

APRIL:**Business Cooperation during COVID-19 Crisis
and Competition Law****Covid-19 & MCO in Malaysia**

As the novel coronavirus disease (“**COVID-19**”) spread across nations, many countries have imposed drastic measures including declaring state of emergency, locking down their countries and shutting down or limiting movement of their people and operations of non-essential sectors and industries.

At the time of writing, the Malaysian government has shut down all government and private businesses except for essential services like food and healthcare until 14 April 2020.

Business cooperation during Covid-19 may raise competition issues

In Malaysia, small and medium enterprises (SMEs), which contribute more than two thirds of the country’s employment and approximately 40 percent of the economy are suffering the brunt of the MCO. SMEs generally have poorer access to capital markets, financial resources, limited cost savings advantage, enjoy less favorable trading conditions and do not benefit from economies of scale.

In times of crisis, it is tempting for businesses to collaborate with competitors to share information and resources. To maintain a certain profit margin, businesses may fix prices, control market outlets or production or attempt to partner with other like businesses to allocate supply and distribution to territories.

Further, as businesses reach out to their associations or representatives to lobby for aid and incentives the frequency of contact increases the risk of sharing of sensitive data which may lead to anti-competitive conducts.

Some businesses may seek to take advantage of the crisis by engaging in anti-competitive behavior, for example:

- Collusion between competitors on price and other supply terms
- Collusion between competitors to limit production or supply
- Sharing of competitively sensitive information
- Excessive pricing by dominant enterprise
- Refusal to supply by dominant enterprise

Businesses should bear in mind that Section 4(1) of the Malaysian Competition Act 2010 (“CA 2010”) prohibits agreements which may impede competition, for example, price fixing, sharing market or supply, or limiting or controlling production or market access.

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Certain businesses may also acquire market power and emerge as a dominant player. Section 10 of the CA 2010 prohibits conduct amounting to abuse of a dominant position in any market for goods or service. Such conduct includes imposing excessive pricing, unfair trading conditions or limiting or controlling market outlet or market access to the prejudice of consumers. As a rule of thumb, dominant enterprises should always tread with caution with regard to their market conduct.

Other businesses may be forced to restructure their businesses or venture into other areas to outlast the impending economic recession. Although CA 2010 does not contain merger control provisions, any gun-jumping market sharing between merging competitors could still be a problem under competition law.

Foreign competition authorities' response to business cooperation during Covid-19

Having said that, the current extraordinary situation may trigger the need for certain types of business cooperation to ensure uninterrupted supply and fair distribution of essential products and services to all consumers.

In some jurisdictions, competition authorities have been conscious of concerns that competition law enforcement could impede necessary cooperation to ensure security of supplies of essentials. In response, they have implemented measures to balance the need to uphold competition laws as well as to protect consumers and businesses. These responses are timely to give legal certainty to businesses on the types of cooperation which are allowed under competition law:

Jurisdiction	Response
Europe	<p>The European Competition Network (ECN):</p> <ul style="list-style-type: none"> • recognizes the pandemic may trigger the need for companies to cooperate to ensure supply and fair distribution of scarce products to all consumers · will not actively intervene against necessary temporary measures as they would either not amount to a restriction of competition or may generate efficiencies likely to outweigh any potential anti-competitive effects arising from such measures • will act against companies taking advantage of the situation by cartelising or abusing their dominant position
United Kingdom	<p>The UK Competition and Markets Authority (UKCMA):</p> <ul style="list-style-type: none"> • temporarily relaxed competition rules to allow food stores to work together during COVID-19. For example, the authorities allowed supermarkets to cooperate to keep shops open, share distribution depots and logistics, as well as share staff to meet demand and share data with each other on stock levels • issued a policy document to outline the focus and priorities of the UKCMA and how it will apply the criteria for exemption from competition law prohibitions and restrictions in light of COVID-19 • will not take enforcement against temporary measures to coordinate action taken by businesses which are: appropriate and necessary to avoid shortage or ensure security of supply, in public interest, contributes to consumer wellbeing, deals with critical issues arising as a result of COVID-19 and lasts no longer than necessary • warned against exploitative businesses which use the crisis as a cover for non-essential collusion <p>The UKCMA also highlights that manufacturers may also take steps to help combat excessive pricing by setting maximum retail prices if they satisfy the stipulated provisos.</p>

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Jurisdiction	Response
Norway	<p>In March 2020, the Norwegian trade minister announced a three-month exemption from competition laws for two Norwegian airlines who have been hard hit to allow them to cooperate and co-ordinate their schedules to continue delivering critical service during the crisis.</p>
Germany	<p>The Germany Bundeswettbewerbbehörde (Federal Competition Authority) (“BWB”):</p> <ul style="list-style-type: none"> ● allowed cooperation in connection with COVID-19 provided they are undertaken to the extent necessary ● will investigate any suspicion of excessive prices, artificial supply shortages, cartel agreements or other abusive behavior in relation to health protection products like masks, disinfectants and protective clothing
New Zealand	<p>The New Zealand Commerce Commission</p> <ul style="list-style-type: none"> ● will not enforce competition laws against businesses who are cooperating to ensure uninterrupted supply essential goods and services during COVID- 19 (for example, sharing staff or distribution networks between competitors) ● expressed intolerance for unscrupulous businesses using COVID-19 as an excuse for non-essential collusion or anti-competitive behaviour, for instance, sharing of information on pricing or strategy where it is not necessary under the current circumstances
United States	<p>The Antitrust Division of the Department of Justice (DoJ) and the Bureau of Competition of the Federal Trade Commission (FTC):</p> <ul style="list-style-type: none"> ● stated that the DoJ Antitrust Division’s business review and FTC’s advisory opinion channels remain open ● provided illustrations of collaborative activities allowed. For example, the agencies would generally: <ul style="list-style-type: none"> ■ not challenge providers’ development of suggested practice parameters – standards for patient management developed to assist providers in clinical decision making ■ not challenge joint purchasing arrangements among healthcare providers designed to increase the efficiency of procurement and reduce transaction costs ■ permit private lobbying addressed to the use of federal emergency authority, including private industry meetings with the federal government to discuss strategies on responding to COVID-19

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Competition law continues to apply in Malaysia

Unlike other jurisdictions, the competition regulators in Malaysia have not indicated that rules will be relaxed to assist businesses to minimise the impact of COVID-19. Given that, ‘crisis cartels’, as the collaborations amongst competitors are termed, must be approached with caution.

Under Section 5 of the CA 2010, one can apply for an exemption from the application of section 4 from the MyCC. However, it is questionable whether the exemption can be processed timely to give definitive guidance to businesses.

In the absence of any relaxation or stop gap measures by the Malaysian Competition Commission (MyCC), businesses will be mindful that local competition laws and guidelines continue to be in force.

Businesses who are compelled to collaborate to ensure uninterrupted supply of essential goods and services during MCO may be deterred from doing so due to the letters of the law. Given that, we think it will reduce legal uncertainty if MyCC is able to assure businesses that competition law will not inhibit cooperation deemed necessary to ensure continued supply of essentials during the MCO.

Concluding Remarks

In a crisis like COVID-19, one may be tempted to think that normal rules no longer apply. This is a mistake. The virus cannot be an excuse for breaching the law even if there are COVID-19 related reasons for the conduct. Like competition regulators in other jurisdictions, it is expected that MyCC will continue to scrutinize businesses on their response to the virus and monitor potential infringements and anti-competitive behavior.

Businesses should always consider competition law issues when planning any collaborative efforts with their competitors or other partners.

If you have any questions or require any further information regarding these or other related matters, please contact us.



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