



COVID-19: ANTITRUST IMPLICATIONS IN HONG KONG AND ACROSS APAC

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Introduction

The COVID-19 pandemic has brought about novel issues and challenges for businesses worldwide. In a separate [briefing](#), we analysed the key competition law considerations for businesses in the EU amidst the pandemic, such as the application of competition law to competitor collaborations. In the APAC region, antitrust authorities are also acknowledging the challenges that the pandemic brings and are making necessary adjustments to balance the need for adequate consumer protection and business assurance. In line with the EU, some competition authorities in APAC are indicating that certain collaborations between competitors necessitated by the pandemic may be authorised. There is also a shift in enforcement priorities to combat excessive pricing of critical goods and services. These developments require businesses to carefully consider and manage the competition law risks potentially associated with their business decisions while grappling with COVID-19.

Collaboration between competitors

Traditional competition law aims to protect consumers by ensuring effective competition in the market. This is often achieved with the help of legal tools such as the prohibition of anti-competitive conduct, including collusion between competitors. However, given the current situation with the COVID-19 outbreak, authorities are aware that a balancing act may be required: for instance, there might be a need for additional cooperation between

businesses on a temporary basis in order to maintain the supply of essential goods and services to consumers during this time.

On 27 March 2020, the Hong Kong Competition Commission (HKCC) issued a [statement](#) on the application of the Competition Ordinance during the COVID-19 outbreak. The HKCC stated clearly that the competition law remains effective during this time, but acknowledged that additional cooperation between competitors may be required in certain industries on a temporary basis, particularly to maintain the supply of essential goods and services to consumers. Taking a closer look at a few examples of the types of additional cooperation that might be relevant to the current situation:

- **Joint buying:** Generally, competition concerns are unlikely if the parties do not have market power in the relevant downstream markets. However, if there is market power and the joint buying results in a high degree of commonality of costs between the competitors in the downstream market, a proper assessment is advised to see if the joint buying could facilitate the coordination of retail/output prices.
- **Joint production agreements:** Competition concerns are unlikely where the agreement allows parties to produce a product that they would not, objectively, be able to produce alone. However, in the course of making such agreements, businesses should be mindful not to engage in price-fixing or output limitation

practices, which are generally considered to have the object of harming competition.

- **Sales-related joint ventures:** Competition concerns are unlikely if the joint venture is objectively necessary for a party to enter a market it could not have entered on its own or with a smaller number of parties than those actually involved in the joint ventures. Similarly, businesses should be vigilant in avoiding any price-fixing, output restriction or market sharing conduct.
- **Exchange of information.** Only the exchange of competitively sensitive information is problematic. Generally, businesses may share information on matters such as best practices or publicly available information. From a practical perspective, it is good practice for businesses to keep a proper record of what was discussed and the objective reasons for needing to exchange the relevant information during the COVID-19 situation. Extra care should be taken if the information is related to prices and quantities, and businesses should seek legal advice if necessary.

The HKCC also proposed an informal engagement process for businesses which intend to adopt temporary cooperative measures genuinely necessitated by the COVID-19 outbreak. This provides a forum for businesses to discuss how the HKCC considers the Competition Ordinance to apply to the proposed measures and explain why they are necessary in light of current circumstances.

However, as the HKCC clearly warned in its statement, this should not be considered a licence for businesses to ignore competition law or to take advantage of the current situation. The HKCC continues to operate to enforce the relevant laws, which remain in full effect during the outbreak. Hence businesses should continue to be aware of, and comply with, the relevant competition laws.

In other parts of the APAC region, antitrust authorities are adopting a similar approach. The Australian Competition and Consumer Commission (ACCC) has granted interim authorisations to competitor collaborations across various sectors on an interim basis, including [regional airlines](#), [banks](#), [supermarket operators](#), [suppliers of medical equipment](#), [medicine wholesalers](#) and [telecommunications companies](#). The ACCC is now seeking feedback on these interim authorisations, and will continue to actively engage with governments and businesses about further authorisations that support coordination between competitors necessary and in public interest at this time. Similar to the informal engagement offered in Hong Kong, the ACCC also encourages businesses and industry groups to contact the authority if they intend to adopt such cooperative measures and will endeavour to progress such enquiries very quickly.

In New Zealand, the government has also [urged](#) the antitrust agency to take into account the exceptional circumstances arising from COVID-19 and adopt a more flexible approach to enforcement, especially against collaborations between sectors such as supermarkets and telecommunications.

Excessive pricing and restriction of supply of critical products

Apart from competitor collaborations, many antitrust authorities (which often also have a consumer protection remit) in the APAC region are prioritising the monitoring of household essentials in high demand and excessive pricing practices amidst the outbreak. Authorities have made clear that they will remain vigilant to protect consumers from anti-competitive conduct by businesses seeking to take advantage of the pandemic or using the pandemic to justify improper practices.

Generally speaking, businesses are free to determine the prices of their products in response to changing market conditions. For example, if there is an increase in input costs due to COVID-19, then businesses can generally raise their prices to remain profitable. However, under the current circumstances, an excessive price increase of certain products may be considered improper, especially if the product concerned is a daily necessity or is essential for pandemic control/prevention. Whilst this is not necessarily a problem under all the different competition laws in the APAC region, businesses are reminded to take extra care when making pricing and distribution decisions, and to consider not only competition laws but also the relevant guidance that authorities may have issued in response to COVID-19 and any relevant consumer protection laws.

For instance, the State Administration for Market Regulation (**SAMR**) in China has reportedly launched various investigations and issued penalties against businesses that sold supplies (such as facemasks and sanitisers) at prices significantly above their normal retail price. SAMR also published further [guidance](#) (in Chinese) on what may constitute illegal practices during the outbreak and possible consequences. An example is hoarding or restricting the supply of household essentials and epidemic prevention goods.

Similarly, the ACCC [indicated](#) that it has set up an internal COVID-19 Taskforce and will re-focus its enforcement efforts to issues arising from the impact of COVID-19, such as price gouging. The Philippines government also reportedly set up a taskforce to monitor prices of basic goods and agri-fishery products during the enhanced community quarantine period. On the other hand, the Korean Fair Trade

Commission (**KFTC**) performed raids on several pharmaceutical firms and consumer goods sellers earlier this month for alleged bundling of face masks with other products.

Impact on merger control process

In relation to merger control, COVID-19 is having an impact on the timing of merger reviews by some competition authorities in the APAC region. Authorities in the [Philippines](#), [Indonesia](#) (in Indonesian) and [India](#) have announced work restrictions following the outbreak, including delaying hearings or suspending merger filings.

However, unlike in the EU and UK, there has been relatively limited impact on merger reviews in much of the APAC region. In China, SAMR continues to accept merger notifications and cases under the simplified procedure are proceeding according to usual timelines. The main reason for potential delays is the need to seek third party feedback, which is why the simplified procedure is more or less unaffected. There has also been minimum disruption to the merger review processes in Japan and Taiwan, as merger filings are reportedly accepted and reviewed as per usual.

Given the uncertainties surrounding how the COVID-19 situation will further develop, businesses are encouraged to plan ahead for their transactions, for example by formulating contingency plans and factoring in more time for merger reviews to be completed.

We continue to advise a number of our clients on what these assurances mean for the practical solutions they are exploring. Please get in touch with your usual Slaughter and May contact or the authors below if you need any further guidance or support in this regard.

If you would like further information about the impact of COVID-19 on your business, please speak to your usual Slaughter and May contact.



Natalie Yeung
Partner

T +86 10 5965 0601 / +852 2901 7275
E natalie.yeung@slaughterandmay.com



Katie Cheung
Associate

T: +86 10 5965 0605 / +852 2901 7324
E: katie.cheung@slaughterandmay.com