

Hong Kong Competition Law

INVESTIGATION SERIES: PART 5

Formal Investigation

At the formal investigation stage, the Hong Kong Competition Commission (the “Commission”) has already formed a preliminary opinion that there is reasonable cause to believe a competition law contravention has taken place. Once a formal investigation is commenced, the Commission will be able to invoke powers of investigation to compel persons and businesses to supply information relevant to the investigation.

Your Duty to Cooperate

Where the Commission exercises its compulsory investigation powers, you are legally required to cooperate and make available any information the Commission requests, provided the information is:

1. Relevant to the investigation; and
2. Not protected by legal privilege.

Failure to cooperate in any manner including providing false or misleading information, destroying or concealing evidence or obstructing a search by the Commission constitutes a criminal offence punishable by fines and/or imprisonment.

Limits to the Commission’s Powers

Irrelevance and legal privilege are the only valid grounds to resist provision of information to the Commission.

Due to the broad powers the Commission enjoys, it is important to work out precisely what information the Commission is, or is not, authorised to collect. The limits of the Commission’s authority will be set out in the description of the subject matter and scope of the investigation.

If you consider the description of the scope of investigation too broad or vague, it is recommended that you make appropriate representations to the Commission as soon as possible, to protect your interests and avoid the appearance of lack of cooperation.

The Commission is not entitled to request, read or copy information that exceeds the scope of investigation.



The Commission's Investigation Powers

The Commission can exercise its investigation powers not only on the subject of investigation, but also in relation to any person who may have possession, or control, of information relevant to the investigation. Specifically, the Commission may exercise any of the following powers at any time during the course of investigation:

1. Issue written requests for documents and information;
2. Request a person attend before the Commission to answer questions; and/or
3. Enter and search premises under warrant (i.e., carry out a dawn raid).

The Commission is not required to have exhausted the other, less intrusive methods before carrying out a dawn raid, particularly where the investigation involves secretive conduct or the likelihood that evidence may be destroyed or interfered with should the Commission first adopt other means.

You are entitled to legal representation in your interactions with the Commission, whether oral or written. However, in the event of a dawn raid, the Commission is not required to wait for your lawyers to attend before commencing search. In practice, the Commission will usually wait a reasonable time for your lawyers to arrive.

Confidentiality and Self Incrimination

Confidentiality and protection from self-incrimination do not excuse you from the duty to cooperate with the Commission. However, the Commission is under an obligation of confidence in relation to information collected in an investigation.

At the end of an investigation, the Commission may adopt any of the following:

1. Take no further action, but this does not prevent the Commission from revisiting the matter at a later date.
2. Accept a commitment from the business(es) under investigation to take any action or refrain from taking any action to address the Commission's concerns.

3. Issue a Warning Notice in case of violations of the First Conduct Rule that do not amount to serious anti-competitive conduct (the Commission is required to do so for non serious anti-competitive conduct).

The Warning Notice will provide an opportunity for the business(es) under investigation to rectify the identified conduct, after which the Commission may commence proceedings in the Competition Tribunal (the "Tribunal") without further notice.

4. Issue an Infringement Notice or directly commence proceedings in the Tribunal for serious anticompetitive conduct or conduct under the Second Conduct Rule. If issued, an Infringement Notice will contain proposed commitments, which, if accepted, will allow the business(es) under investigation to avoid prosecution. Failing this, the Commission may commence proceedings in the Tribunal.

COMMITMENTS

At any stage of the investigative process, business(es) under investigation may offer to enter into commitments with the Commission aimed at addressing the Commission's concerns. If the Commission accepts a commitment, it may agree to terminate its investigation or not to bring proceedings in the Tribunal.

The Commission may also apply to the Tribunal for an interim order if it is satisfied a person is engaged in, or proposing to engage in, a contravention of the competition rules.

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