

COMPETITION NEWS ALERT

April 20, 2020

Competition & COVID-19-CCI issues advisory for businesses during COVID-19

The fair trade regulator, the Competition Commission of India (“CCI”), has joined other peers across the Globe and has issued a brief advisory on 19 April 2020 for guidance of businessmen across sectors on whether limited coordination can be allowed to bridge demand and supply gap during the nationwide lockdown due to COVID 19 pandemic and if so to what extent.

The advisory published on the official website can be viewed [here](#).

We provide below a gist of the DO’s & DONTs’ for benefit of our readers.

What you CAN DO during COVID-19:

1. You may coordinate certain activities in a limited way, by way of sharing data on stock levels, timings of operation, sharing of distribution network and infrastructure, transport logistics, R & D, production etc. to ensure continued supply and fair distribution of products (e.g. medical and healthcare products such as ventilators, face masks, gloves, vaccines etc. and essential commodities) & services (e.g. logistics, testing etc.) during COVID 19, provided such coordination does not lead to either price fixing, limiting or allocation of markets etc. as mentioned and prohibited under sub section 3 of section 3 of the Competition Act, 2002.
2. You may enter into JOINT VENTURES to undertake the above mentioned coordinated ventures to assist the government or the authorities concerned to fight the Corona Virus pandemic to ensure continued supply and fair distribution of products (e.g. medical and healthcare products such as ventilators, face masks, gloves, vaccines etc. and essential commodities) & services (e.g. logistics, testing etc.).
3. However, such JOINT VENTURES must be shown to lead to **efficiency gains** to escape any possible challenge thereof as an anti-competitive agreement to share, allocate or limit or control price, markets etc. The **increase in efficiency** must relate to efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. Besides, it may also lead to the accrual of benefits to consumers; improvement in production or distribution of goods or provision of services; and promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

COMPETITION NEWS ALERT

April 20, 2020

What you CAN NOT DO during COVID-19

1. Any co-ordination with your competitors which may lead to either price fixing, limiting or allocation of markets etc. as mentioned and prohibited under sub section 3 of section 3 of the Competition Act, 2002.
2. Any co-ordination with your competitors which may be considered as DISPROPORTIONATE AND UNNECESSARY to address concerns arising from COVID-19. This may vary from case to case and will be considered on the facts and circumstances of each case.
3. Apart from any co-ordination with competitors or dealers considered necessary and proportionate to the requirement of meeting any emergency needs during the COVID-19 crisis, all other unilateral business conducts or market behaviour, by any firm with a large market share in the relevant markets, which may be considered either exploitative to consumers or exclusionary for smaller business rivals are and continue to be prohibited and may be penalized as abuse of dominant position under section 4 of the Act.

VA COMMENT

The CCI official advisory is just in time and a welcome step. It will be noticed that unlike the competition authorities of EU¹, CCI has not committed itself either against “active intervention” for “necessary and temporary” cooperation between competitors; or like those in the USA, has not carved out certain *categories of collaborations* ²that may be permitted during the pandemic or like in UK³, or Holland, where exemption is granted to certain sectors by invoking relevant provision in the statute.

In our view, the approach taken by CCI is the right approach suited to the peculiar conditions in India because the existing legal framework in terms of assessing the

¹ The European Competition Network has confirmed that its competition authorities will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply during COVID 19. Available at https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf

² the Antitrust “Agencies” in USA i.e the Department of Justice (DOJ) and the Federal Trade Commission (FTC) in a joint statement have clarified that certain collaborative actions designed to improve the health and safety response to the current pandemic such as research and development activities, sharing of technical know-how, etc. will be considered consistent with the applicable antitrust laws. Available at - https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf

³ UK and Dutch competition authorities have taken welcome steps to allow cooperation in the food supply chain. UK Notification available at <http://www.legislation.gov.uk/ukxi/2020/369/made>

COMPETITION NEWS ALERT

April 20, 2020

appreciable adverse effect in competition (“AAEC”) under the Competition Act, 2002 (the Act) is flexible and enables the CCI, to undertake a case-by-case analysis taking into account any hardship/peculiarities of the present circumstances. The determination of AAEC requires a balancing of its procompetitive effects against its anticompetitive effects, mentioned specifically as factors under Section 19(3) of the Act. For instance, one of the factors that the CCI may consider while assessing the impact of an agreement is whether it enables or leads to “*improvements in production or distribution of goods or provision of service*”. Similarly, for determining the unliteral conduct of an enterprise with a strong market position to see whether an abuse of dominant position has occurred, requires the CCI to consider if an objective justifications exists that the enterprise had (such as, protecting the quality of supply chain, or meet competition) when imposing such restrictions.

For any further information/clarification, please feel free to write to:

MM Sharma -mmsharma@vaishlaw.com

Charms Mathew -charms@vaishlaw.com
