

COVID-19 and its impact on Asian competition/ consumer laws

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Top 5 things businesses need to know

INTRODUCTION

Competition and consumer protection laws in Asia do not generally contain “force majeure” or “public health” exceptions which permit businesses to undertake conduct which would otherwise be deemed as anti-competitive. So far, none of the competition and consumer protection law authorities in Asia have indicated that rules will be relaxed to assist businesses to minimise the impact of COVID-19. Businesses therefore need to continue to be aware of, and comply with (and in most cases, be even more attentive to), competition and consumer laws and issues in Asia during the COVID-19 pandemic.

To assist businesses with distilling competition and consumer issues, we have outlined the top 5 things to note about Asian competition/consumer laws in light of COVID-19.

ASIAN COMPETITION AUTHORITIES ARE FOCUSED ON EXCESSIVE PRICING

Given high demands and shortages of “COVID-19 essentials” including masks, hand sanitizers, toilet paper and other household products, an overwhelming number of “price gouging” (ie, where retailers take advantage of spikes in demand by charging exorbitant prices for necessities) complaints have been received by competition authorities in Asia. This has prompted the competition authorities to monitor these markets very closely for anticompetitive conduct. For instance:

- **Taiwan:** the Taiwan Fair Trade Commission has published a notice warning businesses that anticompetitive agreements to hoard or manipulate the price of masks will be severely punished and parties could be subject to criminal prosecution; and
- **South Korea:** a taskforce has been set up consisting of the Korean Fair Trade Commission and other government agencies specifically to monitor the markets for masks, hand sanitisers and other household essentials.

In addition, many Asian jurisdictions have either imposed price ceilings or have enacted specific legislation to deal with price gouging conduct, including:

- **China:** the State Administration for Market Regulation has implemented strict pricing rules on mask and medical protective gear manufacturers along with suppliers of major inputs to these manufacturers (eg, suppliers of raw materials);
- **Philippines:** the local government of Manila has implemented an ordinance aimed at curbing hoarding, profiteering and cartelization (Anti-Hoarding, Profiteering and Cartel Ordinance). This ordinance prohibits, inter alia, businesses from facing closure if they increase the prices of essential items;
- **South Korea:** a new law is effective from 5 February to 30 April whereby any individual found hoarding specified products including masks, hand sanitisers and other household necessities could face a maximum prison term of 2 years or a maximum fine of KRW 50 million; and
- **Thailand:** in February, the Thai government classified hand sanitizers and surgical face masks as “controlled goods” and it has set price ceilings and is monitoring the distribution of these products closely.

Given the above, manufacturers or sellers of these products (and other household essentials) should take extra care when dealing with pricing and distribution decisions. Businesses will have to consider not only competition laws but also, in some cases, laws specifically formulated to regulate conduct during the COVID-19 pandemic.

COLLUSION BETWEEN COMPETITORS ON PRICE AND OTHER SUPPLY TERMS WILL CONTINUE TO BE “PER SE” ILLEGAL, EVEN IF THERE ARE COVID-19 RELATED REASONS FOR THE CONDUCT

Absent express authorisation by competition authorities, the following conduct between competitors, must be avoided (ie, even if there are apparently legitimate reasons for the conduct such as to assist with managing supply shortages):

- price-fixing;
- allocating customers or supply regions;
- limiting production or supply;
- bid-rigging; and
- sharing of competitively sensitive information.

A number of Asian jurisdictions (including for instance, Singapore and Hong Kong) offer businesses the option to seek formal or informal authorisation from the local competition authority in respect of proposed conduct that might otherwise risk contravening the competition law rules. For the remainder of the jurisdictions (including for instance, China), such “authorisations” are not available and instead, competition authorities encourage businesses to self-assess or seek independent legal advice.

Furthermore, a number of Asian jurisdictions have criminal cartel regimes (including Thailand and Philippines) which means that undertaking the types of conduct above could result in criminal fines and jail terms for offenders.

SOME BUSINESSES MAY ACQUIRE MARKET POWER DUE TO THE SLOWDOWN AND IF SO, MUST TREAD WITH CAUTION WITH REGARDS TO CERTAIN CONDUCT

COVID-19 has already had a severe impact on supply chains. Interruptions to the labour force, shortage of supply of products and services and the impending shutdown of businesses (especially small to medium enterprises) will cause shifts in competitive landscapes. Businesses who previously possessed market power in certain markets may no longer have market power. Conversely, others who have not possessed market power could potentially be in a stronger position. As a rule of thumb, businesses who are able to profitably raise prices above the competitive level for a sustained period without constraints from customers or suppliers are likely to possess market power. Businesses with market power would be well advised to be cautious when undertaking the following:

- charging higher than usual prices, without a clear justification based on costs;

- discriminating against customers (ie, charging different prices or applying different terms);
- refusing to supply certain customers without objective justifications; and
- making the sale of a product/sale contingent on the sale of another product/service (ie, tying or bundling).

BE AWARE OF CONSUMER PROTECTION RULES IN ASIA, PENALTIES FOR BREACH COULD BE SEVERE

Given the current focus on protecting the rights of consumers and fair trading (especially in relation to household essentials), it is important for businesses to continue to be aware of, and comply with consumer protection rules in Asia. This is including because penalties for breach could have severe consequences for businesses and individuals, including criminal sanctions. In Hong Kong, for instance, it is a criminal offence to engage in a range of unscrupulous trade practices, including false trade descriptions, misleading omissions and aggressive commercial practices.

Specifically, the following types of conduct should not be undertaken:

- misleading statements (or omissions) about their products/ services, including any statements regarding the purported scarcity of that product to encourage consumers to pay higher prices;
- making or enforcing unfair contract terms, such as excessive fees and charges hidden in the small print, seeking unreasonably to limit consumer rights or reserving an ability to unilaterally vary terms, or excessive or disproportionate default or early termination charges; and
- engaging in unconscionable conduct, such as raising prices to an excessive level or targeting vulnerable consumers, where it is not simply unfair but against conscience as judged against the norms of society (which may change in the context of a crisis).

COVID-19 WILL IMPACT ON TRANSACTION TIMELINES

Like their global counterparts, we expect that the COVID-19 spread will cause the Asian competition authorities to struggle with merger review caseloads. This will have an impact on transaction timelines.

In relation to merging parties who have already lodged their merger filings, review periods may be lengthened by competition authorities dealing with COVID-19 related issues rather than competition concerns. We understand that China's State Administration for Market Regulation has, post COVID-19, currently been clearing only 2 merger cases per day.

Asian merger regimes with filing deadlines may also be impacted by COVID-19. The Indonesian and Philippine competition authorities have announced that they will not be accepting new merger notifications and that filing deadlines have been temporarily suspended. Other authorities may follow this lead in due course.

Businesses are advised to plan ahead (including by allowing for more time for merger reviews to be complete).

Please contact the Ashurst team if we can assist in any way.

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