DISPUTE RESOLUTION

COVID-19: UNDERSTANDING COMPETITION LAW RISKS WHILE ENSURING BUSINESS COMPETITIVENESS DURING CRISIS

The outbreak of COVID-19 was declared as a global pandemic by the World Health Organization ("**WHO**") on 11 March 2020.[1] COVID-19 is arguably responsible for the current global economic volatility and have brought entire industries to its knees. Enterprises at large are disrupted due to the trade and movement restrictions, closure of premises, halted production and supply chains, government imposed lockdowns and reduced demands in the non-essential services and/or goods. In the same vein, other essential services' providers such as the health-related and basic household products are facing unusually high market demand which lead to the tendency of price gouging, manipulation of supplies and other exploitative conducts.

In formulating a coordinated business response to the COVID-19 rippling economic effects, enterprises must observe closely the competition law risks in relevant jurisdictions to prevent potential infringements. The competition law regime continues to apply during the global crisis in the absence of specific waiver or exemption by the competition regulators.

WHAT IS THE COMPETITION ACT 2010?

In Malaysia, anti-competitive conduct in respect of any commercial activity, both within and outside Malaysia which has an effect on competition in any market in Malaysia are regulated under the Competition Act 2010 ("**Act 712**") unless otherwise excluded pursuant to the First Schedule of the Act 712.[2] Act 712 came into force on 1 January 2012 and applies to any agreement or conduct which arose or continues after the said date.

TYPES OF ANTI-COMPETITIVE PRACTICES

There are two main types of anti-competitive practices prohibited under the Act 712. First is the anti-competitive agreement which has the object or effect of significantly preventing, restricting or distorting competition and second is the abuse of dominant position in any market for goods or services by enterprise.[3]

Amid the COVID-19 crisis, enterprises could possibly be under pressure to collaborate or enter into arrangements with other competing enterprises to ensure business resilience and continuity and/or to mitigate the commercial effects of the crisis. However, enterprises regardless of their size including small and medium enterprises (SMEs), government linked companies (GLCs), large or international companies in carrying on commercial activities should remain compliant with competition law and avoid exposing itself to competition law risks by entering into agreements which have the following possible anti-competitive object or effect:-

- fixing of purchase or selling prices or other trading conditions such as transport charges or credit terms either directly or indirectly causing parties to the agreement losing its ability to independently determine its own price;
- sharing markets or sources of supply by division of market, allocation of customers or exclusive dealing agreements;
- limiting production or supply;
- bid-rigging by colluding to distort the normal conditions of competition in respect of tender;
- exchanges of commercially sensitive information such as pricing information relating to future intended prices, costs, discounts, rebates or allowances or non-pricing matters like sales date, capacity information, demand data, market shares or investment plans;
- advertising restrictions which may be harmful to competition;

[1] Kindly refer https://www.who.int/westernpacific/emergencies/covid-19.

[2] Act 712 does not apply to any commercial activity regulated under the Communications and Multimedia Act 1998, Energy Commission Act 2001, Petroleum Development Act 1974 and the Petroleum Regulations 1974, and Aviation Commission Act 2015 in accordance to section 3 read with First Schedule of Act 712.

[3] Chapter 1 and Chapter 2 of Act 712.

- standardization agreements which might have the anti-competitive effect of reducing price competition, incentive to develop new technologies or act as barrier to entry;
- joint purchasing or selling of a product which may lead to market sharing or price fixing;
- exclusive dealing arrangements which competitors agree to only deal with certain suppliers or customers to the effect of significantly distort competition; or
- tying when the supply of one product conditional on the customer buying a second product.

An anti-competitive agreement will be caught by the Act 712 even if it is not in writing. The agreement could exist in the form of an arrangement or understanding, whether or not legally enforceable between enterprises and includes a decision by an association and concerted practices.[4]

Furthermore, if an enterprise holds a dominant position in any market (generally market share of above 60% is indicative of dominant position),[5] it should also take precautions before partaking in any of the following activities which could possibly constitute an abuse of dominant position restricted by Act 712:-

- directly or indirectly imposing unfair purchase or selling price or other trading conditions on suppliers or customers such as excessive pricing where charges of a price has no reasonable relation to the economic value of the product or predatory pricing of reducing its price below cost in an attempt to drive competitor out of market;
- limiting or controlling production, markets or market outlets, technological or technical development or investment to the prejudice of customers or price discrimination by selling same product at different prices without justification;
- refusal to supply which may prevent the buyer from competing in the market;
- applying different conditions to equivalent transactions;
- attaching irrelevant conditions to contract conclusion;
- predatory behaviour; or
- buying up scarce supply of intermediate goods or resources without a commercial need.[6]

RELIEF OF LIABILITY AND JUSTIFICATION Notwithstanding the above, an allegation of abuse of dominant position may be defended by proving that the conduct in question is reasonably justified, for instance, due to past purchase records or price matching. Whereas an enterprise may also seek to relieve its liability for infringement for anti-competitive agreements if it could show that the agreement satisfies the following conditions under section 5 of the Act 712:-

- there are significant and identifiable technological, efficiency or social benefits;
- these benefits cannot reasonably be provided without lessening competition;
- the harm to competition is proportionate to the benefits; and
- competition is not completely eliminated for most of the goods and services.

PENALTY If there is a finding by competition regulators i.e. the Malaysia Competition Commission ("**MyCC**") that there is infringement of the Act 712, MyCC may impose a financial penalty of up to 10% of the worldwide turnover of the enterprise for the period during which the infringement occurred, require the infringement to be ceased immediately, specify steps that are required to be taken by the infringing enterprise to bring the infringement to an end or to give any other direction as it deems appropriate.[7]

The financial penalty would be a hefty repercussion to enterprises in failing to observe fair competitive practices. For instance, in October 2019, MyCC issued a proposed decision to impose a financial penalty of up to RM86 million against an e-hailing company for abuse of dominant position by imposing a number of restrictive clauses on its drivers which prevents the promotion or provision

[4] Section 2 of Act 712.
[5] Paragraph 2.2 of the MyCC Guidelines on Chapter 2 Prohibition (Abuse of Dominant Position).
[6] Section 10 of Act 712.
[7] Section 40 of Act 712.

of advertising services to its competitors in the e-hailing and transit media advertising market.[8] While on another occasion, MyCC had imposed a financial penalty of RM10 million against each of two airline companies in Malaysia for having infringed section 4(2)(b) of the Act 712 by entering into an anti-competitive agreement that has its object of sharing of markets within the air transport services in Malaysia.[9]

WHAT SHOULD ENTERPRISES DO DURING THIS TIME OF CRISIS?

In dealing with the COVID-19 crisis, enterprises need to carefully consider the competition risks before devising any coordinated commercial efforts especially if the preferred solutions involve close collaboration with competitors and place appropriate safeguards to manage competition law infringement risks. The following key notes could be considered by enterprises:-

- conduct compliance review of current contractual and non-contractual arrangement and business practices to determine whether there is any existing concerns that need to be addressed;
- introduce a tailored compliance programme;
- apply for individual exemption from the MyCC to relief liability in respect of possible infringing agreements subject to conditions, obligations and duration as may be imposed by the MyCC;
- avail itself to the leniency regime if there is any suspected involvement in cartel to reduce financial penalty;
- seek independent legal advice to identify or clarify any possible infringing arrangement or conducts; or
- approach MyCC for consultation or guidance.

Lastly, enterprises are urged to exercise great caution if any potential anti-competitive matters such as cartels or exchange of commercially sensitive information are discussed and to consider the relevant legal risks in planning its commercial activities amidst the crisis.

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[8] Kindly refer to https://www.mycc.gov.my/sites/default/files/pdf/decision/Proposed%20Decision%20against%20GRAB%20%28Eng%29.pdf.

[9] Kindly refer to https://www.mycc.gov.my/sites/default/files/pdf/decision/MAS%20AIRASIA.pdf.