ExxonMobil Hong Kong's Submission
to Hong Kong Competition Commission
Regarding Draft Competition Guidelines

Feedback on Consultation on Guidelines under the Competition Ordinance, Cap. 619

Part I:

Draft Guideline on Investigations

Draft Guideline on Complaints

Draft Guideline on Applications

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1. Overarching comments:

Draft Guidelines remain high level in many places and the ensuing discretion the Competition Commission reserves unto itself compromises the certainty otherwise expected from the Guidelines.

2. Draft Guideline on Complaints

Paragraph	Comments
2.	Preference is to see the Guidelines' reference to the Commission's exercise of the statutory power to sanction against provision of false information by any person under S. 172 of the Ordinance as a measure against malicious abuse by third parties, especially during the initially implementation of the Ordinance.
	Draft Guidelines' encourage complaints to be made by "in any form" by "any person" is a very broad approach. Compared with the EU, the requirement for the complainant to demonstrate a "legitimate interest" in relation to the subject matter of complaint is absent. Conversely, this encouragement for making of complaints is accompanied with the paradox of the Commission retaining the discretion not to investigate complaints and it is a matter of conjecture whether / how this discretion / its exercise may be subject to contention. This is because the Commission retains the exclusive rights to address potential infringement of the Ordinance which deprive subjects of investigation the right to sought remedy from the judiciary.
4.3	Reference in (b) to the Commission's "current enforcement strategy, priorities and objectives", which would, by nature, change from time to time, negate value of certainty of the Guideline to prospective Complainants as well as respondents.

3. Draft Guideline on Investigations

Paragraph	Comments
5.1 (b)	It is doubtful how well the threshold of "beyond mere speculation" as a manifestation of "have reasonable cause" under the Ordinance will work in practice in the context of the Commission making circumstantial inference of anti-competitive conducts from observation / events.
5.4	Who is the reference to "inviting parties to make submissions" intending to refer to?
5.14	The reservation unto the Commission the discretion to determine deadline for production of documents / information depending on nature & information requested could not ensure fairness on and parity of treatment between respondents.
5.26	This language is too broad and vague, specifically the words "expects" and "without limitation." As written, this section seems to provide the Commission with unrestricted ability to seek a section 48 warrant. Preference is to see this language tightened so that the Commission had clearer guidance as to when it could or could not seek a section 48 warrant.
5.28	"With broad powers" provided to authorized Commission Officers should be expressly reference to "specified in the warrant" to eliminate potential for abuse by Commission officers.
6.11	The Guideline should oblige the Commission to inform the recipient of information disclosed by the Commission the duty to maintain confidentiality given the offence imposed under S. 128(3) of the Ordinance for unauthorized disclosure.
6.14	When then might the Commission accept information or document on condition that seeks to limit the Commission's usage.
7.5	If the Commission desires parties under investigation to swiftly alter any conduct of concern in response to the Commission's enquires to encourage the Commission not to take further action then 7.5 ought to elaborate on criteria of the Commission taking of no further action as encouragement.

4. Draft Guideline on Block Exemptions Orders

Paragraph	Comments
5.8	Does this paragraph contain enough specifics to be useful to prospective application in determining whether to apply for a Decision vs. Block Exemption Order?

5.14 & 11.13	Basis, or a minimum, principle for computation of the fees payable need to be specified.
6.2	Total absence of commitment on timeline on the Commission's review of application process stand to compromise the usefulness of this provision where commercial decisions rest on the outcome of such decision. A worthwhile consideration may be to prescribe the Commission's commitment to a time certain after it is satisfied all requisite supporting information have been received as that would at least enable interactive participation of the application as well as confer the ability to schedule commercial decisions by reference to the Commission's sign off on completeness of submissions.
6.7	Will an applicant have access to full guidance of the Tribunal or order, decision, guidelines of the Commission it (at least) the Commission is not obligated to make every such item public?
6.13 & 14	As an alternative to the suggestion on 5.14, the Commission should consider providing for the determination of the fees payable under 5.14 and 11.13 during the Initial Consultation.
11.8	See comment on 6.2.
11.13	Will the fee payable under 11.13 for Block Exemption Application be refundable for unsuccessful application similar to 5.14 where the application is unsuccessful?
14	Section 14 requires the Commission to give 30 days to interested parties to make representations on a Commission decision to revoke or change a block exemption. However, the provisions do not seem to provide additional time for firms operating within a block exemption to come into compliance once the exemption is revoked. Additional time would be necessary to unwind contracts or operations that could be problematic, and for which firms had understood to be permissible under the now revoked exemption.

Feedback on Consultation on Guidelines under the Competition Ordinance, Cap. 619

Part II:

Draft Guideline on The First Conduct Rule

Draft Guideline on The Second Conduct Rule

Draft Guideline on The Merger Rule

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1. Overarching comments:

The second set of Draft Guidelines tackle the intricate and multifaceted manifestation of the First and Second Conduct Rule & the Merger. The varying depths of non-exhaustive examples laid over necessarily limited scenarios however left perhaps as many questions outstanding as answered. The Commission is encouraged to address the noted gaps before actual roll out of the Guidelines.

2. Draft Guideline on The First Conduct Rule

Paragraph	Comments
2.15 - 2.18	The Guideline should provide more elaborate reference on demarcation between "concerted practice" vs. "parallel behavior" to render itself useful to undertakings for self-assessment.
2.17	This section indicates, in part, that undertakings may not disclose to a competitor the course of conduct which they have decided to adopt or contemplate adopting in the market. This language is considered too broad, as such disclosures may be necessary in certain circumstances. For example, when competitors are also in a supplier/customer relationship, this information may be necessary for the customer to be able to plan for supply disruptions or other problems in securing necessary products. While the customer's sharing of that information internally could subsequently lead to its improper use, the sharing in the first instance is not anti-competitive.
2.21- 2.22 & 2.25	The Commission's inclusion of non-binding recommendations (2.21(c)) from associations / its committees and non-compliance of association's decisions by members to fall within the First conduct Rule is contradictory to the principle and philosophy of "meeting of the minds" referenced under 2.13.
3.3	Absence of perimeter on the remoteness of the Commission's consideration of "potential effects" of anti-competitive behavior negates the usefulness of the Guideline being relied on by undertakings on self-assessment.
3.11	Same comment as 3.3 on the Guideline's reference to "actual or likely effects of the agreement".

3.16	Question on meaningfulness of reference to degree of market power under the First Conduct Rule being "less than the degree of market power required for concerns to arise under the Second Conduct Rule" when market power remains non quantitative under the Second Conduct Rule Guideline.
4.3	Undertakings cannot reliably assess if the "burden of demonstrating the terms of the general exclusion are met" when the perimeter of the Commission's assessment of "potential effects" under 3.3 remains unknown.
6.8	Is the "some degree of market power" referenced under 6.8 at the same threshold for "market power" referenced under 3.16? Both clarity and consistency are required to makes these provisions in the Guideline useful to undertakings.
6.15 & 6.16	If the Commission looks to identification of "object of harming competition" as its criteria for assessment of market sharing agreement, it should make that explicit in 6.15 & 6.16. As the text stands, citation of such object as a "likely example" leaves undertakings no wiser…. Please see 6.27, 6.33, 6.34, 6.45, 6.77 etc. as contrasts.
6.33 – 6.34	Given the breadth of action that can be covered under "facilitation", the Guideline ought to provide guidance on what the Commission considers as "facilitation" to serve its desired function.
6.36 – 6.37	The Guideline provides no guidance on the elements needed for a breach of the Ordinance on information exchange via customers / suppliers. The examples cited under 6.37 is by reference to price which in any event is caught under 6.35 and serves no guidance purpose under 6.37.
6.38 – 6.43	On "other information exchange", reference to "case by case assessment" under 6.38 leaves undertakings in doubt as to the ultimate relevance / usefulness in subsequent reference to "effect of harming competition" under 6.39, the various criteria under 6.40, 6.41's reference to type of information / structure of market for the purpose of managing their exposure under the Ordinance. The Commission may consider remediation of this by introducing test criteria such as intention and sue of the relevant information to provide reliable benchmarks for undertakings to conduct their own risk assessment.
6.37	This may be a drafting mistake, but as written it indicates that an exchange of information between undertakings on proposed future intentions with respect to price is considered price fixing with the object of harming competition. This is too broad, and should be limited to such exchanges between competitors. There are many circumstances in which undertakings which are not competitors need

	to exchange such information, and in which the exchange is not anti-competitive. Further, even if the undertakings are competitors, there are circumstances in which they would not have the ability to cause anti-competitive effects (for example, if they have very small market shares or the market is very unconcentrated). In these conditions, such an exchange of information is unlikely to be anti-competitive.
6.38	This section indicates that certain forms of information exchange (other than those that seem to receive a per se illegal standard) require a case by case assessment of their effects or likely effects on competition. This may be too narrow, and should apply to all information exchanges. Information exchanges in and of themselves should generally not be considered illegal without further evidence of parallel conduct, agreements to set prices, etc.
6.6	The Commission's characterizing of resale price maintenance (RPM) as "Serious Anti-competitive Conduct" for which the Commission does not need to show the practice leads to anti-competitive effects gives serious concern and is contradictory to the ensuing recognition that RPM can sometimes lead to efficiencies outweighing any anti-competitive effects. The definition of "Serious Anti-competitive Conduct" includes price fixing without distinguishing between whether it is done in a horizontal or vertical supply relationship, as pointed out in footnote 15. This is potentially problematic. In the last decade or so the US has moved away from treating resale price maintenance as per se illegal, based on recognition that RPM can have pro-competitive effects. Whilst the Guideline agrees that vertical agreements are "generally less harmful to competition" (p.21) and goes on to outline potential efficiencies of RPM on pages 39-40, it does not distinguish between vertical and horizontal price fixing in the definition of Serious Anti-competitive Conduct. The Commission's Guideline resembles that of the European Commission but that took an instructive approach on RPM since RPM is outlawed in Europe as a *per se* violation with no efficiency recognition. Likewise, the PRC Anti-Monopoly Law treats RPM as *per se* violation with significant fines being imposed for sanctions, again with no recognition for the efficiency exception.

3. Draft Guideline on The Second Conduct Rule

Paragraph	Comments
3.	The Guideline only provides a series of qualitative criteria in a non-exhaustive manner under 3.8 as elements of consideration in its assessment of market power. En route, this reserves total discretion in the determination unto the Commission and creates uncertainty as to market threshold when a reasonable indicative market share threshold

	would serve as a useful screening device for undertakings to determine their likelihood of being subject to the conduct restraints under the Second Conduct Rule. Conversely, the Commission should reconsider the implication of focusing on exclusionary abuses in its seriatim of examples to the exclusion of exploitative conduct, which itself was not featured in the Ordinance. For local undertakings less well versed with competition compliance, such omission may send an unintended signal by the Commission on their expected latitude under the Second Conduct Rule.
4.6 & 4.7	The Guideline should elaborate the criteria the Commission will use to infer anti-competitive object of conduct under 4.6 given the Commission is not required to demonstrate the effect of harming competition under 4.7 upon establishing the object of harming competition.
5.	The non-exhaustive seriatim of "Examples of conduct that may constitute an abuse" can only be of academic reference to undertakings in their self-assessment of potential exposure under the Ordinance and confer no meaningful benefits to the undertakings as a guideline under the ordinance.
5.19	This section indicates that, with respect to a refusal to deal, the Commission may take into account the past history of dealing between the undertakings, and that the termination of an existing supply arrangement might be more readily characterized as abusive. This standard is too restrictive. Rather, a lack of a prior course of dealing between the undertakings should create a presumption that a refusal to deal is not abusive. As the guideline states in Section 5.15, undertakings generally are free to decide with whom they do business, and refusals to deal are likely to be abusive only in very limited or exceptional circumstances. Thus, Section 5.19 should be revised to reflect this policy.
5.22	Whilst the draft Guideline mentions exclusive distribution agreements may present risks to competition and the effects of such agreements will need to be assessed in order to determine whether they infringe the law, the draft Guideline provides little guidance as to the criteria of assessment of these agreements leaving the undertakings to conduct their own full competitive effects analysis for every distribution agreement which is both unrealistic and does not confer the required certainty to be useful for the undertakings involved. Corresponding this may have the effect of creating an overly cautious approach to the development of distribution agreements which are not regarded as giving rise to competition concerns in comparable regimes.
5.23, 5.24 & 5.27	Reference to "locks up *most* of the efficient input" under 5.23 is merely qualitative and it is not by any means clear whether reference to "has the object or effect of harming competition" under 5.24 and "foreclosure effect" under are referring to the same standard.

5.24 Footnote #21	Given the breadth of examples listed in footnote #21 and their pervasive use in commerce by many major undertakings, short of the Commission providing a safe harbor under 5.22, providing clarification under 5.23, 5.24 and 5.27 is critical for the Guideline to meaningfully function as a guideline for many undertakings.

4. Draft Guideline on The Merger Rule

Paragraph	Comments
3.37	This section indicates that market share is usually measured in terms of sales volume or revenue, but lists other methods of determining shares such as capacity, bandwidth, and reserves. One method that is left out is assigning each market participant equal shares (known as the 1/n method of determining market share). In certain circumstances (such as in markets in which expansion is easy and firms are not capacity constrained, and in markets where the theory of harm is coordinated interaction and the number of firms is a significant factor in determining the likelihood of coordinated behavior), using a 1/n market share analysis can be the most accurate way of analyzing the market, and prevents assigning too much weight to large market players when not appropriate.
5.25	This section states that the Commission may investigate a merger if it believes that a contravention of the Merger Rule has taken place, is taking place, or is about to take place. The Commission should not initiate an investigation if it merely thinks a merger is about to take place. Many mergers never come to fruition despite looking as though they will. Having the Commission meddle into a merger where an agreement has not even been signed seems premature. The Commission should not have the power to investigate unless a merger agreement has been signed, or at the least the signing of the agreement is imminent.

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