

## COVID 19 AND ANTI-TRUST: HOW WILL THE COMPETITION COMMISSION OF INDIA RESPOND

The Indian Prime Minister's address on March 24, 2020, his second within a period of five days, directing a complete nationwide lockdown for twenty-one days, is testament to the unprecedented times and extraordinary steps required to be taken to control the spread of COVID-19 pandemic.

Amid the lockdown, while access to and production of [essential services](#) has been allowed, several concerns have arisen in the markets. In the initial days of the COVID-19 pandemic, a sudden increase in demand for essential products (hereinafter used to refer to products such as hand sanitizers, protective face masks and other healthcare products) had caused a supply shortage in the market leading to steep increase in prices for such essential products. Given the on-going uncertainty, a continuing imbalance between supply and demand of essential products would require immediate corrective steps to ensure availability of such products in this time of crises.

Globally, as enterprises take steps to respond to dynamic changes in demand and supply in the markets caused by the pandemic, scrutiny by the competition regulators of business conduct has become an important concern. It is imperative for enterprises to be aware of the regulations and restrictions applicable to them while they operate in these new market conditions. Authorities are already proactively encouraging steps to bridge supply gaps for the essential products and are increasingly taking steps to control their prices. For instance, [the government took prompt action](#) to correct the increased prices and low availability of protective face masks and hand sanitizers by amending the schedule of the Essential Commodities Act, 1955 and issuing an advisory under the Legal Metrology Act, 2009. Similarly, the Ministry of Consumer Affairs, Food & Public Distribution, *vide* its [notification](#) addressed the demand-supply gap of sanitizers in the markets. The notification provides that Ethyl Alcohol/Extra Neutral Alcohol/Ethanol, which is the most essential component of sanitizers, would be made available to the sanitizer industry by industry associations such as the All India Distilleries Association (AIDA) and Indian Sugar Mills Association. It noted that AIDA had informed the Ministry that its distillery members can bulk manufacture sanitizers which could be bottled by the sanitizer industry. Such prompt action by industry bodies and individual enterprises could become necessary to maintain market demand-supply levels and prevent shortage of essential products in this time of crisis. Whether such conduct, could give rise to potential competition issues under the Competition Act, 2002 (**Act**) would require closer scrutiny.

### Impact on CCI's behavioral and merger enforcement

As on the time of publication, the Competition Commission of India (**CCI**) has not issued any guidance on conduct of enterprises in view of the developing market realities. The enterprises while taking certain business decisions to meet the current crises might be concerned about potential exposure under the Indian competition law. Discussed below are some key issues that the enterprises should keep mind during these times:

- **Coordination between competitors:** Issues such as *coordination between competitors* which might include exchange of business-sensitive information to maintain adequate supplies in the market, or coordination to improve the efficiency of the distribution process by segregating the market into smaller divisions, may arise given the present circumstances. These issues are most relevant in sectors such as the sanitizer industry or the protective face mask industry or other essential supplies, where balance between supply and demand is crucial during these times

Other jurisdictions dealing with similar market conditions amid the spread of COVID-19 pandemic, such as the [United Kingdom have allowed temporary relaxation of competition law for supermarkets](#) to allow the retailers to collaborate to enable adequate response to market needs. Following the decision of United Kingdom, the European Competition Network, made up of the European Commission and national competition agencies, issued a [joint statement](#) calling the present times as “**extraordinary situation**” and noted that in such circumstances in order to ensure supply and fair distribution, cooperation between companies might be needed and that they would “**not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply.**” While such exchange of market facing information between competitors is prohibited under the Act (as causing or likely causing appreciable adverse effect on competition in India), it is left to be seen if the CCI, like other anti-trust regulators, provides guidance to regulate the conduct of business to avoid exploitation of market situation by firms. It will be interesting to see if the CCI while initiating any emergency measures, considers the fact that any possible anti-competitive conduct (government induced or otherwise) is probably temporary and have been brought in to address reactionary actions of the consumers (such as panic buying).

- **Pricing:** Issues of **pricing** including **price gouging, price fixation or unfair or discriminatory pricing** could also be faced by the markets and consumers, especially for the essential products. Interestingly, just after the announcement of nationwide lockdown for twenty-one days, there was [news of movement of people from Bengaluru to their home in other districts](#). Amid suspension of public transport services, many private bus operators drastically overcharged these passengers. Such conduct, under certain conditions, may be viewed as **unfair pricing or price gouging** by firms. Such issues may arise in various industry sectors including essential supplies and medical supplies industry to the extent the prices are unregulated under applicable laws. While unfair pricing by dominant entities is regulated under the Act, it is not clear if price gouging generally is within the scope of the Act
- **Other issues:** Considering the market realities, there can be a situation where some enterprises could **refuse to deal** with one group of customers in favor of other groups. Such refusal could be to maintain adequate supply into the market or could also be ill-motivated to sell the products to more lucrative group of customers. Market concerns could also arise where enterprises might be **limiting supply** to sell the products at increased costs. The markets of essential products could witness concerns such as attempts of **tying and bundling** of essential products with non-essential products, which provides an avenue of sale of the non-essential products and generates profits. Similarly, there could be competition concerns in mitigating market issues of quality maintenance arising out of the distribution system, by putting into place **exclusive distribution and supply agreements or territorial limitations** on distributors of essential products. While such conducts could be violative under the Act

As stated above, in absence of any guidance or exemptions by the CCI regarding any of these issues, business conduct of enterprises will be open to scrutiny by the CCI in the ordinary course. Accordingly, the enterprises may consider the following in their business decision making process –

- Understand the legal position and implication of the intended business decisions
- **Maintain well documented records of all business actions** and decisions taken as a response to market conditions/government directives amid the threat of COVID-19. Presence of such documented evidences will be useful in justifying any action taken, in case of CCI scrutiny
- Seek suitable legal advice from expert competition lawyers in case of any doubts

While this document discusses potential scenarios very broadly, you would be able to get specific and more detailed information in our theme-based discussion papers, which will follow soon. In the meantime, we will keep a close watch on the developments in the business and legal spheres that may be of relevance to our clients and business community in general.

**This article has been authored by ELP's Competition Team**

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**Note : This article is one amongst a series Business Continuity articles which ELP has instituted in light of COVID-19. Through these articles we hope to address legal and regulatory issues which will have an impact for doing business in and with India. To read our other articles please [click here](#).**

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