



## Hong Kong Competition Law

### INVESTIGATION SERIES: PART 10

#### Commitments

The Hong Kong Competition Commission (the “Commission”) may exercise its discretion to settle alleged breaches of the Competition Ordinance (the “Ordinance”) by accepting a ‘Commitment’ from the parties under investigation.

A Commitment requires that the parties concerned take, or refrain from taking, any action that the Commission considers appropriate to address its concerns about a possible contravention of the Ordinance and/or offer appropriate redress to third parties affected by the conduct. The Commission has yet to provide further guidance on the types of commitments it would be prepared to accept.

A Commitment can be offered to, and accepted by, the Commission at any stage of the investigative process, even if proceedings have already commenced. If the Commission accepts a Commitment, it may agree to terminate its investigation or to withdraw proceedings in the Competition Tribunal (the “Tribunal”).

#### Acceptance of a Commitment

If the Commission accepts a Commitment, it will notify in writing the person who made the Commitment of its decision, together with a copy of the Commitment in question.

The Commission will then proceed to register the Commitment on the Register of commitments, where the Commission will also keep track of any variations or withdrawal of the Commitment.

Importantly, the Register of commitments is made publicly available on the Commission’s website and as such Commitments are not confidential. The Commission may, however, omit confidential information to preserve the legitimate interests of the parties (you can refer to our previous update on Confidentiality for more information in that respect).

#### Withdrawal of a Commitment

Where there is a material change of circumstances, the Commission may withdraw its acceptance of a Commitment. The Commission may also withdraw its acceptance if it has reasonable grounds to suspect that the person who made that Commitment has failed to comply with the Commitment or that the information on which it based its decision was incomplete, false or misleading.

In such cases, the Commitments are no longer binding on the parties and the Commission may decide to conduct a new investigation or commence proceedings before the Tribunal.



Similarly, the Commission can release the Commitment if it has reasonable grounds to believe the alleged contravention no longer arises. Commitments can also be varied or substituted upon request by the parties as long as the Commission is satisfied that the variation or new commitment addresses its concerns.

### What to Consider when Offering a Commitment?

Where a Commitment has been accepted by the Commission, the Commission cannot open or carry on with an investigation. Similarly, the Commission cannot bring proceedings before the Tribunal, or alternatively, must terminate any current proceedings that are the subject of the Commitment. The Commission may, however, continue to investigate any matter not covered by the Commitment.

Evidently, the most obvious benefit is that a Commitment protects the parties from financial penalties imposed by the Tribunal, which can go up to 10 percent of the undertaking's annual turnover for each year in which the contravention occurred (with a maximum of three years). Allegedly, Commitments greatly minimise the legal and financial risk that a company would otherwise face if the matter was brought before the Tribunal. Commitments can also offer a more prompt resolution to the parties.

However, as mentioned, Commitments are not confidential. Since Commitments typically require the party concerned to acknowledge a contravention of the Ordinance, it could potentially expose the

business to private follow-on actions for claim of damages. Publication of the Commitments can also negatively affect the reputation of your business.

### Commitments in the Context of an Infringement Notice

Further to its investigation, if the Commission has reasonable cause to believe that the parties were involved in a serious anti-competitive conduct in violation of the First Conduct Rule (i.e. price-fixing, output limitation, market sharing or bid-rigging) or that a contravention of the Second Conduct Rule has occurred, the Commission may decide to issue an Infringement Notice instead of bringing proceedings before the Tribunal.

In the Infringement Notice, the Commission will offer not to bring proceedings to the Tribunal on condition that the parties under investigation make a commitment to comply with the requirements of the notice (the "Infringement Notice Commitment").

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