



## UNDERSTANDING THE POSITION OF COMPETITION LAW IN THE TIME OF COVID-19: INDIA & THE E.U.

By Kunal Singh

From Vivekananda Institute of Professional Studies

### **ABSTRACT**

The world at large is badly hit by the COVID-19 pandemic. In the time of the pandemic, businesses, including huge conglomerations, are experiencing unprecedented challenges in the proper regulation of their business and finding it difficult to sustain themselves. Big business giants are coming forward in pharmaceutical, hospitality, banking, and software development sectors to cooperate to hand over a boost to the economy. While these efforts taken by the companies are commendable, the cooperation between the business entities should operate in consonance with the provisions of the competition law. This article discusses the refashioned implementation of the provisions of the competition law without having an Appreciable Adverse Effect on Competition (AAEC). This article further compares the perspective of India on the competition with the perspective of other countries and concludes plausible solutions to tackle the problems arising therein.

### **INDIAN PERSPECTIVE**

The competition sector in India is governed by the Competition Act 2002<sup>1</sup>. In the time of the pandemic, more and more business

groups are coming forward to join hands to cooperate to increase the production, demand, supply, distribution, and consumption of goods so that a larger section of society would be benefitted. The catch here is that these business groups can only cooperate if they do not violate the provisions of the competition law, and adhere to the guideline laid down by the commission otherwise, it would attract penalty.

Section 3(1)<sup>2</sup> of the Competition Act 2002 deals with the Anti Competitive Agreements.<sup>3</sup> While conducting business in India, business groups are prohibited from executing anti-competitive agreements. These agreements include agreements between **“enterprises or association of enterprises or persons and association of persons germane to the production, supply, distribution, storage, acquisition or control of goods and provision of services”**<sup>4</sup>. This type of agreement is thought to be having an AAEC within India and for this reason it is prohibited.

Section 3(3)<sup>5</sup> of the Competition Act deals with the anti-competitive cartel agreements which are agreements; “(a) to directly or indirectly determine sale or purchase prices; (b) to limit or control production, supply markets, technical developments, investment or provision of services; (c) share markets, source of production or provision of services by way of allocation of the geographical area of the market, types of goods or service, number of customers in the market, or in any

<sup>1</sup> The Competition Act 2002

<sup>2</sup> The Competition Act 2002, s 3(1)

<sup>3</sup> PSA, ‘India: Anti Competitive Agreements: Tests and Tribulations’ (*Mondaq*, 11 July 2013) <<https://www.mondaq.com/india/trade-regulation-practices/250048/anti-competitive-agreements-tests-and-tribulation>> accessed on 19 May 2020

practices/250048/anti-competitive-agreements-tests-and-tribulation> accessed on 19 May 2020

<sup>4</sup> Sherry J Thomas, ‘Competition Act, 2002’ (*Scribd*) <<https://www.scribd.com/document/37019161/Competition-Act>> accessed on 19 May 2020

<sup>5</sup> The Competition Act 2002, s 3(3)



other similar way; or (d) rig bidding or collusive bidding as it is presumed to have an AAEC within India”<sup>6</sup>. An exception to this is that the agreement entered into by way of Joint Venture that is or is likely to increase the efficiency in the production, distribution, supply, storage, acquisition or control of goods, and provision of services is not prohibited under the provisions of the Act.

The Competition Commission of India also issued an advisory<sup>7</sup> dated 19<sup>th</sup> April 2020 citing this as an extraordinary, unprecedented, and challenging time for the businesses to carry on their operations. It notified that in these hard times it is essential to maintain the chain of production, supply, distribution of essential commodities and has allowed the business group to cooperate and share critical information such as stock levels, information about infrastructure, and information about customers, but also added that this cooperation between business groups should look to enhancing the efficiency in the production, supply, distribution, and consumption of the commodities and if the commission finds someone contravening the guidelines laid by it would be penalized. The *onus probandi* lies upon the party being investigated for the possible contravention.

For the business groups to benefit from this presumption, increased efficiency, larger benefits and social welfare has to be demonstrated by them, in the absence of

which they are presumed to have been violating the provisions of the competition law and thus will elicit the prescribed penalty.

While some of the jurisdictions in the **European Union** recognize *crisis cartels*<sup>8</sup>, India does not. The concept of crisis cartels allows the industry players to join hands to cooperate and find a solution for the common problem arising out of the crisis. These industry players have to demonstrate that their cooperation is the *sine qua non* for the larger benefit and welfare of the society and the consumers will receive a fair share of the benefit received by them. In India, the provision of, ‘efficiency increasing JV’s’ is carved out in the Competition Act which is a possible defense for the cooperation between business players and not industry-wide collaboration.

#### MEASURES TAKEN BY THE COMPETITION COMMISSION OF INDIA

In the bid to tackle this pandemic and to succour the business operations, the Competition Commission of India has taken some timely and effective measures. Some of the steps taken by the commission are:

##### Suspension of filings under Sections 3 and 4 of the Act:

Sections 3 and 4 deal with the anti-competitive agreements and abuse of dominance position respectively. The

<sup>6</sup> Competition Commission of India, ‘Competition Act’ (*Competition Commission of India*, 1 August 2018) < <https://www.cci.gov.in/competition-act>> accessed on 19 May 2020

<sup>7</sup> Competition Commission of India, ‘Advisory to Businesses in Time of COVID-19’ (*Competition Commission of India*, 19 April 2020)

<[https://www.cci.gov.in/sites/default/files/whats\\_new\\_document/Advisory.pdf](https://www.cci.gov.in/sites/default/files/whats_new_document/Advisory.pdf)> accessed on 20 May 2020

<sup>8</sup> Maverick Advocaten NV, ‘Crisis cartels and state aid as a solution to the corona pandemic’ (*Lexology*, 20 March 2020) <<https://www.maverick-law.com/en/blogs/crisis-cartels-and-state-aid-as-a-solution-to-the-corona-pandemic.html>> accessed on 19 May 2020



Competition Commission of India had suspended all the filings related to the aforementioned sections as per the notice dated 23<sup>rd</sup> March 2020<sup>9</sup>. Subsequent notices by the commission extended this date to 14<sup>th</sup> April 2020.

#### Hearings before the Commission:

Even before a nationwide lockdown came into operation, the CCI had suspended all the business and competition-related hearings from 17<sup>th</sup> March to 31<sup>st</sup> March 2020. Further, it extended the date of this suspension to 13<sup>th</sup> April 2020.

#### Pre-filing consultations:

All the pre-filing consultations were suspended by the CCI by a notice dated 23<sup>rd</sup> March 2020. Later, they were allowed via video conferencing through a notice dated 13<sup>th</sup> April 2020.

#### Notification of combinations:

The CCI following its notice dated 23<sup>rd</sup> March 2020 had suspended all the notification of combination related to combinations (Section 6<sup>10</sup> of the Act). Further, a notice released by the CCI on 30<sup>th</sup> March 2020 allowed for the filing of notification of combinations electronically only through the Green Channel<sup>11</sup>.

### ANALYSIS OF THE INDIAN PERSPECTIVE

The competition authority in India, i.e. the Competition Commission of India responded readily and effectively the imminent threat, posed by COVID-19, to the business sector and competition regulation in India. The most significant step taken by the Commission was the adoption of electronic means for filings and notification of combinations. This step, if studied in the light of COVID-19, was appreciable because it saved time of the applicants and red-tapism involved in the whole procedure and maintained the social distancing norms.

Taking cognizance of the challenges faced by the business operators in these hard times and welfare of the society at the same time, the CCI took a comprehensive and balanced approach in addressing these issues. It allowed the industry players to collaborate and cooperate with each other for the purpose of boosting the production, supply, and distribution sectors, keeping in mind that while doing so they are not contravening the provisions of the Act. It is generally said that hard times call for innovation and the CCI has put this saying into practice. In an advisory released by the CCI dated 19<sup>th</sup> April 2020, it stated that it will only allow those businesses that are essential to operate to address the concerns arising out of COVID-19, and no business operator should contravene the provisions of the Act. Thus, the approach of the CCI is pro-competitive and not anti-competitive in nature.

<sup>9</sup> The Economic Times, 'CCI suspends combination, anti-competitive business practices filings till 31<sup>st</sup> March' (*The Economic Times*, 23 March 2020) < <https://economictimes.indiatimes.com/news/politics-and-nation/cci-suspends-combination-anti-competitive-business-practices-filings-till-march-31/articleshow/74779221.cms>> accessed on 20 May 2020

<sup>10</sup> The Competition Act 2002, s 6

<sup>11</sup> SS Rana & Co Advocates, 'CCI introduces "Green Channel" clearance for mergers and acquisitions (M&A)' (*Mondaq*, 23 October 2019) < <https://www.mondaq.com/india/maprivate-equity/856352/cci-introduces-green-channel-clearance-for-mergers-acquisitionsma>> accessed on 20 May 2020



### **THE GLOBAL PERSPECTIVE**

India is not the only country that has been suffering persistent unprecedented challenges in the business and the competition sector stemming from the gradual rise of the COVID-19 pandemic. Many countries across the world have been badly hit by the pandemic resulting in the disruptions faced by industries in maintaining the production and supply chain to make up for the imminent shortage of essential scarce products.

These times have provided an opportunity for the countries to re-assess their competitive practices and to re-frame their competitive provisions in order to facilitate the production and supply chain of essential scarce products saving them from imminent shortage and ensuring that these concerns should be addressed in compliance with the intensity of the emergency. For this, many countries, like India, have allowed the industry players in the essential goods sector to cooperate by sharing all the commercial, consumer-related, and business-related information that may otherwise be anti-competitive in nature.

#### **The European Competition Network (European Union):**

The European Competition Network responded readily to the challenges posed by the pandemic and has temporarily accepted the cooperation between industry players to continue the disrupted production and supply chain of essential scarce products and

ensuring proper dispersal of those essential goods to the consumer.

To this effect, the ECN<sup>12</sup> released a Temporary Antitrust Framework<sup>13</sup> on the 8<sup>th</sup> of April 2020 to ease the competitive practices for the purpose of cooperation between industry players dealing in essential scarce products. Since this pandemic is a public health emergency and the word emergency means that things will not be normally operated and a temporary restructured framework is necessary to facilitate the operations as they would have been if things were normal. Thus under the TAF, the ECN inspected the scope for cooperation between competitors and allowed them to carry on their operations in cooperation for a temporary period.

The ECN under the TAF has set out some criteria for the validation of the essential cooperation and stated that since this cooperation involves the sharing of sensitive information germane to the business and commerce which would attract anti-competitive provisions, and to prevent this these criteria have to be met by them. These are as follows:

- a) The cooperation should be 'essential' and necessary to foster the output of essential scarce goods and avoid the imminent shortage.
- b) The cooperation should purely be temporary in nature and not continue beyond the prescribed periods by the ECN.
- c) It should not be strictly necessary to achieve the objective of avoiding the imminent

<sup>12</sup> The European Competition Network

<sup>13</sup> European Commission, 'Communication from the Commission' (*European Commission*, 8 April 2020) <

[https://ec.europa.eu/info/sites/info/files/framework\\_communication\\_antitrust\\_issues\\_related\\_to\\_cooperation\\_between\\_competitors\\_in\\_covid-19.pdf](https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf)> accessed on 20 May 2020



shortage in the supply of essential scarce goods.

The ECN in the TAF also stated that the cooperation between the industry players is a way to avoid the imminent shortage of essential scarce goods. For this, the ECN recognized the need for specific guidance that can help the industry players with their cooperation initiatives for their self-assessment. The ECN also recognized that providing *ad hoc* feedback to the undertaking would help in carrying on their cooperation initiatives. The ECN for guiding the undertakings in their essential cooperation initiatives and to facilitate a swift continuity in the production and supply chain had also introduced a completely dedicated portal<sup>14</sup> and mailbox (COMP-covid-ANTITRUST@ec.europa.eu) for guiding the undertakings in their initiatives. In the first, the ECN issued first of the comfort letters to the Medicines for Europe<sup>15</sup> on 25<sup>th</sup> March 2020 relating to the essential cooperation for ensuring a continued supply of medicines to some critical hospitals. The issuance of the comfort letter has opened up the scope for other undertakings to seek exemption from the anti-competitive practices during the pandemic.

Article 102 of the Treaty on the Functioning of the European Union<sup>16</sup> prohibits the potential abuse of a dominant position by one or more than undertakings in the form of refusal to supply, setting up of the minimum price, and fixing of exorbitant prices of the

essential scarce commodities. Within the ambit of the aforementioned article, the ECN is also planning of fixing the maximum price of the essential scarce commodities so that the undertakings do not take undue advantage of the consumers and charge them exorbitantly.

**A COMPARATIVE ANALYSIS OF THE APPROACHES TAKEN BY THE CCI AND THE ECN**

During the time of the pandemic, every antitrust regulator is faced with the challenge of regulating a free and fair competition in the market alongside preventing the abuse of dominant position and on the other hand allowing the undertakings to cooperate and coordinate for enhancing the efficiency in the production and supply of essential scarce goods to overcome the imminent shortage of goods. Both the CCI and the ECN responded readily anticipating the graveness of the situation and took suitable measures for it. A close examination of the policies made by the two antitrust regulators showed that their approaches are distinct and yet significant.

STEPS	CCI	ECN
Crisis Cartels	No (only through JV's)	Yes
Suspension of Filings	Yes	No. It has been accepted albeit at a

<sup>14</sup> < <https://ec.europa.eu/cmpetition/antitrust/coronavirus> > accessed on 20 May 2020

<sup>15</sup> European Commission, 'Antitrust: Commission provides guidance on allowing limited cooperation among businesses, especially for critical hospital medicines during the coronavirus outbreak' (8 April 2020) <

[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_618](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_618)> accessed on 20 May 2020

<sup>16</sup> Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ 115 <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E102&from=ES>> accessed on 21 May 2020



		slower rate.
<b>Hearings before the Commission</b>	Suspended	Suspended
<b>Notification of Combinations</b>	Suspended	Not suspended and ECN is already accepting them.

CCI, the ECN continued to accept the notification of mergers albeit in a slower manner. Both the CCI and the ECN suspended the hearing before the respective commission.

A close look at the steps taken by both the antitrust regulators has shown that although their approaches were distinct, they were directed towards revitalizing the economic structure by re-assessing the antitrust regulations and re-framing a temporary framework to uplift the production and supply chain of the essential scarce goods for the general well being of the public.

**CONCLUDING REMARKS**

The above table draws a fair comparison between the two antitrust regulators after a close analysis. The Competition Commission of India does not recognize the concept of ‘crisis cartels’. It has only allowed the business players to cooperate in situations like this only by way of Joint Ventures. It does not permit an industry-wide collaboration for the purpose of general well being and overcoming the imminent shortage of essential scarce goods. Unlike India, many jurisdictions in the European Union<sup>17</sup> recognize ‘crisis cartels’ which allow an industry-wide collaboration between the undertakings without contravening the provisions of the competition law.

The public health emergency has called for a coordinating approach by the undertaking to fulfil the public health objectives. The most important thing that the industry players or the undertakings have to remember that before collaborating with other competitors one should take legal advice on the legality of the cooperation and should assess one’s competition compliance program. Competitors should not share (directly/indirectly) any sensitive information; use a common platform to set prices, or cooperate by equally dividing the geographical area and sharing the consumer-related information. An ill-informed decision at the time of the pandemic may attract the penal provisions of the respective anti-trust regulators that can cause the financial drain of the undertaking.

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Another distinction is regarding the suspension of filings before the respective commissions. While the CCI had suspended all the filings under Section 3 and Section 4 of the Act till 14<sup>th</sup> April, the ECN on the other continued to accept the filings. Unlike the

<sup>17</sup> Andrea L Hamilton, Christin Krohs and Max Kuttner, ‘Crisis and Compliance’ (*Mwe*, 26 March

2020) <<https://www.mwe.com/insights/crisis-compliance-eu-competition-law-during-covid-19/>> accessed on 21 May 2020