

COVID-19: IMPLICATIONS UNDER THE INDIAN COMPETITION LAWS

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I. INTRODUCTION

Undisputedly, these are trying times, not only for small businesses but also for conglomerates. In more ways than one, the COVID-19 pandemic has raised similar if not identical issues for most enterprises. Certainly the businesses are facing huge challenges including total collapse of demands, severe uncertainties and disturbances in the supply and distributions chains, severe liquidity crunch owing to delays in receiving payments even for past supplies / services, managing employee relations both in terms of retention and salaries. Business plans and the forecasts for the year 2020 have gone for a toss and there is a huge sense of uncertainty in relation to a host of issues including business continuity, cash and credit cycles and meeting fixed costs. In more ways than one, the COVID-19 pandemic has brought most businesses to a grinding halt with a deep dark tunnel ahead. Organisations are considering a host of measures to manage and survive this crisis.

Faced with these challenges, businesses may feel the need to realign themselves including exploring creative and innovative ideas for

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surviving this huge turbulence. Due to the lockdown and restrictions imposed by governments across the world, there may be unprecedented collaborations, communications and co-operations even amongst competitors, particularly in relation to the production, distribution, supply, sharing of data, infrastructure and other logistics related to essential commodities and healthcare products. Under the circumstances, these measures may be laudable and perhaps even necessary in some cases. However, some organisations may be tempted to indulge in activities to take advantage of this situation, while others, and particularly those with liquidity and other resources at their disposal, may see this as an opportunity to acquire their competitors and become stronger.

The million dollar question is whether even in these challenging times, are the businesses expected to adhere to the competition law requirements and compliances? The answer is overwhelmingly in the affirmative. In the Indian context, all businesses and companies are required to continue to work within the four corners of the provisions of the (Indian) Competition Act, 2002 (“**Competition Act**”) as well as the relevant rules and regulations made thereunder. The very basis of any competition law regime is to try and ensure a level playing field for all concerned and at the same time ensuring that the ultimate consumers are getting all the possible benefits. Therefore, in the absence of any specific exemption(s) or relaxations from the application of the Competition Act, all its provisions will continue to be applicable to all enterprises. The COVID-19 crisis notwithstanding, any action violative of the provisions of the Competition Act is likely to be scrutinised by the Competition Commission of India (“**CCI**”).

II. ANTI-COMPETITIVE AGREEMENTS

The Competition Act stipulates that any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India shall be void. Further, in relation to cartels, the Competition Act stipulates that any agreement amongst competitors which (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; or (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition in India.

Interestingly, any agreement entered into by way of a joint venture that increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services, escapes the above presumption (“**Efficiency Exception**”).² Further, while conducting competition assessment, the Competition Act enables the CCI to have due regard, *inter-alia*, to the accrual of benefits to consumers; improvement in production or distribution of goods or provision of services; and promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services (**Beneficial Factors**).³ Enterprises or rather competitors attempting to take protection

² Competition Act, 2002, No. 12, Acts of Parliament, 2002, s. 3(3).

³ *Id.*, s. 19(3).

under this umbrella will need to demonstrate the efficiencies achieved as well as the ultimate benefits to the consumers.

A. Abuse of Dominance

No entity or group that enjoys a position of dominance or strength with the ability to act independent of market forces, shall impose conditions in relation to purchase or sale of goods or services that are unfair, discriminatory, restrictive, exploitative or exclusionary. The CCI has not shied away from imposing penalties in the past and would be following the activities of some dominant players closely, particularly any action that may be seen to either create shortfall in supply and consequential raising of prices or seeking to benefit from the same owing to their market position.

B. Merger Control

Any acquisition of control, shares, voting rights or assets that breaches the prescribed thresholds requires notification (in the prescribed form) to and prior approval of the CCI. In the absence of any specific exemption, the parties entering into any combination are expected to be mindful of all competition law related considerations and requirements. That said, the regulatory scrutiny may be higher to ascertain whether any party(ies) is (are) trying to take advantage of the COVID-19 situation.

III. EXEMPTIONS / RELAXATIONS BY COMPETITION REGULATORS WORLDWIDE

Recognising that these are extraordinary circumstances, in their endeavour to assist businesses to sustain themselves, certain jurisdictions have granted temporary exemptions to facilitate certain specified kinds of

collaborations amongst competitors. These are primarily in relation to provision of essential goods and services, the underlying principle being that such collaborations may be necessary to increase efficiencies and ultimately benefit the consumers. Some prominent examples of such exemptions are as follows:

- (i) In the European Union, the European Competition Network (“ECN”) has published a joint statement⁴ on the application of competition law during the COVID-19 crisis, emphasising that cooperation between companies to ensure the supply and fair distribution of scarce products to all consumers will not be scrutinised. In this context, the ECN will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply. However, the ECN has clearly indicated that products protecting consumers’ health need to remain available at competitive prices and that it will therefore not hesitate to take action against companies taking advantage of the COVID-19 crisis by cartelising or abusing their dominant position. The ECN also stressed the possibility for manufacturers to set maximum prices for their products, which may be useful to mitigate unjustified price increases at distribution level. The European Commission has launched a dedicated website to provide guidance to companies, associations and their legal advisors regarding the compatibility of certain actions with EU competition law. A mailbox has also been set up for those seeking informal guidance. Further, the European Commission has published a

⁴ European Competition Network, *Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis*, at <https://webgate.ec.europa.eu/multisite/ecn-brief/en/brief/editorial> (last visited June 13, 2020).

Temporary Framework (“**Framework**”)⁵ for the antitrust assessment of increased business cooperation between competitors in response to the Covid-19 pandemic. The aim of the Framework is to reduce shortages for essential products and services. These are mainly but not necessarily medicinal products. Under the Framework, competitors may lawfully appoint an independent third party to coordinate certain activities, gather certain information or develop projections relating to demand and supply provided, however, that no individual information is exchanged amongst competitors. Competitors may also need to coordinate production, stock management and potentially distribution of essential products to ensure that there is no shortage of said products. Such a coordination may be allowed if it is (a) designed and objectively necessary to increase output in the most efficient way; (b) temporary in nature; and (c) being limited to what is strictly necessary to eliminate the shortage.

- (ii) In the United States of America, the Department of Justice and the Federal Trade Commission have issued a joint statement⁶ stipulating that certain specified collaborations amongst competitors will be presumed to be pro-competitive.

⁵ *Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak*, EUROPEAN COMMISSION (Apr. 8, 2020), https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf.

⁶ *Federal Trade Commission and Justice Department Issue Joint Statement Announcing They are on Alert for Collusion in U.S. Labor Market*, FEDERAL TRADE COMM’N (Apr. 13, 2020), <https://www.ftc.gov/news-events/press-releases/2020/04/federal-trade-commission-justice-department-issue-joint-statement>.

(iii) ⁷In the United Kingdom, the Competition and Markets Authority has issued a statement stipulating, *inter-alia*, that where temporary measures to coordinate action taken by businesses: (a) are appropriate and necessary in order to avoid a shortage, or ensure security, of supply; (b) are clearly in the public interest; (c) contribute to the benefit or wellbeing of consumers; (d) deal with critical issues that arise as a result of the COVID-19 pandemic; and (e) last no longer than is necessary to deal with these critical issues, it will not take enforcement action.

IV. POSITION IN INDIA

Pursuant to the announcement of the lockdown, the CCI had initially decided⁸ not to accept any filings/submissions until March 31, 2020 including (a) any fresh merger filing and/or submissions in respect of any existing filing that is in the process of being reviewed; (b) any pre-filing consultation request; (c) any fresh complaint in respect of anti-competitive (such as cartel and bid rigging) and/or abusive practices; and (d) any filings/submissions in respect of existing antitrust proceedings. Subsequently, the CCI has issued public notices (latest on April 20, 2020⁹) stipulating that the combination notices as well as information regarding anti-competitive agreements and abuse of dominant market position, may

⁷ Competition & Markets Authority, *CMA approach to business cooperation in response to COVID-19*, at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875468/COVID-19_guidance_-.pdf (last visited June 13, 2020).

⁸ *Measures in view of threat of CORONAVIRUS/ COVID-19 pandemic*, COMPETITION COMM'N OF INDIA (Mar. 23, 2020),

https://www.cci.gov.in/sites/default/files/whats_newdocument/scan1.pdf.

⁹ *Measures in view of threat of CORONAVIRUS/ COVID-19 pandemic*, COMPETITION COMM'N OF INDIA (Apr. 20, 2020),

https://www.cci.gov.in/sites/default/files/whats_newdocument/Notice20042020.pdf

be filed electronically. Further, parties to a combination may also avail pre-filing consultations through video conference. For all the matters listed for hearing up to May 3, 2020, fresh dates will be notified. As the lockdown has been extended, the CCI may issue a similar notification.

The Competition Act stipulates that the Central Government may, by notification, exempt from the application of the Competition Act or any provision thereof, and for such period as it may specify in such notification, *inter-alia*, any class of enterprises if such exemption is necessary in the interest of security of the State or public interest. The Government has been taking several measures to deal with the situations that have arisen due to this pandemic and taking cue from several other jurisdictions, may issue a specific exemption exercising this power.

Significantly, in a welcome move, the CCI has issued an Advisory to Businesses in Time of Covid-19 (“**Advisory**”)¹⁰ on April 19, 2020. The Advisory acknowledges that Covid-19 has caused disruptions in supply chains, including those of critical healthcare products and other essential commodities / services and that the businesses may need to coordinate certain activities, by way of sharing data on stock levels, timings of operation, sharing of distribution network and infrastructure, transport logistics, research and development, production etc. to ensure continued supply and fair distribution of the products. It refers to the Efficiency Exception and the Beneficial Factors that have been discussed above and stipulates that the Competition Act has in-built safeguards to protect businesses from sanctions for certain coordinated conduct, provided such arrangements, as mentioned above, result in increasing efficiencies. The

¹⁰ *Advisory to Businesses in Time of COVID-19*, COMPETITION COMM’N OF INDIA (Apr. 19, 2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf.

Advisory clarifies that only such conduct of businesses which is necessary and proportionate to address concerns arising from COVID-19 will be considered. It also cautions the businesses not to take advantage of COVID-19 situation to contravene any of the provisions of the Competition Act.

V. SOME PRACTICAL IMPLICATIONS AND GUIDELINES FOR BUSINESSES

- (i) Covid-19 pandemic has affected one and all and its adverse implications on businesses, domestically as well as globally, are likely to be felt for the next several months. However, despite the said situation, competition laws continue to apply.
- (ii) Competition laws continues to prohibit anticompetitive behaviour, especially where businesses seek to take advantage of the Covid-19 pandemic situation to coordinate joint actions with the aim to make up the losses.
- (iii) It will be unwise to think that the COVID-19 crisis shield the businesses from the prohibition to engage in anticompetitive behaviour. Therefore, business should not engage in any activity that would otherwise considered anticompetitive if the Covid-19 pandemic situation was not there.
- (iv) The competition authorities will not tolerate actions by businesses who are enjoying significant market power, even where such market power is only temporary in nature and due to the emergency situation, that seek to exploit their position.

- (v) When cooperating with competitors, businesses need to put the necessary safeguards in place to ensure compliance with competition laws.
- (vi) The competition authorities around the world are monitoring the situation very closely and are not shying away from taking actions against businesses whose actions are either squarely breaching the set parameters or at least raising suspicion
- (vii) In relation to merger control, although almost all competition authorities appear to be trying their best to cope, given the challenging situation coupled with various lockdown and other restrictions that have been imposed on regular operations, the timelines in relation to competition assessment and enquiries are bound to get stretched and must be factored in by the businesses while undertaking mergers and acquisitions.
- (viii) Businesses should closely engage with their legal advisors, both internal as well as external, to ensure that the actions that they are planning to undertake are not likely to fall foul of the applicable competition law provisions.

VI. CONCLUSION

These are challenging times and there is no doubt that competing businesses will be exploring to collaborate by using innovative means, more so if the lockdown gets extended. Using the crisis arisen due to the Covid-19 pandemic as an opportunity to make profit by resorting to practises that adversely affect consumers, particularly excessive pricing due to increased demand but shortage in supplies could definitely attract

scrutiny by the CCI. Only time will tell whether the government will consider specific exemptions or temporary suspension of certain provisions of the Competition Act during this period. However, for the time being, the Advisory issued by the CCI definitely indicates the mindset of the regulator and businesses should be careful not to indulge in opportunistic practices with a view to benefiting in the short term, as these could have an adverse outcome in the long term.