

10 November 2021

For Immediate Release

Competition Commission publishes Policy on Section 60 Commitments

The Competition Commission (Commission) today published a policy on commitments under section 60 (Commitments) of the Competition Ordinance (Ordinance) which sets out the Commission's practice and procedure in respect of such Commitments (Policy).

Under section 60 of the Ordinance, the Commission may accept a Commitment from a party 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.¹ If the Commission accepts a Commitment, it will not commence or continue any investigation or proceedings before the Competition Tribunal (Tribunal) regarding the matters addressed by the Commitment.

Appropriateness of a Commitment as a remedy

The Ordinance provides a range of remedies which the Commission can seek to address its concerns about a possible contravention of the competition rules. These include accepting Commitments, issuing Warning Notices or Infringement Notices and instituting proceedings before the Tribunal to seek appropriate orders and sanctions.

The Policy clarifies that, when deciding whether a Commitment is an appropriate remedy and whether a proposed Commitment is appropriate to address its competition concerns, the Commission will consider the following factors:

- i) ***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. For example, the Commission is very unlikely to accept a Commitment in cartel cases.
- ii) ***Ability to address competition concerns.*** 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.
- iii) ***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.
- iv) ***Severity Factors & Remedial Goals.*** The Commission will consider whether there are Severity Factors present which would militate against the appropriateness of a Commitment

¹ The competition rules comprise the first conduct rule, the second conduct rule and the merger rule in the Ordinance. The Policy applies with respect to Commitments regarding possible contraventions of the first conduct rule and the second conduct rule only.

in the circumstances of the case. A Commitment should also address the Commission's Remedial Goals, to the extent that they are applicable.²

- v) **Good faith.** The Commission may take into account the apparent good faith of the party offering the Commitment.
- vi) **Timing considerations.** The Commission is unlikely to accept a Commitment before it has gathered sufficient information to exercise its discretion to do so and/or where a matter is very advanced.

The Commitment process and content

The Policy illustrates the key steps in the Commitment process, including the initiation of the process either by the Commission or the parties concerned, consultation on a proposed Commitment as well as matters following the acceptance of the Commitment. The Policy also provides a non-exhaustive list of the types of substantive Commitments. It clarifies that the Commission will usually be willing to accept a Commitment which does not contain an admission of a contravention, but it will generally not accept statements seeking to minimise the seriousness of the conduct.

To facilitate understanding of the process, the Policy includes a flowchart setting out the key steps as well as a template Commitment.

Failure to comply with a Commitment

Where a party has failed to comply with a Commitment, the Commission may withdraw acceptance of the Commitment and/or apply to the Tribunal for orders in section 63 of the Ordinance.³ If acceptance of a Commitment is withdrawn, the Commission may then commence an investigation or bring proceedings in the Tribunal with respect to the alleged contraventions that have occurred after the withdrawal.

Mr. Rasul Butt, Chief Executive Officer of the Commission, said, "In addition to bringing cases to court, it is important, and at times more efficient, to resolve competition issues through the use of Commitments where appropriate. This would save the Commission and relevant parties the time and costs associated with further investigation or proceedings before the Tribunal, while rectifying business misconduct effectively.

Last year, the Commission accepted Commitments from several leading online travel agencies to remove wide parity clauses in their contracts with hotels, and from the Hong Kong Seaport Alliance to maintain pricing and service levels for certain services, benefitting consumers, relevant stakeholders and industries as a whole. With the publication of the Policy on Commitments today, we believe the legal and business communities will benefit from the clarity and guidance provided on how the process works."

The Policy is available on the Commission's website at www.compcomm.hk.

² See the Commission's Enforcement Policy, paragraph 3.12 and 3.13.

³ Under such orders, the party 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 other orders it considers appropriate.