CPI's Asia Column Presents:

COVID Advisories from the Competition Commission of India

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Unusual times require unusual measures. The lockdown of the entire country by the Government of India on account of COVID on March 24 is an unusual measure and, in its fallout, the economic lockout has produced unusual times. Market and trade disruptions have led to rising unemployment levels, and the migration of workers from cities to villages due to layoffs and the closure of businesses. These changes are expected to persist in the long term. In this "lockdown-lockout" equation context, the COVID advisories issued by the Competition Commission of India ("CCI") raise several issues as to the rationale of regulating markets and outcomes both during the pandemic and post-COVID. The CCI has a major role in reviving markets brought to a standstill by the pandemic and incentivizing investments to combat lagging growth rates.

Five Advisories have been issued by CCI, but I shall refer only to the two Advisories of March30 and April 19.[2] The advisory of March 30 (the Green Channel Advisory) permits filing of merger cases (Sections 5 & 6) of the Competition Act electronically. The Green Channel is an initiative incorporated to the 2019 Amendment on Combination Regulations that sets out the conditions for automatic clearance of mergers and acquisitions.[3] The April 19 advisory has relaxed the presumption of appreciable adverse effect on competition ("AAEC") of concerted action in joint ventures in supply chains of health and essential commodities.

Green Channel Advisory

As the gatekeeper for the clearance of mergers the attempt of the CCI in the 2019 Amendment is to be pro-business in mergers and acquisitions by introducing the green channel for automatic clearances. To ensure quick clearance, information filed by merging parties in Form I of Regulation 5A must adhere to the conditions laid out in Schedule III.

Schedule III [sub-regulation (1) of Regulation 5A] reads:

> "Considering all plausible ***alternative market definitions*** (*emphasis added*), the parties to the combination, their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control:
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> i. do not produce/provide similar or identical or substitutable product(s) or service(s);
>
> ii. are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in product(s) or provision of service(s) which are at different stage or level of production chain;
>
> iii. and are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in product(s) or provision of service(s) which are complementary to each other."

The conditions that merging parties have no <u>horizontal</u> and <u>vertical</u> linkages are part of the due diligence process when parties file for merger clearance from the CCI. In antitrust language, there should be no upstream or downstream linkages between the merging parties that could lead to the merged entity monopolizing the market. The catch lies in defining the relevant market and the relevant product in terms of substitutes and complements. Section

2(t) defines the relevant product in terms of substitutes and interchangeability with reference to price and intended use. While this has been accepted as appropriate when applied to traditional product markets their relevance and appropriateness to platform markets are under question in economic analysis of competition. Similarly, activities complementary to each other associated with portfolio acquisitions of products or patents remain blurred in assessing the consumer benefit of firms merging. It is a given that these definitions are open to interpretation and the Green Channel runs the risk of creating uncertainty.

Competition authorities tread cautiously. It is open to question whether such caution is conducive to attracting much needed foreign investment for the economy to revive and for markets to function. Uncertainty dampens foreign investment flows.

The Preamble to the Competition Act[4] mandates the CCI "*to promote and sustain competition in market.*" Acquisitions of failing firms or mergers of weak and strong firms in the air travel and hospitality segments (the two sectors most severely impacted by COVID-19) are hotly debated in antitrust circles. The scope for acquisitions of failing firms or mergers of weak and strong firms during the lockdown touches on a sensitive area relating to "failing firms." The recently enacted Insolvency and Bankruptcy Code has seen several acquisitions and mergers cleared by CCI. No attempt has been made to define a "failing firm."

The CCI has the powers to review a consummated merger within a year of its clearance. It is also open to the CCI to invoke Section 4[5]in abuse of dominance cases at anytime, albeit at its own motion. With these inbuilt safety valves, an overly cautious Green Channel Combinations (Amendment) Regulation maybe unwarranted at this time, when several digital companies and high-tech companies are seeking to establish themselves in India. The Green Channel advisory underscores the importance of Guidelines. For young competition authorities like CCI the importance of Guidelines in changing market structures is self-evident.

Supply Chains

The COVID advisory of April 19, on the other hand, is upbeat on concerted actions to address the disruption caused "*in supply chains **including** (emphasis added)those of critical healthcare products and other essential commodities and services.*"[6] Section 3(3) prohibits conduct that causes or is likely to cause appreciable adverse effects on competition in the case of concerted action in joint ventures, if such agreements increase efficiency in production, supply, distribution storage, etc., to the benefit of consumers.

The advisory extends the permission for <u>concerted action</u> and <u>coordinated activity to</u> sharing of non-price data, i.e. data on (a) production levels; (b) the timing of operations; (c) the sharing of distribution networks, infrastructure, and transport logistics; and (d) the sharing of R&D, production, etc. It is here that the advisory treads on thin ground. The caveat that all information should be filed with the CCI and the warning that "*[b]usinesses are, however, cautioned not to take advantage of Covid-19 to contravene any provisions of the Act*" would appear, to quote an old song, to be "blowing in the wind."

What constitutes essential commodities? Does it include vegetables and fruits? Experience in the onion market has shown the scope for hoarding and short-term spikes in prices by traders, as observed by the CCI in the "*cartel of traders in the onion market*."[7] Cement, coal and tires are essential commodities. They are prone to cartelization as they are homogenous products with relatively inelastic demand. Ironically, post the cement cartel judgment, the CCI[8] advised the Government to dissuade associations like the Cement Manufacturing Association of India from publishing price data on major cement companies in the public domain.

New associations and new links will be created pursuant to the COVID advisory on supply chains. Small firms collaborating on R&D in generic drugs or APIs essential for treatment of COVID-19 or even HIV can lead to a peculiar situation in which market power is not held by a dominant firm, but by a small firm. Shared information on R&D under Section 3(5) is entitled to "safe harbor" status. Clearance of information sharing permitted under the Advisory could have peculiar outcomes post-COVID, as in the example of generic drugs and control of APIs – Daraprime (pyrimethamine) by Turing. The control of the pharma industry by the All India Drug Association with repeated warnings from the CCI only shows how strong the pharma industry can be.[9]

The CCI must be on high alert post-COVID-19 with respect to price and data tracking measures that could prompt cartels.

Advisories of Competition Authorities

In the end, the basic fact is that mere advisories cannot be an antidote for the problems raised by the virus. They can only be an antidote for the fallout of lockdown on the economy. To be effective as an antidote for market revival more openness to mergers, acquisitions and joint ventures is imminent. Guidelines would better define and clarify terms such as substitutes, complements, and failing firms than the mere reiteration of existing regulations. The lack of Guidelines has often been pointed out as a major shortcoming of the CCI's regulations and notes. The tracking mechanisms of the CCI will also have to sharpened with new tools for price tracking and data tracking. These unusual times are revealing fault lines in prevailing structures, regulations and advisories.

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2 Public Notice dated March 30, 2020: Measures in view of threat of CORONA VIRUS / COVID-19 Pandemic, https://www.cci.gov.in/sites/default/files/notification/210553.pdf.

3 Green Channel (Regulation 5A of the Combination Regulations) at comb.registry@cci.gov.in.

4 The Competition Act, 2002 (12 of 2009), 2016.

5 *Ibid*.

6 Advisory to Businesses in Time of COVID-19, https://www.cci.gov.in/sites/default/files/news_ticker/Notice20042020.pdf.

7 *Suo-moto* Case 1/2011.

8 Case 29/2010, *Builders Association of India v. Cement Manufacturers' Association*.

9 https://www.cci.gov.in/sites/default/files/press_release/PressReleaseSuoMoto052013.pdf.