy indicates generally that the Commission will target conduct that is clearly harmful to competition and consumers in Hong Kong. In this respect, the Commission recognises that the Code may in fact benefit customers in particular ways, is intended to promote good banking practices towards customers, and has been formulated with the input and support of the Consumer Council and the HKMA.

The Decision and the Statement of Reasons are available in English and Chinese on the Commission's website at www.compcomm.hk.
