

INFORMATION EXCHANGE AND EFFORTS OF COORDINATION AMID COVID 19:  
ANTI-TRUST IMPLICATIONS IN INDIA

*This is the second article in a series of Competition Law Alerts by the Competition Law and Policy team at Economic Laws Practice, about the impact of the COVID-19 pandemic on antitrust and policy in India.*

The coronavirus pandemic has forced nations to adopt and implement far-reaching and immediate measures having wide-ranging health, social and economic consequences for the benefit of the general consumer at large. For instance, in India, in an effort to curb the voracious spread of the pandemic, the central government [announced](#) a 21 day national lockdown on March 25, 2020, with [exceptions](#) created only for the movement of essential goods (including fast moving consumer goods (**FMCG**)).

This uncertain and ever altering scenario has raised unprecedented challenges which businesses across sectors will now have to navigate through. It is in these challenging circumstances that the Competition Commission of India (**CCI**) will have a potentially important role in protecting and promoting consumer welfare while balancing industry expectations.

### CCI's Role

India, in the past few weeks, has seen disruption/shortage in both FMCG and essential products (*such as hand sanitizers, protective face masks and other healthcare products*) leading to a [sharp increase in prices](#), severely affecting the demand-supply balance in the markets. To ensure uninterrupted and fair-priced supply, the Ministry of Consumer Affairs has [temporarily marked](#) these products under price regulation (*per the Essential Commodities Act, 1955*) which mandates that these products be available the general public at reasonable prices or under maximum retail price. With a view to keep alive the transaction appetite of the Indian industry, the [Reserve Bank of India](#) stepped in and formulated a detailed regulatory package, including slashing interest rates and allowing a three-month moratorium on loan repayments.

The CCI has the unique task of promoting and sustaining competition in the markets while regulating practices which might have an appreciable adverse effect on competition (**AAEC**), in addition to protecting the interests of consumers in India. Dealing with the COVID-19 pandemic in an effective manner with reduced resources might require companies to join hands and collaborate on maintaining adequate production and supply of FMCG and essential products. Under usual circumstances, such cooperation may trigger AAEC as market players are no longer competing to provide better services but are relying on each other's resources to share the market and customers.

With a view to balance expectations from industries and to ensure consumer welfare/public interest, antitrust regulators around the world have relaxed applicability of antitrust rules and have provided specific directions for companies involved in provision of such essential services. The CCI, till date, has not issued any directions or guidance to cope with the extraordinary market situation.<sup>1</sup> Even the CCI's nodal ministry, the Ministry of Corporate Affairs has not waded in to provide clarity to the relevant stakeholders from a competition law perspective.

- The Australian Competition and Consumer Commission has [authorized](#) private and public hospital to work together by discussing expected demand for services, sharing and jointly procuring equipment, medicines and other resources, allocating patients and staff between themselves.

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<sup>1</sup> The CCI has only directed that in light of the national lockdown, all filings, submissions and oral hearings will be [suspended till 14<sup>th</sup> April](#), with only merger notices falling under Green Channel being allowed to be filed electronically.

- The [United Kingdom has allowed temporary relaxation of competition law for supermarkets](#) to allow the retailers to collaborate to enable adequate response to the market needs.
- The European Competition Network, comprised of the European Commission and national competition agencies recently issued a [joint statement](#) noting that 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.*”
- Similarly, the Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission of the United States recently issued a [joint statement](#) which allowed collaborative efforts between competitors to respond to COVID 19. The joint statement also provides guidance and expedited processes for reviewing competitor collaborations.

While cooperation and information exchange in itself are not *per se* illegal under the Competition Act, 2002 (**Act**), cooperation (*will be assessed as ‘agreement’ under the Act*) which changes market dynamics (*see section 3(3) of the Act*) is presumed to have an AAEC. In practice, the CCI considers communication between competitors, either in person or by telephone, letters, e-mail or through any other means to qualify as an agreement under the Act. As such, any communication between market players seeking information on mutual supply or pricing may be seen as an ‘agreement’ under the Act.

Companies in India have already responded to the Indian government’s directive of speedy and focused production and may face regulatory restraints in conducting their business in the existing circumstances. They might be forced to modify their modus of conducting business. Some instances of market coordination which may be undertaken between competitors to effectively implement the directives of the Indian’s government could include,

- Companies sharing data sets encapsulating the demand spikes, supply restrictions and disruptions, availability of capacity (*both present and future projections*) as experienced by various market players;
- Companies entering into informal arrangements agreeing to jointly prioritize certain suppliers/buyers or only engage with certain suppliers/buyers in order to ensure uninterrupted trade;
- Companies assessing data from competitors to formulate their own response strategies to manage their own response to the market;
- Companies jointly working with other research companies to accelerate the development, manufacture and delivery of vaccines, diagnostics, and treatments to combat COVID-19 [*see Novartis’ statement [here](#)*].

In absence of any guidance or directives from the CCI, these instances may be well presented for scrutiny of antitrust violations. The Act does not have any stopgap provisions but does allow the central government to exempt any class of enterprises from the applicability of the Act, if necessary, for the security of the state or in public interest (*see Section 54 of the Act*). Accordingly, certain companies involved in trade of essential goods may fall within this category should the central government decide to issue such notification. Till date the CCI in its decisions, has not taken into account the impact of ‘extraordinary/ unprecedented circumstances’ (*such as floods/ cyclones or economic crises, and in the current circumstances, COVID-19*) on the market when assessing contravening conduct. Companies would do well to note that any relaxations, whenever they come from the CCI or the Central Government, cannot be seen to confer absolute immunity to implement agreements in violation of the established competition law principles. Gross antitrust violations such as price

fixing, bid rigging, exclusionary unilateral conduct will continue to be investigated (*regulators from other jurisdictions have taken a similar view*).<sup>2</sup>

Assuming that the CCI does not issue any guidance on coordination undertaken to cope with COVID-19 or the Central Government does not issue a notification temporarily exempting certain conduct, and companies are found indulging in any one of the illustrative conducts discussed above, the companies may find themselves having to defend such the conduct as being pro-competitive, pro-consumer or have some rationale justification. The Act recognizes actions which lead to accrual of benefits to consumers and/or improve and promote technical improvements in production and supply lead to pro-competitive or positive effects in the market. The CCI when assessing AAEC also seeks to balance the negative factors against the positive factors to scrutinize the conduct of the companies.

**Comment:**

While the CCI is yet to issue any guidance with respect to conduct of companies in light of the extraordinary market conditions, it is important to note that the provisions of the Act continue to apply with respect to conduct of companies. While it can be assumed that the regulator might be willing to permit some 'temporary' competitor cooperation and information exchange (*at best as pro-competitive and therefore not causing AAEC*), as a means necessary to combat the COVID-19 pandemic, scrutiny of the company's conduct from an antitrust lens will continue.

It is imperative that companies remain compliant with the provisions of the Act while dealing with the COVID-19 pandemic. Companies must continue to act independently and compete even during a crisis and should maintain well documented record of all business decisions taken in response to the market needs or government directives.

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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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<sup>2</sup> In fact, even the few conducts which the Central Government exempts from CCI scrutiny, such as the [VSA exemptions](#), carve out hardcore restraints such as price fixation, allocation of markets etc. from the scope of the exemption.