



**CRISIS EXCEPTION UNDER THE ANTITRUST LAW: ANALYSIS IN LIGHT OF
CORONAVIRUS PANDEMIC**

The Coronavirus pandemic put forth a challenge not only to the existing health infrastructure but to the antitrust and consumer protection framework world over. While the health agencies face a daunting mandate to fight the public health emergency the antitrust law regulatory framework needs to keep the market in check and ensure that the supporting infrastructure does not fail. Besides analysis of the action of these companies in terms of the Epidemic Diseases Act, 1987, Indian Penal Code, 1860 and Essential Commodities Act, 1955 any agreement, cooperation or collaboration between companies who sell products or services that are necessary for the society to sustain themselves needs to be assessed on the benchmark of competition law legality. This article looks into the framework in India and different jurisdictions to deal with such crisis under their Antitrust law and whether there is a vacuum required to be filled in India for the same and a need to adopt a specific exception to deal with public health emergencies in the Competition Law.

INDIA'S EFFORTS TO MITIGATE THE RISK

In a press release dated 24.10.2018 the Competition Commission of India underlined the information asymmetry in the healthcare sector and its impact on consumer choice. The lack of consumer sovereignty can help industry practices which choke competition and thus regulations can preempt market distorting practices.¹ Public health emergencies such as coronavirus may bring the need for certain companies to collaborate with competitors, whether under State compulsion or otherwise. The bottlenecks in supply chains of food and medicine might require suppliers to consider joint logistics and distribution methods. The manufacturers of Personal Protective Equipment and other key medical equipment might have to collaborate for Research and development and ensuring efficient supply of hospital and other emergency equipment and drugs. Similarly, accommodation and insurance providers might align their terms and conditions to meet the market needs. These measures might be important for avoiding economic damage which may follow from the coronavirus pandemic and helpful in improving public health measures to meet the crises. However, the businesses need to take care of the surrounding risk from collaborating with competitors in the same market during such times.

¹ Policy Note on 'Making Markets Work for Affordable Healthcare' (Oct.24, 2018)
https://www.cci.gov.in/sites/default/files/press_release/PressRelease.pdf

The Central Government has power to exempt the application of the Act or any provision of the Act on any enterprise or class of enterprise in public interest or for purpose of performing sovereign functions.² Thus it may issue a notification on the application of Section 3 and 4 to enterprises during public health emergencies as well. However, beyond the scope of the power the Central Government, the statute might protect these agreements from any anticompetitive liability. As per Section 2(c) of the Competition Act 2002 a cartel has an agreement amongst themselves to limit, control or attempt to control the production, distribution, sale or price of, or trade in goods or provision of services. The definition does not create an exception on the purpose or scope of the agreement to include such acts that limit, control or attempt to control the production, distribution, sale or price of goods or trade in goods or provision of services which are aimed to ensure efficient allocation of resources.³ However while determining whether such an agreement or collaboration amongst companies vertically or horizontally linked has an appreciable adverse effect on competition, the Commission will also consider the accrual of benefits, if any, to consumers. The Act will protect joint ventures between companies collaborating for Research and Development or pooling of manufacturing and production capacities since the proviso to Section 3(3) gives a proviso to the application of Section 3 on joint ventures for increasing efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. In terms of Section 19(3) of the Act, the Commission will also consider improvements in production or distribution of goods or provision of services. Collaboration for the purpose of technical, scientific and economic development by means of production or distribution of goods or provision of services between different businesses in different industries may be weighed favorably as against possible cons of such an agreement such as creation of entry barriers, driving existing competitors out of the market and/or foreclosure of competition by hindering entry into the market.

The Essential Commodities Act, 1955 empowers the Central Government to notify a commodity to be part of the schedule of essential commodities in public interest.⁴ In the general public interest, the Central Government may if it finds it necessary or expedient for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution take control over the production, supply, distribution, etc., of essential commodities.⁵ The Central Government may

² The Competition Act, 2002, Section 54.

³ The Competition Act, 2002, Section 3(3).

⁴ The Essential Commodities Act, 1955, Section 2.

⁵ Id., Section 3.



thus direct the geographical territory and prices for the companies to function in. In such a situation, under Centre directed arrangement of resources, the agreement or collaboration would not fall foul of the Competition Act, 2002. However, the Competition Act, 2002 does not provide an explicit exemption for businesses to cooperate or collaborate during public health emergencies or crisis such as the coronavirus pandemic.

The Competition Commission of India (hereinafter referred to as "the Commission") vide order dated 23.03.2020 adjourned all matters listed for hearing till 31.03.2020. It also suspended pre-consultations, all filings in relation to Section 3 and 4, all notifications in relation to combination under Section 6 and 20 as well as other filings, submissions and proceedings under the Act and regulations made thereunder.⁶ Subsequently, it passed another order dated 30.03.2020. Vide the said order the Commission informed of the closure of the office of CCI till 14.04.2020 in view of notice dated 24.03.2020 by the Ministry of Corporate Affairs on "*Measures in view of threat of Coronavirus/COVID 19 pandemic*". It permitted the filing of combination notices under Green Channel (Regulation 5A of the Combination Regulation) through email at comb.registry@cci.gov.in with electronic payment of the fees. However other filings in relation to Section 3 and 4 remained suspended.⁷ Thus even though the Competition Act, 2002 is silent on the application or otherwise of Competition Law during such crises, the Commission stayed filings under Section 3 and 4 of the Act.

INTERNATIONAL RESPONSE

The United States allows any firm, individual, or group of firms or individuals to submit a proposal to the agencies and get the Federal Trade Commission's (FTC) "Staff Advisory Opinion" or the Department of Justice's "Business Review Letter", advising whether the antitrust activity violates the antitrust laws. This procedure has been expedited and proposal's related to COVID-19 problem would be vetted within seven calendar days of receiving all necessary information. In the joint statement by FTC and DOJ, it was stated that certain collaborative research and development efforts which are "efficiency-enhancing integration of economic activity" are considered procompetitive. Similarly sharing technical know-how rather than company specific data may also be

⁶ Competition Commission of India, Measures in view of threat of Coronavirus/ COVID 19 pandemic (Mar.23, 2020) https://www.cci.gov.in/sites/default/files/whats_newdocument/scan1.pdf

⁷ Competition Commission of India, Measures in view of threat of Coronavirus/ COVID 19 pandemic (Mar.30, 2020) https://www.cci.gov.in/sites/default/files/whats_newdocument/30thcircular.pdf

necessary to achieve procompetitive benefits. The FTC also stated that it would initiate criminal prosecution for actions such as fixation of prices or wages, rig bids or allocate markets.⁸

The European Commission, the EFTA Surveillance Authority and the National Competition Authorities which together form the European Competition Network (ECN) issued a joint statement on the application of the antitrust rules during coronavirus crisis. Considering the fact that initiatives may be taken by companies to meet the need of the circumstances, the Commission set up a dedicated mailbox COMP-COVID-ANTITRUST@ec.europa.eu, where the companies could seek advice on the compliance of the initiative with EU antitrust law. The companies were asked to submit information on (i) the firm(s), product(s) or services(s) concerned; (ii) the scope and setup of the cooperation; (iii) the aspects that may raise concerns under EU antitrust law; and (iv) the benefits that the cooperation seeks to achieve, and an explanation of why the cooperation is necessary and proportionate to achieve those benefits.⁹ ECN stated that it would take action to ensure competitive price of products (such as face masks and sanitising gel) and the existing rules would allow manufacturers to set maximum prices for their products. The Commission advised the companies to approach the National Competition Authorities for local or national cooperation issues.

Certain specific antitrust issues of local or national cooperation or concentration of power during the Coronavirus COVID-19 pandemic was also addressed by the competition authorities of these countries. The Norwegian Government granted an exemption from the application of competition laws to allow Norwegian airlines to coordinate routes during the coronavirus epidemic for three months.¹⁰

The Hellenic Competition Commission (Greece) stated that in order to safeguard competitive market conditions, to protect consumer interests and economic growth it would be more vigilant of

⁸ Federal Trade Commission, Joint Antitrust Statement regarding COVID-19 (Mar.24, 2020) https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf

⁹ European Competition Network, Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona Crisis (Mar.23, 2020) <https://www.competitionpolicyinternational.com/eus-statement-by-the-competition-authorities-on-the-coronavirus-crisis/>

¹⁰ Nina Berglund, Airlines allowed to cooperate, for now (Mar.18,2020) <https://www.newsenglish.no/2020/03/18/airlines-allowed-to-cooperate/>

possible anticompetitive practices.¹¹ It issued another press release on the application of competition rules wherein it stated that in view of Article 1(1) of Law 3959/2011 and Article 101(1) TFEU as well as Regulation (EU) No 330/2010 "Block Exemption Regulation" certain agreements and practices which restrict and distort competition between undertaking operating at different levels of the production or distribution chain are prohibited. It also stated that subject to certain conditions it will not take action against imposition of a maximum resale price or recommended price on supply contracts and distribution agreements.¹²

The French competition law enforcement body stated that the measures linked to COVID-19 will have an impact on its ability to deal with concentration cases. It urged companies to postpone economic concentration projects that are not urgent. The Commission stated that it would not be able to meet the processing times given the situation and would accept communications of any document or notifications exclusively by electronic means from March 17, 2020.¹³ The Portuguese Authority (AdC) also issued a notification on anti-competitive practices that may exploit the situation and invited complaints through its electronic portal. The Authority also put in place a contingency plan designed to mitigate public health risks which includes measures such as remote working for staff, restricting travelling etc.¹⁴ Similar measures to ensure suspension of non-critical international and domestic travel and remote working of employees has been taken up in by the Federal Trade Commission in the United States of America.¹⁵

The measures adopted by European member states show that the cartel activities would not be taken in light vein and the Authorities would not hesitate to crackdown. In fact the Polish Competition Authority ('UOKiK') initiated proceedings on unfair conduct, i.e., termination of contract with the aim to obtain contract on significantly higher prices, of wholesale suppliers of personal protective equipment to hospitals and launched a hotline for hospital directors to inform

¹¹ Hellenic Competition Commission, Competition Law Enforcement and COVID-19 Pandemic (Mar.7, 2020) <https://www.epant.gr/en/enimerosi/press-releases/item/838-press-release-competition-law-enforcement-and-covid-19-pandemic.html>

¹² Hellenic Competition Commission, Application of Competition Rules (Mar.16, 2020) <https://www.epant.gr/en/enimerosi/press-releases/item/837-press-release-application-of-competition-rules.html>

¹³ Autorite de la concurrence, Adaptation of concentration control procedures due to Coronavirus COVID-19 (Mar.17,2020) <https://www.autoritedelaconcurrence.fr/fr/article/adaptation-des-procedures-de-controle-des-concentrations-en-raison-du-coronavirus-covid-19>

¹⁴ Portuguese Competition Authority, AdC assures vigilance of anticompetitive practices that exploit current situation (Mar.16, 2020) http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202003.aspx

¹⁵ Federal Trade Commission, FTC Outlines Agency's response to coronavirus challenges (Mar.7, 2020) <https://www.ftc.gov/news-events/press-releases/2020/03/ftc-outlines-agencys-response-coronavirus-challenges>



the Authority of such behavior.¹⁶ The Italian Competition Authority also started investigation against Amazon and eBay for allegedly excessive pricing of its products such as hand sanitizer during the crisis.¹⁷

Before the Indian government stepped in masks and sanitizers were in scarcity and the prices shot up¹⁸ and despite imposition of export ban face masks were being attempted to be smuggled out of India.¹⁹ Thus indicating the need for Competition Commission of India's strong vigilance on all collaborations, agreements and any concentration of power. The global response shows that the current antitrust law is adept to meet the public health emergencies or crises even though there is no explicit provision of such crises exception. The measures adopted by various countries including India's antitrust body show that no carte blanche for arbitrary action would be allowed in this time of crises and there is no need for an explicit inclusion of a crises exception in antitrust laws.



¹⁶ Poland Competition Authority, UOKik's proceeding on wholesalers' unfair conduct towards hospitals (Mar.4, 2020) https://www.uokik.gov.pl/news.php?news_id=16277

¹⁷ Competition Policy International, Italy probes Amazon, eBay over price hikes over Coronavirus (Mar.12, 2020) <https://www.competitionpolicyinternational.com/italy-probes-amazon-ebay-over-price-hikes-over-coronavirus/>

¹⁸ The Economic Times, Coronavirus scare grips India: Price of N95 mask shoots up to Rs.500, Sanitizer shortage in stores (Mar.19, 2020) <https://economictimes.indiatimes.com/magazines/panache/coronavirus-scare-grips-india-price-of-n95-mask-shoots-up-to-rs-500-sanitiser-shortage-in-stores/articleshow/74476650.cms?from=mdr>

¹⁹ Times of India, Face masks worth Rs.14 crore seized in Mumbai (Mar.24, 2020) <https://timesofindia.indiatimes.com/city/mumbai/face-masks-worth-rs-14-crores-seized-in-mumbai/articleshow/74788262.cms>