

(This is part 2 of a 2-part COVID-19 series. Part 1 of this series is titled 'COVID-19 and Competition Law Risks')

COVID-19 AND CRISIS CARTELS

Can cartels be good for recovery?

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The fact that this question is being asked may come as a surprise to those who have witnessed stringent anti-cartel enforcement since the inception of the Competition Act 2010 (CA 2010).

However, in light of the pronounced global downturn brought on by the COVID-19 pandemic and the prospect of high levels of unemployment, potential social instability and low or volatile levels of demand, should the government facilitate the formation of crisis cartels by distressed firms as a temporary measure to weather the crisis?

Where governments do not have the capacity and resources to fully support alternative public policy measures to improve market outcomes (such as subsidisation), crisis cartels could be an additional or alternative strategy to aid firms and sectors in distress.¹

Meaning of Crisis Cartels

Crisis cartels, as the term implies, is used broadly to describe collaborations or joint actions taken by competitors during and as a result of an economic crisis. It describes two scenarios:

- Crisis related collaborations between private sector firms, not approved by the state, that restrict competition (including agreements that fix prices, set quantities, set market shares, limit production, rig bids and even share competitive data). These are illegal under the CA 2010.²
- Cartels that are enforced or directed by the state (or exempted by the relevant competition authority). These are beyond the reach of antitrust enforcement.

Motivations behind Crisis Cartel

Essential sectors

In essential sectors such as health, medical supplies and banking, the motives for coordination between competitors presently relate to alleviating shortages and ensuring continuity of supply of essential goods and services. As the measures may involve exchanges of information (e.g., sales data, capacity data, demand data for rationing purposes), sharing of distribution networks and pooling of staff, these (while well-intentioned), are likely to be illegal as it decreases the incentives to compete and reduces the parties' decision-making independence.

It would make sense for governments to give outright waivers for these types of coordinated behaviour for the period of the pandemic, for they are unlikely to be problematic. Even if they amounted to a restriction of competition, they generate efficiencies that would most likely outweigh any such restriction. It is noteworthy that -

- The United Kingdom (UK) government has formally waived the Competition Act 1998 for a limited period for supermarket retailers to allow sharing of data on stock levels, collaboration to keep shops open, or sharing of distribution depots.³
- The Norwegian government has granted the transportation sector a three-month temporary exemption from the prohibition against anticompetitive agreements⁴ making it possible, for example, for airlines SAS and Norwegian to coordinate their schedules to maintain minimum services for citizens during the COVID-19 outbreak.⁵

Other sectors

It is likely that proposals for coordination or joint action will not be limited to just the essential sectors. For one, non-essential sectors are the hardest hit by the Movement Control Order⁶, in not being able to operate optimally. While more controversial, historically governments during crisis times have put in place processes for evaluation of joint action to enforce price fixing and capacity reduction agreements (such as during the East Asian Financial Crisis, Great Depression in the United States and even the 1980s recession in the European Union⁷). To filter out opportunistic behaviour, tests or rules were put in place - for example joint action to limit price cuts or stem output were permitted only where conditions in the market had driven market prices below average production cost.⁸

These types of cartels are sometimes referred to as depression cartels, recession cartels or restructuring cartels.

It is possible to discern a set of common motivations behind these crisis cartels. They –

- Facilitate closure of excess capacity;
- Facilitate rationalisation of input shortage such as fuel and/or spare parts;
- Limit or avoid employment losses;
- Stabilise prices particularly in products and services that are exposed to high income elasticity of demand;
- Protect domestic firms from international competition likely to drive these firms out of the market.

The OECD Report on Crisis Cartels (2011)⁹ suggests that a policy towards crisis cartels could be justified in one of the following ways:

- The policy raises total welfare standards (both producer welfare and consumer welfare) **more than any other policy embarked upon** (for example if the issue faced by the industry is a liquidity crunch, a crisis cartel here would not be an efficient policy as it takes time to affect prices, sales and revenues of cartel members);
- The policy attains a numerical target with a chosen non-economic objective at a lower cost than any other alternative policy considered (e.g. a policy that ensures that employment losses are no more than 5%).

Antitrust purists would argue that there is nothing different between a cartel and a crisis cartel - both raise prices above incremental costs, limit output and distort market outcomes away from efficient outcomes, and so harm consumers.

Yet the exemption provision for cartels in the CA 2010¹⁰ appears to accommodate interests other than consumer interests. Social benefits (such as stemming job losses) is a ground for exemption as much as efficiency considerations are. While the scope for social policy considerations is presently untested, the current climate will put pressure on competition authorities to accommodate such considerations when evaluating the types of benefits capable of offsetting the anti-competitive effects of any crisis cartel pursued.

These tensions exist even in the European Union where competition agencies tend to consider economic efficiencies as only capable of offsetting competitive harm and not industrial or social policy considerations. Businesses are said to be applying pressure on competition agencies to take into account the economic context and to be more accommodating of restrictions on competition that could ensure their survival in recessionary times.¹¹ To quote from a research paper on this subject, “[T]hey [the competition agencies] are also faced with the uncomfortable knowledge that every failing business will further increase the number of unemployed, with tangible consequences for the general standard of living and additional knock-on effects on public spending.”¹²

Routes for Exemptions

The crisis calls for swift measures by the government or competition authorities to get competition law out of the way. They include -

- **Outright waivers or exemptions** on a pro-active basis to firms needing to coordinate to secure the availability of essential goods and services where there is high demand – e.g. food and medical supplies or bank collaborations to fund distressed SMEs. The routes available in the CA 2010 (i.e. Ministerial Order or a block exemption) require a 30-day public notice period for submissions to be made by members of the public, as

well as the requirement to give due consideration to the comments received.¹³ While this offers broader accommodation to a sector, it does not offer swift reprieve from the CA 2010.

- **Expedited exemption approvals** (individual/block exemptions) upon application by firms from all sectors including collaborations to establish and enforce the rules relating to prices and output. This route appears to be *sans* the need for public notice and therefore offers speedier timelines for approvals, as the following antitrust authorities have done:
 - **Within a Week:** The U.S Department of Justice and the Federal Trade Commission have announced an expedited antitrust procedure (within seven calendar days of receiving all information necessary to vet these proposals) for COVID-19 related healthcare collaborations;¹⁴
 - **Overnight Approval:** The Australian Competition and Consumer Commission (ACCC) has issued exemptions on an expedited basis to for example, the Australian Banking Association's (ABA) application on an overnight basis to permit banks to work together to implement a small business relief package.¹⁵
 - **Within 48 Hours:** The Icelandic Competition Authority (ICA) has an expedited process for granting exemptions in relation to the COVID-19 pandemic - within 48 hours of an application.¹⁶

A waiver by the MyCC of the fees for individual exemption applications of RM50,000 per application would be a welcome gesture to facilitate applications.

It is unlikely that SMEs who would be worst hit by the crisis would have the resources to navigate the process of securing exemptions. Therefore, competition authorities may wish to emulate the counterparts in the UK,¹⁷ EU and New Zealand¹⁸ **by temporarily modifying their enforcement practices and providing reassurances that good faith collaborations to share staff, distribution networks and ensure continuity of supply, are permitted.**

Conclusion

Sectors in Malaysia that could benefit from temporary flexibilities (subject to a finite timeframe and review based on a pre-specified criteria) include:

- Medical equipment – to minimise disruption in supply of medical equipment (both manufacturing and distribution);
- Hospitals – to designate hospitals to undertake testing and those for critical care facilities;

- Food Supplies – to share data on stock levels, collaboration to keep shops open, or share distribution depots and delivery vans;
- Airlines – to facilitate rationalisation of routes in the face of low demand;
- Hotels – to reduce capacity (e.g. days open for business) to meet low demand given travel restrictions;
- Banking – collaborations to spread risk and offer broader funding to SMEs;
- Building materials – collaborations to ensure closure of excess supply and access to inputs such as spare parts/fuel to maintain operations.

These examples provide strong impetus for the government and competition authorities to enhance and expedite existing procedures to evaluate proposals for such cartels given these extraordinary times.

¹ See OECD Global Forum on Competition, Background Paper on Crisis Cartels, February 2011 DAF/COMP/GF (2011)11 which discusses the view held by some development economists that it is an option for developing countries with fewer public policy instruments effectively available to them during downturns.

² Any agreement that has the object or effect of preventing, restricting or distorting competition is prohibited under Section 4(1) of the CA 2010. Section 4(2) of the CA 2010 deems illegal agreements between competitor firms to for example, fix prices, set quantities, set market shares (determine market allocation), limit production or rig bids i.e. cartels.

³ <https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation>

⁴ <https://konkurransetilsynet.no/transportation-sector-is-granted-temporary-exception-from-the-competition-act/?lang=en>

⁵ <https://www.regjeringen.no/no/aktuelt/flyselskapene-gis-klarsignal-til-a-samarbeide/id2693957/>

⁶ Malaysia Movement Control Order 2020 (Perintah Kawalan Pergerakan Malaysia 2020) refers to a cordon sanitaire implemented as a preventive measure of the federal government of Malaysia towards the 2019–20 coronavirus pandemic (COVID-19) on 18 March 2020 throughout the country pursuant to the Prevention and Control of Infectious Diseases Act 1988 and the Police Act 1967.

⁷ See for example the European Commission decision in Synthetic Fibres OJ [1984] L 207/17.

⁸ See OECD Global Forum on Competition, Background Paper on Crisis Cartels, February 2011 DAF/COMP/GF (2011)11, page 27 in relation to Chinese Taipei and measures in place up to and including the East Asian Financial Crisis.

⁹ OECD Global Forum on Competition, Background Paper on Crisis Cartels, February 2011 DAF/COMP/GF (2011)11.

¹⁰ Section 5 of the CA 2010.

¹¹ OECD, Global Forum on Competition, Background Paper on Crisis Cartels-Contribution from the European Union, 27 January 2011, DAF/COMP/GF/WD (2011)20.

¹² Anne C. Witt, Public Policy Goals Under EU Competition Law – Now is the Time to Set the House in Order, University of Leicester School of Law, Research Paper No. 14-09.

¹³ Sections 13(3) and section 9 of the CA 2010 in respect of Ministerial exclusions and block exemptions respectively.

¹⁴ <https://www.ftc.gov/news-events/press-releases/2020/03/ftc-doj-announce-expedited-antitrust-procedure>

¹⁵ <https://www.accc.gov.au/media-release/australian-banking-association-small-business-relief-package>

¹⁶ <https://en.samkeppni.is/published-content/news/covid-19>

¹⁷ <https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-covid-19/cma-approach-to-business-cooperation-in-response-to-covid-19>

¹⁸ <https://comcom.govt.nz/news-and-media/media-releases/2020/covid-19-commerce-commission-approach-to-essential-goods-and-services-business-cooperation>