



COMPETITION POLICY AND ANALYSIS

India's Competition Act, 2002, as amended has come into full effect since May 2009. With a few exceptions, this law generally applies to all economic activities and markets in India. Keeping in view the pace of economic development in the country, the government established the Competition Commission of India to prevent business practices adversely affecting competition, to promote and sustain competition in markets, to protect the interests of consumers, and to ensure freedom of trade.

Led by Dr R Shyam Khemani, SKP's team of in-house analysts in collaboration with major law firms, assists leading domestic and international enterprises in navigating through the case-specific reviews and filings before the Competition Commission of India (CCI). The areas focused on include M&A transactions, joint ventures and strategic alliances, alleged cartels and monopolistic behaviour (abuse of dominant market position), and various competitive business practices.

Our experience in competition analysis spans across industries, which include energy/petro-industrial chemicals, information technology (IT), automotive vehicles and parts, cement, and professional sports, among others.



OUR SERVICES

Mergers & Acquisitions

It is widely recognised that M&A transactions are an important mechanism for business expansion, industry/firm restructuring and market entry. The 'combination provisions' of the Competition Act, 2002 require M&A transactions above certain size thresholds (based on assets or turnover in or outside of India) to be reported for review and clearance by the CCI. A transaction may be void if it is likely to cause an "appreciable adverse effect on competition in the relevant market in India."

In order to get the transaction properly evaluated and expeditiously approved, the SKP team works closely with our client's legal representatives to prepare a 'competition assessment' brief that is filed with the CCI. The brief takes into account various factors specified in the Act, and addresses, in advance, issues or factors such as definition of the relevant market, barriers to entry, impact on market structure and competition, and potential economic efficiencies, among others. Employing the latest industrial organisation methods, we present credible analysis of the nature and degree of competition prevailing in the relevant market, the business rationale for the acquisition, and whether or not the proposed transaction will adversely affect or increase competition. Also, where necessary, we explore alternative ways to restructure the transaction to alleviate competition concerns, should they arise. If required, we also conduct due diligence, forensic accounting, transaction restructuring, and competitive market analysis with respect to the proposed M&As.

The SKP team has prepared several competition impact briefs, and all the M&A transactions we have worked on have been cleared by the CCI well within 30 days, saving our clients significant monies in bridge financing and other costs. We pride ourselves in bringing clarity to complex business matters to facilitate decisions by the CCI and other regulators in favour of our clients.

Prohibition of Anti-competitive Agreements

Under the Competition Act, agreements between enterprises, whether or not explicitly entered into, that result in fixing of prices, allocation of customers, markets or geographic territories, restriction of production, supply, distribution, storage, acquisition or control of goods or provision of services that cause or are likely to cause appreciable adverse effect on competition within India are strictly prohibited. The fines levied by the CCI in such cases can be financially significant – up to 10% of the enterprise's average turnover of the previous three years. For example, in the alleged cartelisation of the cement market—a case that is currently under appeal—the fine levied was INR 63 billion (USD 1 billion); among the highest fines imposed by a competition authority globally.

Unless there is evidence of overt meetings by businesses to engage in prohibited agreements and related practices, it is difficult to prove cartelisation of markets. Nonetheless, it must be noted that circumstantial 'evidence' such as parallel or similar pricing can be construed as being an illegal agreement. However, the commercial reality is such that often enterprises compete by matching the competitors' prices and other sale conditions – particularly when the product in question is homogenous, terms and conditions of sale are easily observable, and the industry has few enterprises so that the gains and losses of sales by one enterprise impact others.

At SKP, we conduct rigorous economic analysis to assess whether the allegations with respect to cartelisation of markets are plausible and credible, and draw distinctions between competitive and anti-competitive business behaviour. In this context, we analyse price patterns and variations, levels and dynamic changes in sales or market shares, 'facilitating devices' such as published price lists and contracts, and other relevant factors to ascertain if there is an alleged prohibited business arrangement.

OUR SERVICES

Abuse of Dominant Market Position

It is not illegal for an enterprise to be 'dominant' or account for a large share of the relevant market. Indeed, enterprises are often larger than their competitors because of being more efficient and supplying higher quality products and services at competitive prices. However, 'abuse' of one's dominant market position such as charging discriminatory prices, exclusionary behaviour, tied selling, predatory pricing and the like can constitute violations of the law. But, 'dominant' enterprises can also become targets of complaints of alleged anti-competitive business practices by those who cannot compete effectively in the market place, or by industrial customers seeking to extract more favourable terms/conditions of sale and/or lower prices.

Given our extensive industrial experience and analytical capabilities, the SKP team has prepared briefs on:

- the 'competitive dynamics' of the relevant market, and the pricing and other constraints confronted by the alleged 'dominant' firm;
- the choice of alternative products and services from competing enterprises and demand elasticity;

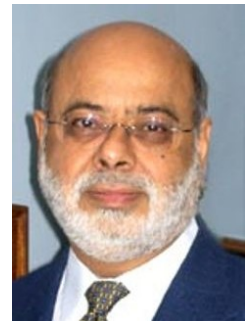
- the nature and extent of barriers to entry, and if such barriers are firm-/market-specific, economic and/or strategic, or primarily determined by government policies and regulations;
- the history of past entry-exit by enterprises and changes in ranks of leading enterprises, assessing the degree of 'market contestability'; and
- the factors contributing to the enterprise's relative market position in terms of superior competitive performance and the benefits accruing to consumers, among other such arguments.

The SKP team, in collaboration with our partner law firms, also provides tailored compliance programs and advice, to complement our work on corporate strategy, investment, restructuring and other areas to ensure client enterprise management, and that you are cognisant and in compliance with various government laws and policies, especially the Competition Act..

ADVISER PROFILE

Dr Shyam Khemani brings extensive global and country-specific experience in providing advice, analytical economic and litigation support to public and private sector entities in the area of competition/antitrust (M&A transactions, cartels and monopolisation cases, economic damages), industrial organisation, competitive strategy, economic regulation, international trade and investments.

Besides having worked with leading international organisations, he has also served as an Adviser to the Raghavan Committee established by the Government of India and was integrally involved in developing the framework for India's competition law and policy, which subsequently led to the passage of the Competition Act, 2002.



About Us

SKP is a long established and rapidly growing professional services group located in seven major cities across India. We specialise in providing sound business and tax guidance and accounting services to international companies that are currently conducting or initiating business in India as well as those expanding overseas. We serve over 1,200 clients including multinationals, companies listed on exchanges, privately held and family-owned businesses from more than 45 countries.

From consulting on entry strategies to implementing business set-up and M&A transactional support, the SKP team assists clients with assurance, domestic and international tax, transfer pricing, corporate services, and finance and accounting outsourcing matters, all under one roof. Our team is dedicated to ensuring clients receive continuity of support, right across the business lifecycle.

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