

## ERGO

*Analysing developments impacting business*

### COVID 19 AND COMPETITION: INDIA PERSPECTIVE

25 March 2020

As COVID-19 continues to induce turbulence in our lives, infrastructure and economies, India continues to show its resilience, strength and unity. However, despite best efforts, our daily lives, working patterns, regulatory and legal structures are constantly facing renewed challenges. However, competition rules continue to apply and thus far, the Competition Commission of India (CCI) has not issued any relaxation in any spheres unlike some of its international counterparts.

In this update, we outline the competition law risks that companies may fall prey to during the subsistence of this global crisis and apprise you of key regulatory developments that will likely impact on-going investigations as well as merger approval timelines.

#### OPERATIONAL CHALLENGES

##### Are compliance requirements under the competition law suspended during COVID-19?

As on 24 March 2020, all requirements under the Competition Act, 2002 and its associated regulations / notifications (Act) continue to be in full effect. As such, competition compliance obligations will not be waived merely on account of COVID-19 unless an explicit notification to that effect is promulgated by the CCI or the Ministry of Corporate Affairs (MCA). Therefore, pending any announcement, all obligations under the Act will continue to apply as is.

##### Can competitors extend cooperation in light of the challenges posed by the COVID 19 crisis?

The Act explicitly prohibits horizontal agreements which result in price fixing; allocation of customers or territories or markets; limiting of technological innovation or production or supply; and bid rigging. These forms of arrangements are presumed to be anti-competitive, unless proven otherwise.

The risk of entering into horizontal agreements for some industries such as, pharmaceutical and healthcare, consumer goods, essential commodities, etc during pandemics is higher compared to others. This is because consolidation of learnings and technologies across competitors in these sectors may appear lucrative in order to meet the pandemic induced demands. In such situations, it is preferable to ensure that all competitor co-ordinations are always undertaken after seeking adequate legal counsel. In addition to the foregoing, it is absolutely crucial that during all inter-business co-

ordinations, relevant departments and information are securely ring-fenced to ensure that the competitive character of the firms is retained.

## Can companies increase pricing at whim given the consumer inclination to stock up on essentials?

Given the current pandemic and the slow-down of many business verticals, firms may find it necessary and/or profitable to increase prices of commodities or services currently in demand. In such a case, the CCI can penalise dominant firms engaging in such practices if the firms fail to establish enough co-relation between the input cost price and the high sell prices.

On a related note, the Ministry of Consumer Affairs, Food and Public Distribution by way of an order dated 13 March 2020 under the Essential Commodities Act, 1955 has added hand sanitisers and face masks to the scheduled list of essential commodities, whereby these goods cannot be sold at prices above the indicated maximum retail price. Further, on 21 March 2020, the Ministry of Consumer Affairs also issued an order to cap prices of these essential commodities at the prices prevailing in the market as on 12 February 2020.

Given this approach taken by the Government of India, it can safely be presumed that the CCI will keep an eye out to monitor any untoward business practice that is detrimental to consumers in the current times.

## Are there any risks in participating in bids?

Given the rapid increase of COVID-19's spread in India, the Government of India may very soon float tenders for purchasing medical equipment and testing kits which are in very high demand. In this regard, any co-ordination between firms designed to (i) co-ordinate prices; (ii) allow select participants to win in select jurisdictions through cover bids; or (iii) undertake any other co-ordination will be considered a gross violation of the law and all participants in such arrangement can be penalised heavily by the CCI.

## What competition issues may emerge from availing a working-from-home set up?

While working from home enables us to connect globally from the privacy of our homes, one must not forget that this technology is heavily reliant on connecting individuals through increased email communications, online document sharing, etc. In this regard, conscious effort should be taken to ensure that email chains and shared document's recipients are correctly vetted each time to ensure that competitively sensitive information is shared appropriately, and no leakages happen. Sincerity in this regard is paramount because problematic online "paper trails" are significantly difficult to cure and remedy.

## What can businesses be mindful of while communicating with supply chain participants under the present circumstances?

Given the current pandemic, it might be necessary to increase communication with supply chain participants to ensure continuance of efficient supply and distribution networks. In this regard, we recommend using safeguards like flagging communications as "confidential" to ensure that your information is not relayed to your competitors through the supply chain participants. If such recycling of information happens without adequate safeguards, you may be seen as communicating with competitors in a hub and spoke model, attracting high penalties.

## What are the precautionary steps that can be taken for internal communication?

Work-from-home set ups increase reliance on instant messaging applications like WhatsApp for continuity of business. Interestingly, unlike in corporate email

infrastructures, in case of instant messaging applications, proliferation of data by the recipients cannot be monitored by the firms. Accordingly, employees can knowingly or unknowingly engage in proliferation of data which may attract penal consequences for both, the firms and the employees. To avoid such risks, it is advisable that competitively sensitive and confidential information are not shared through instant messaging applications or shared with great care and consideration.

## REGULATORY FUNCTIONING

### Is the CCI functioning as normal during this pandemic?

The CCI is currently functioning at a reduced capacity and most of its officers are working from home. By way of notification dated 23 March 2020, the CCI has suspended all submissions and hearings before the CCI pertaining to (i) anti-competitive agreements or abuse of dominance and (ii) merger control. The CCI has also suspended (i) any other filings, including filings made before the investigative arm of the CCI, ie the office of the Director General, and (ii) conducting of any informal pre-filing consultation exercise with the officers of the CCI. The CCI has also adjourned all matters listed for hearing before it until 31 March 2020. This period may be extended depending on how developments unfold. Merging entities must therefore brace for delay in approval timelines and factor it into their overall deal closing timelines. Parties under investigation or in the midst of enforcement proceedings must be equally mindful of delayed progress in proceedings at the CCI.

### Are appellate bodies of the CCI suspended during this pandemic?

The National Company Law Appellate Tribunal (NCLAT), the court of first appeal from the CCI, through a notification dated 20 March 2020 stated that until 1 April 2020, only urgent matters will be listed for hearing. All other matters are adjourned and the date of hearing for such matters will be notified at a later date. The filing counter at the NCLAT is also closed, and therefore, no filings can currently be made at the NCLAT. As such, the notification requires the officers and judges of the NCLAT to work from home and come to the NCLAT premises only if absolutely necessary.

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