
Competition concerns regarding certain provisions in the Codes of Conduct of the Hong Kong Institute of Architects and the Hong Kong Institute of Planners

Background

- 1.1 The Competition Commission encourages and assists businesses to be ready, willing and able to comply with the Competition Ordinance (Cap. 619) (“Ordinance”). Recognising the important role played by trade and professional associations (“Associations”) in promoting best practices amongst their members, the Commission undertook a comprehensive review of the published practices of more than 350 Associations prior to the full commencement of the Ordinance. In this context, the Commission identified and engaged with over 20 Associations whose published practices and/or aspects of their codes of conduct were considered to be at high risk of contravening the Ordinance. In March 2016, the Commission publicly announced the progress of this project.
- 1.2 As a result of the Commission’s engagement efforts, most of the Associations contacted by the Commission have now undertaken prompt and decisive steps to comply with the Ordinance. This has included, for example, removing price restrictions and/or fee scales (Annex A). However, the Commission notes that, despite continuing contacts by the Commission, to date, two Associations have failed to remove or amend certain problematic provisions in their Codes of Conduct relating to the charging of fees, namely the Hong Kong Institute of Architects (“HKIA”) and the Hong Kong Institute of Planners (“HKIP”).
- 1.3 While both the HKIA and HKIP are statutory bodies exempted from the application of the Conduct Rules under the Ordinance,¹ members of these

¹ Under Section 3 of the Ordinance, Part 2 (The conduct rules), Part 4 (Enforcement powers of Commission), Part 6 (Enforcement before Tribunal), and Schedule 7 (Mergers) do not apply to a statutory body. The Conduct Rules comprise the First Conduct Rule and the Second Conduct Rule. During the passage of the Ordinance before the Legislative Council, the Government indicated that 575 statutory bodies would come within the scope of the exemption in section 3 of the Ordinance, including 415 statutory bodies that do not engage in economic activities and 160 statutory bodies engaging economic activities that are directly related to the provision of essential public services or the implementation of Government policy.

Associations following the relevant provisions of the Codes of Conduct since the full commencement of the Ordinance on 14 December 2015 would be placing themselves at risk of falling foul of the Ordinance. This Advisory Bulletin aims to highlight the provisions of the Codes of Conduct which may create such risks, advise the HKIA and HKIP to take appropriate action to remove the offending provisions without delay, and more generally to provide further guidance on the types of Association practices which may give rise to competition concerns under the Ordinance.

- 1.4 The HKIA is incorporated under The Hong Kong Institute of Architects Incorporation Ordinance (Cap. 1147). The objectives of the HKIA include promoting the general advancement of architecture, and raising the standard of architecture and professional architecture services in Hong Kong. The HKIP is incorporated under The Hong Kong Institute of Planners Incorporation Ordinance (Cap. 1153). The objectives of the HKIP include promoting the general advancement of town planning and the employment of professional town planners.

Current status

The HKIA

- 2.1 The HKIA publishes a “Code of Professional Conduct” (“HKIA Code”) on its website² which governs the conduct of its members. As of 28 November 2016, the HKIA Code continues to provide for a number of restrictions concerning the charging of fees and taking on of clients which on their face the Commission considers to be highly problematic. These are as follows:

- (a) Rule 3.1, which provides that:

“A Member shall uphold and apply the HKIA Agreement between Client and Architect and the Scale of Professional Charges contained therein.”

- (b) Rule 3.1.2, which provides that:

“A Member who is offering professional services shall not revise a fee quotation to take account of the fee quoted by another architect for the

² The HKIA Code is available at: <http://www.hkia.net/en/pdf/codeofconduct.pdf>.

same service.”

(c) Rule 3.3, which provides that:

“A Member shall not prepare designs for a client in competition with another Member without payment or for a reduced fee, except in a competition conducted under the HKIA and/or International Union of Architects (UIA) Regulations for the Promotion and Conduct of Competitions, or in a competition otherwise approved by the HKIA and/or the UIA.”

(d) Rule 3.5, which provides that:

“A Member shall not attempt to supplant another architect.”

(e) Rule 3.6.2 which provides that:

“A Member, on being approached or instructed to proceed with work on which he can ascertain by reasonable enquiry that another architect is or has been at any time engaged, shall notify the other architect in writing.”

2.2 In addition to the above, the “*Guidelines to HKIA Members on Participation in Invited Submission for Architectural Consultancy Proposal*”, which are annexed to the HKIA Code, set out “Minimum Remuneration” which HKIA members are to follow when submitting concept design proposals.

The HKIP

2.3 The HKIP publishes a “Code of Professional Conduct” (“HKIP Code”) on its website,³ which governs the conduct of its members. As of 28 November 2016, the HKIP Code still provides in its Rule 16(b) that members of the HKIP who are offering professional services “*shall not reduce a fee quotation to take account of the fee quoted by another planner for the same service*”.

Potential to restrict competition

3.1 The restrictions contained in the HKIA Code and the HKIP Code on members’ freedom to set their own fees and offer discounts clearly have the potential to

³ The HKIP Code is available at: <http://www.hkip.org.hk/En/SubContent.asp?Bid=5&Sid=12>.

prevent, reduce or distort competition in the relevant markets. In particular, the observance of such restrictions would mean that planners and architects could not compete with each other by offering lower professional fees to customers. The Commission notes in this respect that members could be subject to disciplinary action by their respective institutes if they do not follow the Codes of Conduct.

- 3.2 The effects of the restrictions on pricing freedom contained in the Codes of Conduct could indeed be akin to those of price fixing implemented by cartels, to the extent that they would prevent any price competition among architects (or their respective companies) or among planners (or their respective companies). Observance of the relevant price restrictions would therefore entail significant harm to competition.
- 3.3 Furthermore, given the indispensable professional roles of architects and planners in various economic activities in Hong Kong, the harm to competition would be widespread.
- 3.4 The Commission notes that the HKIA Code and its related standardised agreements and guidelines govern the conduct of more than 4,000 members and more than 170 architectural practices as corporate members. The member architects and architecture companies together provide a key input in the process of developing buildings and other physical structures in Hong Kong. The economic activities of the members of the HKIA are particularly important considering the significance of the construction sector in Hong Kong generally.
- 3.5 In addition, the HKIP Code governs the conduct of the HKIP's 400 members. These members would seem to play a central role in town planning activities in Hong Kong, and such activities are in turn integral to numerous development and redevelopment projects in Hong Kong.

The Commission's advice and further actions

Regarding the HKIA and the HKIP

- 4.1 It is the Commission's view that by maintaining provisions in their Codes of Conduct which induce members to engage in activities that may contravene the Ordinance, the two institutes would be at risk of contravening the First Conduct Rule but for their status as exempt statutory bodies. In addition, notwithstanding the exemption, the Government has made clear that statutory bodies still have an obligation to comply with the competition principles, and they should not engage in any anti-competitive activities without reasonable grounds. Indeed, exempt bodies should take the lead in setting a good example.
- 4.2 The Commission advises the HKIA and the HKIP to take appropriate action to remove or amend the offending provisions in their respective Codes of Conduct without further delay. In the absence of a clear indication that genuine action to rectify the situation is underway by end of January 2017, the Commission will refer the matter to the Competition Policy Advisory Group ("COMPAG"). COMPAG receives complaints concerning entities which are not subject to the Conduct Rules of the Ordinance, such as the HKIA and the HKIP.⁴

Regarding Members of the HKIA and the HKIP

- 4.3 The Commission stresses that although the two institutes are currently exempted under the Ordinance, their members do not enjoy such exemption to the extent that they are considered to be undertakings under the Ordinance. Where the Commission has reasonable cause to suspect that any undertakings have given effect to provisions in the Codes of Conduct that are anti-competitive, for example, by following the price restrictions set out in the Codes of Conduct, the Commission will consider appropriate enforcement action in accordance with the Ordinance.

⁴ The terms of reference of COMPAG are as follows: (a) to promulgate guidelines on competition principles applicable for government entities and bodies or persons which are not subject to the competition rules and enforcement provisions of the Ordinance; (b) to handle complaints on anti-competitive conduct against government entities and bodies or persons which are not subject to the competition rules and enforcement provisions of the Ordinance; and (c) to handle complaints on non-compliance with conditions and limitations imposed on agreement, conduct and merger exempted by the Ordinance.

Regarding exempt bodies in general

- 4.4 The Commission calls upon all bodies exempted from the application of the Conduct Rules to adhere to the spirit of the Ordinance by taking steps to cease and desist from any practice or conduct which causes or may cause harm to competition. The Commission encourages exempt bodies to approach the Commission if they suspect their practices or conduct are causing or may cause harm to competition in a relevant market. The Commission will provide advice where appropriate.
- 4.5 Exempt bodies should take note that while they may be exempted from the Conduct Rules, they are still subject to the investigation powers of the Commission under sections 41, 42 and 48 of the Ordinance. Exempt bodies may therefore be required to assist the Commission in investigations into the practices of their members or companies in which its members are employed.
- 4.6 Lastly, exempt statutory bodies should further take note that it is always open for the Chief Executive in Council, where the conditions in section 5 of the Ordinance are met, to apply the Conduct Rules and other relevant provisions of the Ordinance to any statutory body by regulation.

Annex A

Associations that responded to Competition Commission's engagement efforts

	Trade association	Change of conduct
1.	Hong Kong Container Tractor Owner Association	Fee scale removed
2.	Hong Kong Real Estate Agencies General Association	Recommended agent commission removed
3.	Hong Kong Society of Notaries	Fee scale removed
4.	The Association of Accredited Advertising Agencies of Hong Kong	Code of Practice revised (provisions which restrict price competition removed)
5.	The Hong Kong Federation of Insurers	Scale of no-claims discount removed
6.	The Hong Kong Institute of Surveyors	Fee scale removed and Code of Conduct revised (provisions which restrict price competition removed)
7.	The Hong Kong Jewellers' & Goldsmiths' Association	Daily reference price removed
8.	The Hong Kong Jewellery & Jade Manufacturers Association	Daily reference price removed
9.	The Institution of Fire Engineers (Hong Kong Branch)	Code of Ethics revised (provisions which restrict price competition removed)
10.	The Kowloon Pearls, Precious Stones, Jade, Gold & Silver Ornament Merchants Association	Daily reference price removed
11.	The Law Society of Hong Kong	Fee scales removed



	Trade association	Change of conduct
12.	Travel Industry Council of Hong Kong	Recommended fee removed
13.	Hong Kong Institute of Professional Photographers Ltd	Price restrictions removed
14.	Hong Kong Institute of Landscape Architects	Price restrictions removed
15.	The Society of Chinese Accountants and Auditors	Fee scale removed
16.	Registered Minor Works Contractor Signatory Association Ltd	Recommended fee removed
17.	Hong Kong Motor Car Driving Instructors Association Ltd	Fee scale removed
18.	Hong Kong DanceSport Association	Fee scales removed
19.	Hong Kong Institute of Urban Design	Code of Conduct revised (provision which restricts price competition removed)