

Dear Sirs,

We refer to the draft guidelines published by the Competition Commission on 9 October 2014, and the Competition Commission's invitation for the public's comments on the draft guidelines.

American Express International, Inc., Hong Kong Branch is pleased to attach our comments on the Draft Guidelines on the First Conduct Rule and the Second Conduct Rule for your kind consideration.

American Express International Inc., Hong Kong

December 10, 2014

AXP FEEDBACK ON DRAFT GUIDELINES UNDER THE HONG KONG COMPETITION ORDINANCE

(A) DRAFT GUIDELINES ON THE FIRST CONDUCT RULE

	Para	Provision	AXP Comments
1.	2.7	<p><i>Single economic unit</i> In particular, an agreement between a parent company and its subsidiary, or between two companies under the control of a third, will not be subject to the First Conduct Rule if the relevant controlling companies exercise decisive influence over their respective subsidiaries and notwithstanding that these various entities might have separate legal personalities.</p>	<p>Commercial law principles appropriately provide parent companies significant flexibility in how they manage their corporate subsidiaries, and this flexibility enables companies to shift strategies for management of its subsidiaries over time as may be necessary and appropriate to enhance the overall entity's competitiveness. The parent company should not run the risk that if it permits its subsidiary more strategic leeway at certain points and less at others, it will open itself to the risk of a violation of the First Conduct Rule in the former case. We would urge that the HKCC modify the Guidelines to expressly provide that a parent company and its controlled subsidiaries will always be treated as a single economic unit as a matter of law.</p>
2.	2.17	<p><i>Concerted practice</i> More specifically, undertakings are precluded from any direct or indirect contact with other undertakings, where the object or effect of that contact is to influence the conduct on the market of an actual or potential competitor, or to disclose to such a competitor the course of conduct which they have decided to adopt or contemplate adopting in the market.</p>	<p>The prior paragraph (2.16) covers the case where competitors interact in a manner whose object or effect is anti-competitive. We respectfully submit that this provision is superfluous and far too broad, as it would appear to prohibit even otherwise legitimate contact between competitors – e.g., if an undertaking supplies products or services to its competitor. We would urge that this provision be deleted.</p>
3.	6.36	<p><i>Information exchanged via customers and suppliers</i> The exchange of competitively sensitive information may not only occur directly between competitors or indirectly through a trade association. Instead, competitors may seek to use a third party supplier or distributor as a “conduit” for the indirect exchange of, for example, future pricing information. This may happen as the result of an agreement or there may simply be a concerted practice.</p>	<p>We support the reference in this section to the concerted use of a third party as a conduit to share information between competitors, but seek an express clarification that a third party's provision of information about a competitor, without evidence that the third party was induced to provide such information by the competitor, should not itself be deemed anti-competitive. For example, in the context of a price negotiation, a customer may wish to demonstrate to its supplier that it has been offered a better price by the supplier's</p>

	Para	Provision	AXP Comments
			competitor. This type of communication is pro-competitive and should not be condemned under the Guidelines.
4.	6.64	<p>Resale Price Maintenance</p> <p>Where an agreement involved direct or indirect RPM, the Commission takes the view that the arrangement has the object of harming competition.</p>	As the HKCC recognizes in provisions 6.71-6.75, resale price maintenance can have significant pro-competitive justifications, including preventing free riding and ensuring that distributors are able to make appropriate investments in marketing, customer service, and the like. We would ask the HKCC to briefly reference in this earlier section this willingness to consider parties' pro-competitive justifications for these arrangements, rather than suggest that they are simply condemned <i>per se</i> .
5.	6.77	<p>Exclusive Distribution or Exclusive Customer Allocation</p> <p>Exclusive distribution and exclusive customer allocation agreements will not generally be considered by the Commission to have the object of harming competition. For the purposes of the First Conduct Rule, these types of agreement will generally require an analysis of their effects or likely effects on competition, including an assessment of how intra-brand and inter-brand competition is affected, the extent of the territorial and/or customer sales limitations, and whether exclusive distributorships are common generally in the markets impacted by the agreements under consideration.</p>	Given the Guidelines' recognition that exclusive distribution and exclusive customer agreements will generally not be considered to have the object of harming competition, we would ask the HKCC to consider providing a market share threshold below which such agreements would be presumed exempted from the First Conduct Rule. Global precedents suggest a threshold in the range of 30-40% of the relevant market.
6.	Annex , para 2.9	<p>The "economic efficiency" exclusion</p> <p>Undertakings cannot simply assert the claimed efficiencies. They must be able to demonstrate on the basis of verifiable evidence the likelihood and magnitude of each claimed efficiency in addition to the other factors referenced above. As the efficiencies must compensate for the harm to competition associated with the agreement, evidence of substantial efficiency gains will need to be particularly strong where the undertakings involved in the agreement account for a substantial proportion of competition in the market.</p>	It is not apparent from the Guidelines what type/extent of evidence a business would need to provide in order to rely on the "economic efficiencies" exception. Could the HKCC provide any examples of evidence the businesses can produce to show that there are efficiencies to be gained?

	Para	Provision	AXP Comments
7.	Annex , para 3.1	<i>The “compliance with legal requirements” exclusion</i> Section 2 of Schedule 1 to the Ordinance provides that agreements or conduct are excluded from the First Conduct Rule and Second Conduct Rule to the extent that the relevant agreement or conduct is made or engaged in for the purposes of complying with a legal requirement imposed by or under any enactment in force in Hong Kong or imposed by any national law applying in Hong Kong.	Businesses are often required to comply with guidelines and directions from regulatory authorities in Hong Kong short of a legal requirement. We would like to seek HKCC’s clarification that the “compliance with legal requirements” exclusion would also apply where the agreement or conduct is taken in order to comply with such guidelines or directions.

(B) DRAFT GUIDELINES ON THE SECOND CONDUCT RULE

	Para	Provision	AXP Comments
1.	1.4 and 3.9-3.13:	<i>Substantial degree of market power</i> <i>Market share and market concentration</i>	We would urge that the HKCC add a numeric market share threshold above which a substantial degree of market power is presumed, as well as a lower market share threshold below which the entity is presumed not to have a substantial degree of market power. In either case, this presumption should be rebuttable (whether by the entity or the HKCC) based on factual evidence. Global precedents suggest a lower threshold of at least 40% of the relevant market, and a higher threshold of approximately 80%. Without such presumptions, entities with market shares well below any reasonable measure of power could find themselves having to defend ultimately meritless allegations under the Second Conduct Rule. We acknowledge that a number of other interested parties previously have suggested a similar addition, but we believe it is worth reemphasizing in light of the important role such thresholds play in limiting potential condemnation to conduct that is likely to have an anti-competitive effect in a relevant market.

2.	1.9(a)	<p><i>Predatory behavior towards competitors</i></p> <p>1.9 Section 21(2) of the Ordinance offers guidance on the types of conduct that might constitute an abuse of substantial market power. Conduct may, in particular, constitute an abuse if it involves:</p> <p>(a) Predatory behaviour towards competitors. Predatory behaviour includes “predatory pricing” which occurs when an undertaking with a substantial degree of market power lowers its price below an appropriate measure of cost, deliberately incurring losses in the short run so as to eliminate or reduce the competitive effectiveness of one or more of its rivals or to prevent entry into the market by potential rivals. ...</p>	<p>We suggest that the summary definition of “predatory pricing” include as an element the reasonable probability that the entity’s conduct would in fact lead to the elimination of competition such that the entity will be able to recoup its initial losses by raising price above competitive levels (as is recognized subsequently in Section 5.6).</p>
3.	2.22	<p><i>Price discrimination markets</i></p> <p>2.22 Where suppliers are able to differentiate between groups of buyers in terms of price, it may be appropriate to assess these groups of buyers as separate markets. Undertakings might be able to discriminate between buyers for a variety of reasons including, for example, because some buyers face such high switching costs that they are “locked in” to purchasing a particular product.</p>	<p>This description of price discrimination markets is highly generalized, and we would urge that if it remains, certain clarifying points are added to the description. For example, it should be noted that differentiation across groups of buyers based on price is commonly found among entities without market power, and that the fact of price discrimination in and of itself should not be seen to demonstrate market power. In addition, the presence of ‘locked in’ buyers should not be seen as a basis for defining a relevant market where such buyers had knowledge of the terms of purchase before making the ‘locking in’ investment, and were able to avoid such purchase if they chose.</p>
4.	6.5	<p><i>The “compliance with legal requirements” exclusion</i></p> <p>Section 2, Schedule 1 to the Ordinance provides that agreements or conduct are excluded from the First Conduct Rule and Second Conduct Rule to the extent that the relevant agreement or conduct is made or engaged in for the purposes of complying with a legal requirement imposed by or under any enactment in force in Hong Kong or imposed by any national law applying in Hong Kong.</p>	<p>Please refer to our comments on Annex, para 3.1 of the Draft Guideline on the First Conduct Rule.</p>