

**CASE AD/01XX**

**COMMISSION DECISION UNDER SECTION 11(1) OF THE  
COMPETITION ORDINANCE IN RESPECT OF THE CODE OF  
BANKING PRACTICE**

***STATEMENT OF REASONS***

***15 OCTOBER 2018***

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## 1 INTRODUCTION AND SUMMARY

1.1 On 11 December 2017, the Competition Commission (“**Commission**”) received an application for a decision (“**Application**”) under section 9 of the Competition Ordinance (Cap. 619) (“**Ordinance**”) in respect of the Code of Banking Practice (“**Code**”). The Commission’s case reference number is AD/01XX.

1.2 The Code is issued jointly by The Hong Kong Association of Banks (“**HKAB**”) and The DTC Association (also known as The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies) (“**DTCA**”), and endorsed by the Hong Kong Monetary Authority (“**HKMA**”). The Application was submitted by 14 parties, all of which are members of HKAB or the DTCA (“**Applicants**”). Further details regarding the relevant parties and the Code are provided below in paragraphs 1.12 to 1.17 and Part 2 respectively.

1.3 The Applicants seek a decision from the Commission that the first conduct rule in section 6 of the Ordinance does not apply to the giving effect to the Code by the Applicants by virtue of the exclusion in section 2 (*Compliance with legal requirements*) of Schedule 1 to the Ordinance (“**legal requirements exclusion**”). The legal requirements exclusion is set out in Part 3 below.

### Legal framework for issue of a decision

1.4 Schedule 1 to the Ordinance provides for certain general exclusions which, if applicable to a particular agreement, mean that the first conduct rule does not apply. These include the legal requirements exclusion.

1.5 Under section 9(1) of the Ordinance, an undertaking that has made, or proposes to make, an agreement may apply to the Commission for a decision as to whether or not an agreement is excluded or exempt from the application of the first conduct rule, as a result of one or more exclusions or exemptions in the Ordinance.<sup>1</sup>

1.6 The Commission is only required to consider applications for a decision in certain circumstances, which the Commission refers to as the Suitability Factors.<sup>2</sup> It

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<sup>1</sup> Section 24 of the Ordinance permits undertakings to apply to the Commission for a decision as to whether or not conduct is excluded or exempt from the application of the second conduct rule.

<sup>2</sup> Under section 9(2) of the Ordinance, the Commission is only required to consider an application if (a) the application poses novel or unresolved questions of wider importance or public interest as to the application of an exclusion or exemption; (b) there is no clarification on that exclusion or exemption in existing case law or decisions of the Commission; and (c) it is possible to make a decision on the basis of the information provided. For further details on the Commission’s interpretation of the Suitability Factors, see the Commission’s *Guideline on Applications for a Decision under Sections 9 and*

is not required to consider applications concerning hypothetical questions or agreements.<sup>3</sup>

1.7 Where the Commission considers the application, it may make a decision under section 11(1) of the Ordinance as to whether or not the agreement in question is excluded or exempt from the first conduct rule. Before making a decision, section 10(1) requires the Commission to publish notice of the application through the Internet and in any other manner the Commission considers appropriate, and to consider any representations that are made to the Commission within a specified period.

1.8 If the Commission's decision confirms that an exclusion or exemption applies to a particular agreement, by virtue of section 12, each undertaking specified in the decision is then immune from any action under the Ordinance with regard to that agreement.

1.9 There is, however, no need for a prior decision of the Commission in order for undertakings to rely on the applicable exclusions and exemptions in the Ordinance. Undertakings may self-assess the legality of their agreements having regard to the first conduct rule and the exclusions and exemptions from those rules.<sup>4</sup>

1.10 Where the Commission decides that a particular agreement is not excluded or exempt from the first conduct rule, this does not necessarily mean that the Commission has formed a view on whether it has reasonable cause to believe that a contravention of the first conduct rule has occurred in connection with that agreement.<sup>5</sup>

1.11 Further details as to the Commission's processes regarding applications for a decision are set out in the Commission's *Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders*, referred to below as the "**Applications Guideline**".

### **The Applicants and related parties**

1.12 The Applicants are all institutions authorized under the Banking Ordinance (Cap. 155) ("**Banking Ordinance**"), also known as "**Als**". Als comprise banks (that is,

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24 (*Exclusions and Exemptions*) and *Section 15 Block Exemption Orders* ("**Applications Guideline**"), paragraphs 6.4 to 6.9.

<sup>3</sup> See further section 9(3) of the Ordinance and *Applications Guideline*, paragraphs 6.10 to 6.11.

<sup>4</sup> *Applications Guideline*, paragraph 5.6.

<sup>5</sup> *Applications Guideline*, paragraph 9.6.

companies which hold a valid banking licence), restricted licence banks and deposit-taking companies.<sup>6</sup>

1.13 The Applicants are as follows:

- (a) Bank of China (Hong Kong) Limited;
- (b) Bank of China International Limited;
- (c) The Bank of East Asia, Limited;
- (d) BNP Paribas;
- (e) Citibank (Hong Kong) Limited;
- (f) Dah Sing Bank, Limited;
- (g) DBS Bank (Hong Kong) Limited;
- (h) Hang Seng Bank, Limited;
- (i) The Hongkong and Shanghai Banking Corporation Limited;
- (j) Industrial and Commercial Bank of China (Asia) Limited;
- (k) JPMorgan Chase Bank, National Association;
- (l) Orix Asia Limited;
- (m) Public Finance Limited; and
- (n) Standard Chartered Bank (Hong Kong) Limited.

1.14 As the Application is in respect of Code generally, AIs other than the Applicants to which the Code applies are also in practice covered by the Commission's decision in response to this Application.

1.15 The Application lists HKAB and the DTCA as relevant parties for the purposes of the Application, on the basis that they are the two industry associations which issue the Code.<sup>7</sup>

1.16 HKAB is a body corporate established under The Hong Kong Association of Banks Ordinance (Cap. 364). Its membership is limited to licensed banks in Hong Kong. It currently has 156 members. According to the Application, banks are authorized by the Monetary Authority subject to the condition that they will become and thereafter remain a member of HKAB.<sup>8</sup> HKAB is managed by its Committee, whose members consist of the three note-issuing banks in Hong Kong, local bank representatives and foreign bank representatives.

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<sup>6</sup> Banking Ordinance, section 2(1).

<sup>7</sup> Application, section 2.4.

<sup>8</sup> Application, paragraph 2.4.5. As noted in footnote 1 of the Application, the Monetary Authority is a public officer appointed by the Financial Secretary empowered with, among other things, the responsibilities and powers under the Banking Ordinance (Cap. 155), while the Hong Kong Monetary Authority or HKMA is an institution established to assist the Monetary Authority in the discharge of, among other things, his statutory functions.

1.17 The DTCA is a company limited by guarantee incorporated under the Companies Ordinance. Its members are restricted license banks and deposit-taking companies. It currently has 32 members. The DTCA is controlled by its Executive Committee, which consists of six of its members.

## **Handling of the Application**

### ***Background to the Application***

1.18 Prior to the commencement of the conduct rules on 14 December 2015, HKAB engaged with the Commission to discuss the compatibility of the Code with the Ordinance.

1.19 Shortly before the entry into force of the conduct rules, HKAB and the DTCA suspended 18 provisions of the Code, mainly relating to the imposition or level of fees, interest rates and charges set by AIs. 17 of these provisions remain suspended and are referred to as the “**Suspended Provisions**”.<sup>9</sup> [...] <sup>10</sup>

1.20 The HKMA has reminded all AIs that they are still required to fully comply with the Code, including the Suspended Provisions.<sup>11</sup> [...] <sup>12</sup>

1.21 From September 2016 onwards, HKAB and certain of its members engaged in discussions with the Commission on a possible application for a decision regarding the Code, pursuant to the Initial Consultation process in the Applications Guideline.

1.22 The Application was submitted on 11 December 2017. It states that the purpose of the Application is to bring legal certainty to the Applicants and the wider banking community that their continued compliance with the Code (in particular, the Suspended Provisions) will not contravene the Ordinance.<sup>13</sup>

### ***Consultation under section 10 of the Ordinance***

1.23 In accordance with the procedure set out in section 10 of the Ordinance, on 5 January 2018, the Commission:

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<sup>9</sup> The Suspended Provisions are sections 5.10, 6.5, 12.3, 22.11, 26.1(c), 26.9, 26.12, 26.15(e), 26.15(f), 28.2, 28.3, 28.4, 28.5, 30.1, 34.3, 36.3 and 52.1 of the Code. Section 22.5 was also suspended in December 2015 but has subsequently been resumed. Further details are provided in paragraphs 2.11 to 2.16 and 2.20 below.

<sup>10</sup> Application, confidential Annexes 6 and 7.

<sup>11</sup> Monetary Authority representation, February 2018, paragraph 11.

<sup>12</sup> Application, confidential Annex 5.

<sup>13</sup> Application, paragraph 4.1.4.

- (a) published notice of the Application, along with a non-confidential version of the Form AD submitted by the Applicants, on its website; and
- (b) invited representations on the Application from interested parties on or before 15 February 2018.<sup>14</sup>

1.24 In addition to publishing the notice, the Commission specifically invited a number of parties which it considered likely to be affected by the Application to provide representations.

1.25 The Commission received a total of 6 representations, which have been published on the Commission's website. The representations were submitted by the Investor Education Centre, the Monetary Authority, the Hong Kong Federation of Insurers, the Consumer Council and two individuals.

1.26 Subsequent to the consultation, the Commission also met the HKMA, and the Monetary Authority provided written comments regarding the Commission's preliminary views on the merits of the Application.

#### ***Request for information and other engagement with the Applicants***

1.27 The Commission issued the Applicants with a request for information aimed at clarifying, and seeking further information on, various aspects of the Application ("RFI"). The Applicants requested an extension of time of two months to respond to certain parts of the RFI, which has inevitably impacted on the time taken by the Commission to assess the Application.

1.28 The Commission also held a meeting with the Applicants to discuss views on the merits of the Application, subsequent to which the Applicants provided a written supplementary submission on the views expressed.

#### ***Basis for considering Application and issuing Decision***

1.29 Upon receiving the Application, the Commission had regard to the Suitability Factors and, on the basis that the Suitability Factors were met, decided to consider the Application. Having now considered and consulted on the Application, the Commission considers it appropriate to issue a decision under section 11(1) of the Ordinance.

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<sup>14</sup> See the Commission's Notice issued under section 10 of the Competition Ordinance of an application for a decision in relation to the Code of Banking Practice.



## **The Decision and Statement of Reasons**

1.30 Taking account of the information and arguments contained in the Application, the representations received on the Application and the subsequent written comments from the Monetary Authority, the responses to the RFI and supplementary submission from the Applicants, the Commission has made a decision on the Application (“**Decision**”). The Decision is that the Code is not excluded from the application of the first conduct rule by or as a result of the legal requirements exclusion.

1.31 In accordance with section 34 of the Ordinance, the Decision is published in the Commission’s Register of Decisions and Block Exemption Orders, which is available on the Commission’s website and at its offices during ordinary business hours.

1.32 This Statement of Reasons sets out the Commission’s reasons for the Decision and other related matters. The remainder of the document sets out:

- (a) information relating to the Code and its provisions (Part 2);
- (b) the Commission’s assessment of the Application, including details of the relevant legal framework, the Commission’s assessment of the Applicants’ arguments and the representations received, and its reasons for the Decision (Part 3); and
- (c) the Commission’s current enforcement intentions regarding the giving effect to the Code by AIs (Part 4).

## **2 THE CODE OF BANKING PRACTICE**

2.1 The Code is an industry code of practice jointly issued by HKAB and the DTCA, and endorsed by the HKMA. It relates to AIs' dealings with and provision of services to customers in Hong Kong who are private individuals (which for the most part can be classified as retail banking services).

### **Provisions of the Code**

2.2 The Code consists of two parts. Part 1 sets out the status of the Code, general principles and its objectives. Part 2, which is the substantial part of the Code, sets out recommendations on banking practice.

#### ***Part 1 - Introduction***

##### *Status of the Code*

2.3 Section 1.2 provides that the Code "is a non-statutory Code issued on a voluntary basis". In this respect, section 1.3 additionally states that the "recommendations set out in this Code are supplementary to and do not supplant any relevant legislation, codes, guidelines or rules applicable to institutions authorized under the Banking Ordinance (Cap. 155)".

2.4 In terms of the coverage of the Code, section 1.4 provides that:

- (a) "HKAB and DTCA expect their respective members to comply with the Code"; and
- (b) "HKMA expects all institutions to comply with the Code and will monitor compliance as part of its regular supervision".

2.5 In their response to the RFI, the Applicants have clarified that a limited number of AIs are neither members of HKAB nor of the DTCA. The HKMA nonetheless requires those non-members to report to it regarding their compliance.<sup>15</sup> In effect, therefore, the Code can be considered to cover all AIs in Hong Kong.

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<sup>15</sup> Response to RFI, 6 April 2018, paragraphs 2.1 and 2.2.

### *General principles*

2.6 The Code lists eight general principles which AIs should follow in their dealings with customers (section 2). One of these principles is titled “Competition” and states that “[i]nstitutions should allow customers to search, compare and, where appropriate, switch between products and institutions easily and at reasonable and disclosed costs”. Several of the other general principles relate to consumer protection issues such as “Equitable and Fair Treatment of Customers”, “Disclosure and Transparency” and “Protection of Customer Assets against Fraud and Misuse”.

### *Objectives*

2.7 According to section 3.1, the Code is intended to achieve the following general objectives:

- “(a) to promote good banking practices by setting out the minimum standards which institutions should follow in their dealings with customers;
- (b) to increase transparency in the provision of banking services so as to enhance the understanding of customers of what they can reasonably expect of the services provided by institutions;
- (c) to promote a stronger culture of treating customers fairly which will ensure customers’ interests are taken into account by institutions in their business dealings with customers; and
- (d) through the above, to foster customer confidence in the banking system”.

## ***Part 2 – Recommendations on banking practice***

### *Recommendations generally*

2.8 The recommendations in the Code cover specific retail banking services such as current accounts, savings and other deposit accounts, loans and overdrafts, card services, electronic banking services and stored value card services.

2.9 A large number of the recommendations concern the information, advice and warnings which should be provided to customers in relation to various aspects of these services (see for example sections 5, 6, 8, 11, 13, 21, 27, 39 and 45).

2.10 There are also specific recommendations on issues such as handling of variations in the service (e.g. sections 20.6, 22.4, 29.3, 51.3), liability for losses suffered by customers (e.g. sections 36 and 48), debt collection activities (e.g. sections 43 and 44), marketing by banks (e.g. sections 11 and 38), handling of complaints (e.g. section 13), and the customer information which may or should be collected and stored (e.g. sections 8, 9, 16).

### *Suspended Provisions*

2.11 As noted above, the Suspended Provisions mainly relate to the imposition and level of fees, interest rates and charges set by AIs.

2.12 First, a number of Suspended Provisions provide that AIs should not charge a fee or charge in particular circumstances. Specifically, the Suspended Provisions provide that AIs should not impose:

- (a) a fee for terminating a banking service following particular variations in terms and conditions (section 5.10);
- (b) administrative charges for handling cash deposits in Hong Kong dollars, except those in large quantities (section 6.5);
- (c) a fee for choosing the master fire insurance policy option (section 22.11);
- (d) a fee for cancelling a card within a specified notice period (of at least 30 days) from the date of replacement or renewal of the card (section 26.9);
- (e) annual fees in respect of credit cards which are not activated by cardholders, or in certain circumstances, renewal or replacement cards which are not activated (section 26.12);
- (f) an 'over-the-limit' fee or charge if a cardholder exceeds a credit limit solely because of fees or interest charged to the cardholder's account (section 26.15(f));
- (g) an account inactivity fee for cardholders (section 28.2);
- (h) a closed account fee, subject to the recovery of the cost of welcome gifts or other benefits received by the cardholder in certain circumstances (section 28.3);
- (i) interest or finance charges on any disputed amount of an unauthorized transaction reported before the payment due date while it is under investigation (section 34.3); and
- (j) a fee for cancelling a stored value card within a specified notice period (of at least 30 days) from the date of renewal of the card (section 52.1).

2.13 Second, certain Suspended Provisions provide that customers should not be charged multiple fees in respect of credit cards. AIs should not impose:

- (a) more than one over-the-limit fee or charge per billing cycle, for cardholders that have not opted out of over-the-limit facilities (section 26.15(e)); and
- (b) more than one fee where a late payment is triggered by a returned payment (either a late payment or a returned payment fee may be imposed) (section 28.5).

2.14 Third, certain Suspended Provisions set upper limits on the amounts a customer should have to pay in certain circumstances. They provide that:

- (a) annualised percentage rates or annualised interest rates (as the case may be) in respect of particular loans should not exceed the legal limit stated in the Money Lenders Ordinance (Cap. 163), unless justified by exceptional monetary conditions (section 12.3);
- (b) late payment fees for credit cards should be set at a reasonable amount or the amount of minimum repayment, whichever is lower (section 28.4); and
- (c) cardholder liability for loss of a card should not exceed HK\$500, except in certain circumstances related to the cardholder's conduct (section 36.3).

2.15 Finally, the remaining Suspended Provisions set ceilings relating to customer debt for credit cards. These provide that AIs (specifically card issuers) should:

- (a) not grant credit limit exceeding HK\$10,000 to students in an institution of higher education, unless the student has submitted a written application and given specific financial information (section 26.1(c)); and
- (b) set the minimum periodic payment at an amount no less than all interest, fees and charges, plus at least 1% of outstanding principal (section 30.1).

2.16 HKAB's website indicates that the Suspended Provisions remain suspended until further notice.<sup>16</sup> As noted in Part 1 above, however, the HKMA has reminded all AIs that they are still required to fully comply with the Code, including the Suspended Provisions.

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<sup>16</sup> HKAB website, <https://www.hkab.org.hk/DisplayArticleAction.do?sid=5&ss=3> (last accessed 15 October 2018).

## Creation and revision of the Code

2.17 The first version of the Code was jointly released by HKAB and the DTCA in July 1997. It was developed by a Working Group comprising representatives of HKAB, the DTCA and the HKMA, and issued following consultation with industry bodies, regulators, Government and political parties. The HKMA stated that it fully endorsed the provisions of the Code and would monitor compliance as part of its regular supervision.<sup>17</sup>

2.18 Revised versions of the Code have been issued in November 2001, January 2009 and February 2015. The revised versions of the Code have been issued following consultations involving HKAB, DTCA, the Consumer Council and most recently, in respect of specific provisions, the Privacy Commissioner for Personal Data.<sup>18</sup>

2.19 Following the issue of the revised Code in 2001, a specialised sub-committee was formed to review and develop the Code, which is known as the Code of Banking Practice Committee (“**CBPC**”). The CBPC is made up of representatives from HKAB, the DTCA and the HKMA. [...] <sup>19</sup>

2.20 The version currently in force is the version issued in February 2015, with the following subsequent amendments:

- (a) As noted previously, 18 of the Code’s provisions were suspended by HKAB and the DTCA effective 11 December 2015.
- (b) In February 2017, the HKMA issued a letter to all AIs in relation to section 22.5 and 22.12, which clarified its supervisory expectation in relation to these provisions, and requested HKAB and the DTCA to arrange for their amendment.<sup>20</sup> Section 22.5 was resumed as amended in June 2017.<sup>21</sup>

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<sup>17</sup> Application, Annex 8.

<sup>18</sup> Application, paragraph 4.3.9.

<sup>19</sup> Response to RFI, 11 May 2018, confidential paragraph 1.8.

<sup>20</sup> Application, Annex 14.

<sup>21</sup> Application, paragraph 3.1.11, footnote 5.

## Regulatory approach of other jurisdictions

2.21 In its RFI, the Commission requested information regarding the regulatory approach of other jurisdictions to matters in the Code such as restrictions relating to the charging of fees, maximum interest rates and credit limits. The Commission requested this information to assist with its understanding of (i) whether the same or equivalent restrictions are found elsewhere; and (ii) if so, the legal status and effect of such restrictions.

2.22 The Applicants provided examples of provisions adopted in the UK, US, Singapore, Australia and Mainland China,<sup>22</sup> as follows:

- (a) The Applicants identified a few examples of provisions which largely mirrored the Suspended Provisions found in the Code. In the US and UK, these were contained in binding legislative provisions or binding directions issued by relevant regulators.<sup>23</sup> In Singapore, some provisions were contained in voluntary codes of conduct issued by an industry association.<sup>24</sup>
- (b) Other examples showed generally that the five jurisdictions in question regulate, to varying degrees, the interest rates, charges, credit limits and notification requirements relating to retail banking services, with some similarities to the provisions of the Code. However, the regulation in question was normally contained in binding legislative provisions or binding directions issued by relevant regulators.<sup>25</sup> The examples cited from voluntary codes of

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<sup>22</sup> Response to RFI, 11 May 2018, paragraphs 2.1 to 2.21.

<sup>23</sup> In the UK, for example, a binding regulation sets the minimum repayment amounts for credit cards at the same level as in section 30.1 of the Code (see CONC 6.7.5R in the Consumer Credit Sourcebook, issued by the Financial Conduct Authority). In the US, a legislative provision prohibits fees based on account inactivity and closure, similar to the recommendation in sections 28.2 and 28.3 of the Code (see Title 12 of the Code of Federal Regulations, §1026.52(b)(2)(i)(B)(2) and (3)).

<sup>24</sup> In Singapore, for example, clause 5 of the *Code of Practice for Banks – Credit Cards* sets the maximum liability for cardholders due to “unauthorized charges” at SG100, subject to certain exceptions, similarly to section 36.3 of the Code. Clause 2 of the *Code of Practice for Banks – Unsecured Credit Guidelines for Individuals with Annual Incomes of between SG\$20,000 and SG\$30,000* provides that banks may offer credit facility of up to 2 times the monthly income of the borrower in particular forms (cf. section 26.1(c) of the Code, which sets a limit on the credit limit which should be granted to students). Both Codes are issued by the Association of Banks in Singapore, which is an industry association.

<sup>25</sup> The Consumer Credit Sourcebook in the UK and Title 12 of the Code of Federal Regulations in the US, cited in footnote [15] above, contain a number of other binding provisions relating to maximum interest rates, fees and notification requirements in relation to credit cards. In Singapore, Regulations 8 and 14 of the Banking (Credit Card and Charge Card) Regulations 2013 impose restrictions on minimum income and asset requirements, and maximum or overall credit limit, for certain Singapore credit and charge cardholders. In Australia, paragraph 32A(1) of the National Credit Code prevents a

conduct were mostly at a greater level of generality than those found in the Code.<sup>26</sup>

- (c) One of the legislative provisions identified from the US provided specifically that non-interest charges and fees should not be calculated on the basis of any agreement or discussion with other banks.<sup>27</sup>

2.23 The above information has been included in this Statement of Reasons for the sole purpose of providing an international perspective on consumer protection in the banking sector. It has not been taken into account by the Commission in its substantive assessment of the Code, which relates only to application of the legal requirements exclusion to the Code as applied in Hong Kong.

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credit provider from entering into a credit contract if the annual cost rate exceeds 48%. In China, legally binding measures and notices promulgated by regulators (including the National Development and Reform Commission and the China Banking Regulatory Commission) impose fixed fees, fixed percentages or caps on maximum charges to various banking services including remittance of funds, transaction fees for cheques, promissory notes and bank drafts (Measures for the Administration of the Service Prices of Commercial Banks (商业银行服务价格管理办法) and Notice on Issuing the Catalogue of Government-Guided Pricing and Government-Fixed Pricing for Services Provided by Commercial Banks (关于印发商业银行服务政府指导价政府定价目录的通知)).

<sup>26</sup> The Applicants have cited, for example, two provisions in the Code of Banking Practice issued by the Australian Banking Association, which is a voluntary industry code of conduct. These refer to banks exercising care and skill when selecting and applying credit assessment methods and forming an opinion about the consumer's ability to repay the credit facility (Clause 27), and state that guarantees may only be accepted from customers where their liability is limited to a specific amount described in the guarantee or the value of a specified security (without setting the level of either) (Clause 31.2).

<sup>27</sup> See Title 12 of the United States Code of Federal Regulations, §7.4002(b)(1).



### 3 ASSESSMENT OF THE APPLICATION

#### 3.1 RELEVANT LEGAL FRAMEWORK

##### The first conduct rule

3.1 The first conduct rule provides that an undertaking must not:

- (a) make or give effect to an agreement;
- (b) engage in a concerted practice; or
- (c) as a member of an association of undertakings, make or give effect to a decision of the association,

if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.

3.2 HKAB and the DTCA constitute associations of undertakings, as their membership comprises AIs which are engaged in economic activity (and thus undertakings). The Code, being issued by HKAB and the DTCA, may be characterised as a decision of an association of undertakings for the purposes of the first conduct rule. The members of HKAB and the DTCA may thus potentially fall within the scope of the first conduct rule,<sup>28</sup> to the extent they are giving effect to the Code.<sup>29</sup>

3.3 The Commission considers that the giving effect to certain of the Code's provisions could give rise to competition concerns under the first conduct rule.

3.4 With respect to the Suspended Provisions in particular, absent such provisions, AIs could determine their conduct independently, and compete, on the relevant fees, charges, interest rates and credit limits.<sup>30</sup> In addition, restrictions on credit limits, while not in this case directly relating to price, could potentially prevent AIs from competing with each other as to the scope of the products they offer.<sup>31</sup> The representation from the Consumer Council referred to potential competition issues arising from restricting AIs from competing with each other by charging different fees or offering different credit limits.<sup>32</sup>

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<sup>28</sup> This is the case with respect to the members of HKAB even though, pursuant to section 3 of the Ordinance, the first conduct rule does not apply to HKAB itself since it is a statutory body.

<sup>29</sup> [...] the Commission notes that the source of the Suspended Provisions remains the Code which is issued by HKAB and the DTCA [...]

<sup>30</sup> As to agreements between competitors on price generally, see paragraphs 6.10 to 6.16 of the Commission's First Conduct Rule Guideline ("FCR Guideline").

<sup>31</sup> As to agreements on standard terms generally, see FCR Guideline, paragraphs 6.62 to 6.66.

<sup>32</sup> Consumer Council representation, 15 March 2018, paragraph 13.

3.5 The Commission does not consider the Code's other provisions are generally likely to give rise to competition concerns. To the extent that such provisions concern the information to be provided to consumers, for example, the provisions may be pro-competitive insofar as they make it easier for consumers to compare conditions offered and thereby facilitate switching between AIs.<sup>33</sup>

3.6 For the purposes of making a decision under section 11(1) of the Ordinance, however, it is not necessary for the Commission to come to a conclusion on whether the giving effect to the Code or Suspended Provisions by AIs has the object or effect of preventing, restricting or distorting competition in Hong Kong. Rather, the Commission is simply required by section 11(1) to decide whether or not the agreement in question is "excluded or exempt" from the application of the first conduct rule.<sup>34</sup> Accordingly, the Commission will consider the legal requirements exclusion without concluding on whether there has been, or still is, a contravention of the first conduct rule.

#### **The legal requirements exclusion**

3.7 According to section 2(1) of Schedule 1 to the Ordinance, the first conduct rule does not apply to an agreement to the extent that it is made for the purpose of applying with a legal requirement.<sup>35</sup>

3.8 Section 2(3) of Schedule 1 to the Ordinance states that a "legal requirement" means a requirement:

- (a) imposed by or under any enactment in force in Hong Kong; or
- (b) imposed by any national law applying in Hong Kong.

3.9 As for the meaning of "enactment", section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) defines the term to mean any Ordinance, any subsidiary legislation made under any such Ordinance and any provision or provisions of any such Ordinance or subsidiary legislation. The Application does not refer to any national law applying in Hong Kong, and this limb of the legal requirements exclusion will not be considered further.

3.10 While the legal requirements exclusion is stated to relate to the making of "agreements", by virtue of section 6(2) of the Ordinance, the exclusion can be

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<sup>33</sup> As noted in paragraph 2.6 above, one of the general principles underlying the Code (titled "Competition") states that AIs should allow customers to search, compare and, where appropriate, switch between products and institutions easily and at reasonable and disclosed costs.

<sup>34</sup> See also Applications Guideline, paragraph 9.6 (cited in paragraph 1.10 above).

<sup>35</sup> Section 2(2) of Schedule 1 provides for an equivalent exclusion to the second conduct rule.

considered to apply equally to the making of or giving effect to a decision of an association of undertakings (in this case, the Code).<sup>36</sup>

### ***Interpretation of the legal requirements exclusion***

#### *Guideline on the First Conduct Rule*

3.11 The Commission’s Guideline on the First Conduct Rule or “**FCR Guideline**” provides further detail as to when an agreement can be considered to be made for the purpose of complying with a legal requirement.

3.12 This will be the case where the relevant legal requirement eliminates any margin of autonomy on the part of the undertakings concerned compelling them to enter into the agreement in question.<sup>37</sup> Conversely, where an undertaking has some scope to exercise its independent judgement on whether it will enter into an agreement, the legal requirements exclusion will not be available.<sup>38</sup>

3.13 In this respect, the FCR Guideline is not intended to suggest that any external expectation or pressure on undertakings to behave in a particular way would suffice for the legal requirements exclusion to be met. Rather, the elimination of the margin of autonomy or ability to exercise independent judgement on the part of undertakings must be the result of a legal requirement imposed “by or under” an enactment. That follows from the express terms of section 2(1) of Schedule 1. While the Applicants caution against what they consider an overly restrictive interpretation of the legal requirements exclusion and submit that the Commission should take account of the legal and factual context in their entirety,<sup>39</sup> as a matter of statutory interpretation, the Commission may only assess the legal and factual context within the confines of the terms of the exclusion.

3.14 Finally, the FCR Guideline states that approval or encouragement on the part of the public authorities to enter into an agreement will not suffice for this general exclusion to apply.<sup>40</sup>

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<sup>36</sup> Section 6(2) provides that a provision of the Ordinance which is expressed to apply to or in relation to an agreement is to be read, unless the context otherwise requires, as applying equally to a decision by an association of undertakings (but with any necessary modifications).

<sup>37</sup> FCR Guideline, Annex, paragraph 3.2.

<sup>38</sup> FCR Guideline, Annex, paragraph 3.3.

<sup>39</sup> Supplementary submission of the Applicants, 29 August 2018, paragraph 1.2. A similar point was made in the Monetary Authority’s written comments, 31 August 2018, paragraph 12.

<sup>40</sup> FCR Guideline, Annex, paragraph 3.3.

*“By” or “under” an enactment*

3.15 The legal requirements exclusion refers to requirements imposed both “by” and “under” an enactment.

3.16 The Commission considers that a legal requirement may be imposed “by” an enactment where the requirement results directly from the enactment itself. For example, this would be the case where the enactment sets out the requirement with which the undertakings in question must comply.

3.17 As for legal requirements imposed “under” an enactment, the Applicants submit that as a matter of textual interpretation such requirements are wider in scope than those imposed “by” an enactment.<sup>41</sup>

3.18 As a general matter, the Commission accepts that a legal requirement may be imposed “under” an enactment, even though it is not imposed “by” that (or indeed any) enactment. This could be the case where the requirement results from some particular measure that is specifically provided for and authorised in an enactment. Such measures might be in the form of an act, decision, direction, or order or notice taken or issued by a governmental or regulatory body pursuant to the enactment.

3.19 For example, if an enactment were to provide that a sector-specific regulator may issue formal directions to undertakings requiring them to engage in particular conduct, the regulator’s directions could depending on the particular circumstances of the case be requirements imposed “under” an enactment. Similarly, where an enactment provides for the issue of a licence for undertakings to engage in a particular business, mandatory licence requirements may be requirements imposed “under” an enactment.

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<sup>41</sup> The Applicants have referred to Australian precedents which are said to interpret “under” an enactment as referring to an act or a decision “made in pursuance of or under the authority of” an enactment (*Evans v Friemann* (1981) 35 ALR 428; *The Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290). The Applicants subsequently highlighted an English precedent which found that a provision similar to the legal requirements exclusion was met in respect of a requirement which was “ultimately traceable” to an enactment (*R (on the application of Speed Medical Examinations Services Ltd) v Secretary of State for Justice* [2015] EWHC 3585 (Admin)). Having examined the precedents highlighted to it, the Commission considers that there are various distinguishing features which mean these precedents may not be directly applicable in the present case. In the case of the Australian precedents, for example, the legislative context of the assessment of the “under an enactment” criterion differs significantly, while the decisions or acts in question were clearly albeit implicitly referred to in the enactments themselves. In the case of the English precedent, for example, the implicit legal requirement in question was not expressed in the qualified terms which apply to compliance with the Code (as discussed further below, the relevant Monetary Authority Guideline states only that “doubts may be raised” as to fulfilment of authorization criteria where non-compliance with the Code occurs). It is not in any event necessary to conclude whether these precedents are applicable, since judgments of foreign courts interpreting different legislative provisions are not binding on the Commission as a matter of Hong Kong law.

## **3.2 ASSESSMENT OF LEGAL REQUIREMENTS EXCLUSION**

3.20 For the purposes of the legal requirements exclusion, the Applicants submit that the relevant enactment in force in Hong Kong is the Banking Ordinance.<sup>42</sup> The Applicants have not identified any other enactment which could be considered to impose compliance with the Code.<sup>43</sup>

3.21 In this Part 3.2, the Commission therefore examines whether the Code has been given effect to by AIs for the purpose of complying with a requirement imposed either (i) “by” or (ii) “under” the Banking Ordinance.

3.22 In making this assessment, the Commission has examined in detail the information and arguments put forward in the Applicants’ Application, responses to the RFI and supplementary submission, and in the relevant representations and the Monetary Authority’s subsequent written comments. The Commission has also carefully considered the representations received during consultation under section 10 of the Ordinance, which are summarised in the section which follows.

### **Representations received**

3.23 Of the six representations received, three representations commented on whether or not the legal requirement exclusion applies, as follows:

- (a) The representation from an individual member of the public disagreed with the Applicants’ position that the exclusion applies, submitting that compliance with the Code is merely an expectation of the HKAB, the DTCA and the HKMA instead of a requirement under an enactment.<sup>44</sup>
- (b) The representation from the Hong Kong Federation of Insurers indicated that it agreed with the Applicants’ position, though did not provide specific arguments in support of this position.
- (c) The representation from the Monetary Authority also agreed with the Applicants’ position, submitting that compliance with the Code by AIs is not voluntary. It pointed out that the Code is distinct from other industry codes in that it has the Monetary Authority’s full endorsement, while compliance with the Code is ensured under the Banking Ordinance as a result of the Monetary Authority’s various

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<sup>42</sup> Application, paragraph 4.3.4(a).

<sup>43</sup> While section 12 of The Hong Kong Association of Banks Ordinance (Cap. 364) provides for the possibility of HKAB making rules as to the conduct of the business of banking, the Code is not a statutory code issued under that ordinance. This was also stated by the Monetary Authority (Monetary Authority representation, paragraph 6).

<sup>44</sup> See in particular representation from Daniel T. C. Lee, 14 February 2018, page 6.

statutory powers to monitor compliance and take supervisory actions. The representation echoed several of the submissions made by the Applicants, and accordingly its submissions are discussed along with the Applicants' submissions below.<sup>45</sup>

3.24 The representations from the Investor Education Centre, Consumer Council and an individual member of the public (Dr. P. Y. Lo) did not take a position on whether or not the legal requirements exclusion applies.

3.25 As for the other issues raised, the representations from the Investor Education Centre, the Monetary Authority, and the Consumer Council indicated that the Code, including the Suspended Provisions, aims to protect customers by setting out minimum standards which AIs should follow, and is therefore important for the general public.<sup>46</sup>

3.26 At the same time, the representations from the Consumer Council and Dr. P. Y. Lo referred to potential competition issues arising from the conduct in question.<sup>47</sup> They noted that the UK Competition and Markets Authority's investigation into the retail banking sector found adverse effects on competition in that sector.

3.27 Finally, the representations from the Hong Kong Federation of Insurers and the Consumer Council highlighted the potential wider consequences of the Commission's decision on the Application for other industries, for example because banks sell products to insurers or because a positive decision might motivate other industries to attempt to avail of the legal requirements exclusion.<sup>48</sup>

### **Relevant aspects of the Code**

3.28 At the outset, it should be noted that a number of features of the Code provide a strong suggestion that compliance with the Code is not imposed by or under the Banking Ordinance.

3.29 Specifically:

- (a) The Code is stated to be voluntary and non-statutory. The Application itself describes the Code as a "voluntary industry code of practice".<sup>49</sup> The Applicants have not provided an explanation as to why, if compliance with the Code is intended to be a legal

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<sup>45</sup> See in particular Monetary Authority representation, paragraphs 5 to 9.

<sup>46</sup> See for example Monetary Authority representation, paragraphs 3, 4 and 10; Consumer Council representation, paragraphs 7 to 12.

<sup>47</sup> See for example Consumer Council representation, paragraphs 13 and 17.

<sup>48</sup> See for example Consumer Council representation, paragraph 16.

<sup>49</sup> Application, paragraph 3.1.1.



requirement, the Code nonetheless refers to itself as voluntary and non-statutory.

- (b) The Code is stated to be supplementary to and not to supplant any relevant legislation, codes, guidelines or rules applicable to AIs. The fact that the Code specifically states that it does not supplant any relevant legislation suggests that it was not, and is not, intended to be capable of resulting in the disapplication of the first conduct rule in the Ordinance, as a result of the legal requirements exclusion.
- (c) The Code contains “recommendations” on banking practice (which state what AIs “should”, rather than “must”, do), further suggesting that compliance with its provisions is not a legal requirement.
- (d) The Code is not referred to in the Banking Ordinance or subsidiary legislation issued thereunder.
- (e) The Code is not issued by Monetary Authority pursuant to any functions under the Banking Ordinance. While the Code is subject to the HKMA’s review and endorsement, it is issued jointly by HKAB and the DTCA, independently of the exercise of any powers, functions or requirements under the Banking Ordinance. The Code therefore differs from a measure made or adopted under a particular legislative provision with which undertakings must comply, such as those mentioned in paragraph 3.18 above.
- (f) The Code does not state it aims to further any objective or provision of the Banking Ordinance. Indeed, as noted, it states that the recommendations in the Code “are supplementary and do not supplant” any relevant legislation.
- (g) The HKMA’s actions in reviewing and endorsing the Code and monitoring of compliance with the Code by AIs are not specifically envisaged in the Banking Ordinance (though the Commission accepts that these actions fall generally within the Monetary Authority’s statutory functions under section 7 of the Banking Ordinance). The relevant actions are therefore different from a measure which is specifically provided for and authorised in an enactment (cf. paragraph 3.18 above).
- (h) Compliance with the Code is not comparable with a requirement imposed directly in a licence issued pursuant to an enactment (cf. paragraph 3.19 above). Compliance with the Code is not in and of itself a requirement to obtain or retain authorization under section 16 of the Banking Ordinance. As will be explained further below:

- (i) the Monetary Authority's *Guideline on the Minimum Criteria for Authorization* ("**Authorization Guideline**")<sup>50</sup> states only that "doubts may be raised" as to the fulfilment of one of the minimum criteria in the event of non-compliance with the Code;
- (ii) a breach of the Code will therefore not automatically give rise to a breach of the authorization criteria or other provisions of the Banking Ordinance.

3.30 The above aspects of the Code are central of the assessment of the two limbs of the legal requirements exclusion, which the Commission now considers in further detail.

**Whether the Code has been given effect to by AIs for the purpose of complying with a requirement imposed "by" the Banking Ordinance**

3.31 The Commission does not consider that AIs give effect to the Code to comply with a requirement imposed "by" the Banking Ordinance, nor have the Applicants suggested this is the case.

3.32 In this respect, none of the provisions of the Banking Ordinance impose or refer to any requirement on AIs to comply with the Code (cf. paragraph 3.16 above).

3.33 In addition, the Code itself suggests that compliance with the Code is not a requirement imposed by the Banking Ordinance. As stated previously, it indicates that it is voluntary and non-statutory, is supplementary to and does not supplant any relevant legislation, codes, guidelines or rules applicable to institutions authorized under the Banking Ordinance.

**Whether the Code has been given effect to by AIs for the purpose of complying with a requirement imposed "under" the Banking Ordinance**

3.34 The Applicants have submitted that, even though the Code itself is not issued directly under the Banking Ordinance, the Monetary Authority's Authorization Guideline provides a statutory basis for the alleged requirement to comply with the Code.<sup>51</sup> The Commission deals with this below as '*Submission 1*'.

3.35 In addition, notwithstanding that the Code is stated to be voluntary, the Applicants take the position that compliance with the Code is in practice a

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<sup>50</sup> Guideline on the Minimum Criteria for Authorization, 9 March 2018. The Authorization Guideline is published in the Gazette (Gazette Notice G.N. 1505).

<sup>51</sup> Application, paragraph 4.3.21; Applicants supplementary submission, paragraph 1.3 and sections 2 and 3.



requirement imposed on AIs under the Banking Ordinance in light of the Monetary Authority's broad supervisory framework.<sup>52</sup> This is on the basis that:

- (a) The Code is subject to the HKMA's review and endorsement, such that whenever the HKMA so requests, revisions of the Code will be issued following consultation, review and final endorsement by the HKMA ('Submission 2').<sup>53</sup>
- (b) The Monetary Authority expects all AIs to comply with the Code and, as the banking regulator, closely monitors compliance as part of its ongoing supervision of AIs under the Banking Ordinance ('Submission 3').<sup>54</sup>
- (c) Any non-compliance with the Code will call into question whether the AI concerned meets the minimum criteria for authorization under the Banking Ordinance.<sup>55</sup> This could lead to the Monetary Authority's exercise of his statutory powers under the Banking Ordinance, including suspending or revoking the AI's authorization in the most serious case of non-compliance ('Submission 4').<sup>56</sup>

3.36 For these reasons, compliance with the Code is said to be a requirement under the Banking Ordinance as AIs have no margin of autonomy but must comply with the Code ('Submission 5').<sup>57</sup>

3.37 Similarly, the representation from the Monetary Authority submits that compliance with the Code by AIs is not voluntary but one of the ongoing supervisory requirements of the HKMA. AIs are said to be required to comply with the Code under the HKMA's broad supervisory framework which is underpinned by the Monetary Authority's various statutory powers under the Banking Ordinance.<sup>58</sup>

3.38 The Commission examines the relevant submissions in paragraphs 3.39 to 3.73 below. The Commission's findings on these submissions must be viewed together with its findings on the relevant aspects of the Code above. The Commission's conclusion on the legal requirements exclusion has been reached following its review of all of these relevant factors, each of which may not in itself be determinative.

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<sup>52</sup> Application, paragraphs 4.3.6 and 4.3.7.

<sup>53</sup> Application, paragraphs 4.3.8 to 4.3.11.

<sup>54</sup> Application, paragraphs 3.1.7 and 4.3.13 to 4.3.19.

<sup>55</sup> Application, paragraph 4.3.4(b).

<sup>56</sup> Application, paragraphs 4.3.20 to 4.3.23.

<sup>57</sup> Application, paragraph 4.3.7.

<sup>58</sup> Monetary Authority representation, paragraphs 7 and 9.

**Submission 1: The Monetary Authority's Authorization Guideline**

3.39 The Applicants submit that the requirement to comply with the Code is a requirement imposed under an enactment because it is contained in a notice issued by the Monetary Authority pursuant to a particular legislative provision.<sup>59</sup>

3.40 In this respect:

- (a) Section 16 of the Banking Ordinance provides for the Monetary Authority to grant the authorization necessary for companies to carry on a relevant banking business. Under section 16(2), such authorization shall be refused where the company does not fulfil one or more of the criteria in the Seventh Schedule of the Banking Ordinance (*Minimum Criteria for Authorization*).
- (b) The criteria for authorization in the Seventh Schedule include, in paragraph 12, the criterion that Monetary Authority be satisfied the relevant business is carried on “with integrity, prudence and the appropriate degree of professional competence” and in a manner “which is not detrimental to the interests of depositors or potential depositors” (“**integrity criterion**”).
- (c) The Monetary Authority has issued a statutory guideline interpreting the minimum criteria for authorization under section 16(10) of the Banking Ordinance, namely the Authorization Guideline.
- (d) In relation to the integrity criterion in paragraph 12 of the Seventh Schedule, paragraph 100 provides that:

*“[...] The institution must observe high ethical standards in carrying on its business.*

*[...] Criminal offences or other breaches of law will obviously call into question the fulfillment of this criterion. Particularly relevant are contraventions of any provision made by or under enactments designed to protect members of the public against financial loss due to dishonesty, incompetence or malpractice. **Doubts may also be raised if the institution fails to comply with recognised ethical standards of conduct such as those embodied in various codes of conduct (e.g. the [Code]) and the Treat Customers Fairly Charter (TCF Charter)***

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<sup>59</sup> Applicants supplementary submission, paragraph 2.3. See also Monetary Authority written comments, paragraph 12.

[...] *In considering what action to take in respect of a breach of statute or of a code of conduct, the MA would have regard to the seriousness of the breach, whether the breach was deliberate or an unintentional or unusual occurrence, and whether it could be detrimental to the interests of depositors or potential depositors*".<sup>60</sup>

- (e) The Authorization Guideline states that the criteria in the Seventh Schedule apply to institutions not only at the time of authorization but also thereafter, meaning that failure to meet the criteria by those with an existing authorization would be a ground for suspension or revocation of authorization (which is provided for under sections 22, 24 and 25 of the Banking Ordinance).<sup>61</sup>

3.41 The Commission accepts that the Authorization Guideline is a measure specifically provided for and authorised under an enactment. It does not agree, however, that it establishes a requirement to comply with the Code which results in the application of the legal requirements exclusion.

3.42 Paragraph 100 of the Authorization Guideline does not indicate that a failure to comply with the Code will automatically amount to a breach of the integrity criterion. It states only that "doubts may be raised" as to whether that criterion is met. The relevant wording, particularly when viewed with the Code's own indication that it is voluntary and non-statutory, suggests that the Authorization Guideline does not establish a legal requirement, for the purpose of the legal requirements exclusion in the Ordinance, to comply with the Code.

3.43 The Applicants have made a number of points in response to the Commission's position in their supplementary submission, to which the Commission replies as follows:

- (a) The Applicants have noted that the Authorization Guideline indicates generally that the institution "must" observe high ethical standards, while the Code is listed as example of such standards.<sup>62</sup> They also note the Monetary Authority must be satisfied an AI's business is carried on in accordance with the integrity criterion,

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<sup>60</sup> Authorization Guideline, paragraph 100 (emphasis added). The Application refers to paragraph 97 of the previous version of the Authorization Guideline, the relevant part of which is the same as paragraph 100 in the current version.

<sup>61</sup> See also Schedule 8 (*Grounds for Revocation of Authorization*), paragraph 2 of the Banking Ordinance. The Monetary Authority has referred to additional supervisory sanctions which may be taken under the Banking Ordinance, i.e., adding conditions to authorization under section 16(5), requiring an AI to submit an auditor's report under section 59(2) and withdrawing his consent for a person to be the chief executive or director of an AI under section 71 (Monetary Authority representation, paragraph 8).

<sup>62</sup> Applicants supplementary submission, paragraph 3.2.



which the Monetary Authority has interpreted under the Authorization Guideline to include compliance with the Code.<sup>63</sup> However, it remains the case that the specific wording used in relation to the Code (“doubts may be raised”) indicates that a failure to comply with the Code alone would not automatically lead to a finding that the criterion was not met.

- (b) The Commission also disagrees with the Applicants’ suggestion that the reference to “doubts [being] raised” as to whether the minimum authorization criteria are met cannot be viewed as anything other than establishing a mandatory legal requirement.<sup>64</sup> [...] <sup>65</sup> [...].
- (c) Finally, the Applicants have submitted that the Authorization Guideline refers to criminal offences or other breaches of law in similar terms to the failures to comply with the Code, and the paragraph equally does not state that a failure to comply with criminal or other laws will in itself be treated as a breach of the authorization criteria.<sup>66</sup> In this respect, the Commission does not suggest that breach of a relevant requirement needs to be treated as a breach of the Banking Ordinance for it to be considered a legal requirement. With respect to criminal offences and other breaches of law, there is a legal requirement not to commit such breaches clearly established elsewhere (even if the Authorization Guideline does not treat such breaches as necessarily amounting to breaches of the Banking Ordinance). With respect to the Code, the only source of the requirement to comply which the Applicants have identified is the Banking Ordinance. The fact that a failure to comply with the Code does not automatically amount to a breach of the integrity criterion or other provision of the Banking Ordinance under the Authorization Guideline, while there is no requirement to comply in any other enactment, is what suggests compliance is not a legal requirement for the purposes of the legal requirements exclusion.<sup>67</sup>

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<sup>63</sup> Applicants supplementary submission, paragraph 2.4.

<sup>64</sup> Applicants supplementary submission, paragraph 2.3(D).

<sup>65</sup> Response to RFI, 5 June 2018, confidential Annex 8.

<sup>66</sup> Applicants supplementary submission, paragraphs 3.2 and 3.3.

<sup>67</sup> While the Commission does not express a view on the Applicants’ argument in paragraph 3.3 of their supplementary submission that there is no substantive difference between the phrases “doubts may also be raised” and “call into question”, it does note that the Authorization Guideline refers to failures to comply with codes of conduct separately from “criminal offences and other breaches of law” and “contraventions of any provision made by or under an enactment”. This suggests that

**Submission 2: Review and endorsement of the Code by the HKMA**

3.44 According to the Applicants, the establishment and drafting of the Code has been subject to involvement, review and endorsement by the HKMA from the outset.<sup>68</sup>

3.45 The Application states that it was the HKMA which required HKAB and the banking industry to develop a Code of Banking Practice in Hong Kong in 1995. In the response to the RFI, the Applicants provided further information on the HKMA's role in the subsequent reviews and endorsement of the Code, as follows:

- (a) Revisions of the Code are initiated at the request of the HKMA, accompanied by its proposals for updates and amendments to the Code. [...] <sup>69</sup>
- (b) When formulating a revised version of the Code, the CBPC deliberates on the proposals from the HKMA. [...] <sup>70</sup>
- (c) The CBPC will then draft proposed wording for the revised Code and consult external stakeholders. [...] <sup>71</sup> [...] <sup>72</sup>
- (d) The HKMA's endorsement [...] is required before amendments to the Code are adopted and released. [...] <sup>73</sup>

3.46 The Applicants indicate that the degree of control which the HKMA has over the precise wording of the Code means any margin of autonomy on the part of HKAB, the DTCA and the AIs over the content and drafting of the provisions of the Code is eliminated.<sup>74</sup>

3.47 Based on the information above, it is clear to the Commission that the HKMA has played a key role in the creation and amendment of the Code. However, the fact that a regulatory authority has initiated, been involved in review and amendment, or endorsed an industry code of conduct does not transform that code into a

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failures to comply with the code are treated at least as conceptually distinct from breaches of law or provisions made by or under an enactment.

<sup>68</sup> The Monetary Authority makes a similar submission (Monetary Authority representation, paragraph 5).

<sup>69</sup> Response to RFI, 11 May 2018, confidential paragraph 1.17.

<sup>70</sup> Response to RFI, 11 May 2018, confidential paragraph 1.4.

<sup>71</sup> Response to RFI, 11 May 2018, confidential Annex 1.

<sup>72</sup> Response to RFI, 11 May 2018, confidential paragraph 1.7.

<sup>73</sup> Response to RFI, 11 May 2018, confidential paragraph 1.11.

<sup>74</sup> Application, paragraph 4.3.11.

requirement imposed under an enactment. As stated in the FCR Guideline, approval or encouragement of a relevant agreement or conduct on the part of the public authorities will not suffice for this general exclusion to apply.

3.48 Even if the HKMA's role in relation to the Code goes beyond mere approval or encouragement of its contents,<sup>75</sup> and as the Applicants allege is such that HKAB, the DTCA and the AIs have no margin of autonomy in the content and drafting of the Code, this would not in itself make the Code a legal requirement. That a regulatory body controls the contents of a particular document issued by industry associations does not render compliance with the document a legal requirement.

3.49 In any event, the Commission does not agree that HKAB, the DTCA and the AIs in practice have no margin of autonomy as to the contents of the Code. [...]

### ***Submission 3: Monitoring of compliance***

3.50 The Application states that the Code is used by the Monetary Authority as part of its ongoing supervision regime of AIs and in discharge of its functions under section 7 of the Banking Ordinance.<sup>76</sup> The functions of the Monetary Authority under section 7 include:

- (a) supervising compliance with the provisions of the Banking Ordinance;
- (b) in relation to the business practices of AIs, promoting and encouraging proper standards of conduct, and suppressing illegal, dishonourable or improper practices; and
- (c) ensuring that any relevant banking business carried on by an AI is carried on with integrity, prudence and the appropriate degree of professional competence and in a manner not detrimental to the interests of depositors and potential depositors.

3.51 The Applicants have referred to a number of processes according to which the Monetary Authority monitors compliance with the Code in this context:<sup>77</sup>

- (a) AIs conduct annual self-assessment surveys regarding their compliance with the Code and submit these to the HKMA. The survey template prescribed by the HKMA requests details of non-compliance such as the provisions which were not complied with, the relevant non-compliance, action taken to rectify the non-

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<sup>75</sup> As suggested in Monetary Authority written comments, Annex, page 2.

<sup>76</sup> Application, paragraph 4.3.14.

<sup>77</sup> See Application, paragraphs 4.3.16 to 4.3.19; response to RFI, 5 June 2018, paragraphs 1.17 to 1.44. See also Monetary Authority representation, paragraph 7.

compliance, and the target date for compliance. Such surveys are signed-off on by the Chief Executive of the relevant AI.

- (b) [...]
- (c) The HKMA periodically conducts on-site examinations of selected AIs that examine the effectiveness and adequacy of an AI's controls with respect to the Code. [...]
- (d) The HKMA also conducts off-site reviews, where it reviews AI's reports on non-compliance with the Code and self-assessment surveys, and supervises AIs' implementation [...]
- (e) The HKMA engages the services of a market research organisation to conduct a mystery shopping programme. This assesses, from customers' perspective, to what extent AIs' business practices comply with the Code (such as the information offered to customers).
- (f) Finally, customers may complain to the HKMA and to AIs, including about non-compliance with the Code. The Code itself requires AIs to have complaints procedures in place.<sup>78</sup>

3.52 In the Commission's view, the presence of these monitoring mechanisms is not sufficient to elevate compliance with the Code into a requirement imposed under an enactment. While the monitoring mechanisms serve the legitimate purpose of bringing instances of non-compliance with the Code to the HKMA's attention, this does not mean that AIs are in fact under a legal requirement to comply with the Code in the first place. That depends on whether compliance with the Code is imposed by or under an enactment, which is discussed elsewhere in this section.

3.53 In addition, the fact that the HKMA is said to undertake such monitoring under section 7 of the Banking Ordinance indicates that the monitoring is conducted in the context of the Monetary Authority's statutory functions. It does not, however, alter the Commission's view that the presence of a monitoring mechanism does not render the Code a legal requirement for the purposes of the exclusion. There is a difference between the HKMA monitoring compliance with the Code in accordance with its general functions under the Banking Ordinance, on the one hand, and the legal status and effect of the Code, on the other.

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<sup>78</sup> See further Code, sections 2.7 and 13.

#### **Submission 4: Consequences of non-compliance**

3.54 The Applicants submit that any non-compliance with the Code will call into question whether the AI concerned meets the minimum criteria for authorization under the Seventh Schedule of the Banking Ordinance, which could lead to the Monetary Authority's exercise of his statutory powers under the Banking Ordinance.<sup>79</sup>

3.55 In the Application and response to the RFI, the Applicants provided further information on [...], as follows:

- (a) [...]<sup>80</sup>
- (b) [...]<sup>81</sup> [...]<sup>82</sup>
- (c) The HKMA will take appropriate follow-up actions if necessary.<sup>83</sup>  
[...]<sup>84</sup> [...]<sup>85</sup>
- (d) Where "material deficiencies" are not adequately addressed by the AI in a timely manner, the Monetary Authority can exercise a range of supervisory actions under the Banking Ordinance where appropriate. In determining what supervisory action to take, the Monetary Authority would have regard to the seriousness of the breach, whether the breach was deliberate or an unintentional or unusual occurrence, and whether it could be detrimental to the interests of depositors or potential depositors.<sup>86</sup> Where an AI blatantly disregards the Code, the Monetary Authority would assess whether or not the business of the AI was being conducted in accordance with the integrity criterion.<sup>87</sup>

3.56 The Applicants have also provided information on [...] statistics on non-compliance from the HKMA's annual reports [...]<sup>88</sup> According to the Applicants, the

<sup>79</sup> Application, paragraph 4.3.4(b). The Monetary Authority made a similar submission to this effect (Monetary Authority representation, paragraph 6).

<sup>80</sup> Response to RFI, 5 June 2018, confidential paragraph 1.49.

<sup>81</sup> [...] (Response to RFI, 5 June 2018, confidential paragraphs 1.61 to 1.66).

<sup>82</sup> Response to RFI, 5 June 2018, confidential paragraph 1.56.

<sup>83</sup> Response to RFI, 5 June 2018, paragraph 1.54.

<sup>84</sup> Response to RFI, 5 June 2018, confidential paragraph 1.55.

<sup>85</sup> Response to RFI, 5 June 2018, confidential paragraphs 1.56, 1.62.

<sup>86</sup> Application, paragraph 4.3.20.

<sup>87</sup> Application, paragraph 4.3.21.

<sup>88</sup> Application, Annex 13; Response to RFI, confidential Annex 8. [...]



relatively low number of instances of non-compliance identified demonstrates the deterrent effect of Monetary Authority's supervisory action.<sup>89</sup>

3.57 In the Commission's view, the submissions and information provided show that AIs and the HKMA take compliance with the Code seriously but, as explained in paragraph 3.59 to 3.70 which follow, fall short of demonstrating that the consequences of non-compliance give rise to a legal requirement imposed under the Banking Ordinance.

3.58 For the avoidance of doubt, the Commission considers that it is entirely a matter for the Monetary Authority's discretion as to the actions it may take in respect of failures to comply with the Code, and expresses no view on whether it would be appropriate or desirable to resort to supervisory sanctions under the Banking Ordinance in this respect. The analysis which follows relates solely to the Commission's assessment of the legal requirements exclusion.

#### *Integrity criterion*

3.59 As already discussed, the Authorization Guideline does not treat a failure to comply with the Code as an automatic breach of the minimum criteria for authorization in the Seventh Schedule to the Banking Ordinance (or any other requirement in the Banking Ordinance), nor have the Applicants suggested that this would be the case. [...]

#### *Differences from non-compliance with a legal requirement*

3.60 [...]

3.61 [...]

3.62 Second, where a legal requirement applies, one would ordinarily expect a sanction to be specified in respect of breaches of the requirement. However, the Banking Ordinance does not mention the Code, including those provisions of the Banking Ordinance which set out supervisory sanctions, while the Code itself does not specify any sanctions for non-compliance. Rather, the Applicants have referred to general supervisory sanctions referred to in the Banking Ordinance which it is said could be taken by the Monetary Authority in the event of non-compliance with the Code, including suspension or revocation of authorization under sections 22, 24 and 25 of the Banking Ordinance.<sup>90</sup>

3.63 [...]

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<sup>89</sup> Application, paragraph 4.3.19.

<sup>90</sup> Application, paragraph 4.3.21. As noted in footnote 61 above, the Monetary Authority has referred to additional supervisory sanctions which may be taken under the Banking Ordinance (Monetary Authority representation, paragraph 8).

3.64 [...]

3.65 In response to this point, it has been submitted to the Commission that:

- (a) not all legal requirements carry sanctions for breach;<sup>91</sup>
- (b) immediate or automatic sanction for a particular breach should not be required to find that the breach concerns a legal requirement, as law enforcement agencies have discretion as to whether or not to pursue any enforcement action in respect of a breach;<sup>92</sup> and
- (c) AIs are required to proactively rectify a breach of the Code, which could be seen to go beyond most legal requirements.<sup>93</sup>

3.66 The Commission does not exclude that there could be legal requirements which are clearly imposed by or under an enactment, where a process similar to the one described in paragraphs 3.60 to 3.64 above is followed in the event of a breach. Its point is rather that in the case of the Code, where the preceding analysis suggests it is not imposed by or under an enactment, the consequences of non-compliance are not sufficient to transform the Code into a legal requirement under the exclusion in the Ordinance.

3.67 In the Commission's view, (i) the flexibility inherent in the process associated with non-compliance, (ii) the fact that neither the Banking Ordinance nor the Code itself refer to a sanction specifically for non-compliance with the Code, and (iii) the fact that [...], militate against the Code being considered a legal requirement for the purposes of the exclusion.

#### *Instances of supervisory action under the Banking Ordinance*

3.68 While the threat of supervisory action may, as the Applicants submit, be sufficient to deter AIs from breaching the Code,<sup>94</sup> [...]<sup>95</sup>

3.69 As noted above, the Commission accepts that it is entirely a matter for the Monetary Authority's discretion as to the actions it may take in respect of failures to comply with the Code.<sup>96</sup> It also accepts that, even in the case of legal requirements

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<sup>91</sup> Applicants supplementary submission, paragraph 6.2. The Applicants have referred to the General Holidays Ordinance (Cap. 149), which banks are said to be bound by and comply with, despite the fact that there are no sanctions for breach.

<sup>92</sup> Monetary Authority written comments, Annex, page 3; Applicants supplementary submission, paragraph 6.2.

<sup>93</sup> Applicants supplementary submission, paragraphs 7.3 and 7.4.

<sup>94</sup> Application, paragraph 4.3.19.

<sup>95</sup> Response to RFI, 5 June 2018, confidential paragraph 1.58.

<sup>96</sup> Cf., Applicants supplementary submission, paragraphs 7.7 to 7.9.

imposed by or under an enactment, a law enforcement agency may choose not to (or never) seek a possible prescribed penalty.<sup>97</sup>

3.70 Nonetheless, [...] is a factor which, along with the other factors suggesting compliance with the Code is not imposed by or under an enactment, further militates against compliance with the Code meeting the legal requirements exclusion.

### ***Submission 5: Als' margin of autonomy***

3.71 In the Commission's view, the Applicants' suggestion that Als have no margin of autonomy but to comply with the Code due to the consequences of non-compliance is not sufficient to render compliance with the Code a legal requirement.

3.72 The Commission notes that the Monetary Authority considers compliance with the Code is not voluntary.<sup>98</sup> The preceding analysis suggests, however, that compliance with the Code is not a requirement imposed by or under an enactment within the meaning of the exclusion. This suggests that any elimination of a margin of autonomy or scope for independent judgement from the Als' perspective, if it indeed arises, would not result from a legal requirement, but rather some other form of regulatory expectation or pressure on Als to comply with the Code. In this respect, the Commission notes the submission in one of the representations to the effect that Als do not have any margin of autonomy or scope for independent judgement not because the law has eliminated these, but due to the expectation of the HKMA, HKAB or DTCA that Als will comply with the Code.<sup>99</sup>

3.73 As noted in paragraph 3.13 above, however, the elimination of the margin of autonomy must be the result of a legal requirement which is imposed "by or under" an enactment, and not some other external factor, where the legal requirements exclusion is concerned.

## **3.3 CONCLUSION**

3.74 For all of the reasons set out above, the Commission concludes that the Code has not been and is not given effect to by Als for the purpose of complying with a requirement imposed either by or under the Banking Ordinance.

3.75 The Decision made by the Commission is therefore that the Code is not excluded from the application of the first conduct rule by or as a result of the legal requirements exclusion.

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<sup>97</sup> Cf., Applicants supplementary submission, paragraph 6.2.

<sup>98</sup> Monetary Authority representation, paragraph 9.

<sup>99</sup> Representation from Daniel T. C. Lee, page 6.

#### **4 STATEMENT OF CURRENT ENFORCEMENT INTENTIONS**

4.1 The Commission makes the following observations relevant to its enforcement intentions regarding the giving effect by AIs to the Code:

- (a) Under its Enforcement Policy, the Commission generally intends to exercise the discretion it has under the Ordinance to direct its resources to the investigation and enforcement of matters that provide the greatest overall benefit to competition and consumers in Hong Kong.<sup>100</sup> The Commission believes that its enforcement function should target anti-competitive conduct that is clearly harmful to competition and consumers in Hong Kong.<sup>101</sup>
- (b) The Commission recognises that the Code is intended to promote good banking practices through setting out minimum standards that AIs should follow in their dealings with customers, as encapsulated in the principles, objectives and specific recommendations set out in the Code.<sup>102</sup>
- (c) The Commission also notes:
  - (i) that the Code has been formulated with the input and support of the Consumer Council, as well as other public bodies, and is endorsed by the HKMA;<sup>103</sup>
  - (ii) the representations received by the Commission, several of which highlighted the consumer protection rationale behind the Code and/or Suspended Provisions, including those from the Consumer Council and the Monetary Authority.
- (d) As for the Suspended Provisions, the Commission considers that:
  - (i) preventing AIs from imposing fees or charges in particular specified circumstances can be expected to benefit consumers of the specific banking services in question, by avoiding customers having to pay for those services;<sup>104</sup>

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<sup>100</sup> Enforcement Policy, paragraph 3.2.

<sup>101</sup> Enforcement Policy, paragraph 3.4.

<sup>102</sup> See further paragraphs 2.6 to 2.10 above.

<sup>103</sup> See further paragraphs 2.17 to 2.18 above and Consumer Council representation, paragraphs 4 to 6.

<sup>104</sup> See further paragraphs 2.12 to 2.13 above.

- (ii) setting upper limits on the amounts a customer should have to pay in certain circumstances can be expected to benefit consumers of the relevant banking services, to the extent that they prevent excessive fees or rates being charged;<sup>105</sup> and
  - (iii) ceilings relating to customer debt for credit cards may benefit consumers by preventing them from building up debt which they are unable to pay (and may not in any event be absolute in their application).<sup>106</sup>
- (e) As for the Code's other provisions, many recommend that particular information be provided to customers in relation to various retail banking services, which could benefit consumers by ensuring that they are properly informed and able to compare competing offerings.

4.2 Based on all the above considerations, the Commission has no current intention to pursue an investigation or enforcement action in respect of the Code in its present iteration, including the giving effect to the Code by AIs.

4.3 For the purposes of this statement:

- (a) investigation comprises the exercise of the investigation powers of the Commission under Part 3 of the Ordinance;
- (b) enforcement action comprises the exercise of the enforcement powers of the Commission under Part 4 of the Ordinance or the initiation of proceedings before the Competition Tribunal under Part 6 of the Ordinance.

4.4 This statement of current enforcement intentions is based on the information available to the Commission at the time of the Decision. It does not extend to any anti-competitive conduct which has not been fully disclosed in the Application. For any future changes to the Code, the Commission's position on enforcement intentions will depend on the changes in question. If the considerations in paragraph 4.1 are also applicable to the changes, the Commission's current view is that its position on enforcement intentions would be unlikely to alter as a result of those changes.

4.5 The Commission generally reserves its right to revisit its position on enforcement intentions with respect to the Code. Should the Commission's position on enforcement intentions change, it will provide the Applicants with reasonable notice of the change prior to initiating any investigation or enforcement action, in

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<sup>105</sup> See further paragraphs 2.14 above.

<sup>106</sup> See further paragraphs 2.15 above.

addition to giving such notice to the relevant industry associations (i.e., HKAB and the DTCA) and the HKMA.

4.6 For the avoidance of doubt, the issue of this Statement on enforcement intentions should not be interpreted to suggest that the Commission has concluded that there has been, or still is, a contravention of the first conduct rule as a result of the giving effect to the Code by AIs. For the reasons explained above, the Commission does not make a finding on this issue.<sup>107</sup>

4.7 Finally, the application of this statement is confined to the specific circumstances of the Code. The statement is not intended to be indicative of the Commission's enforcement intentions in respect of similar industry codes of conduct or any other conduct.

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<sup>107</sup> See further paragraph 3.6 above.