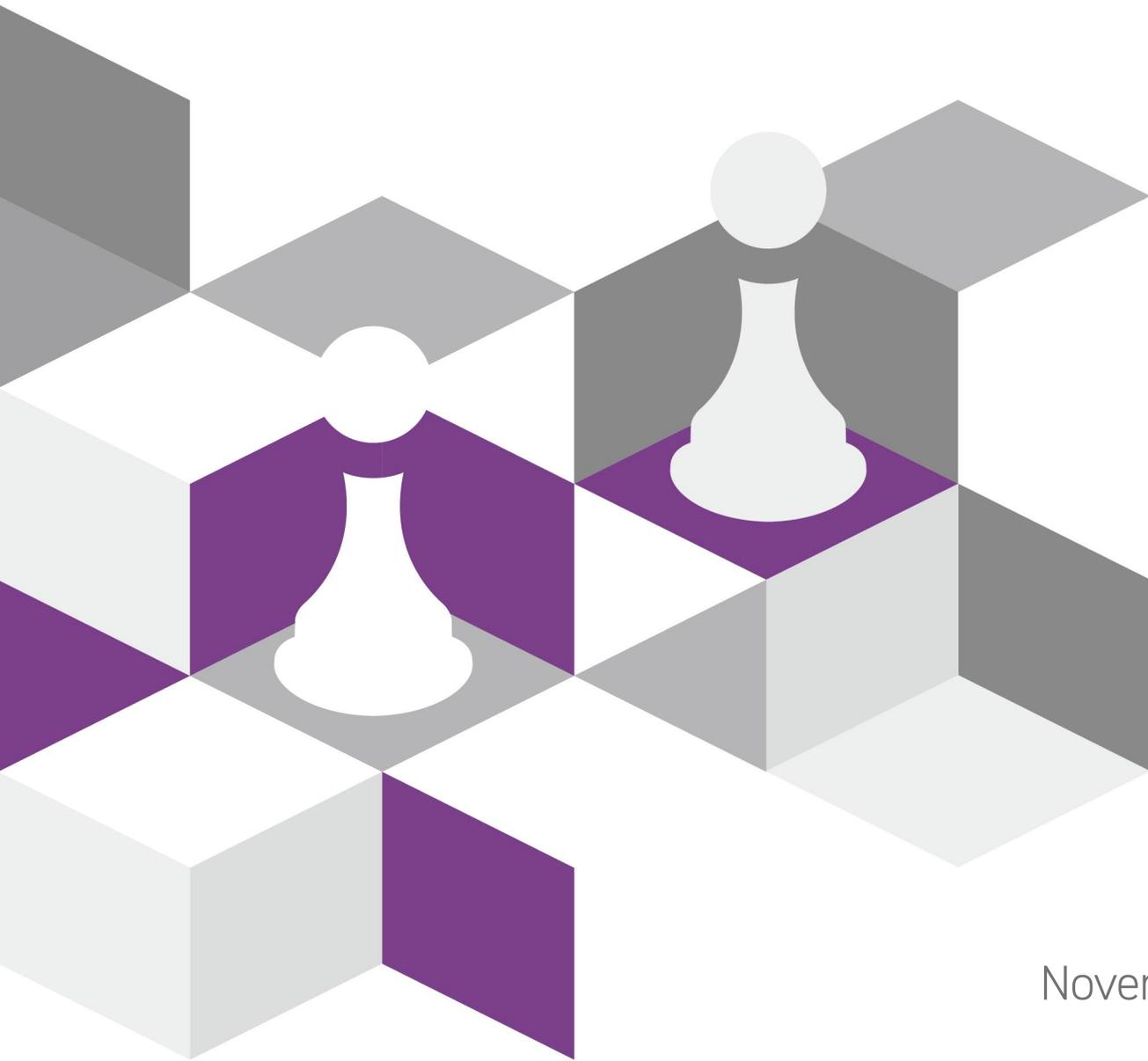


# Policy on Section 60 Commitments



November 2021



# Policy on Section 60 Commitments

## 1. Introduction

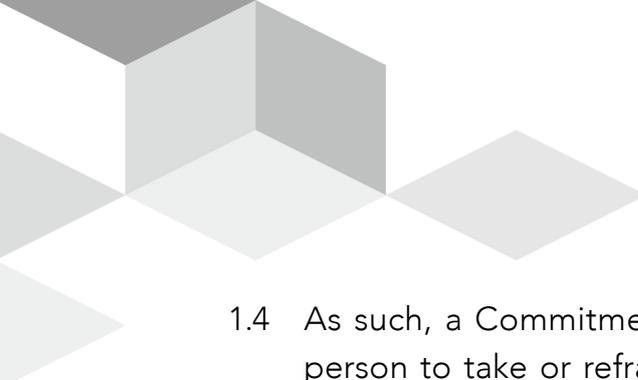
- 1.1 The Competition Commission ("**Commission**") issues this Policy with respect to commitments which:
- a. fall within section 60 of the Competition Ordinance (Cap. 619) ("**Ordinance**"); and
  - b. relate to possible contraventions of section 6 of the Ordinance ("**first conduct rule**") or section 21 of the Ordinance ("**second conduct rule**")
- (referred to below as "**a Commitment**" or "**Commitments**").<sup>1</sup>
- 1.2 Under section 60(1) of the Ordinance, the Commission may accept a Commitment from a person<sup>2</sup> to take any action, or refrain from taking any action, that the Commission considers appropriate to address its concerns about a possible contravention of a competition rule (which includes the first conduct rule and the second conduct rule).
- 1.3 Where a Commitment is accepted by the Commission, section 60(4) provides that the Commission is required to cease any investigation or proceedings before the Competition Tribunal ("**Tribunal**") which relate to matters addressed by the Commitment (or must not commence such investigation or proceedings if they have not yet begun).<sup>3</sup>

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<sup>1</sup> For the avoidance of doubt, the Policy does not apply to commitments to comply with the requirements of an infringement notice issued under section 67 of the Ordinance (for further details of which see Part 4, Division 2 of the Ordinance and the Commission's Guideline on Investigations, paragraphs 7.17 to 7.19). It also does not apply to commitments which relate to possible contraventions of the merger rule (for further details of which see the Commission's Guideline on the Merger Rule, paragraphs 5.9 to 5.15).

<sup>2</sup> Throughout this Policy, "person" has the same meaning as in section 2(1) of the Ordinance and includes an undertaking.

<sup>3</sup> See further paragraphs 5.1 and 5.2 below.

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- 1.4 As such, a Commitment is a voluntarily-assumed, binding obligation by a person to take or refrain from a particular action or actions, which may be offered to the Commission at any time to resolve its competition concerns and avoid or close an investigation or Tribunal proceedings in a specific matter.
  - 1.5 In appropriate cases, a Commitment may provide an effective and proportionate resolution to potentially anti-competitive conduct. It may save the Commission and person providing the Commitment the time and costs associated with further investigation or proceedings before the Tribunal. It will also provide certainty to the person concerned that the Commission will not pursue the conduct covered by the Commitment. Nonetheless, it should be noted that a Commitment may involve significant and onerous obligations for the person concerned.
  - 1.6 The remainder of this Policy sets out the Commission's practice and procedure in respect of Commitments. It should be read in conjunction with, and supplements, Part 4, Division 1 of the Ordinance, the Commission's Guideline on Investigations and the Commission's Enforcement Policy.

## **2. Appropriateness of a Commitment as an enforcement outcome**

- 2.1 The decision as to whether a Commitment provides an appropriate enforcement outcome in a particular case is at the Commission's sole discretion.
- 2.2 In exercising this discretion, the Commission will consider whether a Commitment is an appropriate enforcement outcome in the matter generally and whether a specific proposed Commitment is appropriate to address the Commission's competition concerns, having regard to relevant factors including, but not limited to:



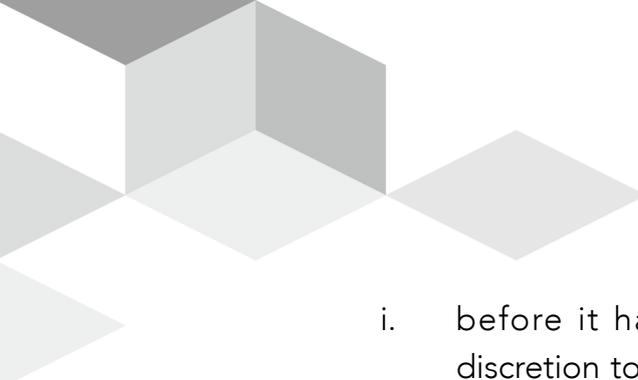
- a. *Seriousness of the conduct.* A Commitment should provide a resolution to the Commission's concerns which is proportionate to the context of the conduct and the harm caused or likely to occur.<sup>4</sup> For example, the Commission is very unlikely to accept a Commitment with respect to cartel conduct involving competitors.
- b. *Ability to address competition concerns.* To accept a Commitment, the Commission must consider that the Commitment is appropriate to address its concerns about a possible contravention of a conduct rule. As such, a Commitment should be targeted to the specific competition concerns of the Commission and directly address those concerns, in the sense that the Commitment removes or appropriately mitigates the concerns.
- c. *Effective implementation and monitoring.* A Commitment should be capable of being implemented effectively within a reasonable period of time. Compliance with the Commitment should also be capable of being monitored effectively, where appropriate.
- d. *Severity Factors.* The Commission will consider whether there are one or more Severity Factors present which would militate against the appropriateness of a Commitment in the circumstances of the case.<sup>5</sup>
- e. *Remedial Goals.* A Commitment should address the Commission's Remedial Goals, to the extent they are applicable.<sup>6</sup>
- f. *Good faith.* The Commission may take into account the apparent good faith of the person offering the Commitment.
- g. *Timing considerations.* The Commission is unlikely to accept a Commitment:

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<sup>4</sup> Enforcement Policy, paragraph 3.14.

<sup>5</sup> See further Enforcement Policy, paragraph 3.12.

<sup>6</sup> See further Enforcement Policy, paragraph 3.13.

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- i. before it has gathered sufficient information to exercise its discretion to do so (for example, by reference to the factors in this paragraph 2.2); and/or
  - ii. where a matter is very advanced, including once Tribunal proceedings have commenced, where the Commission may not consider that a Commitment would be appropriate depending on the circumstances.

### 3. Content of a Commitment

3.1 In so far as the content of a Commitment is concerned, the Ordinance establishes that:

- a. a Commitment involves a person taking any action or refraining from taking any action that the Commission considers appropriate to address its competition concerns;
- b. a Commitment may not involve making a payment to the Government;<sup>7</sup> and
- c. a Commitment may or may not contain an admission from the person that they have contravened a conduct rule.<sup>8</sup>

3.2 Beyond these provisions, the Ordinance does not prescribe any requirements as to the contents of a Commitment. Commitments will need to be tailored to address the specific competition concerns in a matter and as such their substantive content and duration may vary significantly from case to case. The Commission would ordinarily expect the person offering the Commitment to propose the substantive content of the Commitment in the first instance.<sup>9</sup>

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<sup>7</sup> Section 60(2) of the Ordinance.

<sup>8</sup> Section 2(2)(c) of Schedule 2 to the Ordinance.

<sup>9</sup> This can be contrasted with a commitment to comply with the requirements of an infringement notice issued under section 67 of the Ordinance, where it is the Commission that specifies the requirements to be complied with.



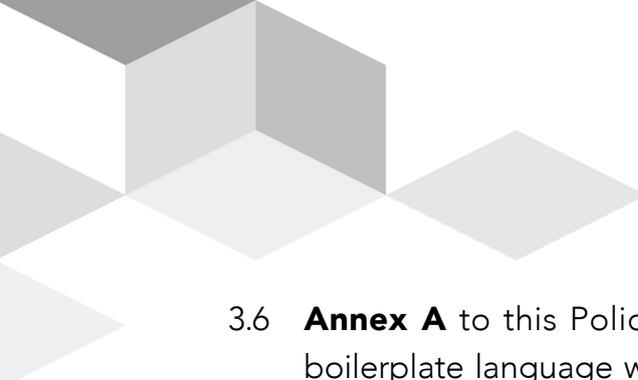
- 3.3 By way of non-exhaustive examples, a Commitment may involve a person agreeing to cease or modify its conduct, enter into or terminate an arrangement, establish a competition compliance programme, remove a problematic clause from an agreement, maintain a service at particular levels or prices, provide a licence, and/or withdraw from a particular activity.
- 3.4 The Commission will ordinarily expect the Commitment to include some mechanism for the Commission to monitor compliance. A monitoring mechanism may range from the submission of a compliance statement to the Commission by the person providing the Commitment to a detailed monitoring trustee regime. The latter would involve the appointment of an independent third party at the cost of the person providing the Commitment, to monitor and provide detailed reports to the Commission on compliance with the Commitment on an ongoing basis. The appropriate mechanism will vary depending on the substantive content and duration of the Commitment.
- 3.5 The Commission will usually be willing to accept a Commitment which does not contain an admission of a contravention.<sup>10</sup> However, the Commission will generally not accept terms or statements in a Commitment which:
- a. seek to minimise the seriousness or consequences of the conduct;<sup>11</sup>
  - b. indicate disagreement with, or undermine, the Commission's analysis of the conduct;
  - c. purport to set up defences for possible non-compliance; or
  - d. impose obligations on the Commission or third parties.<sup>12</sup>

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<sup>10</sup> Unlike in the case of a commitment relating to an infringement notice, where the Commission would usually require an admission to be provided.

<sup>11</sup> For the avoidance of doubt, the Commitment may indicate that the person providing the Commitment does not admit that the conduct amounts to a contravention.

<sup>12</sup> The Commitment may provide for the appointment of a third party, such as a monitoring trustee whose mandate is provided for in the Commitment.



3.6 **Annex A** to this Policy contains a template Commitment, which contains boilerplate language which may be used by persons offering a Commitment to the Commission (with such adaptations as necessary).

## 4. Commitment process

- 4.1 The Commitment process may be initiated by the Commission or parties subject to a Commission investigation or Tribunal proceedings at any time.<sup>13</sup>
- 4.2 The Commission may initiate the Commitment process, if it considers that a Commitment may in principle offer an appropriate enforcement outcome in a matter (a "**Commission initiated process**"). In such a case, the Commission would indicate so to the person concerned and ordinarily provide it with a summary of its competition concerns.
- 4.3 A party to the relevant conduct may initiate the Commitment process by either offering a Commitment or indicating its willingness to do so (a "**party initiated process**"). The Commission will pursue a party initiated process if it considers that a Commitment may in principle offer an appropriate enforcement outcome in the matter and that it is likely to result in a Commitment that could appropriately address the Commission's concerns. The Commission would indicate this to the person concerned and ordinarily provide it with a summary of its competition concerns.
- 4.4 If a Commitment is offered in a Commission initiated process or a party initiated process pursued by the Commission, the Commission will discuss with the person concerned whether the offered Commitment would be likely to appropriately address the Commission's concerns. The discussions may result in the person concerned making amendments to the content of the Commitment in relation to its terms, duration and/or monitoring mechanism.

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<sup>13</sup> Regard should be had, however, to the timing considerations in paragraph 2.2(g) above.



- 4.5 Discussions between the Commission and the person considering to offer or offering a Commitment will be held without prejudice.<sup>14</sup>
- 4.6 The Commission retains full discretion to initiate, pursue or terminate the Commitment process at any time. If it decides not to pursue a party initiated process or to terminate an ongoing Commitment process, it will inform the person concerned of its decision.
- 4.7 If, in a Commitment process, an offer of a Commitment is made that the Commission proposes to accept, the Commission will conduct a consultation pursuant to section 2 of Schedule 2 to the Ordinance.<sup>15</sup>
- 4.8 In such a consultation, the Commission must:
- a. give notice of the proposed Commitment to those the Commission considers likely to be affected by it;
  - b. allow a period of at least 15 days from the date of the notice for representations to be made; and
  - c. consider any representations made in response to the notice.
- 4.9 The notice of the proposed Commitment is required to address particular matters, which are set out in section 2(2) of Schedule 2 to the Ordinance.<sup>16</sup>
- 4.10 After considering the representations received, the Commission will indicate to the person offering the proposed Commitment whether any changes to its content are required before the Commission will accept it. In addition, the Commission will generally consider any submissions made by that person in response to the representations.

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<sup>14</sup> The Commission's investigation may continue while Commitment discussions are taking place. In such circumstances, any information provided to the Commission which does not directly relate to the Commitment would not be considered to benefit from without prejudice privilege.

<sup>15</sup> For the avoidance of doubt, the Commission is under no obligation to conduct a consultation with respect to an offered Commitment unless it proposes to accept the Commitment.

<sup>16</sup> The notice must state the following: (a) that the Commission proposes to accept the Commitment; (b) the intended object and effect of the Commitment; (c) whether the Commitment constitutes an admission of contravention of a conduct rule; (d) the situation that the Commitment is seeking to deal with; (e) any other facts that the Commission considers to be relevant to the acceptance of the Commitment; (f) a means of gaining access, at all reasonable times, to an accurate version of the proposed Commitment; and (g) the period within which representations may be made in relation to the proposed Commitment.



4.11 Where the Commission accepts the Commitment (revised if necessary following the consultation), it is required to:

- a. give written notice of the acceptance to the person who made the Commitment under section 60(6) of the Ordinance; and
- b. publish the Commitment on the Commission's Register of Commitments under section 64 of the Ordinance (subject to omissions for confidential information<sup>17</sup>).

4.12 Where the Commission decides not to accept the Commitment after completing the consultation process in paragraph 4.7 above, it must also give notice that it has so decided under section 3 of Schedule 2 to the Ordinance.

4.13 For reference purposes only, a flowchart illustrating the key steps in the Commitment process is provided at **Annex B** to this Policy.

## 5. Matters following acceptance of a Commitment

### Effect of acceptance of a Commitment

5.1 Where the Commission accepts a Commitment, it is required under section 60(4) of the Ordinance not to commence or continue an investigation, or bring or continue proceedings in the Tribunal, where that investigation or those proceedings relate to matters that are addressed by the Commitment.

5.2 Pursuant to section 60(5) of the Ordinance, the Commission may still commence or continue an investigation or proceedings before the Tribunal in relation to persons who are not subject to the Commitment or matters that are not addressed by the Commitment. This will not be the case, however, where the Commission has expressly agreed under section 60(3) of the Ordinance not to commence or continue the investigation or Tribunal proceedings more broadly.

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<sup>17</sup> See Part 6 of this Policy below.



## **Failure to comply with a Commitment**

- 5.3 Where the Commission has the requisite basis under the Ordinance to consider that a person has failed to comply with a Commitment, it may:
- a. withdraw acceptance of the Commitment under section 61 of the Ordinance;<sup>18</sup> and/or
  - b. apply to the Tribunal for one or more of the orders in section 63 of the Ordinance.<sup>19</sup>
- 5.4 To withdraw acceptance of a Commitment, the Commission must comply with the notice and publication requirements in section 61 and sections 6 to 10 of Schedule 2 to the Ordinance. In this scenario, the Commission will be required to conduct a consultation, similar to the consultation which is conducted where the Commission proposes to accept a Commitment.<sup>20</sup> If acceptance of a Commitment is withdrawn, the Commission may then commence an investigation or bring proceedings in the Tribunal with respect to alleged contraventions that have occurred after the date specified in the notice of withdrawal issued by the Commission.
- 5.5 Prior to taking action for non-compliance under sections 61 or 63, the Commission will ordinarily advise the person providing the Commitment of its concerns around non-compliance and provide the person with an opportunity to address those concerns.

## **Variation, substitution and release of a Commitment**

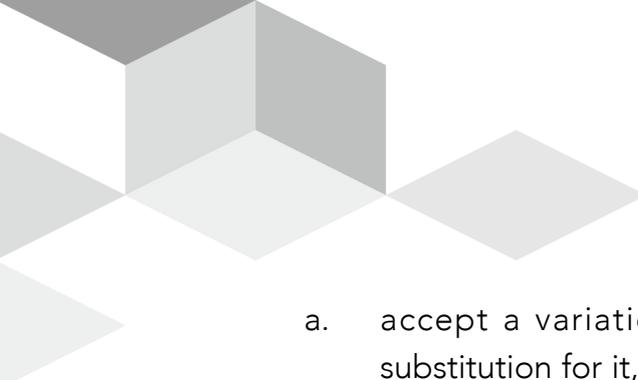
- 5.6 After the Commission has accepted a Commitment, it may under section 62 of the Ordinance:

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<sup>18</sup> In addition to situations of non-compliance, the Commission may withdraw acceptance of a Commitment where there has been a material change of circumstances since the Commitment was accepted or the information on which the Commission based its decision to accept the Commitment was incomplete, false or misleading in a material particular.

<sup>19</sup> Under such orders, the person who made the Commitment may be directed to take or refrain from taking action specified in the Commitment, pay a sum to the Government or compensate a third party for loss or damage caused by the failure to comply with the Commitment. The Tribunal may also make any other order it considers appropriate.

<sup>20</sup> See paragraphs 4.7 to 4.12 above.

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- a. accept a variation of the Commitment or a new Commitment in substitution for it, if the Commission is satisfied that the variation or new Commitment will address its competition concerns; and/or
  - b. release the person who made the Commitment from the Commitment, if requested to do so by that person or if the Commission has reasonable grounds for believing that its competition concerns no longer arise.

5.7 To accept a variation of a Commitment or a new Commitment in substitution for it, the Commission must comply with the notice and publication requirements in sections 1 to 5 of Schedule 2 to the Ordinance. To release a person from a Commitment, the Commission must comply with the notice and publication requirements in sections 11 to 15 of Schedule 2 to the Ordinance.

5.8 In each of these scenarios, the Commission will be required to conduct a consultation, similar to the consultation which is conducted where the Commission proposes to accept a Commitment.<sup>21</sup>

## 6. Confidentiality

6.1 In the Commitment process, the Commission will handle confidential information<sup>22</sup> in accordance with Part 8 of the Ordinance and Part 6 of the Guideline on Investigations.

6.2 Section 125 of the Ordinance imposes a general obligation on the Commission to preserve the confidentiality of any confidential information provided to the Commission. Section 126 of the Ordinance lists the exceptions to this obligation where the Commission may disclose confidential information with lawful authority.

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<sup>21</sup> See paragraphs 4.7 to 4.12 above.

<sup>22</sup> In this Policy, “confidential information” has the same meaning as in section 123 of the Ordinance.



- 6.3 With a view to transparency in its decision making, the Commission will ordinarily publish on its website the notices which it is required to issue with respect to a Commitment and any representations received in response, as well as the Commitment itself.
- 6.4 A person offering or making a Commitment may request to the Commission to omit confidential information from:
  - a. the relevant notices; and
  - b. any entry made in the Register of Commitments in accordance with section 64(2) of the Ordinance. Where confidential information has been omitted, the Commission must disclose the fact of such an omission on the Register.
- 6.5 Persons requesting the Commission to omit confidential information from these documents are asked to clearly articulate the reasons why they consider the information to be confidential. This will enable the Commission to better evaluate whether to accept the confidentiality claim.
- 6.6 In addition, persons making a representation may request the Commission to omit confidential information from the version published on its website and should provide a non-confidential version of the representation for these purposes.



## Annex A

### Template for a Commitment that may be offered by parties pursuant to section 60 of the Ordinance

*This template contains terms that may be used by parties seeking to make commitments pursuant to section 60 of the Competition Ordinance. Notes on drafting are provided in footnotes, which should be removed when the template is being prepared.*

*The template is to be amended to reflect the specific circumstances of the matter in question. The template may also be updated from time to time.*

*In drafting a Commitment pursuant to this template, consideration should be given to Part 3 of the Policy on Section 60 Commitments. In addition, parties are reminded of the implications of failing to comply with a Commitment provided for in sections 61 and 63 of the Ordinance, which are addressed from paragraphs 5.3 to 5.5 of the Policy.*

\* \* \* \* \*

**Case [insert case number]**

**Commitment made by [name of party/parties] to the Competition Commission pursuant to section 60 of the Competition Ordinance (Cap. 619)**

#### RECITALS

- (1) **[Name of party/The Parties]** agree[s] to make the following Commitment under section 60 of the Ordinance with the objective of addressing the Commission's concerns about a possible contravention of **[relevant conduct rule[s]]** in respect of **[identification of conduct that is addressed by the Commitment]**.
- (2) In particular, **[description of conduct]**.<sup>1</sup>

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<sup>1</sup> This recital may not be necessary where the identification of the conduct in the preceding recital is sufficiently clear.



- (3) The Commission opened an investigation in relation to the above referenced conduct on [**date of opening of investigation**] with the case number [**case number**].<sup>2</sup>
- (4) The Commitment is made on a voluntary basis by [**name of party/the Parties**] in return for the Commission terminating its investigation and not bringing proceedings in the Tribunal in Case [**case number**] insofar as that investigation or those proceedings relates to matters that are addressed by the Commitment.<sup>3</sup>
- (5) [The offering of the Commitment by [**name of party/the Parties**] does not constitute an admission by [**name of party/the Parties**] of a contravention of [**relevant conduct rule[s]**].<sup>4</sup>

## 1. Interpretation

1.1 For the purpose of this Commitment, the following terms shall have the following meanings:<sup>5</sup>

- a. "**Commission**" means the Competition Commission established by section 129 of the Ordinance;
- b. "**Commitment**" means the commitment made by [name of party/the Parties] hereunder pursuant to section 60 of the Ordinance;
- c. "**Commitment Duration**" means the duration of the Commitment as specified in clause [5];
- d. "**Court**" means the Tribunal, and other courts of Hong Kong;
- e. "**Effective Date**" means the date on which [**name of party/the Parties**] receive[s] a Notice of Acceptance from the Commission;

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<sup>2</sup> This recital will need to be amended in circumstances where a Commitment is made before the Commission opens an investigation. It would similarly need to be amended in circumstances where a Commitment is made after proceedings have been brought by the Commission in the Tribunal.

<sup>3</sup> Where a Commitment is made after the Commission has brought proceedings in the Tribunal, this should be amended to refer to the termination of those proceedings.

<sup>4</sup> This recital should not be included where the relevant party/parties admit a contravention of a conduct rule in the Commitment. In that case, clause 2 below should instead be included.

<sup>5</sup> To be completed with definitions necessary given the circumstances of each case.

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- f. **"Notice of Acceptance"** means a notice in writing provided by the Commission to **[name of party/the Parties]** under section 60(6)(a) of the Ordinance of the Commission's decision to accept the Commitment;
  - g. **"Ordinance"** means the Competition Ordinance (Cap. 619);
  - h. **"Parties"** means [name of party 1] and [name of party 2], each a **"Party"**;<sup>6</sup>
  - i. **"Tribunal"** means the Competition Tribunal established by section 134 of the Ordinance.

## 2. **[Admission of a contravention of a conduct rule]**<sup>7</sup>

- 2.1 **[Name of party/The Parties]** admit[s] that **[it has/they have]** contravened **[the first conduct rule in section 6/the second conduct rule in section 21]** of the Ordinance by engaging in **[set out description of conduct which forms the basis of the Contravention, if necessary by cross-referring to the Notice of Acceptance].**

## 3. **Substantive Commitment**<sup>8</sup>

- 3.1 **[insert substantive terms of Commitment].**

## 4. **Reporting on compliance with the Commitment**<sup>9</sup>

- 4.1 **[insert terms of reporting mechanism].**

## 5. **Effective Date and duration**<sup>10</sup>

- 5.1 This Commitment shall enter into force and take effect from the Effective Date.

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<sup>6</sup> To be included where the Commitment is being made by more than one party.

<sup>7</sup> To be included where the Commitment includes an admission of a contravention of a conduct rule.

<sup>8</sup> To be tailored to reflect the circumstances of each case.

<sup>9</sup> To be tailored to reflect the circumstances of each case. Clauses may also be required to be added for the appointment of a monitoring trustee.

<sup>10</sup> The provisions in this clause 5 may need to be amended or added to depending on the circumstances of the case; for example, should different aspects of the Commitment have different durations and/or deadlines for implementation after the Effective Date.



5.2 This Commitment shall remain in force for a period of **[insert duration of Commitment]** commencing on the Effective Date unless, at an earlier date, the Commission withdraws acceptance of the Commitment under section 61 of the Ordinance, the Commission accepts from **[name of party/the Parties]** a variation of the duration of the Commitment or a new Commitment in substitution for it under section 62(1) of the Ordinance, or the Commission releases the Parties from the Commitment under section 62(2) of the Ordinance.

## 6. Miscellaneous

6.1 Any written notice or communication to the Commission pursuant to this Commitment shall be delivered by registered mail or by e-mail as follows:

For the attention of [•]  
Competition Commission  
19/F, South Island Place,  
8 Wong Chuk Hang Road,  
Wong Chuk Hang, HONG KONG  
  
E-mail: [•@compcomm.hk]

6.2 Applicable Law: This Commitment is governed by, and shall be construed in accordance with, the laws of Hong Kong. **[Name of party/The Parties]** agree[s] that the Court has jurisdiction to determine any proceedings arising out of or in connection with this Commitment and the matters to which it relates, including any proceedings brought by the Commission.

6.3 [Execution in Counterparts: This Commitment may be executed in counterparts.]<sup>11</sup>

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<sup>11</sup> To be included where the Commitment is being made by more than one party.



**MADE by [name of party/the Parties] through [its/their] authorised [signatory/signatories]:<sup>12</sup>**

SIGNED for and on behalf of [**name of party**]

Date:

Name:

Position: [**Director/Duly Authorised Signatory (Officer of [name of party])**]

SIGNED for and on behalf of [**name of party 2**]<sup>13</sup>

Date:

Name:

Position: [**Director/Duly Authorised Signatory (Officer of [name of party 2])**]

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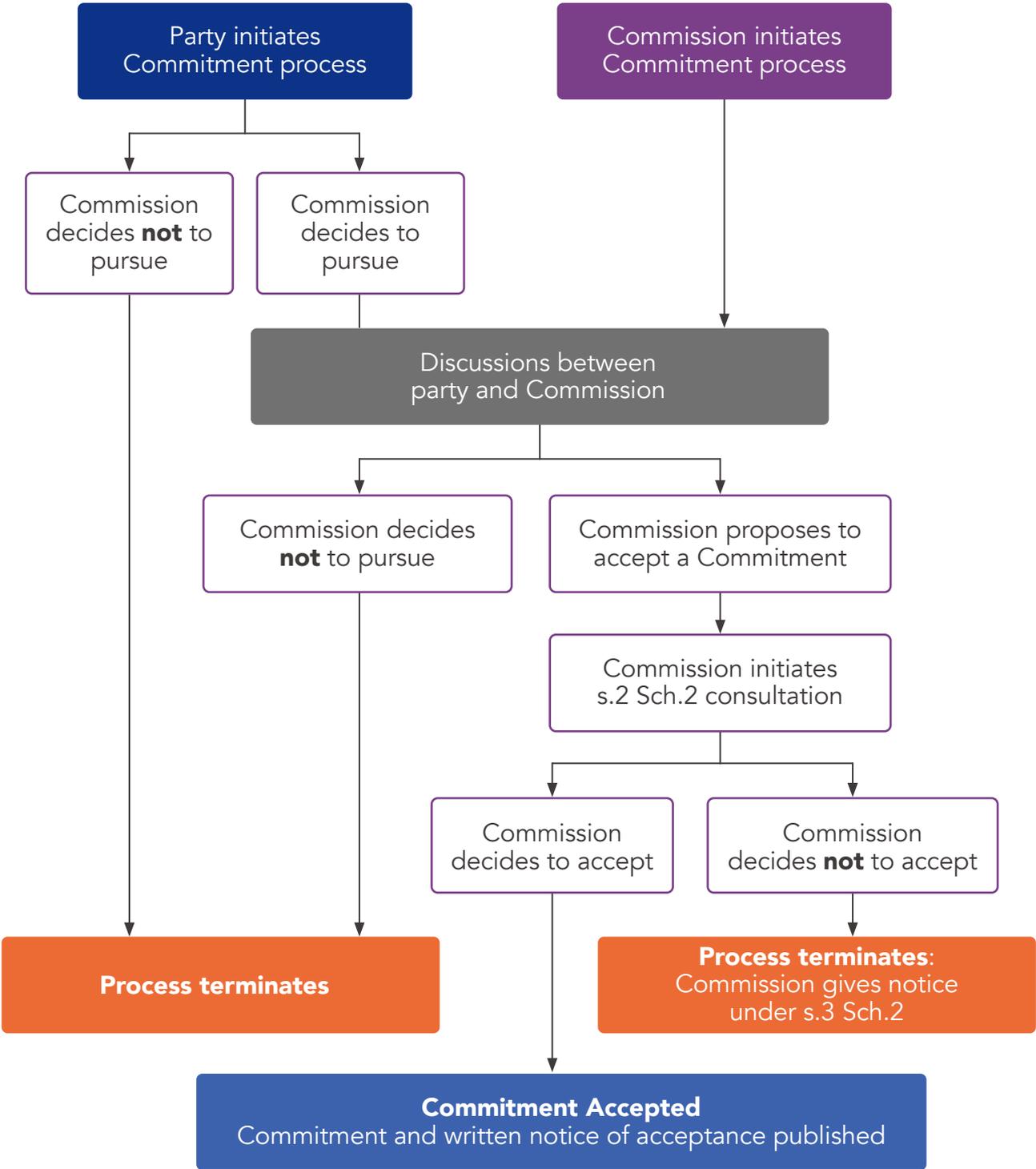
<sup>12</sup> The signature blocks which follow should be adjusted depending on the specific formalities required for execution.

<sup>13</sup> To be included where the Commitment is being made by more than one party.



# Annex B

## Simplified flowchart of Commitment process





競爭事務委員會  
COMPETITION  
COMMISSION

19/F, South Island Place,  
8 Wong Chuk Hang Road,  
Wong Chuk Hang, HONG KONG