

COVID-19: Spotlight On The Competition Law Regime In India

written by Priyanka Barik | May 14, 2020



A Sketch of Competition Law Regime Amid the COVID-19 Crisis

The outbreak of COVID-19 has impacted businesses tremendously all across the world. It has brought economies to a standstill, pushing the world into recession. While there are certain specific sectors such as tourism, aviation, automobile, entertainment, hospitality, import-export, etc. which are severely affected, sectors dealing in essential commodities such as healthcare, pharma, telecom, FMCG & retail, etc. will benefit immensely during this time of crisis as these industries will be flooded with unprecedented demand in the market.

The link between financial growth and competition has been predominant during the times of economic recession and therefore, businesses that are facing the wrath of the pandemic are looking for any aid available in order to survive. Though the organizations would not be having competition law on their priority list of concerns right now, any kind of unethical collaboration in the current situation would have an adverse effect on the competition in the market. However, the Competition Commission of India ("CCI") is responsible for regulating anti-competitive practices in India.

"Coming together" in the time of COVID-19

In India, competition law aims to promote and sustain competition in markets thereby protecting the interests of consumers by preventing practices that can cause an appreciable adverse effect on competition. There have been a lot of disruptions in the supply chains, including the need for substantive production of healthcare supplies and other essential commodities/ services. In order to cope up with such extreme changes in the demand and supply pattern, businesses might require helping hands to coordinate in carrying out certain activities such as manufacturing of essential goods, fair distribution of such products, etc.

This act of "coming together" by companies might attract a few eyeballs as it possesses a potential threat to the competition in the market. Though the current situation might push many companies to come together and collaborate with other competitors in order to sustain their businesses in these difficult times, the provisions of the Competition Act ("Act") will continue to apply and the CCI will be keeping a strict check over any such practices in the market, especially during the time when the supply of goods is high due to the current crisis.

The collaboration agreement between corporations for distribution, supply, production, or manufacture of essential products and services requires the intervention of CCI as market players coming together, who were initially competitors but have collaborated to meet the urgent demand for certain products. This can be an issue as it might affect the market orientation and hence can have an adverse effect on the competition in the market. The suppliers and producers should be aware of the fact that there won't be any claim addressed against the application of competition laws, even during a pandemic.

However, as per the advisory issued by the CCI^[1] dated April 19, 2020 ("Advisory"), the authority will take other factors such as accrual of benefits to consumers, improvement in production or distribution of goods and services, and promotion of technical, scientific and economic development by means of production or distribution of goods, etc.^[2] into consideration at the time of competition assessment. The CCI has also notified that it will only consider those businesses which are important and proportionate to address the concerns arising from the current pandemic.

Anti-competitive arrangements

As per the Advisory, certain agreements between competitors directly determine purchase or sale prices, limit or control the production or supplies in the market, or share markets, source of production, or provision of services by way of allotment of the geographical area of the market, type of goods or services, number of consumers in the market, etc., or rig bids are presumed to cause an appreciable adverse effect on the competition and hence are considered to be anti-competitive as per Section 3(3) of the Act. However, this presumption is not applicable to joint ventures, if such agreements are increasing efficiency in production, supply, distribution, storage, acquisition, or control of goods or provision of services.

There is a high probability that businesses that are dealing with essential commodities are witnessing a huge demand for the products or services, and in order to earn more profits, they might indulge in cartel formation, price fixation, or limiting the production or supply of products. If such businesses are in a dominant position in the market they can end up abusing such power by over-charging for such essential products.^[3] Therefore, such collaborations amongst competitors in the market should be closely monitored by the antitrust authorities as such practices are strictly prohibited under the Act and may not be justified even during the pandemic.

An economic crisis like this leads to the formation of "Crisis Cartels". It generally refers to a cartel that was formed during a severe sectoral, national, or global economic downturn without state permission or legal sanction. However, it has also been formed in situations wherein the government has permitted the formation of such cartels during severe sectoral, economic downturns.^[4]

These are some of the most challenging issues for the competition authorities, as they will have to ensure a balance between antitrust considerations and governmental objectives, such as social welfare. Certain countries like the European Union recognize this concept in such extreme conditions.^[5] However, Indian law acknowledges the concept of entering into joint ventures by competitors for certain activities, but such an alliance does not consist of the industrial collaborations; it still hasn't explored the concept of the formation of Crisis Cartels yet.

Few countries have amended their antitrust laws providing certain exemptions during this time of crisis, like in the US, the collaborations between competitors with respect to research and development, sharing of technical know-how, sharing of standards of patient management, and joint purchase agreements amongst healthcare providers are considered to be pro-competitive in nature.

Similarly, in the UK, the coordination of activities between the competitors will not come under the purview of the antitrust scrutiny provided that such steps are taken in order to avoid a shortage in the supply of essential commodities and contribute to the well-being of consumers during this time of crisis. However, CCI has not provided any such exemptions in any key sectors from the perspective of anti-competitive agreements except for a few relaxations in the compliance requirements.

Compliance Requirements

The fair trade regulator has issued several notices and circulars with respect to digital filling or compliances. Further, vide a public notice dated 13th April 2020[6], it allowed parties to file complaints against anti-competitive practices as per Sections 3 and 4 of the Act. It also allowed for the electronic filing of all combination notices with the CCI. Further, the notice dated 20th April 2020, provided for notification of fresh dates for all other compliances up to 03rd May 2020.[7]

Conclusion

Since the government has not specifically come out with any exemptions with regard to certain sectors from the purview of antitrust laws, therefore it would be interesting to note how the antitrust watchdog would be handling any such collaboration between competitors such as healthcare providers for sharing technical know-how, or supermarket dealers who might indulge in deciding prices of commodities in future, or food aggregators dealing with retailers in order to provide easy services, etc.

These collaborations will be monitored closely in light of antitrust regulations in the country. Further, most of the essential goods such as masks, ventilators, etc. are mostly used for government procurement at this time, with players in these segments being allowed, without any fear of antitrust actions of cartels later, to collaborate with government and each other to ensure public welfare.

Since the government has a monopoly in a few sectors as a sole buyer, the impact over the competition seems less and such impact is yet to be covered under the Act under the concept of buyer cartel. However, the government should come up with consolidated guidelines for businesses in order to allow certain need-based collaboration without any malaise intention in order to meet the upsurge public demands of goods and services in parlance to the pandemic.

- [1] https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf
- [2] Section 19(3) of the Competition Act, 2002.
- [3] <https://pib.gov.in/newsite/PrintRelease.aspx?relid=200239>
- [4] Refer, "The crisis cartel in the fish-farming sector in Greece."
- [5] Irish beef cartel case, case 2003 no. 7764P "Competition Authority v Beef Industry Development Society"
- [6] https://www.cci.gov.in/sites/default/files/whats_newdocument/COVID-19.pdf
- [7] https://www.cci.gov.in/sites/default/files/whats_newdocument/Notice20042020.p

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