(This is part 1 of a 2-part COVID-19 series. Part 2 of this series is titled 'COVID-19 and Crisis Cartels – Can cartels be good for recovery?')

COVID-19 AND COMPETITION LAW RISKS

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The COVID-19 crisis, coupled with the Movement Control Order (MCO), has without a doubt led to severe day-to-day business disruptions and ultimately, significant financial challenges for firms. Despite having to tread these unchartered waters **firms should understand that competition law continues to apply**. The competition authorities are on the lookout for firms seeking to exploit the uncertainty surrounding the current crisis to the detriment of consumers.

Firms providing essential products and services may see a sudden surge in demand for these products and services. This would in turn enable them to exploit the sudden advantageous position that they now find themselves in by increasing the price of goods far beyond competitive prices (e.g. face-masks and hand sanitisers).

On the other hand, the converse scenario is also likely: many firms will undoubtedly be experiencing significant losses and more pertinently, significant uncertainty, in the current economic climate given the sharp decline in consumer spending for non-essential goods and services. It is thus not inconceivable that many firms would seek to coordinate with their competitors in responding to the current crisis. As this article will show, whether well-intentioned or not, such coordination can fall foul of competition law.

Part 1 of this 2-part COVID-19 series seeks to highlight some of the competition law concerns that may arise, in the context of the current crisis, in two broad areas: excessive pricing and coordination.

Part 2 is a call for action by the government to consider 'crisis cartels' as a temporary policy option for governments to establish several crises related objectives (e.g. stemming job losses) and to provide greater flexibility for firms to tackle specific crisis era problems.

Excessive pricing and other market abuses

The surge in demand for certain goods and services and disruptions in supply chains due to the COVID-19 pandemic provides ample scope for opportunistic sellers to exploit this situation by marking up prices far beyond what is considered fair or reasonable, i.e. *price gouging*. Instances of price gouging in the current pandemic are particularly apparent in certain sectors:

- **Manufacture and supply of medical equipment** – rising demand of essential products such as hand sanitisers, face masks and other hygienic products have provided an avenue for firms in these sectors to charge high prices for these products.

- **Food retail** – increased reports of panic buying not just in Malaysia, but around the world, have made it possible for food retailers to charge higher than normal competitive prices.

Price gouging may trigger the prohibition of excessive pricing under the Competition Act 2010 (CA 2010).

Another type of market abuse likely to occur during this crisis is *tying and bundling*. Given the drastic decline in consumer demand, firms may feel pressured to sell off excess inventory of non-essential products by tying these products with those that are in high demand.

It should be noted, however, that these abuses constitute an infringement of competition law where a firm holds a dominant position in the relevant market.[1]

More reliance on consumer protection laws?

Even if competition law does not apply, firms may still be liable for their pricing practices under consumer protection laws. Indeed, domestic and foreign consumer and competition authorities are increasingly reliant on consumer protection laws, as opposed to competition law, to curb the practice of price gouging. This may be because the enforcement of consumer protection laws is far less time consuming and resource-intensive than competition law enforcement.

In Malaysia, we have seen recourse to consumer protection laws being made during the crisis. The Ministry of Domestic Trade and Consumer Affairs (MDTCA) has recently issued fines under the Price Control and Anti-Profiteering Act 2011 against more than a dozen premises for selling face masks above the permitted price[2] and have imposed price controls by setting ceiling prices for face masks.

Similarly, in the international scene, authorities have relied heavily on consumer protection laws in tackling price-gouging:

- The Beijing municipal market regulator has imposed fines of up to 3 million yuan against drugstores and pharmacies for hiking up the price of face masks amid the COVID-19 outbreak.[3]

- Some countries, such as France, have imposed price controls such as capping the price of hand sanitisers.[4]

- Japan has banned price-gouging on the resale of face masks and have warned that a hefty fine may be imposed on businesses guilty of reselling face masks for a profit.[5]

No place for competition law?

Does this then mean that competition law has no role to play in curbing market abuses that are prone to occur in the current crisis? Not necessarily. As mentioned above, firms that hold a dominant position in the market can still fall foul if they participate in price-gouging (or more accurately, excessive pricing) and other market abuses.

In assessing dominance, the Malaysia Competition Commission (MyCC) may also adopt an aggressive approach by defining markets narrowly. Indeed, the restriction on the movement of consumers as a result of the MCO may provide the MyCC the impetus to define a geographic market narrowly by confining it to a particular city, town or suburb.

Further, while the MyCC has not made any enforcement decisions under the CA 2010 in relation to abusive conduct during the crisis, we have seen competition authorities in other jurisdictions take action via the competition law route:

- The Korea Fair Trade Commission have launched investigations into suspected price fixing and other unfair acts by distribution of mask filter fabrics.[6]

- The Japan Fair Trade Commission have issued warnings to drug store chain operators engaging in the bundling of face masks with expensive products.[7]

I. ‘Crisis cartels’ and collaboration among competitors

‘Crisis cartels’, as the name implies, are cartels formed during and as a result of an economic crisis. Broadly speaking, there are two types of crisis cartels. The first is a cartel between private firms that has not been approved by a government. The formation of such a crisis cartel during the COVID-19 pandemic may appear to be an attractive option for many firms in responding to the widescale decline in consumer demand and disruption to supply chains. For example, firms in many industries such as the tourism or airline industry will undoubtedly be facing a huge drop in consumer demand. Coordinating with one another during these perilous times (e.g. by restricting output) may appear to be a necessary option to prevent the collapse of whole swathes of firms in that industry. It may also help to prevent or reduce widescale employment losses.

Nonetheless, firms need to recognise that a crisis cartel, no matter how well-intentioned, is still a cartel. There has never been an automatic exception under competition law for crisis

cartels of this kind. Rather, any agreement between a firm and its competitors, even in responding to the current pandemic, must either:

- Satisfy the conditions for relief under section 5 of the CA 2010; or

- Be excluded from the application of the CA 2010 by the Minister of the MDTCA in accordance with section 13 of the CA 2010.

The second kind of crisis cartels relates to agreements between firms that have been sanctioned by the government or a government body. A recent example of this can be seen in both the United Kingdom and Australia where food retailers have been permitted to collaborate by sharing data on stock levels and distribution depots and vans.[8] This was done to ensure security of supply of essential provisions for consumers during this pandemic. It is not difficult to see the utility of this kind of coordination.

Firms may also want to collaborate to expedite the production of products to combat the pandemic. A recent example of this can be seen in the agreement between pharmaceutical companies BioNTech and Pfizer to produce vaccines for COVID-19.[9] Closer to home, manufacturers and suppliers of medical equipment such as ventilators and face masks may potentially consider collaborating with one another to ensure a sufficient supply of such equipment to combat the COVID-19 crisis. Collaborations of this kind are usually seen as pro-competitive as they have consumer welfare enhancing benefits. Many competition law regimes around the world thus allow collaborative efforts of this kind.

Yet, firms must still be cognisant of the fact that mere encouragement by a government body (albeit in a bid to protect consumers and deal with the uncertainty around demand and supply) to participate in such coordination will not be sufficient to discharge firms of their liability under competition law. Firms should at the very least take legal advice on whether an exemption is required or perform an assessment against the conditions for relief under section 5 of the CA 2010 to ensure that the coordination goes no further than what can reasonably be considered necessary to:

- avoid a shortage or ensure security of supply;
- ensure a fair distribution of scarce products;
- continue essential services; or
- provide new services such as food delivery to vulnerable consumers.

What will not be tolerated, for example, is any opportunistic behaviour to use the crisis to share commercially sensitive information on future pricing or business strategies (where this is not necessary to meet the needs of the current situation), fix prices (to mitigate the commercial consequences of a fall in demand), exclude smaller rivals from any efforts to cooperate or

collaborate in order to achieve security of supply or denying rivals access to supplies or services.

Key takeaways

Competition law will not take a backseat during this crisis. Firms that hold a dominant position in a market, particularly in sectors experiencing a surge in demand, such as the food retail and medical equipment sector will need to be careful that their pricing practices are not excessive. Even where competition law does not apply, firms involved in price hiking may be caught under consumer protections laws and as it stands, this appears to be the preferred route of enforcement for authorities worldwide.

Coordination among firms, even in this period of heightened economic distress and uncertainty, remain potentially in breach of competition rules. The authorities will be on the look-out for opportunistic behaviour arising from the crisis that causes consumer detriment.
In this respect, there is certainly room for both the MyCC and the Malaysian government to assist firms in dealing with the challenges posed by the unprecedented nature of this crisis by speeding up the process for exemptions or granting outright exemptions where supply of essential goods and services are under threat, which is the subject of *Part 2: COVID-19 & Crisis Cartels – Can cartels be good for recovery?*

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[1] Generally speaking, a market share above 60% is indicative that a firm is dominant but this is not in itself conclusive of dominance.
[2] https://www.malaysiakini.com/news/510487
[3] https://www.reuters.com/article/us-china-health-masks/beijing-drugstore-fined-for-hiking-mask-prices-amid-virus-outbreak-idUSKBN1ZS07I
[4] https://www.politico.eu/article/france-slaps-price-controls-on-hand-sanitizer/
[5] https://english.kyodonews.net/news/2020/03/40cf1f3531e8-mask-resellers-could-face-1-year-in-prison-hefty-fine-under-new-ban.html
[6] https://en.yna.co.kr/view/AEN20200311008651315
[7] https://www.japantimes.co.jp/news/2020/02/28/business/face-masks-online-auctions/#.Xn2r_9IzZPY
[8] https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation; https://www.accc.gov.au/media-release/supermarkets-to-work-together-to-ensure-grocery-supply
[9] https://www.reuters.com/article/us-health-coronavirus-pfizer-biontech/pfizer-biontech-to-co-develop-potential-coronavirus-vaccine-idUSKBN2140LM