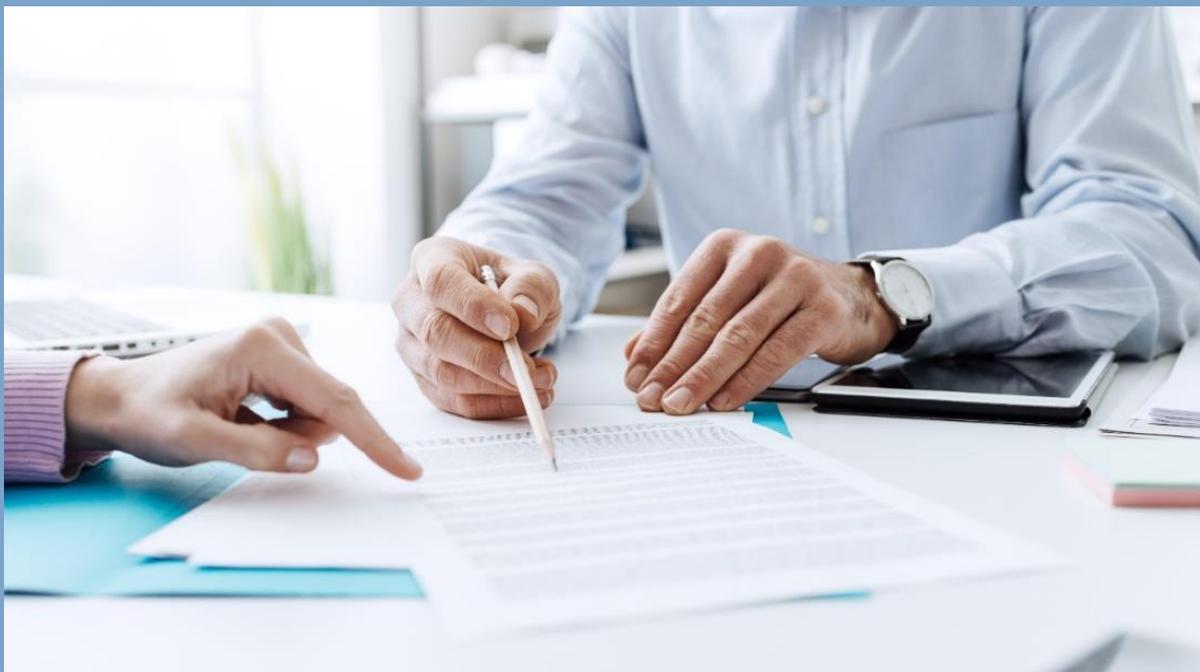


Competition Commission of India Exempts Cartel Behaviour



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Vide its order dated 10 July 2020 ('Order'), the Competition Commission of India ('CCI') found that ten (10) enterprises had indulged in cartelisation during the period 2009 to 2017. Curiously however, instead of imposing any fine or penalty, the errant companies were given a mere rap on their hands and let off with a warning¹.

While the CCI has cited various factors in taking this 'measure' – being the current economic scenario, the enterprises being micro, small and medium enterprises ('MSMEs'), the level of cooperation accorded by the enterprises etc., the Order seemingly is in contravention to the CCI's own advisory of April this year² ('Advisory').

Per the Advisory, the fair trade watchdog had opined that some collaboration amongst competitors would be acceptable in light of the economic impact of COVID-19 but cautioned that only the conduct which was "necessary and proportionate to address(ing) concerns arising from COVID-19 would be considered" [for exemption]. The Advisory further clarified that businesses were not allowed to take advantage of COVID-19 to contravene any of the provisions of the Indian Competition Act ('Act').

What the Order portrays is seemingly a detour from the principle laid down under the Advisory. The question that begs an answer is – can "all" anti-competitive agreements and/or behaviour that the CCI is investigating currently avail of the COVID-19 exemption assuming that the enterprises under investigation proffer their cooperation to the investigation?

The economic scenario is the same for all enterprises – big or small. Yes, the MSMEs have smaller pockets than the larger companies, but that should not deter the regulatory bodies from their adjudicatory functions. Smaller pockets may mean lesser profits and thus, the CCI may have levied lesser penalties, but letting the errant enterprises go scott-free is seemingly an injustice.

Per the Order, the enterprises were found guilty of cartelisation by means of directly or indirectly determining prices, allocating markets, co-ordinating bid response and manipulating the bidding process - against which, there is a presumption of an appreciable adverse effect on competition in India (AAEC). In addition to the enterprises being found guilty of cartel behaviour, the investigation found that the companies' directors & officers (D&Os) even admitted to their respective role(s) in the cartel.

With such set of facts and indeed, findings, the case would normally have been a 'slam-dunk' case, but for the *current economic scenario*.

But should the current economic scenario be considered for violations that happened between 2009 and 2017? Should the fact that the enterprises (and the individuals) were in blatant disregard of the law for close to a decade not be a superseding consideration? Should the fact that the violations cannot be considered "necessary and proportionate to address(ing) concerns arising from COVID-19" have a bearing on the decision? Additionally, isn't it the same CCI who was having difficulties in recovering monies sometime back³ and should be doing whatever it can to enforce the provisions of the Act for violations which are 'unrelated to COVID-19' instead of doling out such freebies to violators?

Had the cartel been in relation to medical supplies or essential commodities (like face masks, surgical gloves, vaccines etc) to cope with the onset of the pandemic, it could have been understandable. Had the violation occurred post the inception of the virus outbreak, the findings could have been justified. Had the competition watchdog deferred its investigation into the pricing practices of hospitals⁴, it would have seemed in line with the principles laid down in the Advisory, but without any of the above elements at play, the regulator is not only muddying the waters in respect of its own rules and precedents, but also discrediting the players-at-large in the relevant market who are playing the fair game.

¹ <https://economictimes.indiatimes.com/news/company/corporate-trends/cci-directs-10-enterprises-officials-to-cess-desist-from-anti-competitive-ways/articleshow/76946339.cms>

² https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf

³ <https://www.businesstoday.in/opinion/columns/just-0-per-cent-of-cci-penalties-recovered-for-now-but-progress-made-in-handling-of-antitrust-cases/story/286148.html>

⁴ <https://www.businesstoday.in/sectors/pharma/cci-orders-investigation-into-pricing-practices-of-super-specialty-hospitals-in-delhi/story/282080.html>

One of the basic tenets of the competition regime is to correct market distortions and to create a level playing field for the participants in the relevant market. If the regulator takes such a lacklustre (and in my opinion, injudicious) approach towards enforcement against inherent antitrust violations citing reasons such as economic hardship, size of enterprise and cooperation during investigation, it defeats the entire *raison d'être* for having a competition legislation in place.

With the onset of the pandemic, other competition authorities had also implemented crisis rules temporarily relaxing restrictions and prohibitions against anti-competitive conduct⁵. Similar to the CCI, the intent behind such 'relaxations' was to ensure supplies like groceries and logistics would not be impacted so as to manage and prevent shortage of "essential items". No other country has thought of using the relaxed restrictions in a way so as to impede the investigation into an unrelated product, time and/or supplier.

Alas, it seems that with the instant Order, the CCI has seemingly established a very dangerous precedent, one that is bound to come back and haunt it in the future!

About The Author

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⁵ For instance, the European Competition Network (ECN) (a body of EEA competition authorities) published a joint statement on the COVID-19 pandemic noting that "*necessary and temporary measures put in place to avoid a shortage of supply*" were unlikely to amount to unlawful agreements to restrict competition. Separately, the UK Government also issued the Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020.

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