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In a connected world, India is as affected by the novel coronavirus (*COVID-19*) as other parts of the world and, as the situation develops rapidly, we have assessed the impact of the changing business scenarios through the lens of competition law.

## Introduction

The COVID-19 outbreak has raised immediate concerns about the availability of essential products and services in India and in other countries affected by the virus. In the longer term, there is likely to be a significant impact on economies across the globe. As part of a panoply of measures to combat the outbreak and address its implications, competition law and policy have an important part to play. This is clearly the case in India which has a developed and functioning competition regime.

## The CCI Remains Open for Business

Although the CCI is still functioning, in a circular dated 17 March 2020, the Competition Commission of India (*CCI*) has decided to adjourn all but urgent matters listed for hearing until 31 March 2020. Non-essential visits are discouraged and visitors are now required to give a self-declaration in prescribed format. It also seems unlikely that outside inspections – dawn raids – will be conducted over the next few weeks. Apart from this, the CCI and its enforcement arm (the Director General) appear to be acting internally very much as normal, and are continuing to work on enforcement files and merger cases, albeit with reduced working hours. However, depending on developments, a future “slow-down” cannot be excluded.

## NCLAT and Courts to Hear Only Urgent Matters

The National Company Law Appellate Tribunal (*NCLAT*) has decided that matters listed between 17 and 31 March 2020 will be taken up after 17 April 2020. Only urgent fresh matters may be mentioned before the acting NCLAT Chairperson. We anticipate that the appointment of the new Chairperson of the NCLAT may also be delayed owing to the present circumstances.

The Supreme Court, which hears appeals from the NCLAT, is also restricting its functioning to urgent matters. Even here, entry to the Supreme Court is restricted. Various High Courts (including the Delhi High Court and the Mumbai High Court), which hear writ petitions in competition cases, are also restricting their functioning to urgent matters. Moreover, the courts have placed restrictions on the number of persons that can be present in the court rooms even for the urgent matters.

## Competition Law: What is Prohibited

Competition law will doubtless play an important part in getting through the crisis and helping to secure economic recovery. Competition authorities in China, the EU and the UK have already opened investigations into excessive pricing or made it clear they will do so where needed.

In India, competition law is governed by the provisions of the Competition Act, 2002 (*Competition Act*), which prohibits restrictive agreements and abuses of dominant positions and controls larger mergers and acquisitions where specified turnover/assets thresholds are met. The CCI has so far not taken specific action against enterprises in the COVID-19 context. However, in the past it has demonstrated an active interest in the healthcare sector and issued a policy note on “*Making Markets Work for Affordable Healthcare*” in October 2018. It has also frequently stamped down on cartels in the pharmaceutical sector with a plethora of cases involving chemists and druggist associations across the country. Its recent report on e-commerce also suggests it is looking actively at the competition implications of e-commerce.

The CCI will treat seriously any complaints of cartelisation in relation to health-care, including the provision of face masks and sanitisers, diagnostic materials and medical care. Similarly, it will be alert to concerns around pricing and artificial restrictions of supply of essential food commodities at this time. It is also a time to be vigilant about agreements between suppliers and resellers of products that involve resale price maintenance, exclusivity provisions or other restrictions which have an appreciable adverse effect on competition (*AAEC*), especially when there is anxiety in the business environment. Where a supplier is dominant, abuses may be found where it prices unfairly (including both excessive and predatory pricing), imposes discriminatory prices or conditions, refuses to supply, engages in tying, or leverages its dominance to enter into/protect its position in another market. At the same time, it has to be recognised that competition law is not a “cure all”. For instance, unfair pricing by non-dominant undertakings is not prohibited under the Competition Act.

## Some Cooperation Allowed

At extraordinary times like these, cooperation between suppliers or buyers in the public interest is likely. In this regard, Section 3 of the Competition Act provides that efficiency-enhancing joint ventures will not be presumed to have an AAEC. The Indian law on this is undeveloped, though the proviso has previously been applied to a joint venture in the health



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insurance sector. There is clear scope for competing pharma companies to cooperate on the development of vaccines and for suppliers/distributors to cooperate to ensure that goods are brought to market where supply/distribution channels are being impacted. It will, however, be important to show that this cooperation is justified on efficiency grounds and that it is not used as a cloak for higher pricing, market sharing or other collusive behaviour, especially outside the scope of the limited cooperation. Companies seeking to avail of the provision must act transparently and, as well as showing efficiencies, be able to demonstrate that the cooperation proposed is the least restrictive of competition.

### Central Government may Issue Directions

The Competition Act provides that it is to have overriding effect, notwithstanding anything inconsistent contained in any other law. However, the Central Government is empowered to exempt classes of enterprise from the application of all or part of the Competition Act, if necessary on state security or public interest grounds. The Central Government has relied on this possibility, for example by exempting vessel sharing agreements in the liner industry from Section 3 of the Competition Act (on restrictive agreements) and various sectors/types of enterprises from the merger control provisions. The Central Government may also issue directions on issues of policy. In times of crisis, enterprises may consider seeking such exemptions or directions to help them weather the effects.

### Trade Associations

At times like these, trade and other business associations have an important role to play. In many sectors, businesses will be concerned about any worsening of the situation. Associations can legitimately address the effects of the outbreak on their members' business and discuss ways to reduce the impact. They may even act as a conduit to Government, suggesting appropriate legislative and administrative measures. However, it is important to ensure that competitors do not use trade associations as a forum for sharing of confidential information or engaging in anti-competitive discussions and behaviour. Protocols (including competition law reminders during meetings) must be maintained/put in place to ensure this.

### Other Measures to Combat the Crisis

On 13 March 2020, the Ministry of Consumer Affairs, Food and Public Distribution announced that the Essential Commodities Act, 1955 would apply to certain masks and sanitizers in order to ensure their equitable distribution and availability at fair prices. Measures have also been taken under the Disaster

Management Act, 2005 to ensure sufficient availability of masks, sanitisers and gloves at prices not exceeding the printed maximum retail price. The Government has also invoked the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 to combat overpricing and black marketing. Actions to secure essential services may also be taken under the Essential Services Management Act, 1968. Other emergency measures on the movement of persons are being taken under the Epidemic Disease Act, 1897 and other legislation.

### Merger Control

On the merger review front, as things stand, the CCI is still accepting new notifications (albeit informally encouraging parties to delay non-urgent filings) and is reviewing ongoing cases with the same degree of rigour as always. However, any future lock-down could impact the timing of review and notifying parties should factor into possible delays, additional requests for information, etc., even for routine filings. Additionally, on 19 March 2020, the CCI announced that, in order to avoid travel from Mumbai to Delhi, pre-filing consultations with the CCI may be conducted using video-conferencing facilities hosted by the Ministry of Corporate Affairs in Mumbai. The CCI may take the opportunity to review its (currently inoperative) e-filing procedures.

We anticipate that the CCI will maintain its rigorous standards of review and will continue to critically examine transactions likely to result in an AAEC, where, for example, a significant competitor is taken out of the market or supply of a product/service to Indian customers may be prejudiced. Given the likely significant economic impact of the outbreak, "failing firm" defences may become more readily available, especially in relation to acquisitions triggered by actions under the Insolvency and Bankruptcy Code 2016, which are expected to increase.

### Competition Law (Amendment) Bill

A draft Competition Law Amendment Bill was put out for public comment in February 2020 with a view to a Bill being presented before the houses of Parliament during the Budget session ending on 3 April 2020. The Parliament is currently sitting and it is possible that the Bill will be presented and passed in this session.



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## Practical Guidance

- The ordinary rules on competition continue to apply. Any breach which is seen as impeding the national effort to curb the epidemic will attract the highest level of penalty.
  - There should be no competitor collusion, whether by price-fixing, limitation of production/supply, allocation of markets/customers or bid rigging/collusive bidding. Companies should continue to focus on well-recorded, reasoned and independent decision making, especially in these difficult times.
  - Especially where a supplier or reseller has a position of market power, avoid anti-competitive vertical restrictions such as resale price maintenance, discount controls, exclusivity provisions and territorial partitioning.
  - Where an enterprise has a dominant position, it should avoid abusing it, for example by unfair pricing, imposing discriminatory terms and conditions, denying market access, tying, or leveraging dominance in one market to enter/protect another market.
- Where competitor collaboration is envisaged or even suggested by the government, parties must ensure that the collaboration clearly qualifies as an efficiency-enhancing joint venture and does not exceed the specified scope. Legitimate collaboration must not be used as a cover for collusion and government mandate is not a defence in such circumstances.
- Enterprises or their associations should consider approaching the Central Government where they feel that enterprises in their sector/class should be exempted from the application of competition rules or the Central Government should issue directions on policy. They should seek short-term reprieve which is the least restrictive of competition.
- Any contact with competitors, including discussions in trade association meetings, must be limited to legitimate purposes (such as lobbying the Central Government), and must not stray into forbidden areas such as discussion of prices, limitation of production, market sharing or bid rigging/collusive tendering. Such contact/discussions should be fully documented to allay any future suspicions of collusion.
- In the merger control field, parties to notifiable transactions should consider the implications of the epidemic for currently planned mergers and acquisitions, in particular issues such as long stop dates, break fees and impact of material adverse change clauses on transactions. On a more practical level, parties should ensure availability of personnel and resources to respond to information requests in a timely manner while working remotely and planning for potential illness. It is also important that parties take extra care to ensure there is no inadvertent gun jumping during longer review periods. Although the CCI will continue to review notified transactions, some delay should be expected and parties must stay flexible and consider avenues such as pull-and-refile to avoid Phase 2 investigations simply because the CCI may be running out of time in Phase 1.
- All those affected should maintain a continuous watch on developments and seek appropriate legal and professional advice to navigate the changing competitive landscape.

### Disclaimer

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