

## COVID-19 AND ITS AFFECT ON COMPETITION LAW REGIME

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### **Abstract**

Every pandemic challenges the world, to change, to adapt and to reboot. The coronavirus or COVID-19 has done the same to people as well as the businesses. Where on one hand we stand together in unison to fight in this struggle, the businesses on the other hand are taking initiative in joining hands to collaborate and innovate to meet the demand supply. In this time the businesses need to understand what they *can* do and *cannot* do to deal with the current crisis from a competition law perspective. It should be understood by the companies that even during a crisis, competition law remains applicable. However there may be certain government exemptions which might seek to counter the crisis by making unprecedented provisions for companies which are seeking to cooperate. These exemptions should not be taken advantage of and thus the role of competition authorities becomes more significant than ever. This article talks about the change brought about in the conduct of the businesses due to the pandemic and further the various regulations and measures adopted by the competition authorities world-wide. The article will further trace the role of these authorities in keeping a check on these companies by means of drawing a line on their conduct.

### **I. Introduction**

### **II. Temporary antitrust measures to check the Effect of Pandemic on Businesses across the world**

### **III. Competition Commission of India: Changes to deal with Pandemic in India**

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### **V. Conclusion: A word of caution to the Businesses**

### **I. Introduction**

THE WORLD is suffering a great deal in fighting against this pandemic of corona virus or covid-19 as the name given by World Health Organization (WHO). This pandemic has challenged the current health as well as economical structure across the globe. Countries are struggling to maintain the adequate supplies of food, health and sanitation requirements of the people. COVID-19 presents companies with many challenges and the consequent disruption is likely to affect the global economy significantly in the coming months and potentially

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years. Thus this has triggered companies around the world to find solutions to deal with this crisis. Such solutions may involve scenarios of cooperation with competitors to deal with supply-chain challenges or with potential future overcapacity.<sup>1</sup>

In addition to this, the businesses and the companies are also engaging in collaborative and creative practices to rise up at the hour of need. Certain examples of such collaborations are the pharmaceutical companies, like Pfizer and Bio-Ntech have joined forces to co-develop a vaccine on one hand and the technological companies such as Apple and Google have also joined hands in creating software to track the trace of infections in the carriers and other patients. The European Commission has published a framework for co-operation between enterprises in the healthcare sector to overcome critical supply shortages of medicines and medical equipment, subject to them being necessary and proportionate.<sup>2</sup> To cope with the extraordinary and significant change in demand of masks, hand wash and sanitizers the businesses are also combining resources and ideas and meeting up this challenge. This extraordinary situation has also triggered the companies to cooperate to ensure the supply and fair distribution of scarce products to all consumers.<sup>3</sup>

This quick surge in coordination between the businesses has been largely prompted by a series of short-term reliefs granted by antitrust enforcement agencies worldwide. There have been temporary exemptions which are being permitted for such specified cooperation amongst businesses, which would earlier fall outside the purview of antitrust laws. Competition law will not be at the top of companies' agendas today.

There have been increased chances of competition law infringements when the time of crisis happens. For example companies who are facing economic difficulties may see cooperation with competitors as the only viable option to survive; some other dominant companies may view this as an opportunity to exploit vulnerabilities of the people by adopting abusive behavior, as in cases of the sale of hand sanitizer, which are being sold at extortionate prices

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<sup>1</sup> Christopher Thomas and Christian Ritz, "COVID-19 and Competition Law – Companies Must Not Quarantine Competition Law Compliance", Apr. 2, 2020, available at: <https://www.competitionpolicyinternational.com/covid-19-and-competition-law-companies-must-not-quarantine-competition-law-compliance/> (last visited on May 31, 2020).

<sup>2</sup> Anisha Chand and Soham Banerjee, "COVID-19 | Is the CCI a friend indeed?" *Money Control*, April 29, 2020 available at: <https://www.moneycontrol.com/news/india/covid-19-is-the-cci-a-friend-indeed-5201571.html>, (last visited on May 12, 2020).

<sup>3</sup> EU, Competition, Trade And Regulatory, March 2020, "Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis", available at: [https://ec.europa.eu/competition/ecn/202003\\_joint-statement\\_ecn\\_corona-crisis.pdf](https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf) (last visited on May 20, 2020).

in light of the high demand due to COVID-19 or even face mask supplies being diverted from the health sector to the public at much higher prices.<sup>4</sup>

Thus the roles of the competition authorities are being once again called up in the time of pandemic to balance the need of the people with that of fair dealings in the business. There are also risks around competitors collaborating during the crisis, potentially leading to “crisis cartels” or other antitrust infringements. Antitrust authorities will also see their resources stretched, with knock-on effects for investigation timetables and how authorities prioritize cases.<sup>5</sup> In such times, the companies must be clear on how much leverage can be taken of such relaxations and what exactly can be done and what cannot be done to deal with the current crisis from the competition law point of view.

## **II. Temporary antitrust measures to check the effect of pandemic on businesses across the world**

### **South Africa**

The South African government has been promptly responsive in formulating ways in which to maintain business viability so as to minimise the undoubtedly crippling effects of COVID-19 and to ensure swift and effective healthcare service in the country. To this end, the Minister of Trade, Industry and Competition in South Africa has issued various regulations in response to the declaration of the COVID-19 pandemic as a national disaster by the South African Government and to strengthen the government's programmes designed to fight COVID-19.<sup>6</sup> The block exemptions are from the section 4 and 5 of the Competition Act (no. 89 of 1998), which speaks about the restrictive horizontal and vertical agreements which are prohibited to be practiced by the firms.

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<sup>4</sup> Jacques Derenne, Dimitris Vallindas and *et.al.*, “COVID-19 is Not a “Get Out of Jail Free Card” from EU Competition Law”, Mar. 24, 2020, available at: <https://www.antitrustlawblog.com/2020/03/articles/coronavirus/crisis-eu-competition-law/> (last visited on May 13, 2020)

<sup>5</sup> “COVID-19: Implications from an antitrust and competition law perspective”, March, 2020, available at: <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/bb6f3c5e/covid-19-implications-from-an-antitrust-and-competition-law-perspective> (last visited on May 30, 2020).

<sup>6</sup> “South Africa: Competition Law Exemptions and Regulations applicable during COVID-19”, Mar. 24, 2020, available at: <https://www.bakermckenzie.com/en/insight/publications/2020/03/south-africa-competition-law-covid19> (last visited on May 30, 2020).

1. *The COVID-19 Block Exemption for the Healthcare Sector Regulations (Exemption for the Healthcare Sector Regulations), effective as of 19 March 2020;*

These exemptions open up a way for private hospitals to collaborate with each other and with the state, to make the best use of hospital beds, intensive care units, and isolation facilities.<sup>7</sup> The Regulations allow for healthcare funders to enter into agreements or engage in practices with each other for the purpose of cost diagnosis, tests and diagnostics, treatment and other preventative measures.<sup>8</sup> These exemptions remove all the impediments which can hamper the co-ordination in procurement of pharmaceuticals and other consumable items, transferring of such equipments and supplies and use of manpower.

2. *The Consumer and Customer Protection and National Disaster Management Regulations and Directions (Consumer/Customer Protection and National Disaster Regulations), effective as of March 19 2020;*

These regulations have been brought into force because of the growing wave of concerns by the government and consumers that companies are charging higher prices for the goods given due to heavy demand of certain products caused by COVID-19. These regulations check the excessive pricing by dominant firms during the pandemic. Dominant firms should guard against inflating prices beyond acceptable standards (e.g. raising prices to a level where there is no reasonable relation between the price charged by a firm and the firm's input costs) during the COVID-19 period to minimise any risks of competition law investigations based on excessive pricing.<sup>9</sup>

3. *The COVID-19 Block Exemption for the Banking Sector, 2020 Regulations (Exemption for the Banking Sector Regulations), which are effective as of 23 March 2020;*

Commercial banks have been exempted from provisions of the Competition Act to enable them to develop common approaches to debt relief and other necessary measures during the

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<sup>7</sup>Genevieve Quintal and Tamar Kahn, "Patel allows competition law exemptions to fight Covid-19", *Business Live*, March 19, 2020, available at: <https://www.businesslive.co.za/bd/national/2020-03-19-patel-allows-competition-law-exemptions-to-fight-covid-19/> (last visited on May 30, 2020).

<sup>8</sup> Hogan Lovells Publications "COVID-19 block exemption for the healthcare sector - South Africa", Mar. 20, 2020, available at: <https://www.hoganlovells.com/en/publications/covid-19-block-exemption-for-the-healthcare-sector-south-africa> (last visited on May 30, 2020).

<sup>9</sup> Lerisha Naidu and Sphesihle Nxumalo, "Competition law exemptions and regulations applicable during Covid-19", Mar. 26, 2020, available at: <https://www.bizcommunity.com/Article/196/739/202034.html> (last visited on May 30, 2020).

COVID-19 crisis.<sup>10</sup> The cooperation envisaged between the banking sector players should not extend to communication and agreements in respect of prices (price-fixing).<sup>11</sup>

“The exemption is underpinned by the imperative to:

1. *promote concerted conduct to prevent an escalation of the national disaster and to alleviate, contain and minimise the effects of the national disaster,*
2. *enable the banking sector to minimise the negative impact on the ability of customers, including both business and private individuals, to manage their finances during the national disaster, and be in a position to continue normal operations beyond the national disaster; and enable the banking sector to manage the banking infrastructure, including the payment infrastructure, ATMs and branches.”<sup>12</sup>*
4. *The COVID-19 Block Exemption for the Retail Property Sector, 2020 Regulations (Exemption for the Retail Property Sector Regulations), which are effective as of 24 March 2020.*

These regulations are aimed at exempting a category of agreements or concerted practices between designated retail tenants and retail property landlords from the application of sections 4 and 5 of the Competition Act at the request of and in coordination with the Department of Trade, Industry and Competition.

It should be kept in mind that these exemptions apply only to the aforesaid sectors or facilities.<sup>13</sup> The focus of the government is on saving lives rather than strengthening the economy for now.

### **Australia**

The Competition and Consumer Act 2010 (CCA) is the legislation which deals with the antitrust measures of the country. The country has taken several special measures aiming at “Pricing and price gouging” by the companies.

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<sup>10</sup> Thando Maeko and Tshagofatso Mathe, “*South Africa’s economic plan for Covid-19*”, March 23, 2020, available at: <https://mg.co.za/article/2020-03-23-south-africas-economic-plan-for-covid-19/> (last visited on May 30, 2020).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Supra* note 6.

<sup>13</sup> *Ibid.*

The country has taken this step to cater to the high price charged by the retailers who are charging for their products. There are certain suppliers who are taking advantage of the pandemic and deliberately withholding the supplies to increase the price.

The Australian Competition and Consumer Commission (ACCC) are likely to be interested in significantly increased pricing, colloquially known as “price gouging” where:<sup>14</sup>

- i. a single, or small number of suppliers, are in the market. In circumstances where a supplier already has market power by reason of its market position and pricing is increased unilaterally in response to the market circumstances, or production reduced in order to increase price, the ACCC may be concerned about a misuse of market power contrary to section 46 of the CCA;*
- ii. suppliers appear to be withholding products in concert in order to facilitate an increase in demand and therefore an increase in pricing due to scarcity of goods.*
- iii. pricing is excessive to the point where it not just unfair but is "against conscience" as judged against the norms of society, recognising that those norms may change in circumstances of emergency; and*
- iv. suppliers mislead consumers about the availability of goods in order to encourage a belief of scarce supply and a willingness to pay higher prices.*

These forms of conduct are prohibited under our competition and consumers laws and significant penalties may be sought by the ACCC.

"Essential goods" include protective medical equipment (such as facemasks and disposable gloves) and disinfectant products. This term of these measures may be extended. Individuals and businesses face significant fines of up to \$63,000 and/or five years of imprisonment for contraventions of these new provisions.<sup>15</sup>

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<sup>14</sup>Clayton Utz, “Briefing Note – COVID-19 Response” Mar. 9 2020, available at: <https://www.claytonutz.com/ArticleDocuments/178/ClaytonUtz-COVID-19-Response-Briefing-Note-March-2020.pdf.aspx?Embed=Y> (last visited on May10, 2020).

<sup>15</sup>“Pricing and Price Gouging”, Apr. 16, 2020, available at: <https://www.claytonutz.com/covid-19-response/competition-and-consumer-law> (last visited on May 30, 2020).

## United Kingdom

In UK, Competition and Markets Authority, on March 19, 2020 issued a statement<sup>16</sup> (which was updated into more detailed guidance on March 25, 2020 for business cooperation in response to COVID-19) that it has no intention of taking enforcement action against cooperation between businesses or rationing of products “to the extent that this is necessary to protect consumers”, for example, by ensuring security of supplies, *etc.*<sup>17</sup>

The CMA added that the type of cooperation between companies that will not face enforcement action includes coordination to: avoid a shortage or ensure a security of supply; ensure a fair distribution of scarce products; continue essential services; or provide new services such as food delivery to vulnerable consumers.<sup>18</sup> The co-ordination should be in public interest and for the well being of the consumers. This move does allow the retailers to share data with each other on stock levels; cooperate to keep shops open; share distribution depots and delivery vans; and pool staff with one another to help meet demand.<sup>19</sup> The justification of CMA is that in certain cases coordination is necessary to ensure that the supply of essentials can be done to the consumers without any hindrances, the health care workers are provided adequate necessities like food, shelter, and travel would not cause any harm to the consumers as well as the competition hence this even if leads to a reduction in the range of products available to consumers, provided that reduction is necessary to avoid supply shortages of the relevant product in the first place.<sup>20</sup>

The government said: “This will be a specific, temporary relaxation to enable retailers to work together for the sole purpose of feeding the nation during these unprecedented circumstances. It will not allow any activity that does not meet this requirement”<sup>21</sup>

<sup>16</sup> The Competition Act, 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020, No. 369 Competition, *available at*: <https://www.legislation.gov.uk/uksi/2020/369/made/data.pdf> (last visited on May 30, 2020).

<sup>17</sup> “*The Impact of Covid-19 UK, Competition Law, Potential Exclusions And Exemption*” May 1, 2020, *available at*: <https://www.ashurst.com/en/news-and-insights/legal-updates/the-impact-of-covid-19---uk-competition-law-potential-exclusions-and-exemption/> (last visited on May 30, 2020).

<sup>18</sup> European Competition Network, “*Covid-19 and The Enforcement Of Competition Law In Europe*”, *available at*: <https://www.hfw.com/COVID-19-and-the-enforcement-of-competition-law-in-Europe-March-2020> (last visited on May 30, 2020).

<sup>19</sup> “*Supermarkets to join forces to feed the nation*”, Mar. 19, 2020, *available at*: <https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation> (last visited on May 14, 2020).

<sup>20</sup> HFW, “*COVID-19 and the enforcement of competition law in Europe*”, *available at*: <https://www.lexology.com/library/detail.aspx?g=7c6e3482-345d-4f37-84aa-c8a0953edd2b> (last visited on May 30, 2020).

<sup>21</sup> *Supra* note 18.

This was not done to waive the competition law completely and CMA emphasised these relaxations do not give a “free pass” to the businesses and companies to engage in conduct that could lead to harm to consumers in any way. Thus the CMA has expressly gave the following potential examples of “unscrupulous” businesses exploiting the crisis as a “cover” for non-essential collusion:<sup>22</sup>

- *Businesses exchanging with their competitors commercially sensitive information on future pricing or business strategies, where this is not necessary to meet the needs of the current situation;*
- *retailers excluding smaller rivals from any efforts to cooperate or collaborate to achieve security of supply, or denying rivals access to supplies or services;*
- *a business abusing its dominant position in a market (which might be a dominant position conferred by the particular circumstances of the crisis) to raise prices significantly above normal competitive levels;*
- *collusion between businesses that seeks to mitigate the commercial consequences of a fall in demand by artificially keeping prices high to the detriment of consumers; or*
- *co-ordination between businesses that is wider in scope than what is actually needed to address the critical issue in question (for example, if the coordination extends to the distribution or provision of goods or services that are not affected by the Covid-19 pandemic).*

UK has created a taskforce that will scrutinize market developments to identify harmful sales and pricing, practises and is working with the Government to advise where extra time limited legal powers, exercisable on an emergency basis may be needed for it and to intervene quickly and effectively.<sup>23</sup>

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<sup>22</sup> Simi Malhi, Hogan Lovells (London) and Ciara Kennedy-Loest, “The UK Competition Authority Publishes Guidance On Forms Of Cooperation Considered As Temporarily Permissible During The Covid-19 Outbreak”, Mar. 25, 2020, available at: <https://www.concurrences.com/en/bulletin/news-issues/preview/the-uk-competition-authority-publishes-guidance-on-forms-of-cooperation> (last visited on May 5, 2020).

<sup>23</sup> Slaughter and May, “Covid-19: Competition Law Considerations”, Mar. 20, 2020, available at: <https://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/newsletters-and-briefings/2020/covid-19-competition-law-considerations/> (last visited on May 19, 2020).

## European Union

The European Union is governed by the Treaty of Functioning of the European Union. Art 101, 102, etc deals with the Competition concerns arising out of business transactions. COVID-19's impact on the functioning of the economy may prompt companies to collaborate with their competitors in hopes of overcoming the hardship, however, EU competition law does not look favorably at collaboration between competitors that restricts competition.<sup>24</sup>

A statement was issued by EU on 23 March 2020 to clarify that the application of competition law remains applicable, but the COVID-19 crisis "*may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers.*"<sup>25</sup> This statement gives relief to the companies that any action taken to fulfill the demand by the consumers and any other act done to provide for supply of products will not be considered a violation of antitrust laws. However it should be kept in mind that EU has never suspended the operation of the competition regulations even in the extreme times of crisis be it health or financial. The French government did not suspend or relax the working of the competition authority in the time of an economic downturn. There can be other examples such as Greece, Poland, Spain, etc in the EU who have been similarly clear not to allow anti-competitive practices to be justified on the basis of economic turmoil.

Certain countries which are governed under EU such as Germany are providing relaxations for example the German Federal Cartel Office has been flexible in the application of competition law in times of pandemic, at least regarding key economic areas such as food supply. Germany is considering allowing closer cooperation between food retailers to avoid shortage to the consumers. In Norway, the airlines SAS and Norwegian were granted a three-month exemption from Norway's competition laws.<sup>26</sup>

While collaboration between competitors will very likely be scrutinized by the European Commission and competition authorities in EU member states and elsewhere, it is

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<sup>24</sup> *Supra* note 8.

<sup>25</sup> Dechert LLP, "*Impact of COVID-19 Coronavirus Pandemic on European Antitrust Enforcement*" Apr. 3 2020, available at: <https://www.jdsupra.com/legalnews/impact-of-covid-19-coronavirus-pandemic-63598/> (last visited on May 17, 2020).

<sup>26</sup> *Supra* note 8.

conceivable that governments may establish exceptions, or authorities may take a lenient approach when considering fines.<sup>27</sup>

Governments in the EU have started to intervene in the economy (e.g., through explicit measures or obligations, such as limiting prices, agreeing on volumes, or by stimulating companies to cooperate in finding technical or commercial solutions for the challenges posed by the COVID-19 crisis).<sup>28</sup> In certain cases where the collusion between the companies occurs due to the inducements by the Government, in such cases those collusions are accepted under TFEU and it ensures a valid defence to the companies against any antitrust complaints.

### United States

The United States of America has been the worst hit by the Covid-19 pandemic, with the highest number of fatalities across the globe. Thus this requires massive amount of cooperation between the centre and the state, businesses, collaborators and local government. The Antitrust Division of the Department of Justice (“the Division”) and the Bureau of Competition of the Federal Trade Commission (the “Bureau,” and collectively the “Agencies”) made clear to the public that there are many ways firms, including competitors, can engage in pro-competitive collaboration that does not violate the antitrust laws.<sup>29</sup>

The FTC and DOJ jointly issued a statement on a detailed antitrust procedure for expedient redressal and for collaborations of businesses working for the protection of health and safety of Americans during the COVID-19 pandemic. The statement recognizes that in these trying times the competitors of a business do need to collaborate in a response to this pandemic. These agencies identify certain types of collaborative activities such as research and development, sharing technical knowledge, development of suggested practice parameters by healthcare providers, joint purchasing agreements among healthcare providers, and private lobbying relating to the use of federal emergency authority that are typically considered pro-competitive and consistent with the U.S. antitrust laws.<sup>30</sup>

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<sup>27</sup> EU Commission, “*The EU Commission Vets Public Statements of Euro commerce for the Non-Food Retailers to take Measures against the Major Crisis Due to Covid-19*”, Mar. 18, 2020, available at: <https://www.concurrences.com/en/bulletin/news-issues/preview/the-eu-commission-vets-public-statements-of-eurocommerce-for-the-non-food> (last visited on May 31, 2020).

<sup>28</sup> *Supra* note 25.

<sup>29</sup> Joint Antitrust Statement Regarding Covid-19, available at: <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19> (last visited on May 31, 2020).

<sup>30</sup> Reed Smith, “*COVID-19 – Impact on Competition Landscape*”, Mar. 25, 2020, available at:

There is no collusion exemption for public health emergencies, for example, DOJ recently announced its intention to “hold accountable anyone who violates the antitrust laws of the United States in connection with the manufacturing, distribution, or sale of public health products.”<sup>31</sup> The antitrust laws allow for beneficial, pro-competitive collaborations and exchanges of information between competitors, and the needs of responding to a health crisis or other public emergencies are relevant to that determination.<sup>32</sup>

Both the Department of Justice, Antitrust Division (DOJ), and the Federal Trade Commission (FTC) have stated that there is no exception to the antitrust laws for emergency situations and have issued statements reminding/warning businesses against engaging in anticompetitive practices during the COVID-19 situation.<sup>33</sup>

In a joint statement issued DOJ and FTC have also announced that they will aim to respond expeditiously to all COVID-19-related DOJ Business Review Process and Federal Trade Commission Advisory Opinion Process requests, and resolve those addressing public health and safety within seven (7) calendar days of receiving all necessary information.<sup>34</sup>

More broadly, the Department of Justice is addressing actions by individuals and businesses to take advantage of COVID-19 through other fraudulent and illegal schemes.<sup>35</sup>

## Canada

The Canadian Government has made it clear that the competition law will not be suspended and the commissioner stated that the bureau will remain vigilant against any harmful anti-competitive conduct which seeks to take advantage of consumers and businesses during these extraordinary circumstances. The commissioner will be extra attentive to the acts of deceptive marketing practices, misleading advertisements, collusion or cartelization acts such as price fixing, etc. The government has made it very clear that if any business is using

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<https://www.reedsmith.com/en/perspectives/2020/03/covid19-impact-on-competition-landscape> (last visited on May 31, 2020).

<sup>31</sup> Covington Competition, “COVID 19 – US and EU Competition Law Implications”, March 27, 2020, available at: <https://www.covcompetition.com/2020/03/covid-19-us-and-eu-competition-law-implications-27-march-2020/> (last visited on May 28, 2020).

<sup>32</sup> *Ibid.*

<sup>33</sup> “US competition law and COVID-19”, Apr. 1, 2020, available at: <https://www.dentons.com/en/insights/alerts/2020/april/1/us-competition-law-and-covid19> (last visited on May 30, 2020).

<sup>34</sup> *Supra* note 29.

<sup>35</sup> *Ibid.*

COVID-19 crisis for exploitative practises, then the penalty would be stricter and harsh in any enforcement action.

At the same time, the Commissioner sought “to assure businesses that Canada’s competition laws accommodate pro-competitive collaborations between companies to support the delivery of affordable goods and services to meet the needs of Canadians” and that the Bureau is “committed to a reasonable and principled enforcement of Canada’s competition laws” during these exceptional times.<sup>36</sup>

Under Canadian law, the agreement for price fixing, market allocations, controls on supply, etc are unlawful even though under emergency situations, regardless of their impact on competition. The Commissioner has the discretion on pursuing enforcement action or not against the businesses, under these circumstances it is likely that the collusion between competitors will continue to be strictly prosecuted. The vertical agreements between supplier and customers are permissible with adequate reasons and without an adverse impact on competition, however they may be reviewed

Even though bureau of competition sought to maintain normal conditions, there are certain aspects which will require special attention and there can be certain delays due to the pandemic, that is; merger reviews which needs review and approval prior to closing which is an essential element of most merger reviews.

### **III. Competition Commission of India: Changes to deal with the pandemic in India**

The Competition Commission of India has clearly provided with an advisory on the businesses to not flout competition rules and regulations even in the times of pandemic. The effect of COVID-19 was delay, be it in supply chain, providing the medical equipments and sanitization products or essential commodities and services. To cope with significant changes in supply and demand patterns arising out of this extraordinary situation, businesses may need to coordinate certain activities, 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

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<sup>36</sup> Ian McDonald and François Baril, “Canadian Competition Law Compliance during the Covid-19 Crisis”, Apr. 1, 2020, available at: <https://gowlingwlg.com/en/insights-resources/articles/2020/canadian-competition-law-compliance-covid19/> (last visited on May 31, 2020).

healthcare products such as ventilators, face masks, gloves, vaccines etc. and essential commodities) and services (*e.g.* logistics, testing *etc.*).<sup>37</sup>

However, only such conduct of businesses which are necessary and proportionate to address concerns arising from COVID-19 will be considered. Businesses are, however, cautioned not to take advantage of COVID-19 to contravene any of the provisions of the Act.

The structure of the Act is more relaxed when contrasted with other legislations of the world, and has an inbuilt mechanism to accommodate situations where the business community or consumers face tough times. The vertical agreements between competitors (such as price fixing, market allocation, etc.) are not *per se* illegal under the Act — they only raise a *rebuttable* presumption of adverse effect on competition.<sup>38</sup>

During this pandemic, the commission has issued various circulars to deal with the situation. The first circular was issued on March 17, 2020<sup>39</sup> for the precautionary measures taken by the CCI.

Then the commission issued a public notice on March 30, 2020, allowing the parties to file the notice related to combination matters under the ‘Green Channel’, at the given e-mail address.<sup>40</sup> CCI issued a notice on April 13,<sup>41</sup> that the information against the anti-competitive agreements and the abuse of dominance can be filed *via* e-mail to the competent authority. The said process is also applicable for filing the combination notices. The CCI widened its scope for the combination matters by also allowing the video conferencing in the case of pre-filing consultation, which was earlier suspended by the Public Notice dated March 23, 2020.<sup>42</sup>

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<sup>37</sup> Competition Commission of India, “*Advisory to Businesses in Time of COVID-19*”, April 19, 2020, available at: [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Advisory.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf) (last visited on May 20, 2020).

<sup>38</sup> *Supra* note 2.

<sup>39</sup> Competition Commission of India (Secretariat), F.No. 40113/Sectt. Mar. 17, 2020, available at: [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/pm.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/pm.pdf) (last visited on May 13, 2020).

<sup>40</sup> Competition Commission of India, “*Measures in view of threat of CORONA VIRUS /COVID -19 pandemic*”, Mar. 30, 2020, available at: [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/30thcircular.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/30thcircular.pdf) (last visited on May 12, 2020).

<sup>41</sup> Competition Commission of India, “*Measures in view of threat of CORONA VIRUS/COVID -19 pandemic*”, Apr. 13, 2020, available at: [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/30thcircular.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/30thcircular.pdf) (last visited on May 30, 2020).

<sup>42</sup> Competition Commission of India, Public Notice, Mar. 23, 2020, available at: [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Advisory.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf) (last visited on May 31, 2020).

The CCI also issued an advisory dated April 19, 2020,<sup>43</sup> which highlights in-built safeguards of the Competition Act. As per the said advisory, coordination between the businesses involving certain activity is allowed to enhance efficiency, especially of the essential commodities and healthcare products and services. Such cooperation must only be provisional and limited to meet the present pandemic. Enterprises or groups must not indulge in any collaboration or cooperation amongst their competitors if it is non-essential or adversely affect the market.

There is no doubt that the promptness of the CCI in taking the preventive measures will help the enterprises in ease of doing their business without worrying much about the market regulator.<sup>44</sup> It is pertinent to note that the CCI has not granted any exemption. It has particularly warned the business entities not to indulge in any activities which are unnecessary or not proportionate.

#### **IV. Relaxations or suspension: What does relaxation under competitive regime actually mean?**

The COVID-19 has left the public at large on the edge for essential goods and services across the world, people in various parts of the world have been exploited for the essential products whose price was drastically increased suddenly during the pandemic. The government of different jurisdictions realized this soon and posed a cap on the price charged particularly on the sale of sanitizers, *etc.* Competition regulators have also warned companies about unilateral breaches of competition law and, in particular, acting abusively by exploiting consumers through imposing unfair prices.<sup>45</sup>

The relaxations given for the antitrust enforcement to address specific consequences of the COVID-19 pandemic doesn't in any way mean that antitrust enforcement will be suspended by the authorities. Businesses should be aware that the competition authorities have also issued warnings and launched investigations to demonstrate that they will not tolerate

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<sup>43</sup> Competition Commission of India, "Advisory to Businesses in Time of COVID-19", Apr. 19, 2020, available at: [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Advisory.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf) (last visited on May 31, 2020).

<sup>44</sup> Rupam Choudhary, "Competition Law Amid COVID-19 in India", May 3, 2020, available at: <https://blog.ipleaders.in/competition-law-amid-covid-19-india/> (last visited on May 31, 2020).

<sup>45</sup> Cameron Firth and Christophe Humpe, "The impact of COVID-19 on competition law", Apr. 1 2020, available at: <https://www.lexology.com/library/detail.aspx?g=2f982380-4f3a-4f5c-805e-3d8bd0d5c3cf> (last visited on May 20, 2020).

anticompetitive conduct which goes beyond what is necessary to alleviate a legitimate concern.<sup>46</sup>

It is the responsibility of each and every company whether it is dominant or not; to take care not to impose significant price increases or materially change terms and conditions. Companies should ensure no false claims are made by them for the efficacy of the products and the increased demand by the consumers should not be taken advantage of in any way like price increase, creating false scarcity, *etc.* The pandemic situation leads to the consumers hoarding the products for later use in large volumes, thus even if the product is normally available becomes short in supply, putting an extra pressure on the supply chain, manufacturer, suppliers to make up for the extra demand.

The exemptions given by the European competition authorities are limited in scope and are intended to take action against companies which are taking advantage of the current situation by colluding or abusing their dominant positions, particularly to raise the prices of essential medical supplies such as sanitizers and other equipment. The competition commissioner has emphasized that a crisis is not a shield against competition law enforcement.

There are certain examples of the countries such as Italy where investigations have been opened relating to substantial and unjustified price increase against Amazon, eBay and other online platforms over the sale of products used to protect against the COVID-19 pandemic.<sup>47</sup>

In Greece, providers and distributors of surgical masks, gloves and other medical supplies have come under antitrust scrutiny and the Hellenic Competition Commission (HCC) has sent out questionnaires to a large number of companies active in the production, import and marketing of healthcare products, in particular surgical masks and disposable gloves, as well as other products such as antiseptic wipes and antiseptic solutions, apparently looking for “markets that show signs of unjustified price hikes.”<sup>48</sup>

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<sup>46</sup> “*The impact of Covid-19: UK Competition law, potential exclusions and exemption*”, May 1, 2020, available at: <https://www.ashurst.com/en/news-and-insights/legal-updates/the-impact-of-covid-19---uk-competition-potential-exclusions-and-exemption/> (last visited on May 31, 2020).

<sup>47</sup> Bertold Bär-Bouyssi re and Moustapha Assahraoui, “*Antitrust and Competition: Impact of Coronavirus COVID-19*”, Antitrust and Competition: Novel Issues in a Post-Coronavirus World, Apr. 14, 2020, available at: <https://www.dlapiper.com/en/uk/insights/publications/2020/03/antitrust-and-competition-impact-of-covid-19/> (last visited on May 24, 2020).

<sup>48</sup> *Supra* note 25.

Similarly, Poland's Office of Competition and Consumer Protection is investigating whether medical equipment suppliers abused their dominance by cutting off doctors' access to surgical masks.<sup>49</sup>

In United Kingdom, a specific taskforce was created to take in charge of scrutinizing market developments for identifying the harmful sales and pricing practices of the businesses, and taking enforcement action against firms who have capitalised the current situation by charging unjustifiably high price for essential goods and other misleading claims.<sup>50</sup>

Investigations linked to the COVID-19 pandemic are likely to be prioritized by the European competition authorities in the very short term, considering the urgency related to medical supplies in the current situation.<sup>51</sup>

While the competition authorities worldwide have moved quickly to demonstrate that they are willing to show some limited flexibility in times of this pandemic, even though with certain exemptions for a temporary period. While competition authorities may, either formally or informally, allow certain specific types of cooperation, business should liaise closely with the authorities and make sure that any divergence from their standard practices remains within the precise scope and duration of the exemptions.<sup>52</sup>

There are certain situations in which businesses are engaged in "crisis cartels" which will be intended to address the overcapacity on the supply demand chain during and after the crisis can expect to be investigated and fined by the authorities. There is a belief across the world that levels of antitrust enforcement will rapidly increase after the pandemic of this Covid

#### **V. Conclusion: A word of caution to the businesses**

The various Competition Authorities across the world have taken a well thought measure of relaxing certain competition regulations temporarily and partially in the interests of consumer protection due to the requirements of the current pandemic. Though the real assessment of these measures will only take place after a certain period of time, it is also imperative that certain steps may become permanent and fundamental in the purview of the post-pandemic world. Meanwhile, it is clear that the competition authorities will not permit businesses to

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<sup>49</sup> Charley Connor, "Competition enforcers tackle coronavirus", Mar. 6 2020, available at: <https://globalcompetitionreview.com/article/1215971/competition-enforcers-tackle-coronavirus> (last visited on May 31, 2020).

<sup>50</sup> *Supra* note 25.

<sup>51</sup> *Supra* note 3.

<sup>52</sup> *Ibid.*

exploit the crisis to take advantage of people, by charging vastly inflated prices or making misleading claims, or by engaging in collusion which is not essential to meet consumers' requirements in the current emergency.<sup>53</sup>

While the businesses and companies struggle with the new world and realities brought by COVID-19, it is almost impossible that competition law remain untouched, antitrust laws will have to be adapted and become flexible in order to maintain economic and survival balance during such a pandemic.

The crisis is far from over, the lockdown was an easy part, living life post-lockdown period with economies struggling financially and businesses suffering from losses will lead to more regulations, enforcement actions and prevention of exploitation of the crisis. Although the challenges above will affect how authorities enforce, they will likely take the view that it's better to act decisively to prevent market harms.<sup>54</sup>

While the government is focused on reviving the economy of the state post lockdown period, they are facing with immense challenges with supply chains disruptions and remote working issues; there will be several economical implications from the perspective of global antitrust and competition enforcement in 2020 and will prevail potentially over a longer period of time. There were certain suspension of competition rules and regulations for the continuation of essential services during lockdown. Thus it would require the states to support businesses as most of the cities were under lockdown recently or are still under restrictions.

Antitrust authorities have a potential role to play in protecting the company's interest during this pandemic, as many competitors will be forced to collaborate and form potential "crisis cartels" and other antitrust infringements.

There are several measures which the states have undertaken to support the business in financial distress. These measures or state aids can be in different methods, such as crisis loans, state guarantees and tax waivers or deferrals. It can distort markets, giving recipients of aid an unfair advantage when competing against other businesses – infringing state aid or

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<sup>53</sup> *Supra* note 20.

<sup>54</sup> Nicole Kar and Emma Cochrane, "Covid-19 and Competition Law: Rapid Regulator Responses", Mar. 13, 2020, available at: <https://www.lexology.com/library/detail.aspx?g=bae4500e-4522-4411-b882-153ac0f3e2d0> (last visited on May 31, 2020).

anti-subsidy rules.<sup>55</sup> But on the other hand these state aids can be really helpful if they are given in proportionate basis and meet the criteria given for exemption. The European Commission has taken several measures to facilitate the same and grant support to the businesses.

Another important area where the antitrust authority has the role to play is examining and inspecting the companies charging high, excessive and unjustified prices for the products which are essential. This practise was specially related to the products such as hand sanitizers, PPE kits, masks, gloves and other protective equipments. This exploited consumers and the companies abused their dominance and infringed the competition and consumer rules.

Thus this needs to be checked, even if lockdown restrictions are removed. The antitrust authorities across the world have issued warnings to the companies about this type of behaviour raising the possibilities of enforcement actions by these authorities. In Nassau County, New York, the Office of Consumer Affairs has already fined two businesses \$5,000 each for price gouging on protective masks.<sup>56</sup> The Government of India also has capped the prices of hand sanitizers to prevent firms from overcharging amid panic-buying due to the corona-virus threat much in advanced stage.<sup>57</sup>

The possibilities of certain companies taking advantage of the pandemic may also increase due to the algorithm pricing happening automatically online. This will further complicate the situation, for example this can be seen from various online sellers increasing the prices of products which are in shortage in physical stores.

The businesses which are in competing position with each other are also working in close collaboration with each other to overcome this crisis. There are certain sectors such as food, pharmaceuticals, etc which have to be in continuous supply for ensuring that it reaches people in need. Such collaborations are also being encouraged in specific countries such as

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<sup>55</sup> "COVID-19: Implications From An Antitrust And Competition Law Perspective", Apr. 7 2020, available at: <https://www.mondaq.com/canada/cartels-monopolies/913946/covid-19-implications-from-an-antitrust-and-competition-law-perspective> (last visited on May 31, 2020).

<sup>56</sup> Carl Hittinger and Ann Marie O'Brien, "Avoiding Price Gouging, Price Fixing and Other Antitrust Risks During the COVID-19 Pandemic", Apr. 15 2020, available at: <https://www.competitionpolicyinternational.com/avoiding-price-gouging-price-fixing-and-other-antitrust-risks-during-the-covid-19-pandemic/> (last visited on May 31, 2020).

<sup>57</sup> Debonish Achom, "Price Of 200 ML Hand Sanitizer Can't Be More Than Rs 100: Government", Mar. 20, 2020, available at: <https://www.ndtv.com/india-news/coronavirus-update-price-of-200-ml-hand-sanitizer-cant-be-more-than-rs-100-says-government-2198205> (last visited on May 31, 2020).

Norway, UK, Germany and US. The suspension of these rules is intended to allow production and supply of essential services during this pandemic.

But these businesses should not take this as a green signal to enter into any types of arrangements to fulfil their needs; rather they should assess any kind of competitive risk before collaborating and putting extra safeguards in place. The risks of collaboration must be undertaken by the companies after taking due permissions, approvals and sanctions. Under the European Union regime, there are certain existing guidelines which are available for joint purchasing agreements and other special collaborations. These can be utilized by the businesses and companies to mitigate the effect of the crisis while being compliant to the rules.

Businesses should only take the risk up to the level of desired results, and restrict any other fatal activity such as exchanges competitively sensitive information unnecessarily.

The banks are also working together in these times, and proposing changes in the loans and financing agreements to facilitate the restructuring of loans. If banks work together, particularly in the context of a distressed borrower, this could lead to unequal bargaining power or inappropriate exchanges of competitively sensitive information.<sup>58</sup>

The rising concern of “crisis cartels” *i.e.*, competitors deciding amongst themselves on how to limit the impact of pandemic on their businesses. This can be like competitors deciding not to charge excess prices or agreeing on how to reduce the supply demand gap.

The antitrust authorities will have to look at these crisis cartels with the same lens as other cartels, and treating them in the same manner. Thus there are certain risks involved in these crisis cartels as well. The general position is that businesses must continue to act independently and compete even during a crisis: this creates a high hurdle to justify a crisis cartel.<sup>59</sup>

The antitrust authorities have to prioritize the working of the commissions so that maximum output could be achieved in minimum contact. Merger filings, reviews, actions of the competitors and certain other transactions will be considered by the commission on the

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<sup>58</sup> *Supra* note 5.

<sup>59</sup> *Ibid.*

priority basis. Certain activities which may be prohibited earlier would be allowed in such pandemic situation. The filings which are not urgent will not be encouraged by the competition commissions. The resources in these situations are both limited and restricted thus to manage them well, it will be required to take up only those cases forward which has some potential.

The important reforms which were to be expected to be applied in this year are being pushed to the next year to presently focus on the current pandemic situation.

There are certain things which businesses should keep in mind for their conduct during and after this crisis. These include first and foremost not neglecting the antitrust compliance, even though with the pandemic in place. It should also be remembered by the companies that antitrust investigations will be conducted for the acts done by them once this situation is taken control of. Companies should not engage in prohibited conduct and anticompetitive practises. These practises may be exploitative or predatory in nature, but they cannot be hidden on the pretext of dealing with pandemic.

The competition law authorities will encourage the companies taking essential steps for dealing with the post pandemic situation and economy however they should not be misused by them. The companies should keep in mind that even though the health sector and essential sectors have been provided with the exemptions but competition law is applicable to everyone irrespective of the sector. The competition authorities may also look into the problems faced by non-essential commodities markets and their companies which was closed or are closed for a long period of time due to the outbreak. These sectors are fighting to survive after the pandemic lockdown and need revival to regain their position in the market.

These exemptions should not include competitors forming cartels and abuse of dominance. The documentation of the companies dealing with any arrangement, contract or any changes should be according to due compliance with the competition law and within its boundaries.

Therefore the take is that in the present situation when the market is not productive and the financial situation is not favourable the companies should not be tempted to make any violations like dealing with or trading confidential information, sharing of data, business strategies, price fixations, future plans, etc. The companies which are facing economical crisis should not enter into collaborations, or enter into agreements which are not compliant

to competition law. Their conduct should be legally approved and in the garb of dealing with the pandemic, they should not disregard the competition law regime. The companies should not forget their perpetual existence and should weigh their actions before taking any step post-pandemic also. The competition authority's role across the world has been augmented and they should allow a breathing space for companies to revive and at the same time hold a tight grip on the activities of the businesses to curtail anti-competitive deeds.