

COVID-19 – The Law Un-Masked: Competition and Cooperation during the COVID-19 Outbreak

In the midst of the COVID-19 outbreak, it is essential to ensure a stable supply of critical goods and services, especially face masks, sanitizing gel, toilet rolls and other basic necessities. Competition law, if understood or applied incorrectly, may become an impediment to cooperation between businesses which is necessary for ensuring security of supplies of these essential products and services. A number of competition authorities around the world have therefore issued statements on their approaches to business cooperation in response to COVID-19 to ease public concerns. Hong Kong Competition Commission (“**HKCC**”) also published its statement on the COVID-19 outbreak last Friday (available [here](#)). It is important to understand the new guidance that the HKCC has provided.

HKCC’s Guidance on Potential Relevant Arrangements

The HKCC emphasized in the statement that the following 4 types of business arrangements are unlikely to give rise to concerns under the First Conduct Rule of the Competition Ordinance, which is a competition rule that prohibits anti-competitive collusion among competitors:

- (a) Joint buying agreements, provided that parties to the agreement do not have market power in the relevant downstream markets;
- (b) Joint production agreements, without which the parties involved would not, objectively, be able to produce the product in question alone;
- (c) Sales-related joint ventures, through which businesses jointly sell, distribute or market particular products, provided 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 collaboration; and
- (d) Exchange of information on matters such as best practices or publicly available information, as opposed to “competitively sensitive information”.

The HKCC has also set up a new informal engagement process, through which businesses may ask the HKCC for its initial views informally on their proposed cooperation. Where businesses propose temporary cooperative measures which are genuinely necessitated by the COVID-19 outbreak and in the interests of Hong Kong consumers and society, they should now make use of this new mechanism so as to ensure that they would not run afoul of the Competition Ordinance.

For businesses who wish to benefit from this informal engagement process, the following steps should be taken:

- (a) **BEFORE** making or giving effect to the proposed cooperation, set out all available details of the proposed cooperation and an explanation of why it is necessary in light of the COVID-19 outbreak;
- (b) Contact the Commission, through a trade association or preferably a legal representative, by email at enquiry@compcomm.hk or by using the [Online Enquiry Form](#) on the HKCC's website. The term "COVID-19" should be included in the subject line of any contacts with the HKCC; and
- (c) The HKCC will endeavour to provide its initial views on an informal basis within 5 working days of receiving all necessary information on the measures.

CMA's Guidance

It is likely that the HKCC will take into account overseas agencies' approaches to this public health crisis. In particular, the Competition and Market Authority ("CMA") of the UK has also published a [guidance](#) on its approach to business cooperation during this critical period. In this guidance, the CMA reassured that it would not take action against business coordination if it satisfies the following criteria:

- (a) It is appropriate and necessary in order to avoid a shortage, or ensure security, of supply;
- (b) It is clearly in the public interest;

- (c) It contributes to the benefit or wellbeing of consumers;
- (d) It deals with critical issues that arise as a result of the COVID-19 pandemic; and
- (e) It is temporary and lasts no longer than is necessary to deal with these critical issues.

Observations

It appears that the paramount consideration is the *necessity* and *proportionality* of the business cooperation in question. Generally, if the purpose of the business cooperation is to (a) ensure stable supply; (b) achieve a fair distribution of scarce products; (c) continue essential services; or (d) provide new services to people in need, they will not fall foul of the Competition Ordinance, **provided that** it is a proportionate measure to achieve these legitimate aims.

Both the HKCC and CMA emphasised that they would not tolerate conduct which opportunistically seeks to exploit the current public health crisis and would remain vigilant to protect consumers from anti-competitive conduct by businesses seeking to take advantage of the outbreak or using the outbreak to justify improper collusion or other anti-competitive conduct. Indeed, such unscrupulous business practices are likely to be the priority of public enforcement in both jurisdictions. To avoid future disputes with the HKCC, it is advisable to make good use of the new informal engagement process with the aid of a professional legal advisor.

This article was produced by Carter Chim.



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