

# Competition Enforcement for Business Collaborations during COVID-19

## *A Global Perspective*



*Discussion Paper*

# **Competition Enforcement for Business Collaborations during COVID-19**

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# Abstract

The COVID-19 pandemic and its associated restrictions have necessitated a rise in collaborations among businesses due to various demand and supply shocks in the economy. This has led competition authorities worldwide to reconsider competition law enforcement, thus ensuring the supply and distribution of essential goods and services. The dominant rationale for this is to protect citizens now and help the economy rebound later. Previous research after similar catastrophic events has shown that relaxation of competition laws during an economic depression or recession is likely to only further the same. Various inter-governmental agencies and networks have also emphasised that it is imperative to further competition in the market during-and-post-COVID-19, linking competition to productivity growth.

On the contrary, governments and competition authorities have looked into relaxing laws for mergers and acquisitions (M&As) and granting state aid to companies in need. With uncertainty around the pandemic, there is no clarity about the timespan and thus the proportionality of such measures. Very few competition authorities have set aside a

mechanism to reverse such emergency measures.

To further these questions, CUTS International is presenting this Discussion Paper, focusing on the different approaches undertaken by competition authorities all around the world to strike a balance between the greater public interest and competition in the market. To ensure a real-time approach, data has been used from a survey conducted targeting competition authorities which enabled a comparative analysis of various jurisdictions. Contrary to what has been observed in previous research, the current times warrant a sympathetic assessment of competition rules, to ensure continuity of supply and distribution, at least in the short-term.

The findings show that competition authorities have not shied away from providing relief to businesses, however, they have ensured that the same is not misused. The differing socio-political environments in each country have also dictated the way competition authorities react to a pandemic like COVID-19, in both commercial and non-commercial terms.

# Abbreviations

ACCC	Australian Competition & Consumer Commission
Act	Competition Act, 2002
AD	After Domestication
Advisory	Advisory to Businesses in Times of COVID-19
AG	Attorney General
AGCM	Italian Competition Authority
BC	Before Coronavirus
Cade	The Administrative Council for Economic Defense
CAK	Competition Authority of Kenya
CCI	Competition Commission of India
CMA	Competition and Markets Authority
DOJ	Department of Justice
EC	European Commission
ECN	European Competition Network
EU	European Union
FCCPC	Federal Competition and Consumer Protection Commission
FTC	Federal Trade Commission
GBMA	Generic and Biosimilar Medicines Association
HCC	Hellenic Competition Commission
ICC	International Chamber of Commerce
ICN	International Competition Network
KPPU	Indonesian Antitrust Authority
MA	Medicines Australia
M&A	Mergers and Acquisitions
MfE	Medicines for Europe
OECD	Organisation for Economic Cooperation and Development
PPE	Personal Protective Equipment
R&D	Research & Development
TCA	Turkish Competition Authority
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
UOKiK	Office of Competition and Consumer Protection
USA	United States of America

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We are faced with the most uncertain and unpredictable times of the last 100 years. This paper is a small attempt by CUTS International to try and bring some clarity, whilst also raising more questions, for competition authorities, businesses, and the public at large. We think this issue is important and needs to be talked about more. We hope you enjoy reading this paper as much as we did writing it.

CUTS International will not make any profit from this paper, as it is solely for informative and educational purposes. We also accept any remaining error to be solely ours.

# Introduction

The COVID-19 public health crisis is unparalleled to anything in the living memory. Its spread is not restricted by boundaries, giving literal meaning to "we are all in this together". The pandemic has affected all aspects of our lives – personal and professional; physical and social; financial and economical, with some of us affected more than the others. This diverse effect has led to imbalances and uncertainties in the lives of people all over the world.

One major consequence has been the deep economic depression which is furthered by shortages of essential goods and services and collapse in demand in many markets. This is because of the general confinement measures adopted by governments making it almost impossible for consumers to access brick and mortar stores and suppliers to meet the demand, especially in the health, tourism, culture, retail, and transport sectors.

Owing to these demand and supply shocks, collaboration among businesses have taken precedence, whereas in normal circumstances competition would be needed in markets to keep the prices low without impairing the

quality. Considering the same, competition authorities worldwide have faced the possibility that businesses may have to coordinate to alleviate shortages of essential goods or services necessary to limit the spread of COVID-19. The competition authorities have responded to these challenging circumstances by adjusting their enforcement priorities, granting exemptions to certain forms of cooperation, and allowing state aids, amongst other measures.

At the same time, they have made it amply clear that businesses found taking advantage of the pandemic to go beyond what is necessary to address this crisis, will not be tolerated. Any weakening or altering of competition law principles previously followed will invite competition enforcement. In light of these developments, the question is, how competition laws should be applied to ensure the greater public interest and competition in the market.

Keeping this in mind, the International Competition Network (ICN) Steering Group emphasised that, *"The COVID-19 pandemic has prompted concerns that, while most businesses will act responsibly, some businesses might respond with anti-competitive conduct, e.g., by*

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*cartelising or abusing a dominant position. It is of utmost importance to ensure that products and services remain available at competitive prices, especially those that are essential to urgent public health needs in the current situation, like medical supplies and equipment. Competition agencies intend to remain vigilant against anti-competitive mergers or conduct during this crisis.”<sup>1</sup>*

There have been various opinions supporting the vitality of competition law when companies and the economy suffer from crisis conditions. The key rationale being that loosening of competition laws could result in permanent changes to market structure. COVID-19, however, has brought a flexible and permissible response from competition authorities all over the world in respect of certain types of collaborations amongst competitors which may be necessary to deal with the

disruption caused by the pandemic – some even waiving or amending competition laws altogether. However, this extraordinary crisis has brought to the fore the need to review some of the traditional frameworks of competition law.

Even though laws have been made amenable to businesses in the current situation, the question remains whether there should be built-in provisions that can help authorities in times of such unforeseen situations? Competition laws must be drafted in a manner that they can accommodate the needs that arise from such situations so that when applied, they can preserve public health and accelerate economic recovery by ensuring the continuous and fair supply of essential goods and services.

On the contrary, it also seems unreasonable to expect competition authorities to be well





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equipped to address crises that occur once in 100 years and are unique and unprecedented in their way. However, even though a retrospective perspective is unfair to the competition authorities, it is imperative to have a futuristic approach, wherein the existing competition legislation should be amended to add provisions which can address such a crisis, to a certain extent, in the future.

The response to the emergencies related to COVID-19 outbreak will require different degrees of cooperation, with a varying scale of potential competition concerns. One of the real concerns is that competition law is based on assumptions about the functioning of the market, wherein there are very few market failures. Competition laws rest on the premise that greater competition in the market will yield the best allocation of economic resources, the lowest prices, the highest quality, and the greatest material progress.

In that context, if new approaches are needed to deal with the COVID-19 crisis, then various market failures leading from such a situation need to be factored in such as imbalances in demand and supply; greater cartelisation leading to price increases passed on to the consumers; concentration of markets due to increasing collaborations; and protectionist measures. To address such productive and allocative inefficiencies, several economists are urging that it is better to do too much than to do too little, that we must protect citizens now, and help the economy rebound later. The challenge then is how to provide a competition-friendly response, which takes into consideration both – consumer and business welfare.

This paper aims to throw light at the need for business collaborations during COVID-19, and the subsequent measures taken by competition authorities worldwide, with a special focus on

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the Competition Commission of India (CCI). The approach has been to first highlight various measures taken by authorities worldwide, then leading to an inward analysis of what the CCI has done, and what more could it do in comparison to other authorities. To ensure a real-time analysis, a survey was conducted spanning jurisdictions to better understand the diverse approaches taken by them. The data from that survey has made part of this paper, helping substantiate the findings.<sup>2</sup>

A pertinent concern while writing this paper was understanding the measures as addressing either competition or consumer protection concerns. Various competition authorities have both mandates, thus allowing them to decide on matters related to consumer protection even though they might not be competition issues, *per se*. However, based on the understanding, the measures have been taken into account that make part of consumer protection laws, as in times like these, they can lead to substantial competition concerns.

This paper will also delve into the need to rethink the framework of competition laws, how authorities can ensure relaxations are not abused, and the debate between 'consumer interest' vs. 'public interest' from BC (Before Coronavirus) to the new AD (After Domestication).<sup>3</sup>



# Exceptional Times Call for Exceptional Measures



**To ensure that businesses do not act unscrupulously, the CMA has constituted a COVID-19 Taskforce (Taskforce), which monitors and responds to competition and consumer protection concerns arising from the pandemic.**

Competition authorities worldwide have been both flexible and resolute: flexible in suspending/bending rules to permit businesses to pivot and meet challenges, and resolute in ensuring that any anti-competitive behaviour undertaken during the crisis will not be tolerated once the dust settles. These temporary suspensions of competition laws are intended to allow collaboration between competitors which may not otherwise have been permissible, to ensure the continuity of supply of essential goods and services for consumers during the crisis.

This section of the paper aims to put forth the exceptional measures undertaken by certain jurisdictions to ensure a balance between public interest and competition in the market. Consequently, this section deals with various enforcement actions undertaken about both competition and consumer protection issues. The section concludes by looking inwards at the measures undertaken by the CCI, whilst posing a few recommendations – also applicable to fellow competition authorities, having a similar competition regime as India.

## A. The Worldview

### United Kingdom (UK)

The Competition and Markets Authority (CMA) has recognised that the current extraordinary situation may trigger the need for businesses to cooperate to ensure the supply and fair distribution of scarce goods or services.<sup>4</sup> It laid down six conditions, the fulfilment of which, will not attract enforcement action.<sup>5</sup>

- ◆ The measures to coordinate action taken by businesses are **temporary**;
- ◆ The measures are **appropriate** and **necessary** to avoid a shortage, or ensure security, of supply;
- ◆ The measures are in the **public interest**;
- ◆ The measures contribute to the **benefit or wellbeing of consumers**;
- ◆ The measures deal with **critical issues** that arise as a **result of the COVID-19 pandemic**; and
- ◆ The measures last **no longer than necessary** to deal with these critical issues.

At the same time, the UK government has stepped in and announced the relaxation of certain elements of competition law to



allow supermarkets to work together to minimise the strain on the supply chain.<sup>6</sup> Similarly, they have allowed ferry operators in the Isle of Wight to work together and maintain a crucial lifeline between the island and the mainland.<sup>7</sup>

These exemptions/susensions are made public in the form of Public Policy Exclusion Orders (Orders) under paragraph 7 of Schedule 3 to the Competition Act, 1998,<sup>8</sup> through which they have permitted: (i) market sharing, (ii) information sharing, (iii) stock allocation, and (iv) sharing of employees to ensure that crucial services continue to function.

However, the CMA has clarified that these exemptions do not give a free pass to businesses to engage in unscrupulous behaviour exploiting the crisis as a cover for non-essential collusion. This could include, for example, sharing of information regarding costs or pricing, among other things.<sup>9</sup>

To ensure that businesses do not act unscrupulously, the CMA has



constituted a COVID-19 Taskforce (Taskforce), which monitors and responds to competition and consumer protection concerns arising from the pandemic.<sup>10</sup> As part of its work, the Taskforce is asking the public for information about businesses behaving unfairly, for instance regarding cancellations and refunds, and unjustifiable price increases, especially of essential goods. A recent update by the Taskforce stated that during May 11-17, 2020 on average 1200 people contacted the CMA daily.<sup>11</sup>

The CMA has also urged the government for 'emergency time-limited legislation' to crack down on businesses profiteering from the pandemic for products such as hand sanitisers and face masks.<sup>12</sup> These precautionary measures by CMA make it clear that if businesses breach competition laws, the CMA will not hesitate to take enforcement if warranted necessary.

## European Union (EU)

The European Commission (EC) published a Temporary Framework recognising the exceptional challenges faced by businesses as a result of the COVID-19 crisis, which may require cooperation to overcome and mitigate some of the impacts and continue to ensure the supply of essential goods and services.<sup>13</sup>

This came in addition to European Competition Network's (ECN) joint statement, indicating that the Commission (and the competition authorities of the Member States)

**It was because of the unprecedented challenges faced by businesses and consumers due to COVID-19 that the EC decided to exceptionally provide businesses with *ad hoc* feedback or comfort on the legality of their cooperation.**

will not actively intervene against necessary and temporary measures aimed at avoiding a shortage of supply.<sup>14</sup>

It was clarified via both documents that such measures are unlikely to be problematic as they either will not amount to a restriction of competition or will generate efficiencies that will most likely outweigh any such restriction. The Temporary Framework identifies mainly two scenarios for assessment:<sup>15</sup>

- ◆ First, businesses that engage in cooperation that would be largely unproblematic even in normal times. Provided no commercially sensitive information is exchanged, such arrangements are unlikely to infringe competition law.
- ◆ Second, businesses might need to cooperate more intensely, for instance in coordinating production to ensure that demand is met. In such circumstances, the EC will accept such cooperation provided the following criteria are met: (i) the cooperation is

objectively necessary to increase output in the most efficient way to ensure supply of essential goods; (ii) the measures are temporary; and (iii) they are proportionate, such that they do not go beyond what is necessary to address the shortage of supply.

The Temporary Framework also explicitly foresees the possibility of informal guidance by the EC for specific forms of collaboration, in the form of 'comfort letter'. Consequently, in early April the EC issued its first comfort letter in almost 20 years, to the Medicines for Europe (MfE), authorising cooperation among them to respond to the shortage in essential medicines required for COVID-19 patients.<sup>16</sup> The specific practices which have been allowed under the MfE comfort letter, involve the exchange of sensitive information and coordination on key parameters of competition, going as far as market sharing.

Under normal circumstances, all these practices would raise material concerns under Article 101, Treaty on the Functioning of the European Union (TFEU). This measure is exceptional as according to 2004, undertakings could no longer notify their agreements to the EC in order to receive individual exemptions under Article 101, TFEU.<sup>17</sup> It was because of the unprecedented challenges faced by businesses and consumers due to COVID-19 that the EC decided to exceptionally provide businesses with *ad hoc* feedback or comfort on the legality of their cooperation.



**The ACCC has also constituted a COVID-19 Taskforce to tackle immediate, harmful consumer and small business problems arising from the crisis.**

At the same time, both the ECN and EC, underline that it is more important than ever that businesses and consumers receive protection under competition law. Therefore, they will continue to closely and actively monitor relevant market developments to detect instances of businesses taking undue advantage of the current situation by indulging in anti-competitive behaviour.

Notably, the Temporary Framework explicitly states that any opportunistic behaviour will not be tolerated, for instance, any cooperation which leads to prices above normal competitive levels, or limits production.<sup>18</sup>

The EC has also recognised the need to maintain the flow of credit to the economy, thus ensuring that businesses do not struggle to pay their suppliers and employees. In furtherance of the same, the EC issued a temporary Framework for state aid.<sup>19</sup> The Framework allows the Member States to claim state aid, under Article 107(3)(c) and compensation, under Article 107(2)(b) of the TFEU, to meet acute liquidity or damages suffered due to and directly caused by the COVID-19 outbreak, respectively.

## Australia

The Australian Competition & Consumer Commission (ACCC) has granted interim authorisation to (i) supermarket operators,<sup>20</sup> (ii) wholesalers of medicines,<sup>21</sup> and (iii) Medicines Australia (MA), the Generic and Biosimilar Medicines Association (GBMA) and their members to work amongst themselves in times of COVID-19.<sup>22</sup>

The purpose as specified is to ensure reliable and fair access to groceries to consumers, facilitate the distribution of essential medication and pharmacy products, and identify and mitigate any shortages or supply chain problems that could impact the availability of medicines in Australia.

The ACCC Chair, Rod Sims said, *"There is a clear public interest in allowing these companies to do all they can to ensure Australians....receive the medicines they need."*<sup>23</sup> Apart from these three exemptions, the ACCC has also allowed collaborations in various other sectors including but not limited to: airlines,<sup>24</sup> banks,<sup>25</sup> telecommunication companies,<sup>26</sup> coal and energy sector,<sup>27</sup> oil



**The Department of Justice and the Federal Trade Commission issued a joint statement that details an expedited antitrust procedure, designed to guide businesses about the legality of their proposed conduct under antitrust laws through the DOJ's 'Business Review Process' and the FTC's 'Advisory Opinion Process'.**

companies,<sup>28</sup> private and public hospitals,<sup>29</sup> life insurance for frontline workers,<sup>30</sup> etc.

At the same time, the ACCC has warned businesses to not indulge in any business behaviour which seeks to exploit the crisis either to unduly enhance their commercial position or harm consumers. Like the CMA, the ACCC has also constituted a COVID-19 Taskforce to tackle immediate, harmful consumer and small business problems arising from the crisis.<sup>31</sup>

### **United States of America (USA)**

The Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued a joint statement<sup>32</sup> allowing collaborations among competitors in the health sector, based on previous measures taken in the aftermath of hurricanes Harvey and Irma. The agencies have recognised that when firms collaborate on research & development (R&D), this '*efficiency-enhancing integration of economic activity*' is typically procompetitive.<sup>33</sup>

Similar to other jurisdictions, the DOJ and the FTC, have made it clear that they will not hesitate to hold accountable individuals and businesses who may use this opportunity to subvert competition, including increased prices, lower wages, decreased output, or reduced quality as well as efforts by dominant players to use their market power to engage in exclusionary conduct.



The joint statement details an expedited antitrust procedure, designed to guide businesses about the legality of their proposed conduct under antitrust laws through the DOJ's 'Business Review Process'<sup>34</sup> and the FTC's 'Advisory Opinion Process'.<sup>35</sup> It also states that the agencies will respond to COVID-19 related requests and resolve those addressing public health and safety within seven days of receiving all information necessary.<sup>36</sup> At the same time, the agencies have set up a dedicated mailbox hotline and are encouraging consumers to bring to its notice possible anti-competitive behaviour.

The approach taken by the CMA differs from that of the EC, the DOJ, and the FTC, as the former has prioritised public interest considerations (the protection of vulnerable consumers) and is willing to apply, in a particularly favourable way, the exemption criteria of Article 9 of the Competition Act, 1998 to alleviate shortages during COVID-19.<sup>37</sup> At the same time, the fact that the EC issued a comfort letter after more than 20 years, shows how unpredictable this situation is, and how the EC is willing to go back to traditional means to ensure businesses are not kept in the dark regarding the legality of their collaborations.

It must also be noted, that the ACCC has granted exemptions to the greatest number of sectors, thus broadening – also helping to define – what is essential and what is not under the present circumstances.

## Advisories from Inter-Governmental Organisations/Networks

Various inter-governmental organisations and networks have also issued advisories regarding competition law enforcement during COVID-19. The main rationale has been to further competition in the market to ensure economic recovery. Even though they advocate a sympathetic assessment to accommodate collaborations necessary to ensure the supply of essential goods and services, they do not shy away from adding that the same should be done in accordance with competition principles.

Agencies/Networks	Measures Taken
International Chamber of Commerce (ICC)	April 22, 2020: It calls for far-reaching cooperation in some sectors to sustain innovation and growth post-recovery and encourages some flexibility during and post-crisis while safeguarding the application of competition laws to spot anti-competitive behaviour. <sup>38</sup>
Organisation for Economic Cooperation and Development (OECD)	April 27, 2020: It laid down certain recommendations for competition authorities: (i) monitor closely any significant and rapid price increases, (ii) coordinate with consumer protection agencies, (iii) clarify to businesses how they will consider efficiencies in arrangements between competitors whilst ensuring that legitimate cooperation is necessary and limited in time, amongst others. <sup>39</sup>
Steering Group, ICN	April 09, 2020: It advised that competition agencies may accommodate collaboration between competitors necessary to address the circumstances of the crisis to the extent that their laws permit. However, it is also iterated that competition enforcement and policy efforts to promote and protect competition will be vital to manage the impacts of the crisis and create the best environment for economic recovery. <sup>40</sup>
United Nations Conference on Trade and Development (UNCTAD)	April 08, 2020: It recommended five key actions to protect competition in the markets: (i) ensure a level playing field between competitors, (ii) temporarily allow cooperation arrangements to ensure the supply and distribution of affordable products, (iii) closely monitor markets to ensure availability of essential products, (iv) vigorously enforce competition law against businesses that take advantage of the crisis, and (v) adapt competition procedures and deadlines to the circumstances created by the pandemic. <sup>41</sup>

## Enforcement Actions

The following is a list of enforcement actions undertaken by competition authorities in response to anti-competitive conduct by businesses during COVID-19. Many such actions revolve around issues of price gouging, which is essentially a consumer protection issue. It becomes imperative to highlight such consumer protection issues, as they have the potential to further competition concerns. Additionally, various competition authorities have under their mandate both competition and consumer protection laws.

Authorities/Countries	Enforcement Actions
Competition Authority of Kenya (CAK), Kenya	<ul style="list-style-type: none"> <li>◆ March 13, 2020: The CAK issued cautionary notices against illegal price increases and hoarding to manufacturers and retailers. Members of the public are also requested to submit information relating to any possible contraventions to the CAK.<sup>42</sup></li> <li>◆ March 16, 2020: The CAK issued a remedial order to Cleanshelf Supermarkets after determining that the retailer unconscionably adjusted the prices of hand sanitisers in contravention of the Competition Act, 2010. Cleanshelf was ordered to contact and refund all the consumers who purchased the hand sanitisers above the usual selling price and submit evidence to support the same within 10 days.<sup>43</sup></li> </ul>
Competition Commission, South Africa	<ul style="list-style-type: none"> <li>◆ June 01, 2020: The Competition Tribunal found Babelegi Workwear and Industrial Supplies CC guilty of excessive pricing and in contravention of the Competition Act. The Commission had referred the matter to the Tribunal on April 15, 2020 on charges of inflating prices of facial masks following the advent of COVID-19.<sup>44</sup></li> </ul>
Federal Competition and Consumer Protection Commission (FCCPC), Nigeria	<ul style="list-style-type: none"> <li>◆ May 04, 2020: The FCCPC issued a notice of Commencement of Investigation against certain medical practitioners and sealed the facility.<sup>45</sup></li> <li>◆ June 09, 2020: The FCCPC prosecuted certain companies, including supermarkets and pharmacies, over alleged price gouging.<sup>46</sup></li> </ul>
Hellenic Competition Commission (HCC), Greece	<ul style="list-style-type: none"> <li>◆ March 21, 2020: The HCC sent requests for information to various companies involved in the production, import, and marketing of sanitary ware. This action was taken as a result of numerous complaints from consumers regarding significant price increases and the shortage of these products, which may be due to business practices in the distribution chain.<sup>47</sup></li> </ul>
Indonesian Antitrust Authority (KPPU), Indonesia	<ul style="list-style-type: none"> <li>◆ April 14, 2020: The KPPU probed into alleged excessive pricing and bundling of COVID-19 test services offered by hospitals, prompted by complaints that prices of services offered are high and hospitals bundle test services with other services as a package.<sup>48</sup></li> </ul>

Authorities/Countries	Enforcement Actions
Italian Competition Authority (AGCM), Italy	<ul style="list-style-type: none"> <li>◆ March 12, 2020: AGCM has launched two separate investigations against Amazon and eBay on account of deceptive claims related to the effectiveness of products (hand sanitisers, respiratory protective masks, and other sanitation products) and an unjustifiable and substantial increase in prices for the sale of such products.<sup>49</sup></li> <li>◆ May 07, 2020: AGCM launched a pre-preliminary investigation by sending requests for information to numerous operators to acquire data on price increases for food, detergents, disinfectants, and gloves.<sup>50</sup></li> </ul>
Office of Competition and Consumer Protection (UOKiK), Poland	<ul style="list-style-type: none"> <li>◆ March 04, 2020: The President of the UOKiK has initiated proceedings against wholesalers who terminated their contracts with hospitals for supplying personal protective equipment (PPE) to raise the price or sell products on the market instead of supplying them to the hospitals.<sup>51</sup></li> </ul>
The Administrative Council for Economic Defense (Cade), Brazil	<ul style="list-style-type: none"> <li>◆ March 18, 2020: The Cade opened an investigation in the medical-pharma sector. The purpose is to investigate if businesses are abusively increasing prices and profits in the face of high demand motivated by COVID-19.<sup>52</sup></li> </ul>
Turkish Competition Authority (TCA), Turkey	<ul style="list-style-type: none"> <li>◆ May 11, 2020: An investigation has been initiated against 29 undertakings including supermarket chains after several warnings and announcements were made regarding extreme price increases in production and trade of food and cleaning products.<sup>53</sup></li> </ul>
USA	<ul style="list-style-type: none"> <li>◆ March 30, 2020: Missouri Attorney General (AG), Eric Schmitt issued eight civil investigative demands to third-party Amazon sellers to combat price gouging. The third-party sellers are required to furnish information about the pricing and sale of face masks, respirators, and hand sanitisers.<sup>54</sup></li> <li>◆ March 17, 2020: Illinois AG, Kwame Raoul announced investigations will be instituted against businesses indulging in price-gouging on items crucial to stop the spread of COVID-19. Targets have not yet been identified.<sup>55</sup></li> <li>◆ March 31, 2020: Washington AG, Bob Ferguson sent letters to five-Washington-based independent sellers who significantly raised prices on COVID-19-related items. The letters call for sellers to immediately stop selling products at unreasonably excessive prices, especially those which are necessary for the health, safety, and welfare of people.<sup>56</sup></li> </ul>

After the rapid action globally, the CCI issued an 'Advisory to Businesses in Times of COVID-19' (Advisory), recognising that joint action and collaboration is the need of the hour.

Even in normal times, collaborations between businesses, including competitors, can create efficient, pro-competitive effects that are consistent with the application of competition laws. In times of crisis, collaborative efforts can become critical components of effective responses. Competition laws are not intended to thwart these well-intentioned efforts. However, businesses must be aware that the rules still apply to their interactions and conduct. As a result, businesses need to structure collaborations carefully and seek pragmatic and practical advice.<sup>57</sup>

To that end, a stark warning has been issued by virtually all competition authorities that have taken recent action: abuses of the flexible approach will meet a resolute response with market places being monitored very closely, for example, through the creation of task forces and a call for whistleblowers.<sup>58</sup>

## B. The Indian Perspective

After the rapid action globally, the CCI issued an 'Advisory to Businesses in Times of COVID-19' (Advisory),<sup>59</sup> recognising that joint action and collaboration is the need of the hour. The Advisory identifies that in such extraordinary situations, certain businesses may need to coordinate their activities by sharing data on production, stock levels and timing of production, sharing of the distribution network and infrastructure, R&D, logistics, etc. in the larger public interest.

The Advisory suggests that the test to determine whether the parties to a business collaboration have violated competition laws or not will be the 'necessity and proportionality' of the conduct to address the concerns arising out of COVID-19. While this is a welcome step which demonstrates that the CCI is taking note of the situation and its severity, in reality, it only states and explains the law as it stands and highlights the exception as given under Section 3(3) of the Competition Act, 2002 (Act).

The Advisory further goes on to say that the Act has built-in safeguards that would protect businesses from sanctions for certain coordinated conduct, provided such arrangements result in increased efficiencies.<sup>60</sup>

The most notable of such safeguards is enumerated under Section 19(3) of the Act, which states that CCI shall give due regard to factors such as accrual of benefits to consumers; improvements 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.

It is to be noted that the Advisory does not provide any exemption from the application of the Act but merely provides that the CCI will consider the circumstances that occurred during COVID-19 while undertaking its assessment.<sup>61</sup>

That said, even though the Advisory is a notable step, it is very



general and offers no specificity either in relation to the decision timeline or the types of conduct that would be likely to be cleared. Additional clarity and guidance would have helped businesses understand where the CCI currently sees the red lines as well as the timeframe for receiving a decision. The CCI must proactively engage with businesses and guide them through what will be acceptable and what may still account as a contravention of the law.<sup>62</sup>

Considering the newness of this crisis, the CCI should consider taking persuasive values from other jurisdictions, subject to India's current economic and social situation. For instance, the CCI may consider issuing non-binding comfort letters or guidelines to businesses regarding the legality of their collaboration, as has been done by the EC.

Subsequently, the CCI could also take note of the approach taken by the ACCC and come up with detailed guidelines as to what would constitute as 'essential'. The ACCC in that regard has granted exemptions to each sector/industry thus demarcating the essentiality of goods and services at such times.

The following are a few recommendations on what the CCI can do next. However, these recommendations can be applicable and are relevant to fellow competition authorities as well, especially those who have a similar competition

regime as India's and may have international cooperation arrangements with it.

- ◆ **Clarify the forms of collaboration that would be unproblematic:** When it comes to anti-competitive agreements between competitors, the size, economic prowess, and line of business (essential or non-essential commodities) of an enterprise is irrelevant. As such, every enterprise must be wary of its conduct. However, for businesses to carry on functioning without being fearful of competition enforcement, the CCI needs to identify certain forms of collaborations that would be unproblematic. For instance, collaborations furthering logistical support in the healthcare sector, medical devices sector, or for essential pharmaceutical products.

A similar practice has been undertaken by almost all competition authorities worldwide, such as the EU in its temporary framework, the ACCC in allowing multiple collaborations, and the CMA in issuing Orders wherein it excludes certain agreements, specifically between grocery chain suppliers and logistic service providers, amongst others.<sup>63</sup>

- ◆ **Emphasise the importance of trade associations:** Besides individual firms, the role of trade associations is likely to gain much significance in the times ahead as common industry concerns will need to be addressed. While such communication is imperative, there must be strict compliance with competition law by industry bodies to ensure that they do not become a platform for coordination or exchange of sensitive business information in contravention of the Act.

- ◆ **Identify essential vs. non-essential commodities:** In times of crisis, what constitutes essential commodities is a fast-evolving concept depending upon the demand and supply. Moreover, competition law applies equally to essential and non-

essential goods as well as services. As such, firms that wield significant market power have an additional burden to tread with caution and ensure that they do not take any opportunistic steps or exploit consumers.<sup>64</sup>

- ◆ **Provide (in)formal guidance to businesses:** The CCI should provide (in)formal guidance to businesses through a team created solely to assess the proposed collaborations, similar to what the Competition Bureau of Canada announced.<sup>65</sup> The aim must be to facilitate rapid decisions and advise the CCI on what (in)formal guidance the CCI might provide. Similarly, the CCI can also set up a dedicated mailbox hotline encouraging customers to bring to its notice possible anti-competitive behaviour. Competition authorities in Spain<sup>66</sup> and Iceland<sup>67</sup> have furthered guidance through hotlines, in turn receiving several complaints from consumers thus enabling them to act against anti-competitive conduct by businesses.
- ◆ **Provide for a notification system for business collaborations:** The CCI should provide for a notification system for business collaborations in exchange for not intervening in relation to notified practices. However, the CCI should reserve the right to take either of the following steps: (i) to request businesses who submit patently anticompetitive agreements to abandon these, thus nipping anti-competitive action in the bid, or (ii) to advise businesses on whether less restrictive options may be available. The DOJ and the FTC already operate an *ex-ante* notification system, the result of which is published in the form of comfort letters.<sup>68</sup> The CCI can also tread on the same waters as the EC, and issue comfort

letters to businesses clarifying the legality of their collaborations under the Act.

- ◆ **Increase transparency:** The CCI should also ensure that these processes are transparent, thereby comforting consumers that the best possible competition-friendly approach has been taken. In furtherance of this, the CCI can publish comfort letters issued to businesses, thereby ensuring accountability, transparency, equal treatment, and good administration. When considering a request for a comfort letter, the CCI should gather information about the business and the products concerned, an outline of the collaboration, its benefits, and competition risks. The same practice has been followed in the USA even before the COVID-19 pandemic when the country faced other natural disasters like hurricanes.<sup>69</sup>

Understandably, the CCI lacks the human, technical, and financial resources for such extensive data collection. Considering such restrictions, the CCI could decide to respond to only such requests for comfort letters which seem unproblematic. At the same time, the CCI could ask for such information from the businesses which are seeking a comfort letter.

It is time for the CCI to urgently relook into its functioning and approach along with the traditional principles of competition law. In times like these, the over-cautious and general advice from the competition authority of India is not sufficient, and there needs to be more detailed guidance. Such guidance will not only help businesses and consumers, it will also prove useful to the Commission as (i) frivolous and unsubstantiated cases will be less during and for COVID-19, and (ii) it will prepare the CCI for any such future exigencies.

## The Road Never Taken: Will it Make a Difference?

A crisis like COVID-19 is potentially hostile towards competition law: the less visible and less immediate costs of restricting competition can look more attractive to policymakers faced with a range of unpalatable options. Policies to relax competition in the USA in the 1930s and Japan in the 1990s arguably added to the duration of recession in both countries.<sup>70</sup> Learning from history and the robust economic evidence linking competition to productivity growth, we need to ensure that today's solutions do not inadvertently become tomorrow's problems.

The competition authorities should ensure that they issue clear guidelines to support the economic survival and required growth of specific critical sectors to sustain the continuous supply of essential goods and services. To further this, a collaboration between governments and competition authorities is imperative, wherein both should consult and advise each other to maximise consumer welfare and minimise anti-competitive conduct.

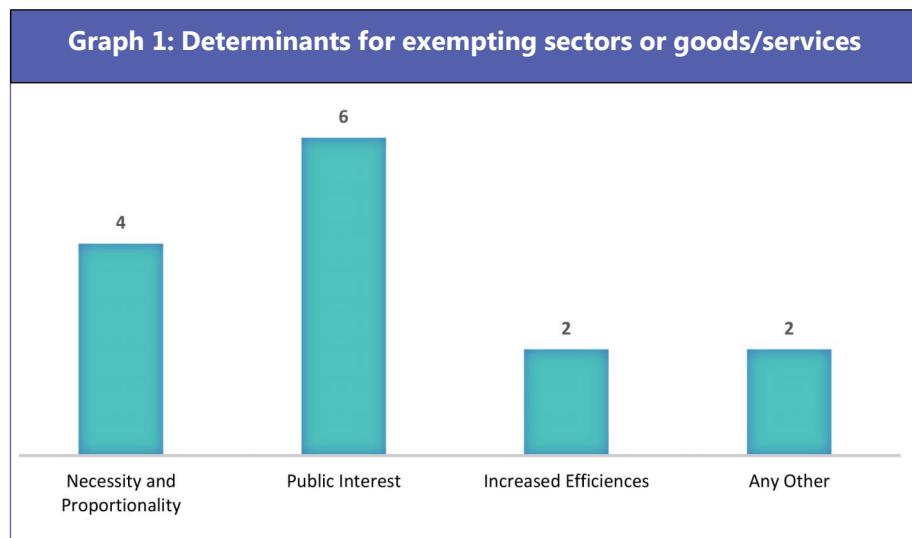
For instance, the guidelines issued by the ACCC, in the form of exemptions to various sectors, acts

as a demarcation for what is essential and what is not, in such trying times. Similarly, with the CMA amending its competition legislation, it has made clear what will be allowed and to what extent. Such guidelines, in any form, could provide materiality thresholds or caveats to make sure that businesses can benefit from them where appropriate but that no business can take advantage of them. This must be done in a way that would confer legal certainty to businesses and provide adequate protection against unnecessary litigation claims.

The guidance should also explain when certain agreements that are aimed at securing the supply of important goods and services may be exempted from competition laws in the context of the economic crisis. This applies in particular if the agreement in question is likely to contribute to improving the production or distribution of goods or services with limited access due to the COVID-19 pandemic and does not lead to lasting structural changes in the market.

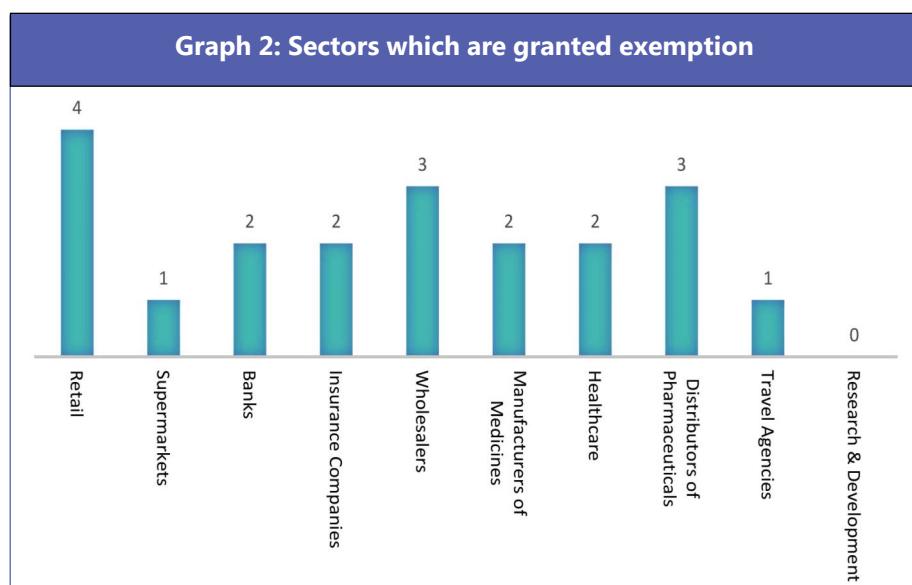
Competition authorities could helpfully explain that certain forms of cooperation will be presumed to benefit consumers in the current

circumstances. These concerns were addressed in the survey conducted by CUTS International, the result of which is as follows.<sup>71</sup>



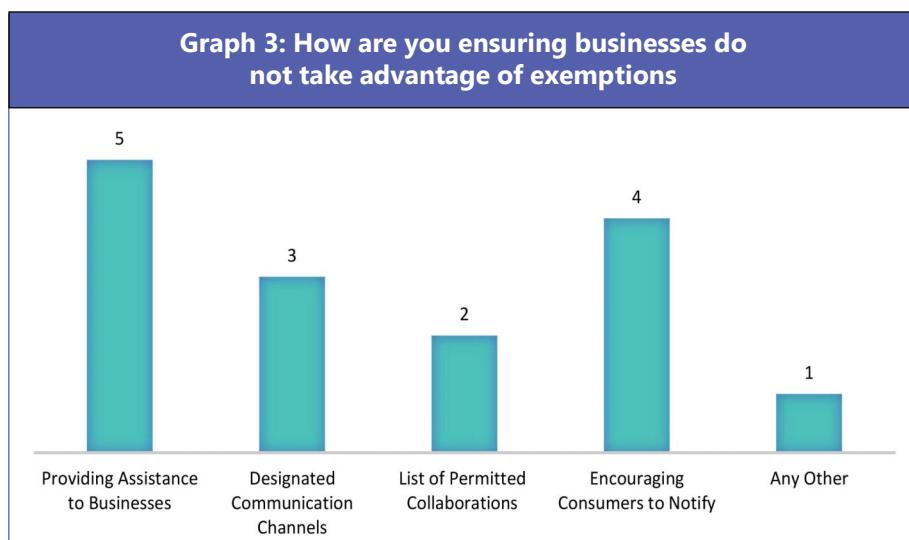
Graph 1 reflects the determinants identified by competition authorities for granting exemptions to certain sectors. Clearly, 'public interest' was the major determinant when deciding whether any sort of exemption should be granted or not. Subsequently, looking at Graph 2 it becomes clear that the sectors which were granted the most exemptions, would lead to greater public interest. For instance, retailers are granted exemptions by most authorities, with wholesalers and distributors of pharmaceuticals, being the second most exempted sectors.

It is also noted that as of now, R&D has not been granted an exemption by any competition authority – this might be a little problematic as it is crucial right now to further R&D to enable introduction of a vaccine or effective medication to cure COVID-19, and collaboration for the same should be encouraged, even beyond national boundaries.



It is equally important to clarify to businesses in a timely manner how efficiencies in arrangements between competitors will be assessed (e.g. dedicated mailbox hotline to provide advice on specific cases of collaboration), in particular those dealing with priority sectors in the crisis, such as medical products and food supply chains. They should ensure that legitimate collaborations between competitors are necessary and limited in time. They should not include hard-core restrictions such as price-fixing.

Manufacturers can also take steps themselves to help combat price gouging or excessive pricing. Manufacturers setting maximum prices at which retailers may sell their products is not unlawful. Manufacturers may therefore directly address price gouging by setting maximum prices for the retail of their products.<sup>72</sup> To that end, the survey by CUTS International posed questions on similar lines to the competition authorities.<sup>73</sup>



Graph 3 and 4 are aimed at understanding what competition authorities have done to ensure that businesses do not take advantage of the current pandemic. It is evident from Graph 3 that the two most opted measures are providing assistance to businesses and encouraging consumers to notify any anti-competitive conduct. Thus, the rationale behind assisting businesses is clearly to curb any activity or collaboration which is not necessary during these times. This would in turn ensure that essential collaborations do not continue after the prescribed time limit, therefore furthering economic recovery and competitive principles.

In that end, Graph 4 lists actions which if undertaken by businesses will invite immediate enforcement by competition authorities. It is interesting to note that price-fixing tops the chart, with collaborations that continue beyond a prescribed time limit, and are non-essential running a close second. This also helps businesses understand what kind of collaborations will not be tolerated at all, even in the face of the crisis. Such clarity becomes important to curb anticompetitive conduct and to minimise unnecessary litigation claims. It

must also be noted that 'price gouging' which is essentially a consumer protection concern, will also be treated with less tolerance, and has been put at par with typical competition contraventions. The same has been highlighted above where various competition authorities have already initiated investigations against businesses for indulging in price gouging.



One of the ways to address the current situation and to ensure the protection of competition in the short-and-medium-term is by issuing clear and detailed guidelines. Minus that, businesses might further collaborations which would be anti-competitive and against consumer welfare at its very core. Businesses could also indulge in price gouging and exclusionary practices since no clear do's and don'ts have been prescribed.

Therefore, the approach by competition authorities all over such as the CMA, the DOJ and the FTC, the ACCC, etc. is to actively be part of the situation and ensure that businesses know what will be allowed and what will not be tolerated. The CCI needs to take a similar approach if it wants to protect competition and ensure accountability and transparency for all business collaborations during COVID-19. Without explicit guidelines, the floodgates will remain open for unscrupulous behaviour, with the possibility of such collaborations continuing post-COVID-19.

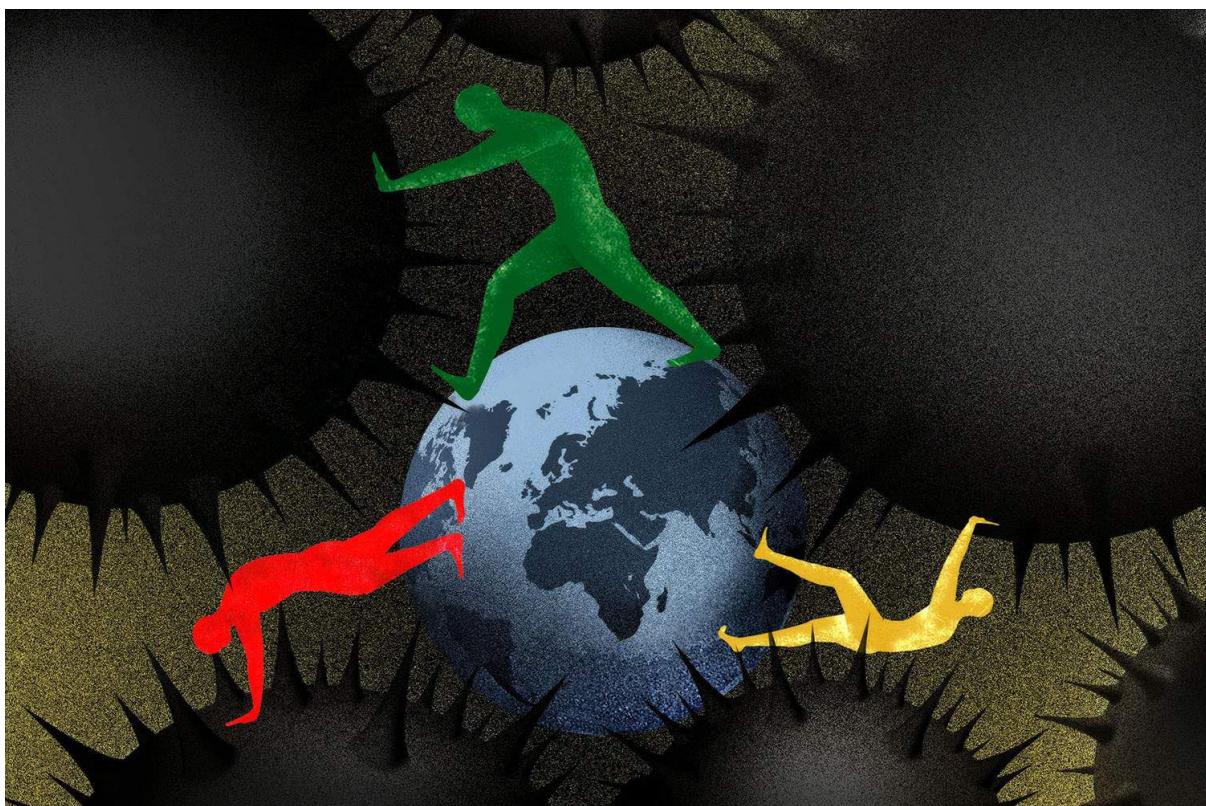
## Conclusion

As the COVID-19 crisis evolves, companies must be aware of and adjust to, changes in how competition authorities are likely to view competitor collaboration. In the longer term, questions undoubtedly will arise as to whether this is temporary, or instead represents a 'new normal', which would represent a significant change in the approach to competition law policy and enforcement.

In many ways, the competition issues that the current public health crisis is trying to address arise in normal times. Companies have, for some time now, argued

that cooperation is essential to respond to climate change or achieve step changes in sustainability, but the full application of competition law makes this difficult to achieve.<sup>74</sup> Post-crisis, it will be worth watching how far current experiences will inform government and regulatory responses to these long-term challenges.

What we have witnessed is the revival of interest in industrial policy after decades of advocating for free markets and laissez-faire economic policies. This could lead to implications for competition authorities in ways that they will be under pressure from their



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governments to ease law enforcement effort and relax merger reviews whilst facing increasing protectionist measures.<sup>75</sup>

The COVID-19 times will forever be remembered as unique and challenging. While on one hand competition authorities are deliberating allowing business collaborations, on the other we have witnessed a collective experience which has reminded us, as we come out of this, how valuable cooperation is. We are better off having a larger picture in a larger framework in mind by knowing what competition authorities all over the world are doing. Without such cooperation and collaboration amongst competition authorities, our ability to adjust to these and other shocks is much weaker. Owing to this realisation competition authorities everywhere have given precedence to 'public interest' as opposed to 'consumer welfare'.

Various authorities are also contemplating prioritising public interest issues to guide case laws. One such example is of EU, where in 2021 the Horizontal Block Exemption Regulations, Technology Transfers, and Specialisations Agreements as well as corresponding guidelines on horizontal cooperation will be revised and they may explicitly refer to certain public interest issues and set them as a priority to guide case law.<sup>76</sup>

It has been realised that it is as important to assist and allow business collaborations in these times, as is cooperation between competition authorities from different jurisdictions. This crisis – this stress test – is an occasion to step back and think: are we happy with the mandate; are we happy with the organisation and its operations; and what new measures should be retained after the crisis, and what traditional measures have worked well in the 'new normal'.

## Annexure I

The following is the list of competition authorities who responded to the survey conducted by CUTS International.

Sr. No.	Competition Agency/Authority, Country
1.	Albania Competition Authority, Albania
2.	Antimonopoly Office, The Slovakia Republic
3.	Australian Competition and Consumer Commission, Australia
4.	Bundeskartellamt (Federal Cartel Office), Germany
5.	Competition Agency, Georgia
6.	Competition and Consumer Protection Commission, Zambia
7.	Competition Commission, Mauritius
8.	Competition Council, Republic of Moldova
9.	Fair Trading Commission, Republic of Seychelles
10.	Federal Antimonopoly Service, Russian Federation
11.	Federal Competition Agency, Austria
12.	Federal Competition and Consumer Protection Commission, Nigeria
13.	Federal Trade Commission, United States of America
14.	The General Authority of Competition, Saudi Arabia
15.	The Office of Trade Competition Commission, Thailand

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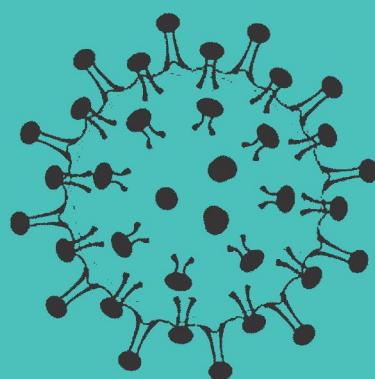
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