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THE NEED FOR PRIORITIZATION OF ANTI-TRUST LAWS IN THE TIME OF WORLD PANDEMIC

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ABSTRACT

Covid 19 pandemic has shook the world to its core, with industries struggling to survive the Global recession and Governments thriving to prioritize the availability of essential goods to people, the countermeasures thus taken by Global ant-trust agencies can be held in contrast to the Competition Commission of India. The article shall talk about the various primary and secondary effects upon the overall trade and economy of the world, initiative taken to mitigate the recession and the need of prioritization on inspection of the various Permissible Co-ordinations between enterprises in the interest of public welfare and trade stability. The article shall also talk about Crisis-Cartels which hasn't been outlined under the Competition Act, 2002. In these extraordinary circumstances there is an impending need to codify sections regarding crisis cartels which are in the interest of public welfare and government with limitations and specifications on legality of such collaborations and the extent of such collaborations. Moreover, the article shall give a brief overview of the Telecom Sector in India which has developed drastically in the last few years and has gained a deeper consumer base in the time of the pandemic.

Keywords: Covid-19, Competition Regime, CCI, Permissible Coordination, Collaboration, Telecommunication.

INTRODUCTION

The outbreak of Novel Coronavirus has significantly affected production and business across the world. The state's measures to prevent the spreading of the pandemic though to an extent controlled the same; on the other hand severely affected the economy, given the state imposed lockdowns that have halted major industries thereby causing shortage of supply for basic commodities. There exists a direct reasoning for increased trade competitiveness during the period of recession as industries on the receiving end of the economic misgivings shall make all attempts necessary to survive such recession. Thus, it is up to the Competition Commission of India to take the appropriate initiatives in order to discourage any anti-competitive practices that are adopted in the meantime. The objective of Competition Law in India, or for that matter, in general is to prioritize on the interests of the consumers by sustaining healthy competition and the same is to be insured for a steady and overall growth of market. The early days of lockdown saw multiples industries/ companies who joined hands to fight against the dreading demand for pharmaceutical products, telecom services, software and bank services etc. However, it is necessary that such co-operation limits within the norms of the Competition Act, 2002 (herein after referred as the "Act"). Any deviation from the said guidelines shall invoke the Competition Commission's duty to scrutinize and if required, penalize appropriately if found against the set guidelines and rule of law.

ANALYSIS

The Competition Commissions across the world, witnessed the sudden surge of demand for essential commodities and the pandemic has put the industries in such a situation that they could not meet up the demands of the country. The Competition Commission of India (herein after referred as "CCI") during the second phase of lockdown issued an advisory on 19th April, 2020 thereby limiting and regulating industries to coordinate and synchronize their business ensuring uninterrupted supply of essential commodities. The CCI acknowledged the fact that coordination between the businesses was unquestionable because meeting such huge demands of commodities like sanitizers, medicines, ventilators and other essential medical equipment to battle the pandemic was not within the production capacity of individual vendors.

The *advisory*¹ released by CCI in lieu of the changing supply and demand patterns, urged businesses to share data on stock levels, timings of operation and supply, distribution network, logistics and the Research and Development statistics in order to cater to the extraordinary circumstances arising out of the pandemic. However, this exception came with a condition that, coordination is permissible if and only such coordination does not lead to price fixing and limitation of markets/allocations. This right to collaborate and coordinate was not given to all forms of business, but only to Joint Venture. The advisory specifies that only the Joint Ventures are eligible for this exception and permits to collaborate production and distribution furthermore supporting the government to battle the pandemic. Such Joint Venture need to prove “efficient gains” with the help of such collaboration, and the term efficient includes efficiency related to production, supply, distribution, acquisition, storage of goods and services. The advisory prohibits any such coordination with competitors which is not considered to be necessary and essential to battle COVID-19, and is done with the only motive of gaining dominance in the market or suppressing competitive provisions of the act for personal benefits in the name of Pandemic. All the unilateral business conducts entered during the time of pandemic unnecessary to the present concern shall be considered to be exploitative and disservice to the consumers as well as small scale businesses, and are liable to be penalized as abuse of dominant position under section 4 of the Act.

The competition Act, 2002 in Section 3(3) talks about collaboration between competitors in order to affect an appreciable effect on competition, though such prerogative is not applicable on joint ventures. However if an increase in efficiency in terms of production, supply, storage, provision of services and control over goods is assured, then such agreement between the competitors shall be in accordance with the above Section. Furthermore in assessment of such agreement under Section 19(3), the CCI shall have due regard to the accrual of benefits to consumers, improvement in quality of products/ services delivered, promotion of scientific and technological advancements and the efficiency in the aspects of production and supply of goods and services. The Central Government is empowered under the act (section 54(a)) to provide exemption to any provision of the act on the matters of public interest through a notification, and this exemption may include collaboration in certain industries such as pharmaceuticals, health care, essential commodities etc. to encourage research and development for medicines and

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

vaccines for the novel coronavirus. Yet the advisory passed by CCI on April 14, 2020 falls impedingly short of specification in its endeavor to address the nature of coordination that it states, as quoted to be “necessary and proportionate to address concerns arising from Covid 19”.

If we look at the US Antitrust Agency’s response to the Novel Coronavirus, the *United States Joint Antitrust Statement Regarding Covid-19*² permitted joint ventures to come together to bring their goods and services in collaboration to ensure enough and uninterrupted supply in the economy. The committee classified certain activities and collaborations to be as ‘pro-competitive’ as a response to the national emergency and to ensure enough supply for all keeping in mind the federal antitrust laws of US. The agency also recognised individuals and businesses whose immediate action to the outgrowing demand for limited supply of essential commodities is inevitable. To support such an action, the agency allowed the collaboration of firms for the purpose of research and development which will enhance the integration of economic activities during the pandemic. The Agencies have expressed that sharing technical know-how, rather than company specific data about prices, wages, outputs, or costs, may be “necessary to achieve the pro-competitive benefits of certain collaborations. It further explained why joint purchasing of health care equipments and services is treated as pre-competitive in the current times. It suggested that such a combination or collaboration would be beneficial not only to the vendors but, to the as customers and the state itself.

The *European Competition Network (ECN)* in its *joint statement*³ issued in context of the Covid 19 pandemic and in response to the surging demand for essential items within the European Union, recognised the importance of distribution of scarce products in the time of the pandemic and thus announced of no active intervention of ECN in regards to any measures taken to absolve such scarcity of resources. Further the advisory also invited for informal guidance to enterprises seeking such coordination in the interest of commonwealth of the EU. The ECN also warned against price manipulation of primary healthcare products such as facemask and sanitizing gels which are to be competitively priced and enterprises resorting to capitalizing on these products by mode of cartelization and abuse of dominant position shall be penalized. The United Kingdom *Competition and Markets Authority* also issued a similar *statement*⁴ in the early

² https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf

³ https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875468/COVID-

days of lockdown that it will not take any action or charge penalty for making coordination in business that are necessary to avoid shortage in the production, distribution and sales of essential commodities during the pandemic. The *Australian Competition & Consumer Commission's release*⁵ in the wake of pandemic on April 3, 2020 has permitted limited co-operation between wholesalers, gas and electricity industry participants, supermarket operators, shopping center owners and managers, medical technology companies and private hospitals in Victoria and Queensland.

A similar surge in demand can be seen in the Global Telecom Sector in the wake of the Covid 19 pandemic as almost all legitimate businesses were incorporated into e-platforms which made a major functioning of various industries online. "Work From Home" became the new normal and it was the demand of a greater spectrum for data traffic that took the Telecom Sector by storm, globally. This sudden surge in traffic called for an "all hands on deck" protocol by the top0 Telecommunication giants to accommodate the surge as seamlessly as possible, without hindering the current standard of communication. Thus, for a brief duration several operators had to make their services offline for a while in order make necessary changes to accommodate the conversion of various educational, industrial and other institutions opening up to e-classes, e-board meetings, e-proceedings and many more.

In context, the Data scheme for India was drastically steamrolled by one company alone in 2016, Reliance Jio entered the market with the up to date 4G spectrum that based its tariff on Data, in contrast to the competing companies in preceding Voice based tariffs. On its release, Jio provided its services free with unlimited data and voice calls for the first 6months, creating a rapidly increasing customer base. This forced the other competing companies to lower tariffs and update to 4G spectrum which isn't necessarily cheap. Reliance moved forward with production of 4G handsets at practically minimal costs, thus gapping the competitions in terms of Customer growth. Airtel, the primary competitor managed to update and downplay its services at a steady rate, which cannot be said for several other competitors such as BSNL, Idea, Vodafone and many more. Thus the new merger between the two underhanded Telecom Companies Vodafone and Idea into V! (Vi) Telecom to compete against the current giants in the sector, Reliance Jio and Bharati Airtel. This merger resulted into unification of both, Vodafone and idea customer base

[19_guidance -.pdf](#)

⁵ <https://www.accc.gov.au/media-release/co-operation-to-support-reliable-energy-sector-authorised>

and meeting of infrastructure resulted into enabling the newfound company to provide its services at competitive prices with the aforementioned providers. This merger has proven to be of importance to the competition in Telecom Sector in abhorrence to the possibility of a duopoly in the industry.

CONCLUSION

The Indian Competition Act while delineates the existence of horizontal agreement within competitors for the motive of maximizing profits, fixing prices and various other cartel activities, the understanding of such regulations fall short in the requirement of "Crisis Cartels". Such cartels if allowed under the impending crisis, shall allow the enterprises in the brunt of recession to co-operate and co-ordinate within themselves to procure an active solution in response to the said supply and demand variations. However, there is a need to keep check on the coordination and collaborations entered by the businesses, which the Competition Act of 2002 does. The penal provisions of the act empower the Commission to execute routine checks upon the various enterprises and levy fines and take other necessary steps in the interest of healthy competition on the market. However, the CCI unlike the other anti-trust bodies of EU, United States or Australia has not out-front made any commitment barring its direct intervention into the collaborations between organizations and enterprises, however, there is an impending ambiguity in regards of the extent of such non-intervention such as healthcare corporations sharing and collaborating on Research and Development, supermarkets sharing stock and demand area for essential commodities and various more examples of such collaborations might end up into Anti-Competitive acts as specified under the provisions of Competition Act, 2002. It is thus important for the watchdog organization such as the CCI, in the interest of stability in trade and competition, to monitor closely these acts of collaborations. The Government has proved to be the sole buyer for certain essential goods such as Ventilators, PPE kits and various others, thus, the CCI expects a healthy collaboration between the corporations as well as the Government in the motive of Public Welfare. However, the Government exercising a certain monopoly on buying of Goods as the sole buyer also goes against the basic jurisprudence of Anti-trust laws as, even monopolistic buyer-ship shall also adversely affect the pricing and valuation of certain goods. Hence a set of consolidated guidelines upon the extent of need-based collaboration between companies in interest of the Public first, and Trade & Commerce, later should be the need of the hour in the current as well as post pandemic economic scenario.