



Economics in antitrust and competition – Our services

**Economic evidence in
competition law**

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Rapidly increasing awareness of competition law, rising number of cases before the Competition Commission of India (CCI) and active levying of penalties have sharply increased the stakes associated with antitrust defaults in India. As it matures as a regulator, the CCI is increasingly using economic tools and comprehensive investigative procedures (dawn raids, computer forensics, etc.) to ensure robust enforcement and judgements. Additionally, the CCI is encouraging voluntary compliance by developing standards and considering leniency for organisations that implement a competition compliance programme.

Indian organisations need to ensure that their activities comply with the regulations of the Competition Act, 2002. A voluntary compliance programme that includes a policy framework, reporting mechanism, awareness campaign for employees and periodic reviews to ensure compliance, is the way forward to demonstrate commitment towards fair business practices and is a potential safeguard against heavy penalties in case of default.

How KPMG in India can help: Addressing seven prime areas of concern

At KPMG in India, we recognise that assessing antitrust matters is a daunting task which requires an overlap of economic and legal skills. We use economic theory grounded in quantitative techniques and a deep understanding of the market dynamics to help find practical approaches for complex business situations. Our team has an in-depth understanding of the Competition Act to help ensure that our analysis is detailed and can help clients meet their regulatory objectives and obligations.

Our economists are skilled in analysing the different facets of an issue to determine practical and relevant approaches to complex business problems. Our focus is on clarity, coherence and the relevance of the proposed approach through a rigorous application of economics to create value for our clients. Our core services can help you with a variety of antitrust issues.



1) Are your agreements anti-competitive

What are horizontal agreements?

Horizontal agreements are written/verbal/tacit agreements or indications of co-operation between rival firms at the same level of the supply chain

Horizontal agreements that limit competition and cause consumer harm, through price or quantity fixing, market sharing or any other form of collusion are prohibited by law.

What are vertical agreements?

Vertical agreements are agreements across different levels of the supply chain such as production, supply, distribution, storage, sale or trade in goods or provision of services.

Antitrust concerns may arise if there are clauses which restrict competition in the market, such as Most Favored Nation clauses, tie-in arrangements, exclusive supply arrangements, exclusive distribution arrangements, refusal to deal, resale price maintenance, etc.

While horizontal agreements are considered anti-competitive per se, vertical agreements may have associated efficiencies and warrant a cost-benefit analysis to ascertain whether they are anti-competitive in nature.

KPMG in India's service offerings

Horizontal agreements

Cartels are the most common form of horizontal agreements. Proof of a cartel requires direct evidence or circumstantial evidence (in absence of the former). KPMG in India assists in sifting through voluminous data, including electronically stored information and communication between competitors to identify direct evidence

KPMG in India can help evaluate indirect or circumstantial evidence pertaining to collusive behaviour using economic tools and econometric assessment of market sales and pricing data to analyse situations of price parallelism and co-ordinated behaviour among competing firms.

Vertical agreements

We can help conduct a detailed perusal of agreements across the supply chain to understand the economic impact of any clause and perform a cost-benefit analysis to compare whether efficiencies outweigh any consumer harm

We help analyse economic relationships between firms at different levels of the supply chain including evidence of selective distribution, exclusive dealing or distribution, impact of recommended prices, tie-in arrangements or resale price maintenance.

2) Are you aware that 'market share' or 'dominant status' depends on 'market definition'? Do you know your 'relevant market'?

The foundation of competition assessment lies in correctly defining the market. The market needs to be defined in an empirically robust but lucid manner because an incorrect definition can overstate or understate the market share.

KPMG in India's service offerings

- Use price correlation tests to evaluate movement of price of the product with respect to other products that could potentially form part of the market
- Calculate cross-price elasticity of product with respect to other products that could potentially form part of the market. Use diversion ratios that are indicative of cross-price elasticity of product
- Use SSNIP (Small but significant non-transitory increase in price) or the hypothetical monopolist test to identify price-based substitutes of the product
- Use Elzinga-Hogarty (EH) test for defining geographic market
- Administer surveys on a representative sample of consumers to gain direct insights into consumer preferences
- Gather information from multiple stakeholders that comprise the potential relevant market
- Conduct detailed qualitative assessment based on consumer preferences, physical characteristics and end-use of goods.

3) Do you know if you have market power or if you are dominant? Is your business prone to CCI scrutiny?

While the Competition Act does not specify a threshold for dominance, a firm is considered dominant if its actions in the relevant market can influence the market to its benefit and to the detriment of its competitors. Dominant firms are required to be cautious as normal business activities when carried out by a dominant firm have the potential to be classified as anti-competitive. Further, any market that is oligopolistic in nature or sells differentiated products is prone to CCI scrutiny.

KPMG in India's service offerings

- Gather information on relevant parameters and compute market share of key players in the relevant market
- Assess industry concentration through the use of concentration ratios and the Herfindahl Hirschmann concentration index (HHI)
- Evaluate the competitive structure of the industry using economic tools, primary and secondary research and market knowledge.



4) Could your actions be perceived as an abuse of dominance?

Per se, there is nothing wrong with an enterprise being dominant. The problem arises when a firm uses its dominance to further its advantage – by abusing its power at the cost of other firms in the relevant market. Abuse of dominance can take place if a firm creates an unfavourable environment for other firms to compete causing limited growth and exit of firms or deters the entry of new firms. It can lead to a maximum penalty of 10 per cent of the enterprise's turnover over three years.

KPMG in India's service offerings

- Evaluate potential consumer harm by assessing costs and benefits associated with actions in light of specific industry structure, norms and business dynamics
- Assess the nature of the market, regulatory barriers, fixed costs of entry, availability of substitutes or presence of economies of scale
- Analyse resource access of a firm and strength of relevant competitors to assess whether the firm can operate independently of competitors
- Assess pricing structure of the firm to analyse predatory behaviour
- Assess conduct, such as tying, foreclosure, price discrimination, refusal to deal and other allegations of monopolistic behaviour
- Understand contribution to economic development, better access to resources, efficiencies, productive resource utilisation from vertical integration that may have arisen from the dominant position of a firm.

5) Could there be competition law infringement in case of a merger, acquisition or joint venture?

Regulatory risks may arise if the assets/turnover of the combined entities exceeds specified thresholds, in which case it is mandatory to file a notification with the CCI. Competition risk assessment may involve a post-merger impact on prices, market share, market structure, concentration or innovation. Failure to notify the CCI about a possible combination within a stipulated time period can lead to penalties of up to 1 per cent of the turnover.

KPMG in India's service offerings

- Assist in the different stages of merger analysis and notification
- Assess antitrust risks of a transaction through advanced techniques of econometric estimation of relevant demand elasticity and merger simulation to estimate the post-merger scenario impact on prices, sales, market shares and competition
- Weigh antitrust concerns of the merger against efficiencies, economies of scale or scope or resultant increase in consumer welfare
- Assist the client in structuring the deal to reduce antitrust concerns
- Assist the client in filing a notification of the combination with the CCI.

6) Do you have an active competition compliance framework? Are your employees aware of the risks?

The CCI actively directs the Director General to conduct a comprehensive competition assessment of the organisation under the scanner, including but not limited to, their agreements, communications with contractors/competitors/suppliers, pricing, distribution and supplier networks, business procedures and business structure.

An active competition compliance mechanism in a firm demonstrates the commitment of the firm to check antitrust violations and has aided firms in claiming leniency from the CCI.

KPMG in India's service offerings

- Develop a competition compliance mechanism aligned to the relevant market and an organisation's business requirements. We assess the existing compliance structure and competition law awareness level in the firm and perform a 'gap analysis' between existing and desired procedures with respect to identified risks
- Provide trainings to enhance awareness of relevant provisions of competition law and develop a compliance manual
- Establish a 'competition hotline' for the firm's employees, vendors and other third parties to provide a channel for reporting antitrust issues
- Conduct third party audits to review the existing compliance procedures and suggest improvements
- Conduct due diligence on target firms for potential risks related to competition law.



7) Are you eligible to claim antitrust damages?

In case an organisation has been impacted by anti-competitive actions of a firm and the CCI imposes a penalty on the firm, it could be eligible to claim damages. KPMG in India's experts can help refute the causal connection between antitrust violations and conduct of the penalised firm as well as quantify any damage the firm may be liable for due to antitrust violations. Quantification of damages can help in the compensation of litigation fees before respective authorities.

KPMG in India's service offerings

- Use of econometrics and microeconomic modelling to real-world data to refute a direct connection between violation and injury claimed as well as measure the extent of damage
- Damage analysis can be used to advise the board on potential exposure
- Damage estimation be used as valuable input in negotiations between regulators, i.e., the CCI or National Company Law Appellate Tribunal (NCLAT), and the companies

- Help with testimony at trial
- Help parties negotiate settlements in civil litigation.



Summary of KPMG in India's value proposition

Competition economics:

Use of in-depth knowledge of microeconomics, econometrics, statistics, sampling and industrial economics in various aspects of antitrust cases

- Define the market on empirical grounds as well as qualitative assessments of consumer preferences
- Conduct a cost-benefit analysis that quantifies efficiencies in case of vertical agreements across the supply chain or mergers against anti-competitive impact of the same
- Perform econometric analysis using market data or bid data to analyse circumstantial or direct evidence in any horizontal arrangements.

Compliance services

- Develop 'tailored to the client' compliance programme keeping in mind specific risks prevalent in the sector
- Develop a compliance manual and provide trainings after a 'gap analysis' between existing and desired procedures
- Conduct third party audits to review the existing compliance mechanism
- Conduct competition due diligence to assess risks from acquisition of targets.

Combination advisory

- Assist in obtaining approvals from the CCI for filing mandatory notifications for combinations exceeding the threshold specified in the Competition Act
- Assist in developing an overall economic impact of the combination - such as assessment of any pro-competitive impact against rise in concentration or barriers in the industry.

Computation of damages

- Draft a case for entitlement to damages for the client as a result of anti-competitive conduct by an enterprise before relevant authority (i.e. CCI or NCLAT)
- Use economic counterfactual analysis to simulate the business case scenario in the absence of antitrust violation
- Assess cartel damages taking into account whether there has been any pass-through to the consumer.

Investigations

- Assist in mitigating risk from the data discovery process
- Provide services related to data collection, processing, hosting, review and production
- Forensic review of actual communication or email exchange between competitors and suppliers
- Support to gather information and evidence required by the CCI in a limited amount of time.

Expert witness

- Act as expert witness to testify in a variety of business and financial matters, as well as any antitrust disputes
- Assist in the preparation of other expert witnesses.

Dawn raids

- Provide on-site training to handle a dawn raid
- Prepare detailed instructions and manuals for a firm and employees to handle dawn raids
- Special training for personnel responsible for managing dawn raids
- Assist in data preservation and taking back-ups of data, as required.

Why KPMG in India?

Core understanding of competition laws and regulatory environment

In-depth understanding of laws related to anti-competition and antitrust and vast experience of dealing with regulators.

Economic and regulatory skills

In-depth knowledge of microeconomics, as well as the ability to communicate technical economic arguments in clear terms.

Dedicated dispute advisory/economic and regulatory practice under forensic services

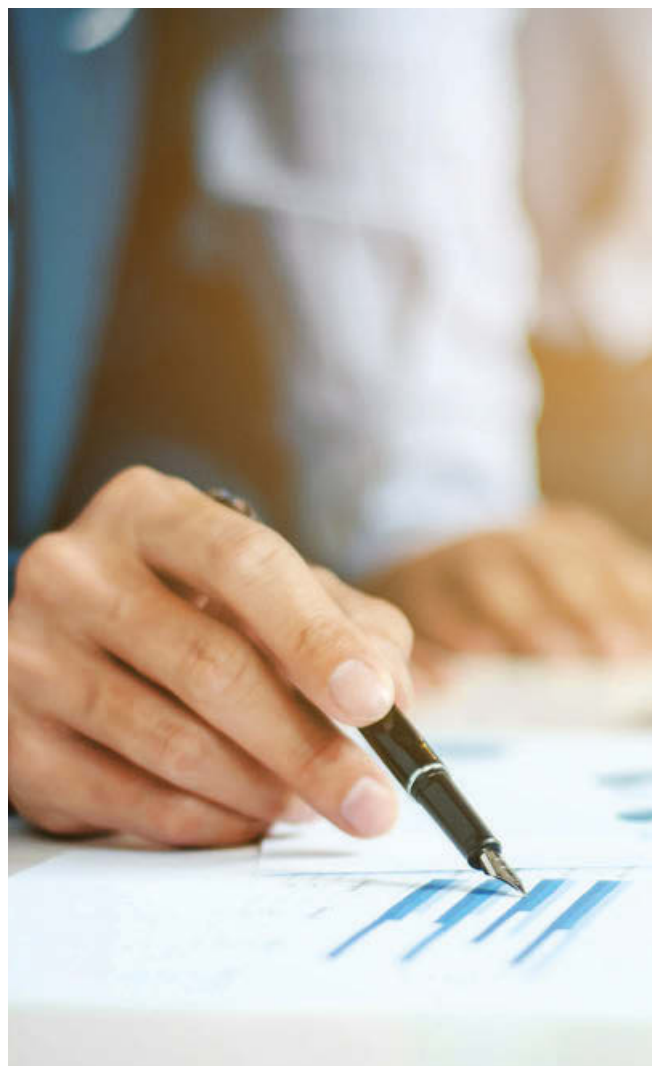
A leader in India with over 900 professionals and with an experience of over 4,500 engagements in forensic services.

Equipped to help you in the courts of law and regulatory processes

Experience of being cross examined as an expert witness in various forums to support the findings of the report.

Global reach and access to international experts

Works closely with and can source relevant expertise from member firms in over 150 countries.



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