

SUPPLY AND DISTRIBUTION AMID COVID-19: ANTITRUST IMPLICATIONS IN INDIA

As businesses continue to adapt to the ever-changing market dynamics in wake of the Covid-19 pandemic, the Competition Commission of India (CCI) has now stepped in and has issued a suggestive guidance document for businesses operating in India. Through this advisory, the CCI has recognized and highlighted that the Competition Act, 2002 (**Act**) *already* provides for built-in safeguards to protect businesses from sanctions for certain coordinated conduct, provided such arrangements lead to increase in efficiencies.

The CCI has noted that to cope with the significant changes in the supply and demand patterns arising from this extraordinary situation, businesses may need to coordinate on certain activities by way of:

- Sharing data on stock levels
- Timings of operations
- Sharing of distribution network and infrastructure
- Transport logistics
- R&D data

to ensure continued supply and fair distribution of products with a view to combat any disruptions caused in the supply chain. This demonstrates that the CCI is aware of the importance of maintaining a sustainable supply chain in order to meet the growing consumer demand and is trying to ensure a balance in supply and demand of essential goods.

Although the CCI's advisory aims to placate the businesses in India, there remains an air of uncertainty and vagueness. For instance, while clarifying that coordinated conduct which results in increasing efficiencies are protected from retribution within the Act, the CCI cautioned that **only conduct which is necessary and proportionate** to address the concerns arising out of Covid-19 would be granted favorable consideration. What will be considered to be necessary and proportionate has not been defined in the advisory nor does there exist jurisprudence to demonstrate the applicability of these identifiers. In order to cope with the change in market dynamics, it is plausible that many businesses (*mainly businesses engaged in the manufacturing sector*) would try to make fundamental changes to their supply and distribution models. Earlier, the businesses used to streamline and optimize their distribution models as per the geographical presence of the end customers and manufacturing units. However, with both customer and supply dynamics no longer the same, the distribution models of businesses will also have to change to accommodate current customer preferences and operational shortage. These changes may be necessitated by government policies (*mandating strict lockdown of manufacturing of non-essential goods*) as well as the lack of work force (*due to large scale reverse migration*). This might mean that many manufacturing sectors and even the agricultural sector would be stripped of a workforce even after the national lockdown ends.¹

In the current circumstances, businesses engaged in manufacturing essential goods may need to pool their resources in the manner as illustrated by the CCI in its advisory above and present such arrangements as a means to increasing efficiencies. It is however a possibility that once a covid-necessitated arrangement is successfully implemented, and its efficiency enhancing characteristics are recognized, the parties may continue to implement such arrangements even after normalcy has been reached. It would be interesting to see how the CCI would assess such arrangements in the vacuum of a pandemic as according to its advisory it will be guided by the already existing safeguards present in the Act. Can it be possible that certain measures taken

¹ See media report here - <https://economictimes.indiatimes.com/news/economy/policy/coronavirus-would-reset-distances-labour-market-experts/articleshow/74965143.cms?from=mdr>

today will need to be winded down tomorrow and how? The answer is uncertain and unclear as the CCI's advisory does not include a time limit for implementation of any 'covid-necessitated arrangements'.

Certain sectors are seeing an uptick in activity over the pandemic as their utility and importance is being brought to the forefront. As the nation is practicing social distancing and working from home, a boost to the **telecom sector** is expected with a surge in data usage by 10-15 percent in the home broadband and mobile space in India. Another sector expected to see heightened activity is the **healthcare sector**, in both the healthcare provider division and research and development of possible vaccines. It will be interesting to note how the CCI will apply its 'necessary and proportionate' test to assess any coordination in these sectors, undertaken with a view to ensure fair distribution and supply.

Comment

It is amply clear that the current circumstances have created and are likely to create a vacuum and mismatch in the supply and demand metrics in India's consumer industry. It is important however, for the CCI to be aware of the fact that crisis arrangements between businesses may be necessitated by market circumstances such as lack of relevant operational resources and creation of distribution bottlenecks. For instance, delay caused by procurement or distribution issues may eventually translate into cost overruns which will need to be rationalized across the production chain. Therefore, while assessing such cases, it will become increasingly critical for the CCI to avoid mis-characterization of the conduct and to also focus more on market realities in order to contextualize the conduct on a case by case basis.

An example of possible misuse of circumstances is perhaps demonstrated by certain Argentinian distributors and businesses who have been accused of artificially inflating prices for food items in a supply tender issued by the country's Ministry of Social Development.¹ Similarly, given the high percentage of government procurement undertaken in India, even in the field of managing supply chain and distribution, the CCI may need to inspect the arrangements to test for possible appreciable adverse effect on competition.

As discussed at length, actions undertaken by businesses may be necessitated by market forces, in order to streamline the scarce resources (*including the weakened supply chain*) with the larger interest of ensuring consumers' needs are met. It would be interesting to see how the CCI would weigh the conduct of the businesses in order to meet consumer needs against factors relevant in a pre-covid market scenario. Although the Act does prescribe pro-competitive or positive factors when checking for AAEC, not every conduct under scrutiny might be able to demonstrate these identified factors (*see Sec 19(3)*). While it is possible that the CCI may take a lenient view ultimately at the time of scrutinizing the businesses' conduct, the content of the advisory does not give businesses the required clarity as to whether their conduct will be contextualized and rationalized.

While laudable, the advisory appears to fall short of its objective. To immediately assuage businesses, the CCI could consider setting up a helpdesk or a dedicated mailbox, allowing them to seek swift and informal guidance on specific initiatives that they propose to undertake. Given the bleak economic forecast (*with S&P opining that recovery from the pandemic will be U shaped with activity returning to pre-outbreak levels, in 2023*¹) any guidance from the CCI will at least provide the businesses with the opportunity to consolidate their losses and formulate an efficient plan of operation.

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