

# INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

---

Volume 3 | Issue 2

2020

---

© 2021 International Journal of Legal Science and Innovation

Follow this and additional works at: <https://www.ijlsi.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

---

This Article is brought to you for free and open access by the International Journal of Legal Science and Innovation at VidhiAagaz. It has been accepted for inclusion in International Journal of Legal Science and Innovation after due review.

In case of **any suggestion or complaint**, please contact [Gyan@vidhiaagaz.com](mailto:Gyan@vidhiaagaz.com).

---

**To submit your Manuscript** for Publication at International Journal of Legal Science and Innovation, kindly email your Manuscript at [editor.ijlsi@gmail.com](mailto:editor.ijlsi@gmail.com).

---

# Review of Indian Competition Law and Healthcare Fundamentals in Light of Covid-19

---

PRARTHNA NACHAPPA<sup>1</sup>

## ABSTRACT

*As of April, 2021, India stood second in the global list of the highest incidence of Covid-19 cases, consequently drawing acute scrutiny and worldwide attention to the Indian healthcare framework. A very tangible fear of overburdening facilities and exhausting the supply of isolation beds and ventilators had forced India into a premature lockdown that has since crippled its economy. Covid-19 has revealed cracks in the healthcare structures of countries across the globe, and, in spite of the tremendous improvement in Indian healthcare over the years, India is still not equipped to cater to its overwhelming population of 1.3 billion people. Through an analysis of Indian Healthcare fundamentals, and its competitive factors, this paper seeks to examine and evaluate India's position in its fight against Covid-19. This paper examines the Competition Commission of India's Policy released in 2018, shedding light on the competitive issues faced by the Indian healthcare and pharmaceutical sector. A comparative analysis of the healthcare structures of China, Australia, European Union and the United States assists in critically assessing the response of the Indian competition authorities to the pandemic, and provides insight into establishing a more robust competition market for Indian healthcare that would invariably protect consumers.*

**Keywords:** *Competition Analysis, Covid-19 Healthcare, Indian Healthcare Infrastructure*

## I. INTRODUCTION

Indian healthcare has come a long way since its formal inception during Indian independence in 1947. From drastically reducing the spread of Malaria and Tuberculosis within the country, to being awarded a Polio free certificate in 2014,<sup>2</sup> India has championed its way to the forefront of the global pharmaceutical market. Today, India supplies over 50% of the world's demand for vaccines<sup>3</sup> and is the third largest player in the market (in terms of volume).<sup>4</sup> It

---

<sup>1</sup> Author is a student at Symbiosis Law School, Pune, India.

<sup>2</sup> Sunil Bahl, Rakesh Kumar, Nata Menabde, Arun Thapa, Jeffrey McFarland, Virginia Swezy, Rudolph H. Tangermann, Hamid S. Jafari, Linda Elsner, Steven G.F. Wassilak, Olen M. Kew, & Stephen L. Cochi, "Polio-Free Certification and Lessons Learned — South-East Asia Region, March 2014", *Centres for Disease Control and Prevention*, Oct. 24, 2014, available at: <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6342a2.htm> (last visited on Oct. 20, 2020).

<sup>3</sup> "Indian Pharmaceuticals Industry Report", *India Brand Equity Foundation*, Nov. 2020, available at:

exports its manufactured drugs to over 200 countries,<sup>5</sup> with the United States being its most valuable importer. Despite this, access to essential medicines within India is a growing and silent crisis, according to the Indian Journal of Medical Ethics.<sup>6</sup> The journal estimates that more than 70% of out-of-pocket expenditure is incurred on the purchase of medicines by the Indian public.<sup>7</sup> The private healthcare sector caters to 80% of outpatient and 60% of inpatient care,<sup>8</sup> consequentially raising the overall cost of healthcare in the country, forcing patients to purchase medicines directly from the market, which, if ill-regulated, can be extremely detrimental to consumers.

Oxfam's latest study has reported India's health budget allocation as the fourth lowest in the world,<sup>9</sup> also observing that only 55% of its population has appropriate access to essential services.<sup>10</sup>

The Indian economy has witnessed a gradual shift over the past two decades, towards an economy that is more reliant on its independent market forces<sup>11</sup> and free trade, allowing for better competition in the market, thereby offering better quality goods and services at lower prices. However, a market dependent economy is only as effective as the restrictions on businesses and other entities preventing them from curtailing competition.<sup>12</sup> Well-regulated competition results in being highly profitable for consumers by providing an impetus to producers to facilitate constant product advancements and encouraging a higher standard of service performance in the market.

---

<https://www.ibef.org/industry/pharmaceutical-india.aspx> (last visited on Mar. 15, 2021).

<sup>4</sup> "India Pharma 2020 Propelling access and acceptance, realising true potential", *McKinsey & Company*, available at: [https://www.mckinsey.com/~media/mckinsey/dotcom/client\\_service/Pharma%20and%20Medical%20Products/PMP%20NEW/PDFs/778886\\_India\\_Pharma\\_2020\\_Propelling\\_Access\\_and\\_Acceptance\\_Realising\\_True\\_Potential.ashx](https://www.mckinsey.com/~media/mckinsey/dotcom/client_service/Pharma%20and%20Medical%20Products/PMP%20NEW/PDFs/778886_India_Pharma_2020_Propelling_Access_and_Acceptance_Realising_True_Potential.ashx) (last visited on Mar. 15, 2021).

<sup>5</sup> Akash Bisht, "How an anti-malarial drug has become a tool of India's diplomacy", *AlJazeera*, Apr. 16, 2020, available at: <https://www.aljazeera.com/news/2020/4/16/how-an-anti-malarial-drug-has-become-a-tool-of-india-s-diplomacy> (last visited on Oct. 31, 2020).

<sup>6</sup> Anurag Bhargava & SP Kalantri, "The Crisis In Access To Essential Medicines In India: Key Issues Which Call For Action" 10 No 2 *Indian Journal of Medical Ethics* (2013).

<sup>7</sup> *Ibid.*

<sup>8</sup> T R Dilip, "Utilization of inpatient care from private hospitals: trends emerging from Kerala, India" 25 Issue 5 *Oxford Academic* (2010)

<sup>9</sup> Oxfam, "Fighting Inequality in the Time of Covid-19" 7 (October, 2020).

<sup>10</sup> Geetanjali Kapoor, Aditi Sriram, Jyoti Joshi, Arindam Nandi & Ramanan Laxminarayan, "COVID-19 in India: State-Wise Estimates of Current Hospital Beds, ICU Beds, and Ventilators", *The Center for Disease Dynamics, Economics & Policy*, Apr. 21, 2020, available at: <https://cddep.org/publications/covid-19-in-india-state-wise-estimates-of-current-hospital-beds-icu-beds-and-ventilators/> (last visited on Oct. 31, 2020).

<sup>11</sup> "Introduction to Competition Law in Healthcare Delivery Sector", *JSPUI*, available at: [http://14.139.58.147:8080/jspui/bitstream/123456789/338/8/08\\_chapter%201.pdf](http://14.139.58.147:8080/jspui/bitstream/123456789/338/8/08_chapter%201.pdf), (last visited on Nov.1, 2020)

<sup>12</sup> UNCTAD, *Manual On The Formulation And Application Of Competition Law*, UNCTAD/DITC/CLP/2003/4 (June 12, 2016), p. no. 2.

## II. FACTORS THAT AFFECT COMPETITION IN THE HEALTHCARE SECTOR

The domestic pharmaceutical market reached INR 1.4 lakh crore (approximately USD 20.03 billion) in 2019, at a growth rate of 9.8%.<sup>13</sup> It is an integral sector of the Indian economy, its implications having far reaching consequences, as made obvious by the Covid-19 pandemic. Competition is a crucial component of the healthcare sector, contributing largely to the prices at which medical services and products are made available to consumers. There exist various factors that impact competition in the healthcare sector, each of which are dealt with below:

### A. Intellectual Property Framework

Intellectual Property Laws applicable to a market have direct and significant consequences on its competitiveness. Where Intellectual Property Rights (“IPR”) seek to protect the exclusive rights of owners, competition law seeks to monitor the interface with market participants and correct any abuse of dominance.

Being a signatory to the Trade-Related Aspects of Intellectual Property Rights Agreement<sup>14</sup> (“TRIPS”), India amended the Patents Act, 1970<sup>15</sup> (“Patents Act”) in an effort to prioritize public health.<sup>16</sup> Before the Patent (Amendment) Act, 2005<sup>17</sup> (“2005 Amendment”), India permitted companies to produce generic versions of drugs that were patented elsewhere, making critical drugs available at a much lower cost than sold internationally.<sup>18</sup> It did this by only protecting the formulation process of the drug and not the actual product itself. The consequential process of ‘evergreening’ led to monopoly in the availability and pricing of drugs, making many generic brands unaffordable to the Indian public.

Evergreening is a practice undertaken by companies when they patent ‘new inventions’ that are only minor improvements or modifications of old, existing drugs.<sup>19</sup> This practice allows for a prolonged monopoly over the patent, that unfairly denies public access to medicines at

---

<sup>13</sup> “Pharmaceuticals”, *IBEF*, Apr. 2020, available at: <https://www.ibef.org/download/Pharmaceuticals-April-2020.pdf> (last visited on Oct. 12, 2020).

<sup>14</sup> Agreement On Trade-Related Aspects Of Intellectual Property Rights, 1995.

<sup>15</sup> The Patents Act, 1970.

<sup>16</sup> Tripta Dixit, Sadhana Srivastava, Smita Sahu & W. Selvamurthy, “Intellectual Property Evolution And Innovation Ecosystem As Effective Tools In Strengthening Indian Healthcare Sector” 114 No. 8 *CURRENT SCIENCE*, 2018.

<sup>17</sup> The Patent (Amendment) Act, 2005.

<sup>18</sup> Kung-Chung Liu and Uday S. Racherla (eds.), *Innovation, Economic Development, and Intellectual Property in India and China* (Springer Open, Singapore, 2019).

<sup>19</sup> Roger Collier, “Drug Patents: The Evergreening Problem” 185(9) *Canadian Medical Association Journal* (2013).

equitable and reasonable prices.<sup>20</sup> Since the 2005 Amendment, courts have restricted such practices in an effort to provide reasonable and affordable healthcare to Indian citizens. Excessive patenting of medicines can lead to complex issues within the healthcare sector;

*Firstly*, a notable **Reduction in Innovation**. Appropriate patenting is critical to sectors that involve innovation, as they incentivize companies to invest in new, unique and novel innovations. In terms of medicine, innovation can be tested or rated as the drug's therapeutic efficacy and is often a deciding factor of a medicine's patentability.<sup>21</sup> In *Novartis v. UOI*<sup>22</sup>, the Supreme Court dismissed the Swiss manufacturer-Novartis' challenge against the Madras High Court's decision to decline the grant of a patent to their anti-cancer drug, 'Glivec'. Glivec was unable to show a sufficient increase in therapeutic efficacy as required under Section 3(d)<sup>23</sup> of the Patents Act, thereby lacking an inventive step. The Apex court explicated their narrow interpretation of *therapeutic efficacy* as under;

*'180. What is "efficacy"? Efficacy means[50] "the ability to produce a desired or intended result". Hence, the test of efficacy in the context of section 3(d) would be different, depending upon the result the product under consideration is desired or intended to produce.....'*

And *secondly*, **Inflated Prices of Medicine**. As reported by a study conducted by Yale University and World Bank economists,<sup>24</sup> an estimated rise of a 100 – 400 percent in price occurs when product patents are available to foreign firms without any kind of price regulation. This price rise is a direct consequence of the protection that the product is granted and the availability of competitor products in the market.

The Hon'ble bench in the *Novartis* case sought to protect the objective of the 2005 Amendment by restricting the process of evergreening;

*'19. ...We have borne in mind the object which the Amending Act wanted to achieve namely, to prevent evergreening; to provide easy access to the citizens of this country*

<sup>20</sup> **FEROZ ALI AND SUDARSAN RAJAGOPAL**, "RAMPANT EVERGREENING IN INDIAN PHARMA INDUSTRY", *LIVEMINT*, APRIL 30, 2018, AVAILABLE AT: [HTTPS://WWW.LIVEMINT.COM/OPINION/AIQAGFMWLYEL1UPEfECETI/RAMPANT-EVERGREENING-IN-INDIAN-PHARMA-INDUSTRY.HTML](https://www.livemint.com/opinion/AIQAGFMWLYEL1UPEfECETI/RAMPANT-EVERGREENING-IN-INDIAN-PHARMA-INDUSTRY.HTML) (LAST VISITED ON OCT. 16, 2020).

<sup>21</sup> Ajay Chandru & Gowree Gokhale, "Novartis Indian Supreme Court Judgment: What Is Efficacy For Pharmaceutical Invention ?", *Nishith Desai*, Apr. 19, 2013, available at: [http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/novartis-indian-supreme-court-judgment-what-is-efficacy-for-pharmaceutical-invention-1.html?no\\_cache=1&cHash=7b74f35ece47cde0f9f37eece009a316](http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/novartis-indian-supreme-court-judgment-what-is-efficacy-for-pharmaceutical-invention-1.html?no_cache=1&cHash=7b74f35ece47cde0f9f37eece009a316) (last visited on Oct. 31, 2020).

<sup>22</sup> *Novartis AG v. Union of India (UOI) and Ors.*, AIR 2013 SC 1311.

<sup>23</sup> The Patents Act, 1970, s. 3(d).

<sup>24</sup> Carsten Fink, "How Stronger Patent Protection in India Might Affect the Behavior of Transnational Pharmaceutical Industries", *World Bank Group E-Library*, Nov. 1999, available at: <https://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2352> (last visited on Mar. 15, 2021).

*to life saving drugs and to discharge their Constitutional obligation of providing good health care to its citizens...'*

The rejection of Novartis' patent application facilitated essential affordable access to critical life-saving drugs and laid emphasis on India's urgent need for affordable and readily accessible healthcare.

Presently, Indian jurisprudence grants patents sparingly, as noted in the *Novartis* case. Section 3(d)<sup>25</sup> of the Patents Act is intended to prevent patents from being awarded to '*new uses or slightly modified versions of known molecules, unless a significant enhancement of efficacy can be demonstrated*'.

One of the primary barriers to the speedy and effective distribution of Covid-19 vaccines is IPR. Under ordinary circumstances, pharmaceutical companies are programmed to fiercely defend their patents and knowledge, maintaining that they are, essentially, commercial entities.<sup>26</sup> Given India's widespread vulnerability to the pandemic, companies should step up and refrain from hiding behind patents at a time when their co-operation and humanity is needed most.

The World Health Organisation ("**WHO**") established the WHO COVID-19 Technology Access Pool ("**C-TAP**") in May, 2020.<sup>27</sup> C-TAP is a global access pool, calling upon nations and institutes to voluntarily share knowledge, intellectual property and data necessary to combat Covid-19. It was instituted in order to remove IP barriers and facilitate the sharing of knowledge in the manufacturing process of Covid-19 tools. Although the WHO has urged companies successful in the vaccine hunt to share their know-how with C-TAP, no pharmaceutical company has complied so far (reported on Jan. 22, 2021).<sup>28</sup> The benefits of a working C-TAP are paramount, in addition to greatly aiding the mass-production process of vaccines, C-TAP could also help reduce the likelihood of new, more dangerous mutations of the virus developing, since more people will have access to vaccines at a much greater pace.

## **B. Foreign Direct Investment Policies of India**

Foreign Direct Investment ("**FDI**") is an important source of capital to most sectors of the

---

<sup>25</sup> The Patents Act, 1970, s. 3(d).

<sup>26</sup> Chris Stokel-Walker, "Have COVID-19 vaccines changed intellectual property for good?" *Raconteur*, Jan. 26, 2021, available at: <https://www.raconteur.net/legal/intellectual-property/vaccines-intellectual-property/> (last visited on Mar. 15, 2021).

<sup>27</sup> COVID-19 Technology Access Pool, *World Health Organisation*, available at: <https://www.who.int/initiatives/covid-19-technology-access-pool> (last visited on Mar. 15, 2021).

<sup>28</sup> Michael Safi, "WHO platform for pharmaceutical firms unused since pandemic began", *The Guardian*, Jan. 22, 2021, available at: <https://www.theguardian.com/world/2021/jan/22/who-platform-for-pharmaceutical-firms-unused-since-pandemic-began> (last visited on Mar. 14, 2021).

economy and is best utilized when complimenting domestic private investment,<sup>29</sup> reducing the burden on government resources. When resident firms have at least 1% foreign participation, it is classified as FDI. The Consolidated FDI Policy, 2020 permits 100% FDI in the pharmaceutical sector for Greenfield investments,<sup>30</sup> and up to 74% for Brownfield Investments<sup>31</sup> through the automatic route. Further, 100% FDI through automatic route is permitted for the manufacture of medical instruments. Government approval is required for any investment beyond this threshold.<sup>32</sup>

Foreign investment has allowed hospitals with limited infrastructure and services to expand their reach and, while widening the scope of FDI has allowed for a direct increase in competition, it has also endangered generic companies that produce essential drugs at much lower costs, threatening to erase their individual standing. Mergers & Acquisitions are viewed as the most efficient route to channel investments into India,<sup>33</sup> gain market control and entry into new geographies.<sup>34</sup> While FDI instigates firms to perform more efficiently,<sup>35</sup> it also disturbs the existing market equilibrium. Especially in developing countries, domestic businesses might not be able to keep up with the infrastructure and money that foreign investment introduces. India has witnessed a surge in brownfield investments, which raises concerns over price hikes, concentration of expensive drugs, availability of affordable drugs and overall impact on competition in the market. Therefore, it is imperative that the government puts in place careful regulations monitoring any market disruptions.

The Indian Government has implemented the following regulatory measures in an effort to monitor the healthcare market:

- i. The FDI Policy, 2020 requires the maintenance of a minimum level of research and development expenses for 5 years at an absolute quantitative level (from the time of induction of FDI);<sup>36</sup>

---

<sup>29</sup> J. François Outreville, "Foreign direct investment in the health care sector and most-favoured locations in developing countries" 8 No. 4 *The European Journal of Health Economics* (2007).

<sup>30</sup> Projects wherein the investors invest in the construction of new production and operational facilities.

<sup>31</sup> Investments that involve the purchase of existing production and operational facilities.

<sup>32</sup> Department of Industrial Policy and Promotion, "Consolidated FDI Policy", *DIPP*, Oct. 15, 2020, available at: [https://dipp.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020\\_0.pdf](https://dipp.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020_0.pdf) (last visited on Mar. 13, 2021).

<sup>33</sup> Ravi Shah, Ashwin Sapra & Avani Dalal, "FDI in Brownfield Pharma – Will COVID-19 be the Catalyst for Policy Reforms?", *Cyril Amarchand Blogs*, June 1, 2020, available at: <https://corporate.cyrilamarchandblogs.com/2020/06/fdi-in-brownfield-pharma-will-covid-19-be-the-catalyst-for-policy-reforms/> (last visit Oct 27, 2020)

<sup>34</sup> Dr. Vikarant Sopan Yadav, "An Analytical Study Of Foreign Direct Investment In Pharma Sector Of India" 3 Issue 5 *International Journal of Law* (2017).

<sup>35</sup> "Impact of FDI on Host Country", *UK Essays*, Nov. 2018, available at: <https://www.ukessays.com/essays/business/impact-of-fdi-on-host-economy.php> (last visited on Mar. 15, 2021).

<sup>36</sup> Department of Industrial Policy and Promotion, "Consolidated FDI Policy", *DIPP*, Oct. 15, 2020, available at: [https://dipp.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020\\_0.pdf](https://dipp.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020_0.pdf) (last visited on Mar.

- ii. Regulatory mechanisms to ensure production and availability of a minimum level of essential medicines and their supply to the domestic market for 5 years, at an absolute quantitative level;<sup>37</sup>
- iii. The National Pharmaceutical Pricing Policy, 2012,<sup>38</sup> has set out measures to regulate the pricing of drugs, to ensure availability of essential drugs at affordable prices; and
- iv. Non-compete clauses in *inter-se* agreements are only allowed under special circumstances, with requirement of Government approval.
- v. Amendment to the existing FDI policy curbing opportunistic takeovers and acquisitions of Indian companies during the pandemic.<sup>39</sup>

### C. Competition Commission of India

The primary role of the Competition Commission of India (“**CCI**”) is to ensure that markets operate in a manner that best enable the efficient allocation of resources and competition-driven market outcomes.<sup>40</sup> The CCI is a regulatory and enforcement body; its duties include prohibition of anti-competitive agreements or conduct and regulation of large Mergers & Acquisitions (“**M&A**”).

The CCI’s decisions over the years have shaped a highly competitive and generically concentrated market. As it seeks to correct anti-competitive conduct by protecting against supra-competitive prices and implementing other corrective structures for the market, its role and actions during the pandemic are under close scrutiny. The Covid-19 pandemic has forced us to rely heavily on the structure of our healthcare system, now more than ever.

The Preamble<sup>41</sup> of the Competition Act, 2002 (“**Competition Act**”) lays down the purpose of the Competition Act, the principles of which the CCI attempts to firmly uphold:

---

13, 2021).

<sup>37</sup> *Id.* at 5.2.27.3 (iv) (a).

<sup>38</sup> Ministry of Chemicals and Fertilizers, “National Pharmaceuticals Pricing Policy, 2012”, *Pharmaceuticals*, Dec. 7, 2012, available at: <https://pharmaceuticals.gov.in/sites/default/files/National%20Pharmaceutical%20Pricing%20Policy%202012.pdf> (last visited on Oct.31, 2020).

<sup>39</sup> Ministry of Commerce and Industry, “Government amends the extant FDI policy for curbing opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic”, *Press Information Bureau*, Apr. 18, 2020, available at: <https://pib.gov.in/PressReleasePage.aspx?PRID=1615711> (last visited on Oct.27, 2020).

<sup>40</sup> CAM Competition Team, “CCI Steps up Advocacy Measures for Healthcare: Policy Note on ‘Making Markets Work for Affordable Healthcare’”, *Competition Law – A Cyril Amarchand Blog*, Oct. 30, 2018, available at: <https://competition.cyrilamarchandblogs.com/2018/10/cci-advocacy-measures-for-affordable-healthcare/> (last visited on Oct. 31, 2020).

<sup>41</sup> “Introduction to Competition Law”, *Competition Commission of India*, Aug. 2016, available at: [https://www.cci.gov.in/sites/default/files/advocacy\\_booklet\\_document/CCI%20Basic%20Introduction\\_0.pdf](https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCI%20Basic%20Introduction_0.pdf) (last visited on Mar. 14, 2021).

## **1. To Prevent Practices Having Adverse Effect On Competition & To Promote And Sustain Competition In Markets, and**

An important duty of the CCI is to prevent any practice that has or is likely to have an appreciable adverse effect on competition (“AAEC”) as under the powers granted by Section 29<sup>42</sup> of the Competition Act. One of the methods of regulating the market is by reviewing proposed acquisitions and ensuring that no combined entity has an AAEC within the relevant market.

On 6 April 2014, Sun-Pharma announced its intention to acquire 100% of Ranbaxy, through a merger/amalgamation.<sup>43</sup> The CCI investigated the merger under Section 29 of the Competition Act and voiced concern over the highly concentrated market position by the combined entity in 7 specific drug formulations.<sup>44</sup> The merger was expected to be one of the biggest M&A transactions that India has witnessed with an estimated value of USD 3.2 billion.<sup>45</sup> The CCI approved the transaction, subject to certain conditions, in light of the fact that the transaction would result in a significant horizontal overlap in certain formulations.<sup>46</sup> A divestment of seven brands was to be executed within 6 months of the order. This divestment was deemed necessary to prevent the merger from having an adverse effect on domestic competition. The CCI held; ‘32. *Based on the above assessment of the likely appreciable adverse effect on competition in the relevant markets, the Commission is of the opinion that the adverse effect of the proposed combination on competition can be eliminated by suitable modification.*’

## **2. To Protect The Interests Of Consumers & To Ensure Freedom Of Trade Carried On By Other Participants In Markets, In India**

One of the primary functions of the CCI is to protect the interest of consumers, however, the CCI has been known to defend this duty rather excessively. In the landmark case of *Hiranandani*,<sup>47</sup> the CCI analyzed the validity of exclusivity contracts involving private hospitals. Hiranandani Hospital had entered into an exclusive agreement with Cyrobanks, an

<sup>42</sup> Competition Act, 2002, s. 29.

<sup>43</sup> “Sun Pharma to acquire Ranbaxy in a US\$ 4 billion landmark transaction”, *Sun Pharma*, Apr. 7, 2014, available at: <https://www.sunpharma.com/node/44359>, (last visited on Mar. 14, 2021).

<sup>44</sup> Nishith Desai, “Sun Pharma – Ranbaxy - A Panacea for Ranbaxy’s ills?”, *Nishith Desai*, Dec. 2014, available at: [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Ma%20Lab/Sun\\_Pharma\\_-\\_Ranbaxy.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Ma%20Lab/Sun_Pharma_-_Ranbaxy.pdf) (last visited on Oct. 26, 2020).

<sup>45</sup> Press Trust of India, “April sees M&A deals worth USD 6.9 bn: Grant Thornton”, *Business Standard*, May 19, 2014, available at: [https://www.business-standard.com/article/companies/april-sees-m-a-deals-worth-usd-6-9-bn-grant-thornton-114051900919\\_1.html](https://www.business-standard.com/article/companies/april-sees-m-a-deals-worth-usd-6-9-bn-grant-thornton-114051900919_1.html) (last visited on Oct.31, 2020).

<sup>46</sup> Competition Commission of India, “Order under Section 31 (7) of the Competition Act, 2002”, *Competition Commission of India*, Dec. 12, 2014, available at: [https://www.cci.gov.in/sites/default/files/C-2014-05-170\\_0.pdf](https://www.cci.gov.in/sites/default/files/C-2014-05-170_0.pdf) (last visited on Oct. 29, 2020).

<sup>47</sup> *Shri Ramakant Kini v Hiranandani Hospital*, Case No. 39 of 2012.

umbilical cord stem bank, mandating that OBGYN-patients at Hiranandani Hospital intending to undertake umbilical cord stem cell preservation services had to do so by availing of Cryobanks' services only. The CCI identified and examined two core issues, *firstly*, whether there existed an anti-competitive agreement between the hospital and the service provider?, and *secondly*, whether there was any abuse of dominance by Hiranandani Hospital?

In response to the first issue, the CCI commented on the nascent stage of the Indian stem cell banking sector, allowing for exclusive contracts to easily distort the market mechanism and therefore held that; '31. .... *the impugned agreement was in contravention of the provisions of section 3(1) of the Act and had adverse effect on competition...*', however, as to the question of any abuse of dominance, the CCI did not find sufficient evidence to hold Hiranandani Hospital to be a dominant player in the market and therefore no question of any abuse of a dominant position arose. In spite of this, the CCI found Hiranandani Hospital guilty of entering into an anti-competitive agreement with Cryobanks and imposed a penalty of INR 3.81 crore.

On appeal<sup>48</sup>, the Competition Appellate Tribunal ("COMPAT") set aside the CCI's orders, emphasizing the difference between consumer protection and regulating competition in the market by reproducing the findings of the CCI in the case of *Subhash Yadav v. Force Motor Ltd. & Ors.*<sup>49</sup>

'33. ...

*"6. ... In nutshell, the purpose of this Act is to protect and promote fair competition in the markets in India. However, for the protection of individual consumer interest, there is another statute already in existence known as Consumer Protection Act, 1986 ('the Act of 1986') which mainly deals with protection of consumer interest against the deficiencies in services or goods being purchased by the consumers from sellers. Therefore, there is a clear difference between the two statutes stated above..."*

Justice Shri G. S. Singhvi upheld the minority opinion of the CCI that found the agreement entered into between the appellant and Cryobanks as valid and not violative of Section 3(1) of the Patents Act.

The COMPAT's decision to set aside the CCI's order is an important one as it sheds light on discussions surrounding exclusive dealings being a fundamental part of business and its

---

<sup>48</sup> *Hiranandani v. Shri Ramakant Kini*, 2016 CompLR 129 (CompAT).

<sup>49</sup> *Subhash Yadav v. Force Motor Ltd. & Ors.*, Case No. 32 of 2012.

contribution to innovation, to an extent.<sup>50</sup>

#### **D. Distribution of Pharmaceutical Drugs in India**

The distribution of pharmaceuticals within India is dominated by chemists and drug trade associations, which accept memberships from similar associations of varying jurisdictions. They are crucial to the collection, publishing and dissemination of information amongst its members. Due to the very nature of their collective positions in the market (i.e., as a trade association), their practices and agreements amongst their members come under the CCI's radar. The All India Organisation of Chemists and Druggists ("AIOCD") is one such association which exercises control over the stockists of drugs and medicines across the country.

Chemists & druggists associations have the responsibility of enacting fair and moderate deals in the market. The only way to ensure a competitive last-mile distribution of drugs in India and affordable access to healthcare during Covid-19 is through the earnest cooperation of all market participants, including such associations.

Apart from the abovementioned international and domestic factors, internal market regulations also greatly impact the working of competition in the healthcare market. In the 12 years since the CCI was duly constituted, it has capitalized on its administrative and quasi-judicial role in order to ensure the regulation of healthy competition in the market. The CCI published a policy note ("Policy Note")<sup>51</sup> in October of 2018, containing the findings of its market study on the Indian healthcare sector. The recommendations made in the Policy Note aim to strengthen the internal structure of the healthcare system in India.

### **III. CCI'S POLICY NOTE, 2018 - 'MAKING MARKETS WORK FOR AFFORDABLE HEALTHCARE':**

The Policy Note critically analyses the regulatory gaps and overreaches of the pharmaceutical market, and attempts to identify areas for reform. It highlights two market factors that lead to limited consumer choice: (i) Information Asymmetry; and (ii) Supplier Induced Demand.

The Policy Note identified four main problem areas in the pharmaceutical and healthcare sector:

---

<sup>50</sup> D. Daniel Sokol and Ruchit R. Patel, "Lessons from COMPAT's judgment in Hiranandani", *Kluwer Competition Law Blog*, Feb 5, 2016, available at: <http://competitionlawblog.kluwercompetitionlaw.com/2016/02/05/lessons-from-compats-judgment-in-hiranandani/>, (last visited on Mar. 14, 2021).

<sup>51</sup> Competition Commission of India, "Policy Note - Making Markets Work for Affordable Healthcare", *Competition Commission of India*, Oct. 2018, available at: [https://www.cci.gov.in/sites/default/files/POLICY\\_NOTE.pdf](https://www.cci.gov.in/sites/default/files/POLICY_NOTE.pdf) (last viewed on Oct. 27, 2020).

*Firstly, The Role of Intermediaries in Drug Price Build-Ups.* Notwithstanding that India produces pharmaceutical drugs worth USD 3 billion, 50% of which are exported, medicines are still inaccessible domestically, largely due to unreasonably high trade margins which can be attributed to two factors;

- i. Pecuniary Motivation: Drug manufacturers offer high trade margins to traders as an incentive to have their drug promoted in the market; and
- ii. Self-regulation by trade associations: Trade associations maintain primary control over the drug distribution system, mitigating competition between traders that would have otherwise helped in reducing trade margins.

The CCI recommended the implementation of public procurement systems as well as the regulated sale of essential medicines on online platforms in order to boost competition and encourage transparency in the market.<sup>52</sup> Public procurement and distribution systems minimize intermediary costs and reduce the final costs of drugs, as seen in Tamil Nadu and Rajasthan, since drugs are procured directly from manufacturers and provided to the public.

*Secondly, Quality Perceptions behind Proliferation of ‘Branded’ Generics.* Presently in India, branded pharmaceutical products enjoy a premium on price as compared to generic alternatives, due to their perceived quality assurance even though all pharmaceutical products are subject to the same statutory approvals and inspections. Doctors and pharmacists have been known to prescribe and market branded versions of drugs in order to achieve higher margins, feeding into the vulnerability of consumers in the market.

The CCI encouraged the effective and uniform quality control of drugs and recommended a *One Company-One Drug-One Brand Name-One Price* policy as a remedy for artificial product differentiation.

### *Thirdly, Vertical Arrangements in Healthcare Services and Lack of Transparency*

The CCI highlighted the dearth of transparent information and lack of agency in the market that leads to ill-informed consumer decisions. Hospitals commonly have exclusive arrangements with in-house pharmacies, labs etc., and offer bundle packaged services. Private interests of healthcare providers could and do interfere with market dynamics.

The CCI recommended. mandatory declaration of vital data by hospitals, a standardized degree of reliability and accuracy across all labs in the country and a firm regulatory

---

<sup>52</sup> Laxmi Yadav, “Scrap e-portal, e-pharmacy provisions in draft Drugs Sale & Distribution Rules, 2017: IPA”, *Pharmabiz*, Nov. 27, 2017, available at: <http://www.pharmabiz.com/NewsDetails.aspx?aid=105696&sid=1> (last visited on Oct. 25, 2020).

framework that ensures that hospitals do not restrict purchases from the open market, and promote data portability.

**Lastly, Regulation of Pharmaceutical Sector and Competition.** Efficient regulation of the product and market will limit irrational entries into the marketplace. India has both centre and state level regulators leading to inconsistencies in application. Only a handful of companies are willing to go through the tedious and ambiguous compliance requirements surrounding new drug applications, proving bio-similarity etc. The CCI suggested the harmonization of processes through effective centre-state coordination and time-bound approval for new drugs.

The impact of the pandemic has primarily affected the most vulnerable in society. A fragile and volatile market devoid of firm practices and regulations like those recommended in the Policy Note will not be able to adjust to the pressures of unforeseen circumstances. In March 2020, prices of N95 masks and sanitizers sky rocketed, the onus was on the Government and its ministries to step in and protect the common consumer. While some countries were able to clamp down on retailers early on, others were overcome by the urgency of the situation and were slow to act.

#### **IV. COMPARATIVE ANALYSIS OF COVID-19 RESPONSES BY VARIOUS COMPETITION AUTHORITIES**

The novel corona virus has debilitated even the strongest economies of the world. It is testing our global medical capacity and administration. More than 30 million Americans have filed for unemployment since March 2020,<sup>53</sup> China's GDP dipped almost 7%<sup>54</sup> in its first quarter of 2020 and the U.K will be spending an estimated 15% of their GDP<sup>55</sup> on rescue efforts in the form of guaranteed loans.

In a desperate effort to save and protect markets, competition authorities across the globe have relaxed or modified the application of relevant competition laws in an effort to assist in the race for a vaccine and facilitate the pooling of resources in order to save small scale businesses from going under.

Competition authorities of different jurisdictions have responded to the pandemic in different

---

<sup>53</sup> Anneken Tappe, "30 million Americans have filed initial unemployment claims since mid-March", *CNN*, Apr. 30, 2020, available at: <https://edition.cnn.com/2020/04/30/economy/unemployment-benefits-coronavirus/index.html> (last visited on Oct. 31, 2020).

<sup>54</sup> Jonathan Masters, "Coronavirus: How Are Countries Responding to the Economic Crisis?", *Council on Foreign Relations*, May 4, 2020, available at: <https://www.cfr.org/backgrounder/coronavirus-how-are-countries-responding-economic-crisis> (last visited on Oct. 29, 2020).

<sup>55</sup> Tim Ross and David Goodman, "U.K. Releases 'Wartime' Funding to Save Economy from Virus", *Bloomberg*, March 17, 2020, available at: <https://www.bloomberg.com/news/articles/2020-03-17/u-k-tells-citizens-not-to-travel-anywhere-in-world-for-30-days> (last visited on Oct. 27, 2020).

ways:

### A. China

China's heavily regulated market is mostly populated with generic drugs and low prices. The market is extremely competitive and foreign entry is tough. The government sets the maximum price that generic producers can charge, which is usually a percentage of the price of a branded drug. Since China has a socialized healthcare system, doctors tend to prescribe lower priced medicines to maintain a low overall cost of healthcare.<sup>56</sup>

During the pandemic, the State Administration for Market Regulation opened a green channel for mergers and granted exemptions to certain coordinating companies.<sup>57</sup> They adopted an electronic merger filing system with an expedited merger review process for sectors closely related to epidemic prevention and people's daily lives. Guidelines have been adopted for the exemption of certain cooperation by businesses related to epidemic prevention and work assumption. Cooperation is permitted only:<sup>58</sup>

- i. On new products developed in the field of drugs and vaccines;
- ii. On product specifications and standards unification that improves product quality;
- iii. On disaster mitigation cooperation that benefits public welfare; and
- iv. Cooperation that increases the efficiency and competitiveness of small and medium sized companies.

A fair Competition Review System requires government bodies to conduct a self-review when forming regulations for businesses. China's competition response to Covid-19 has been fairly liberal, with broad relaxations in place.

### B. Australia

The Australian Competition and Consumer Commission ("ACCC") is responsible for overseeing and regulating anti-competitive behaviour in Australian markets.<sup>59</sup> The ACCC is wary of pre-existing patent holders resisting the entry of generic pharmaceutical products into

---

<sup>56</sup> Erica Berry, "Domestic Competition in the Chinese Pharmaceutical Industry", *Democracy Lab*, Mar. 6, 2017, available at: [https://www.democracylab.uwo.ca/Archives/2016\\_\\_2017\\_research\\_/pharma\\_in\\_china/domestic\\_competition\\_in\\_the\\_chinese\\_pharmaceutical\\_industry.html](https://www.democracylab.uwo.ca/Archives/2016__2017_research_/pharma_in_china/domestic_competition_in_the_chinese_pharmaceutical_industry.html) (last visited on Oct. 31, 2020).

<sup>57</sup> Jet Deng & Ken Dai, "China: COVID-19: Chinese Antitrust Regulators Have Taken Actions", *Mondaq*, May 11, 2020, available at: <https://www.mondaq.com/china/operational-impacts-and-strategy/930528/covid-19-chinese-antitrust-regulators-have-taken-actions> (last visited on Oct. 31, 2020).

<sup>58</sup> *Ibid.*

<sup>59</sup> Nicholas Tyacke, Simon Uthmeyer, Kieran O'Brien, Greg Bodulovic, Eliza Saunders, Rob McMaster, Alexandra de Zwart, Nikki Kahn and Ben Mawby, "Pharmaceutical IP And Competition Law In Australia: Overview", *Thomson Reuters Practical Law*, Jul. 1, 2019, available at: [https://uk.practicallaw.thomsonreuters.com/9-565-4226?\\_\\_lrTS=20200527190720991&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/9-565-4226?__lrTS=20200527190720991&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (last visited on Oct. 23, 2020).

the market, carefully scrutinizing any commercial strategies utilized to retain market power.

Section 88<sup>60</sup> of the Competition and Consumer Act, 2010<sup>61</sup> (“CCA”) allows for the ACCC to grant authorization to companies allowing them to conduct practices that might otherwise be in contravention to the provisions of the CCA. During Covid-19 the ACCC has granted interim authorization to companies belonging to various sectors like healthcare, telecommunications, energy and fuel, to enter into temporary cooperation or collaboration arrangements.<sup>62</sup> It has also permitted supermarkets to coordinate their supply, banks to coordinate relief package efforts and medical manufacturers to manage supply of essential medical equipment. Such authorizations are done on a case-to-case basis, which, although time and resource consuming, avoids any ambiguity in application, especially when compared to the practice of issuing publicly applicable guidelines of a general nature. The regulations exclude permission to share price information and allows the ACCC to withdraw its authorization at any time.

### C. European Union

The European Commission (“EC”) is the politically independent executive arm of the European Union. It oversees the national competition authorities of European Member States and *inter alia* enforces competition rules. In the EU, competition is based more on innovation than price, largely because of patent protection for originator molecules.<sup>63</sup>

Italy and Spain were initially some of the worst hit by Covid-19. An immense amount of pressure was placed on their healthcare system as they struggled to cope with the onslaught of the novel disease. The EC acted promptly and released a notice, ‘*Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak*’ (“**Temporary/Co-operation Framework**”)<sup>64</sup> on April 8, 2020, providing regulatory guidelines to companies that wish to come together and work to increase production and optimize supply of essential items. The

---

<sup>60</sup> The Competition and Consumer Act, 2010, s. 88.

<sup>61</sup> The Competition and Consumer Act, 2010.

<sup>62</sup> Jessica Apel & Barbora Jedlickova, “Competition in “Lockdown” After the Attack of COVID-19 in Australia”, *Competition Policy International*, Apr. 6, 2020, available at: <https://www.competitionpolicyinternational.com/competition-in-lockdown-after-the-attack-of-covid-19-in-australia/> (last visited on Oct. 27, 2020).

<sup>63</sup> European Commission, “Competition Enforcement In The Pharmaceutical Sector (2009-2017)”, *European Commission*, Jan. 28, 2019, available at: [https://ec.europa.eu/competition/sectors/pharmaceuticals/report2019/report\\_en.pdf](https://ec.europa.eu/competition/sectors/pharmaceuticals/report2019/report_en.pdf) (last visited on Oct. 25, 2020).

<sup>64</sup> European Commission, “Temporary Framework For Assessing Antitrust Issues Related To Business Cooperation In Response To Situations Of Urgency Stemming From The Current COVID-19 Outbreak”, *European Commission*, Apr. 8, 2020, available at: [https://ec.europa.eu/info/sites/info/files/framework\\_communication\\_antitrust\\_issues\\_related\\_to\\_cooperation\\_between\\_competitors\\_in\\_covid-19.pdf](https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf) (last visited on Oct. 29, 2020).

Temporary Framework excuses practices that would normally be in contravention to the competition rules and regulations.

Conditions imposed on practices that can be undertaken under this framework are:<sup>65</sup>

- i. The practice must have an objective or purpose of efficient increase in output to avoid a shortage of supply of essential stock;
- ii. The practice must be of a temporary nature; and
- iii. The practice must not include measures that are more than necessary in avoiding a shortage of supply.

The EC also issued Comfort Letters to participants of the sector, ‘Medicines for Europe’ addressing *anti-trust issues related to business cooperation in response to situations of urgency stemming from the current Covid-19 outbreak*.<sup>66</sup> The comfort letter has been issued to facilitate production co-ordination between firms and lay out conditions for collaboration.<sup>67</sup>

The Temporary Framework does a good job of addressing competition concerns in the healthcare sector but neglects to lay down guidelines for corresponding sectors like transport, supermarkets etc. However, this framework should be appreciated for its clear and direct response and acknowledgement of the issues and its administrative mechanism during these strange times.

#### **D. United States of America**

In the U.S, the Federal Trade Commission (“**FTC**”) and the Anti-trust Division of the Department of Justice (“**DOJ**”) is authorised to regulate anti-competitive behaviour in markets. In the pharmaceutical sector, the FTC plays a greater role in overseeing participants and their practices. The United States pharmaceutical sector enjoys a free market with heightened generic competition consequentially reducing healthcare costs greatly since the 1980s.<sup>68</sup> A Joint Anti-Trust Statement regarding Covid-19<sup>69</sup> was released by the DOJ elucidating that if competitors work together to produce or facilitate the production of Covid-

---

<sup>65</sup> *Ibid.*

<sup>66</sup> European Commission, “Comfort Letter : Coordination In The Pharmaceutical Industry To Increase Production And To Improve Supply Of Urgently Needed Critical Hospital Medicines To Treat COVID-19 Patients”, *European Commission*, Apr. 8, 2020, *available at*: [https://www.vbb.com/media/Insights\\_Article\\_s/medicines\\_for\\_europe\\_comfort\\_letter.pdf](https://www.vbb.com/media/Insights_Article_s/medicines_for_europe_comfort_letter.pdf) (last visited on Oct. 31, 2020).

<sup>67</sup> *Ibid.*

<sup>68</sup> Atanu Saha, Henry Grabowski, Howard Birnbaum, Paul Greenberg & Oded Bizan, “Generic Competition in the US Pharmaceutical Industry” 13 No. 1 *Int. J. of the Economics of Business* (2006).

<sup>69</sup> Federal Trade Commission, “Joint Anti-Trust Statement Regarding Covid-19”, March, 2020, *available at*: [https://www.ftc.gov/system/files/documents/public\\_statements/1569593/statement\\_on\\_coronavirus\\_ftc-doj-3-24-20.pdf](https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf) (last visited on Oct. 25, 2020).

19 related essential supplies, the state would view such measures as ‘a necessary response’. Similar to the U.K, the statement includes the requirement of any such collusive practices to be temporary and of an essential nature to the fight against Covid-19.

The guidelines regarding transactions that would not violate anti-trust laws included collaborations on ‘*efficiency enhancing integration of economic activity*’ based research and development; joint purchase transactions between healthcare providers that increase efficiency or procurement and reduce transaction costs; and the sharing of technical know-how ‘*necessary to achieve procompetitive benefits of certain collaborations*’.<sup>70</sup>

## V. INDIAN COMPETITION RESPONSE TO COVID-19

The Indian Government, through the Ministry of Consumer Affairs, Food and Public Distribution, was quick to cap the maximum prices of essential goods and services like masks and hand sanitizers by declaring them to be ‘essential commodities’.

The CCI is not directly empowered to regulate prices in the market. However, it can *inter alia* regulate:

- i. Price Gouging: The practice of businesses unilaterally and unjustifiably increasing their prices in an effort to increase revenue;<sup>71</sup>
- ii. Differential Pricing: Businesses that enjoy a dominant position cannot charge different consumers at different rates based on unjustified criteria;<sup>72</sup> and
- iii. Determination of Prices: Collusive conduct, where two or more businesses engaged in the production or sale of similar services, collectively fix or determine prices is presumed to have an appreciable adverse effect on competition.

On 19 April 2020, the CCI issued an Advisory to *Businesses in Time of Covid-19*<sup>73</sup> (“**Advisory**”). The Advisory takes cognizance of the fact that certain businesses will have to coordinate their production and other related activities in order to better serve the public during the pandemic. Essential products like ventilators, face masks, gloves, vaccines, testing and logistics were among the commodities specified by the CCI. The Advisory acknowledges

---

<sup>70</sup> *Ibid.*

<sup>71</sup> Newmeyer Dillion, “Profiting From Fear: What You Need to Know About Price Gouging During the Coronavirus Emergency”, *Lexology*, March 24, 2020, available at: <https://www.lexology.com/library/detail.aspx?g=550ef773-cde4-4f19-9953-03570313fed8> (last visited on Oct. 31, 2020).

<sup>72</sup> Abhay Joshi, Sahil Khanna and Ketki Agrawal, “Pricing of Products in Times of Covid-19 and CCI’s Role”, *LawStreetIndia*, May 6, 2020, available at: <http://www.lawstreetindia.com/experts/column?sid=374> (last visited on Oct. 25, 2020).

<sup>73</sup> Competition Commission of India, “Advisory to Businesses in Time of Covid-19”, *CCI*, Apr. 19, 2020, available at: [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Advisory.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf) (last visited on Nov.1, 2020).

that the following types of coordination are likely during the time of the pandemic: sharing data on stock levels & timings of operation; sharing of distribution network and infrastructure; and research and development, etc.<sup>74</sup>

The Advisory provides that competitor coordination in these circumstances may not breach the Competition Act, having due regard to the efficiencies and consumer benefits accruing on account of such coordination. Joint competitor conduct in these circumstances will be assessed having regard to whether it:<sup>75</sup> (i) increases efficiencies; (ii) leads to consumer benefits; (iii) improves production and distribution of goods and services; and (iv) promotes technical, scientific and economic development. The CCI will also take into account the necessity and proportionality of such competitor collaboration to address concerns arising from Covid-19. No specific exemptions have been carved out by the CCI to mitigate the provisions of the Competition Act on any coordinated acts by entities.<sup>76</sup>

## VI. RECOMMENDATIONS

During the Covid-19 crisis, collaboration has globally taken significant precedence over competition.<sup>77</sup> By implementing the following recommendations, collaboration in the market can be effectively monitored, even during times of crisis, thus ensuring that consumers are not unfairly disadvantaged;

### A. Introduction of Crisis Cartels

The legalization of agreements between competitors during an economic crisis in an attempt to find a solution to the common problems faced is commonly referred to as crisis cartels.<sup>78</sup> Most effective in remedying overcapacity, competitors often enter into agreements on quantity of production, setting 'fair' prices etc. The European Court of Justice has previously upheld such agreements in the *Synthetic Fibres*<sup>79</sup> Case;

*(31) In the present case, however, market forces by themselves had failed to achieve the capacity reductions necessary to re-establish and maintain in the longer term an*

---

<sup>74</sup> Vaibhav Choukse, "Coronavirus Crisis: Keeping Up With The Competition", *Financial Express*, Apr. 16, 2020, available at: <https://www.financialexpress.com/opinion/coronavirus-crisis-keeping-up-with-the-competition/1929711/> (last visited on Oct. 31, 2020).

<sup>75</sup> *Supra* note 73.

<sup>76</sup> Sanchet Khandelwal, "An Analysis of the Indian Competition Law Regime During the Covid-19 Pandemic", *RMLNLU Law Review Blog*, May 28, 2020, available at: <https://rmlnlulawreview.com/2020/05/28/an-analysis-of-the-indian-competition-law-regime-during-the-covid-19-pandemic/> (last visited on Nov.1, 2020).

<sup>77</sup> "Defending Competition in the Markets during Covid-19", *UNCTAD*, Apr. 8, 2020, available at: <https://unctad.org/news/defending-competition-markets-during-covid-19> (last visited on Oct. 29, 2020).

<sup>78</sup> Manjushree RM, "Rethink role of crisis cartels, as Indian industries face risk of overcapacity", *The Print*, Jul. 23, 2020, available at: <https://theprint.in/opinion/rethink-role-of-crisis-cartels-as-indian-industries-face-risk-of-overcapacity/466636/> (last visited on Nov.1, 2020).

<sup>79</sup> *Synthetic Fibres*, [1984] OJ L207/17.

*effective competitive structure within the common market. The producers concerned therefore agreed to organize for a limited period and collectively, the needed structural adjustment.'*

and the *Dutch Bricks*<sup>80</sup> Case;

*'(18) ...it is clear that the brick industry in the Netherlands is suffering from considerable overcapacity and steadily mounting stockpiles, and from difficulties in matching capacity to demand that are chiefly due to technological developments (introduction of new processes and construction of larger plants to achieve economies of scale), to falling demand caused by a constant decline in the relative consumption of bricks, and to a very low price elasticity of demand.*

*(28) It can, therefore, be concluded that the agreement helps to improve production and to promote technical and economic progress.'*

Currently, India does not have any jurisprudence regulating crisis cartels, the concept would be considered anti-competitive *per se*. Although the Advisory permits collaboration that enhances efficiency, it does not elaborate on the factors that would demonstrate sufficient efficiency. Regulation recognizing crisis cartels would allow for organized co-ordination while remaining wary of any excess co-ordination and collusion by market players.

### **B. Monitoring and Scrutinizing Rapid Increases in Price By The CCI**

The CCI could adopt the practice of issuing warning letters to companies that do not adhere to competition regulations and guidelines.<sup>81</sup> The competitive authority should pursue strict action against violating companies in the form of heavy penalties.

Two orders have been passed by the CCI during the pandemic, that found the involved parties in violation of the cartel and bid-rigging provisions of the Competition Act. However, the CCI surprisingly did not impose any penalties and instead passed *cease and desist* orders in the judgements of *Re: Cartelisation in Industrial and Automotive Bearings*<sup>82</sup> and *Re: Chief Materials Manager, South Eastern Railway v. Hindustan Composites Limited & Ors*<sup>83</sup>, citing the economic strain caused by Covid-19 as one of the primary reasons behind the passing of such orders.

---

<sup>80</sup> *Dutch Bricks*, Case IV/34.456.

<sup>81</sup> Secretary General – OECD, “COVID-19: Competition policy actions for governments and competition authorities”, *OECD*, available at: <https://www.oecd.org/competition/COVID-19-competition-policy-actions-for-governments-and-competition-authorities.pdf> (last visited on Nov.1, 2020).

<sup>82</sup> Case No. 05 of 2017.

<sup>83</sup> Case No. 03 of 2016.

In the case of *Industrial and Automotive Bearings*,<sup>84</sup> the CCI opined that a penalty was not necessary in order to effectively deliver justice;

*“34. Regarding penalty, it is observed that in light of the peculiar facts and circumstances of the present case as detailed in this order, ends of justice would be met if the parties cease such cartel behaviour and desist from indulging in it in future, as directed earlier. The parties are however, cautioned to ensure that their future conduct is strictly in accord with the provisions of the Act, failing which any such future behaviour would be vied seriously with attendant consequences.”*

Similarly, in *Chief Materials Manager, South Eastern Railway v. Hindustan Composites Limited & Ors.*<sup>85</sup>, the CCI re-emphasized its stance largely effected by the consequences of Covid-19;

*‘51. ... the Commission is also cognizant of the prevailing economic situation arising due to the outbreak of global pandemic (COVID-19) and the various measures undertaken by the Government of India to support the liquidity and credit needs of viable MSMEs to help them withstand the impact of the current shock. In this backdrop, considering the matter holistically and cumulatively, the Commission, in the interest of justice, refrains from imposing any monetary penalty in the peculiar circumstances of the case.....’*

It is important to note that the practices of the involved parties had begun much before the country was overcome by the pandemic.<sup>86</sup> This stance of the CCI leaves scope for market entities to assume that their collaborative actions will be dealt with leniently. The CCI should not refrain from imposing penalties, but should instead offer the option of staggering the payment of the fines.

### **C. Detailed Guidance to Businesses**

Dr. Geeta Gouri, ex-commissioner of the CCI, commented on the ambiguity of the guidelines released during Covid-19, *‘The CCI has gained a reputation for its lack of clear guidelines released to the public. The lack of Guidelines has often been pointed out as a major shortcoming of the CCI’s regulations and notes’*.<sup>87</sup> Ambiguous advisories and notifications

---

<sup>84</sup> *Supra* at 82.

<sup>85</sup> *Supra* at 83.

<sup>86</sup> Charanya Lakshmikumaran and Neelamberra Sandeepan, “CCI’s changed approach to enforcement amidst the pandemic”, *Lexology*, Aug. 26, 2020, available at: <https://www.lexology.com/library/detail.aspx?g=7802b739-b3cb-45f3-836f-2894842ddc6d> (last visited on Oct. 25, 2020).

<sup>87</sup> Dr. Geeta Gouri, “Covid Advisories from the Competition Commission of India”, *Competition Policy International*, Jul. 19, 2020, available at: <https://www.competitionpolicyinternational.com/covid-advisories->

by the CCI is bound to cause unnecessary speculation and confusion in the market. Uncertainties surrounding the penalizing of collaborative efforts undeniably leads to inefficiency of operation. It is the author's recommendation for the CCI to assemble a Covid-19 Competition Task Force similar to that set up by the Competition Market Authority in the United Kingdom.<sup>88</sup>

#### **D. Identifying Kinds of Collaboration That Would be Exempted**

The CCI should undertake a more specific and detailed approach towards regulating collaboration during the pandemic by specifying the kinds of arrangements that would be exempted, like, collaborations furthering logistical support in the medical and pharmaceutical sectors.<sup>89</sup> The EC, ACCC and CMA have used similar approaches by issuing orders exempting certain collaborations in the supermarket sector.<sup>90</sup>

#### **E. Focus on Trade Associations**

Communicating instructions through trade associations would streamline the CCI's efforts in ensuring compliance with existing regulations. Simultaneously, the trade associations will come under close scrutiny and will be hindered from becoming a platform for undue coordination or the exchange of sensitive business information.

### **VII. CONCLUSION**

The Constitution of the WHO<sup>91</sup> preserves the widely accepted ideal of healthcare for all, '*the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic, or social conditions*'.

The onslaught of the pandemic's consequential economic crisis has left countries in a balancing act between defending competition and granting exemptions in order to revive the economy. The ratio of availability of doctors to patients is 1:1457 in India, lower than the

---

from-the-competition-commission-of-india/ (last visited on Oct. 29, 2020).

<sup>88</sup> James Marshall & James Kim, "Competition Law In The Time Of Coronavirus: UK Regulators' Response And Approach To The COVID-19 Pandemic", *Covington Competition*, Apr. 7, 2020, available at: <https://www.covcompetition.com/2020/04/competition-law-in-the-time-of-coronavirus-uk-regulators-response-and-approach-to-the-covid-19-pandemic/> (last visited on Oct. 29, 2020).

<sup>89</sup> Uday S Mehta and Sakhi Shah, "Competition Enforcement for Business Collaborations during COVID-19 A Global Perspective", *CUTS International*, July, 2020, available at: <https://cuts-ccier.org/pdf/competition-enforcement-for-business-collaborations-during-covid-19.pdf> (last visited on Oct. 23, 2020).

<sup>90</sup> Vinay Shukla and Payel Chatterjee, "CCI's Advisory for COVID-19 – A Much Needed Breather!", *Nishith Desai Associates Hotline*, May 5, 2020, available at: <https://www.nishithdesai.com/information/news-storage/news-details/article/ccis-advisory-for-covid-19-a-much-needed-breather.html> (last visited on Mar. 10, 2021).

<sup>91</sup> The Constitution of the World Health Organization, 2006.

WHO recommended ratio of 1:1000.<sup>92</sup> India's inadequate pharmaceutical and healthcare facilities are a recipe for disaster.

Additionally, the CCI's lack of clear guidelines on how businesses wishing to co-ordinate can navigate their transactions leaves companies to self-assess the necessity and proportionality of their actions taken to address Covid-19 concerns and any business conduct taking advantage of Covid-19 will be found in contravention of the provisions of the Act. Unlike actions taken by the European Commission, U.S.A etc., the CCI has avoided the expression of any specific regulation, retaining wide discretionary powers to later decide what actions taken by companies can be found to be competitive and to what extent. Businesses are left to analyse their conduct and weigh out the pro-competitive impact of the deal against its anti-competitive effect.

During periods of emergency, essential services should be safeguarded to enable the optimization of their time and resources. Market participants might be wary of entering into certain anti-competitive agreements, worrying about being consumed by long, legal battles down the line. The lack of swift and guided action has resulted in the rapid growth of cases that India is currently witnessing.<sup>93</sup> For that reason, there is a clear and immediate need for direct action and some clarity from the Centre.

\*\*\*\*\*

---

<sup>92</sup> Press Trust of India, "India has one doctor for every 1,457 citizens: Govt.", *Business Standard*, Jul. 4, 2019, available at: [https://www.business-standard.com/article/pti-stories/india-has-one-doctor-for-every-1-457-citizens-govt-119070401127\\_1.html](https://www.business-standard.com/article/pti-stories/india-has-one-doctor-for-every-1-457-citizens-govt-119070401127_1.html) (last visited on Nov. 1, 2020).

<sup>93</sup> "Covid: India sees world's highest daily cases amid oxygen shortage", *BBC*, April 23, 2021, available at: <https://www.bbc.com/news/world-asia-india-56826645> (last visited on April 23, 2021).