

Competition Law Hotline

May 05, 2020

CCI'S ADVISORY FOR COVID-19 – A MUCH NEEDED BREATHER !

INTRODUCTION

In the wake of Covid-19 outbreak amidst economy facing an uphill task, the Competition Commission of India (“CCI”) with the right intent has issued an “**Advisory to Businesses in times of Covid-19**” on April 19, 2020 (“**Advisory**”) for functioning of businesses without disruption.¹

The CCI keeping in mind the exigencies has recognized the need of the businesses especially those involved in critical healthcare and essential services to work in tandem with each other, including by way of sharing of distribution network and infrastructure, timings of operations, transport logistics, R&D, production etc. The Advisory has been issued with the primary objective 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.)

ANALYSIS

The Advisory has come at a time when most of the businesses are at a standstill due to lockdown with the future looking grim and no clarity on full-fledged opening up of businesses. On the consumer side, many of the essential commodities are either in shortage or being sold at exorbitant prices.

While there was always an exception with respect to joint ventures subject to fulfillment of certain conditions², the Advisory should now sheath Section 3 (3) of the Act as well which presumes certain concerted actions between competitors to cause an appreciable adverse effect on competition

While doing so, the Advisory has also emphasized that Act itself has in-built safeguards to protect businesses from sanctions for certain coordinated conducts. The most notable being Section 19 (3) of the Act which requires CCI to render due regard to factors including 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.

As with any legislative leeway, there is also a possibility of misuse. To alleviate such concerns, the CCI has clearly cautioned business entities against contravening any of the provisions of the Act under the garb of Advisory and made it clear that only such conduct of businesses which is necessary and proportionate to address concerns arising from COVID-19 will be covered under the ambit of relaxations.

In order to bring more color to this decision of the CCI, we have drawn a comparative analysis of the advisories/recommendations issued by other jurisdictions below:

Name of the country/jurisdiction	Measures taken
European Union	<p>The European Union Commission (“EC”) has also published a Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current Covid-19 outbreak (“EU Relaxation”).</p> <p>The EU Relaxation addresses certain forms of cooperation in the health sector. It also identifies unproblematic forms of cooperation that don't raise any anti-competitive concerns provided that certain safeguards are in place.</p> <p>However, at the same time the Antitrust Framework also identifies situations where the EC will refrain from taking actions even in cases where there are extensive exchanges of commercially sensitive information between companies. Such measures shall necessarily be designed and objectively necessary to increase output, temporary in nature and not exceeding beyond the contours of what is strictly necessary. It has also issued a Comfort Letter addressing a specific voluntary cooperation project among pharmaceutical producers – between both members and non-members of the association.</p>

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Australia

The Australian Competition and Consumer Commission ("ACCC") has taken measures which are largely welcoming and positive for the industry not only for the pharmaceuticals or essential commodities sectors but for a varied array of sectors. The ACCC has granted a slew of **interim authorizations** to facilitate supply of essential products to consumers, businesses and healthcare providers. Such authorizations have been granted across a range of sectors such as supermarkets, energy, fuel, medical equipment suppliers, hospitals and healthcare facilities, pharmaceutical wholesalers and telecommunication providers. For instance, banks have been authorized to coordinate activities in relation to provision of debt relief packages, airlines have been authorized to coordinate flight schedules and insurance providers have been authorized to implement relief measures for small businesses and consumers.

United Kingdom

The United Kingdom ("**UK**") seems to be ahead of the curve as well. The UK government has issued the Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) **Order** 2020, wherein it excludes the agreements between groceries chain suppliers and agreements between logistic service providers from the Chapter I prohibition in the Competition Act 1998. The Order sets out very clearly a list of products which constitute 'groceries' for the purposes, namely: food, pharmaceuticals, pet food, drinks, cleaning products, toiletries and household goods. Similarly, it provides a much extensive list of goods and services which don't qualify the criteria. At the same time, it also provides for compulsory notification of relevant agreements in writing to the Secretary of State within fourteen days (of the Order for those already in place and of the agreement being made for the future ones).

The UK Government has also **suspended competition law to allow ferry operators** in the Isle of Wight to work together and maintain a crucial lifeline between the island and the mainland during the COVID-19 outbreak.

Competition Markets Authority

The Competition Markets Authority ("CMA") has also followed suit and offered **guidance** to assist businesses in making their own response assessment confidently. While deciding if the cooperation between businesses is necessary and indispensable, the businesses are supposed to consider factors such as provision of services to the public or an important sub-set of the public such as key workers or vulnerable consumers (to be considered as efficiency enhancing); likelihood of giving consumers a fair share of benefits if it avoids or mitigates shortages of a product etc.

Given the measures taken by other countries, we believe that India's Advisory could also benefit by making suitable amendments.

- i. Addition of proper guidelines or clarifications specifying sectors and industries that will come under the ambit of the Advisory. For example, in UK the sectors amenable to the benefits and exclusion have been clearly identified unlike the mere mentioning of certain products as in the case of India. Even the ACCC has granted interim authorizations to a wide range of sectors as against mentioning particular products. This makes it imperative for businesses to tread on the path of caution and not abuse their position in the market to gain economic benefits.
- ii. Clarification regarding the vaguely worded "*necessary and proportionate*" caveat. In the absence of any clarification it does more harm than good by creating an ambiguity for bonafide business entities and providing a leeway for the other entities to possibly take advantage of such provisions.
- iii. Further, any guidance for self-assessment would also be appreciated. Interestingly enough, the CMA has laid down a four-tiered test to determine the necessity of the measures that can be taken by businesses during these times.

CONCLUSION

While the measures taken by CCI are laudable, a better framework with the guidance for self-assessment would

Vaibhav Parikh, Partner, Nishith Desai Associate on Tech, M&A, and Ease of Doing Business

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have proved to be more beneficial for the businesses in the long run given the uncertainty and the fact that no one knows conclusively when things will normalize. Similarly, in the midst of giving a priority to healthcare sector, the CCI has missed out on taking into consideration other sectors such as logistics, groceries etc. which have been included in the 'essential products/services' categorization by the Central Government. It seems that with the right tweaks perhaps this will be more useful and relevant than as it stands today.

– Vinay Shukla & Payel Chatterjee

You can direct your queries or comments to the authors

¹ https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf

² So long as such joint venture leads to increase in efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

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