Competition Matters

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India: Competition Law and COVID-19: Update

In this update, we summarise the state of play on the application of competition law in India in the midst of the countrywide lockdown resulting from the COVID-19 outbreak.

We first outline the current position with regard to competition law enforcement and merger review.

In the light of an Advisory published by the Competition Commission of India (CCI) on 19 April, we then consider the application of Section 3 of the Competition Act, 2002 (*Competition Act*) to coordination between competitors designed to address the effects of the COVID-19 outbreak. Although such coordination may not be anti-competitive where it increases efficiency, price-fixing and other cartels will continue to be prohibited. Given the increased risk of cartels in times of crisis and economic downturn, we address the position likely to be taken by the CCI.

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On 14 April 2020, Prime Minister Narendra Modi announced that the All-India lockdown on account of the COVID-19 outbreak would be extended until 3 May. The CCI has issued a number of notices detailing the arrangements for its functioning during the outbreak; the most recent one was published on 20 April.[1] The current position is as follows.

For enforcement cases, the CCI has announced that complaints (called "informations") with respect to Section 3 (anti-competitive agreements) and Section 4 (abuses of dominant position) of the Competition Act may be filed electronically.

For merger control cases, combination notices may be filed electronically. Parties to a proposed combination may avail of pre-filing consultation (PFC) through video-conference. A request for a PFC is to be made to the registry, which will then e-mail a web link to be accessed by the parties.

The CCI has stated that "it would endeavour to process the new and pending cases subject

1 CCI, *Measures in view of threat of CORONAVIRUS/COVID-19 pandemic* (20 April 2020) (https://www.cci.gov.in/sites/default/files/whats_newdocument/Notice20042020.pdf).

to the availability of necessary information and material". This will apply to enforcement and merger control cases.

There is, however, a backlog of cases to be addressed. The CCI will notify fresh dates of hearings for matters listed up to 3 May 2020 and for all other compliances due up to 3 May 2020 in respect of pending Section 3 and Section 4 cases before the CCI and the Director General (DG).

The CCI has thus signalled that it is open for business and will endeavour to process new and old cases, though there will be constraints on hearings and delays in compliance measures. Although senior CCI and DG officials will be physically present in their offices, the continued lockdown and social distancing requirements mean that many junior officers and support staff will continue to work from home. Parties will also have to address the effects of lockdown and for the time being will have to connect remotely with CCI/DG officials.

However, the willingness of the CCI to take on new work is seen in its preparedness to accept electronic filing of complaints. Such complaints may, of course, include allegations of cartelisation and other anti-competitive behaviour in the context of the Covid-19 outbreak. It is therefore timely to consider the approach to be taken to competitor coordination and cartels in the time of COVID-19.

Competitor Coordination in the Time of COVID-19

On 19 April, the CCI issued an *Advisory to Business in Time of COVID-19*[2] in which it pointed out that the Competition Act already has built in safeguards to protect businesses from sanctions for certain coordinated conduct where it results in increasing efficiencies.

The CCI noted that COVID-19 had caused disruptions in supply chains, including for critical healthcare products and other essential commodities/services. It recognised that, to cope with significant changes in supply and demand patterns, businesses might need to coordinate certain activities in order to ensure the continued supply and fair distribution of products (e.g., medical/healthcare products such as ventilators, face masks, gloves and vaccines as well as essential commodities) and services (e.g., logistics and testing). Such coordination could cover sharing data on stock levels, timing of operations, sharing of distribution networks and infrastructure, transport logistics, R&D and production.

The CCI stated that Section 3(3) of the Competition Act presumes that certain types of concerted activity between competitors cause an appreciable adverse effect on competition (*AAEC*). This presumption is (according to the proviso to Section 3(3)) not applicable to efficiency-enhancing joint ventures. In addition, in conducting its competition assessment, Section 19(3) of the Competition Act enables the CCI to have due regard to a number of positive factors: (a) the accrual of benefits to consumers; (b) improvement in production or distribution of goods or provision of services; and (c) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services. The CCI stated that these provisions would inform its decisions. However, it would consider "only such conduct of business which is necessary and proportionate to address concerns arising from COVID-19".

2 CCI, *Advisory to Businesses in Time of COVID-19* (19 April 2020) (https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf).

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It is clearly comforting that the CCI has issued the Advisory. It has now joined other competition authorities – such as the UK Competition and Markets Authority, the US Department of Justice and Federal Trade Commission and the European Commission – who have issued guidance on dealing with competitor cooperation during the COVID-19 outbreak and its aftermath. The CCI's references to the proviso to Section 3(3) and to Section 19(3) criteria are helpful to competitors considering forms of coordination and are considered in a little more detail below.

Efficiency-Enhancing Joint Ventures

The proviso to Section 3(3) of the Competition Act states that the presumption of an AAEC where competitors fix prices, limit or control production, allocate markets/customers or engage in bid-rigging/collusive tendering is not to "*apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services*". To avail of the proviso in the COVID-19 context, the parties to a joint venture must act transparently and show that the cooperation is absolutely necessary, limited to the period needed to address the outbreak and its effects and is designed to be the least restrictive of competition. Use of this proviso should be the exception and not the rule; it is limited to efficiency-enhancing cooperation and is not designed to be used as a long-term measure for recovery of a business or an industry as a whole. The parties should carefully document the transaction and be able to demonstrate efficiencies if the CCI raises the issue of competition compliance.

The Section 3(3) proviso only removes the *presumption* of an AAEC for efficiency-enhancing joint ventures; it does not remove such joint ventures from the prohibition of agreements having an AAEC. Where the proviso applies, and collusion is found, the CCI has to establish an AAEC. It is therefore crucial that competitors contemplating coordinated conduct should consider whether it may have an AAEC.

Section 19(3) Factors

Section 19(3) of the Competition Act sets out three "negative" and three "positive" factors to which the CCI shall have due regard when considering whether an agreement has an AAEC. The negative factors are: (a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; and (c) foreclosure of competition by hindering entry into the market. The positive factors are set out above. The CCI is suggesting that some weight would be given to the positive factors in considering whether coordination measures taken to address the COVID-19 outbreak and its effects have an AAEC. The CCI has made it clear that such measures must be necessary and proportionate. Parties should be sure that the proposed coordination satisfies these three positive factors and that they outweigh any negative factors. Again they should act transparently, limit their coordination to the time needed to address the outbreak and its effects and ensure that it is the least restrictive of competition. In short, they will need to be able to demonstrate why there is no AAEC if the CCI raises the issue.

The CCI concluded its Advisory by cautioning businesses not to take advantage of COVID-19 to contravene any of the provisions of the Competition Act. In this regard, care needs to be taken not to breach the provisions of the Competition Act combating cartels, which are considered below.

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It is a natural tendency in such times for competitors to engage with each other. There may be a temptation for suppliers of essential products and services – such as face-masks and sanitisers, diagnostic materials, medical care and foodstuffs – to agree to increase prices, divide markets, artificially restrict supply or engage in bid rigging/collusive tendering. More generally, in order to mitigate the effects of the downturn, competing manufacturers/ suppliers of any product or service may agree prices, limit production/supply, divide up markets or customers, or engage in bid rigging/collusive tendering. Such collusion can be facilitated by trade associations.

Section 3(1) of the Competition Act prohibits agreements which cause or are likely to cause an AAEC. Under Section 3(3), agreements between competitors, including cartels, will, where they involve price-fixing or other forms of collusion, be presumed to have an AAEC.

Customers seeking supply may, where they feel that a cartel exists, complain to the CCI. Given that the CCI is open for business, such complaints may be looked at speedily and, where a prima face case is established, the CCI may direct that the DG investigate the matter (even without calling for any prior hearings). In its recent Advisory, the CCI has cautioned businesses not to take advantage of COVID-19 to contravene the Competition Act, and this clearly puts anybody contemplating collusion on notice.

Although tough times may justify exceptional measures, it is highly unlikely that cartelists will find the CCI receptive to arguments that the crisis justified their conduct. The Central Government may, however, exempt classes of enterprise from the application of all or part of the Competition Act on state security or public interest grounds and it may also issue directions on issues of policy. In times of crisis, enterprises may consider seeking exemptions or directions to help them weather the effects. We think that the Central Government would be wary of granting such exemptions or making directions at this stage, especially where the CCI has already signalled its approach to efficiency-enhancing joint ventures. Until such time exemptions (if any) are issued or policy directions made, the rules of competition strictly apply.

As matters stand, competitors should thus be wary of collaboration beyond the scope of efficiency-enhancing joint ventures where such collaboration involves price-fixing or other forms of collusion. Where such collusion is established, the burden will fall on the parties to show that there was no AAEC. Where they are unable to do so, the enterprises involved, together with persons responsible for the conduct of their business and other directors and officers, are liable to heavy penalties. As an alternative to standard penalties of up to 10% of the average turnover/income over a period of three years, enterprises and individuals engaged in cartel activity may incur a penalty of up to three times the profit or ten percent of the turnover/income for each year of the continuance of the agreement, whichever is higher. It is therefore important that companies and their directors and other officers carefully comply with competition law at this time.

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- Competitors should avoid entering into anti-competitive arrangements and should continue to follow robust compliance policies. Companies must remind all employees that COVID-19 does not provide an excuse for competition law violations. They should maintain visibility over staff working from home and remind them to use only prescribed official means of communication for conducting business.
- There should be no competitor collusion, whether by price-fixing, limitation of production/supply, allocation of markets/competitors or bid-rigging/collusive bidding.
- Companies should continue to make decisions independently of competitors and record such independent decision-making in order to be able to demonstrate, if challenged, that there has been no collusion.
- Inappropriate contacts with competitors should be avoided. This includes discussions and communications in the context of trade associations. Trade association meetings must be limited to the legitimate objectives of trade associations (such as addressing environmental issues). The agenda should be set and adhered to and proceedings properly recorded.
- Efficiency-enhancing joint ventures will not be deemed anti-competitive. However, parties to cooperation in the context of COVID-19 must act transparently, be able to show such efficiencies and must demonstrate that the cooperation is the least restrictive of competition.
- Where competitors seek to coordinate their activities to address the effects of the COVID-19 outbreak, they must be able to show the CCI, if called upon to do so, that any restrictions on competition do not have an AAEC.
- Enterprises or their associations can consider approaching the concerned Ministries of the Central Government where they feel that enterprises in their sector/class should be exempted from the application of competition rules or there should be directions on policy. However, obtaining such exemptions will be problematic. Those seeking such exemptions should seek only short-term reprieve and show the absolute necessity for the relaxation of competition rules.
- As matters stand, competitors should be wary of collaboration beyond the scope of efficiency-enhancing joint ventures. The position with regard to information exchanges, even to ensure security of supply, also remains unclear. If companies are thinking of such collaboration or information exchanges, even where being asked by the Central or a State Government to do so, they should seek legal advice.

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