

A close-up photograph of a hand holding a white chess piece, likely a king or queen, positioned over a black chess piece on a chessboard. The background is blurred, showing other chess pieces and the board's surface. The lighting is dramatic, with strong highlights and deep shadows.

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Understanding and using economic evidence to tackle competition concerns

Deloitte India Forensic Webinar
10 December 2015
Q&A session

Some concerns highlighted during the webinar

1. On what basis was a 2 percent penalty charged by the CCI in the automobile case?

The Commission is authorized/ may levy penalty amounts up to 10 percent of the average turnover of the company in question. Penalty decisions are normally made after taking into account various factors such as type of offence, financial health, and paying capacity of a firm.

2. Can survey reports be used as evidence?

Yes, survey reports can be used and submitted as economic evidence. In its general regulations, the Competition Commission of India (CCI) lists all valid economic evidence that can be submitted with the Commission – these include verifiable transcripts of tape recordings, video recordings, electronic mail, telephone records, signed responses to written questionnaires and/ or interviews or opinions as material evidence.

3. How does one use forensics (discovery) to develop data for defense?

E-discovery or data obtained by imaging computer hard disks, memory devices, or smartphones may be used to gather evidence to either prove or disprove an allegation. For example an email exchange between key employees may provide evidence of anti-competitive behavior/ impact of a proposed combination. Similarly exchange of information while fixing prices may provide evidence to prove or disprove existence of a cartel. E-discovery is useful to gather evidence for all instances of anti-competitive conduct.

4. Economic evidence can be used to support or negate situations. Are there any standards by which to determine which set of economic evidence is correct?

Economic evidence can be used to bolster any assertion. It serves a pivotal role in defining the market, assessing dominance, proving abuse of dominance, analyzing impact of mergers and acquisitions, determining cartels, analyzing cost-benefit impact of anti-competitive vertical and horizontal agreements and quantifying losses. The quality of economic analysis also depends on the quality of underlying data i.e., source of data, quantum and periodicity and econometric specifications and types of models used.

5. Is it possible to frame guidelines to decide how to arrive at a relevant market?

There can be no clear set of guidelines to define the relevant market, which is the most crucial component of conducting a market study and assessing dominance or abuse. It involves an analysis of numerous factors such as nature of industry, nature of business, substitution behavior of consumers and price-non price factors. It is almost always specific to the nature of the case in question/ being studied.

6. Is there a need for economic evidence other than M&As?

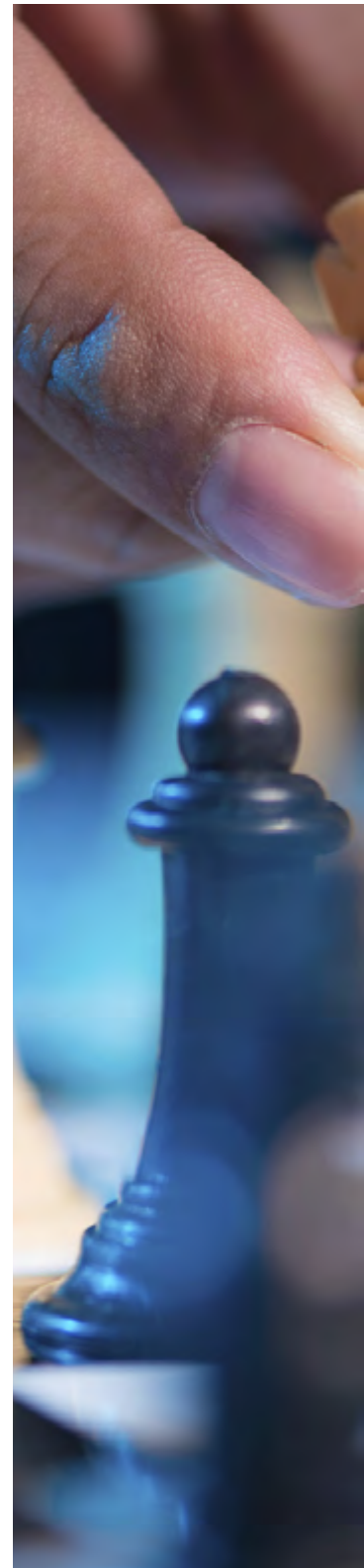
Apart from mergers and acquisitions, there are many scenarios where competition issues and anti-trust concerns may arise. Anti-trust concerns can arise if there is presence of a large firm that abuses its dominance to deter new entry or causes existing players to exit. There can be presence of horizontal or vertical anti-competitive contracts that may impose undesirable conditions on sellers and limit competition. Economics would be required to compute claims for any aggrieved party.

7. How can economic analysis be carried out with inadequate data?

Economic analysis, though reliant on data, is not confined to it. There is a lot of valuable economic analysis that can also be conducted with basic statistical data such as price, sales, cost, and market share which are readily available in the public domain. Arguments can be made based on nature of market and industry analysis (which does not always require data), to ascertain whether an industry is susceptible to dominance.

8. In case of cartels, where finding direct economic evidence is more difficult, what is the value of economic evidence?

Horizontal agreements like cartels are perceived to be anti-competitive in India. In most cases, direct documentary evidence is difficult to find. Even when such direct evidence is available, it is not entirely conclusive. Documentary evidence does not shed light on the impact, duration, and frequency of the alleged





agreement. Economic and empirical analysis on the other hand can help evaluate the plausibility of cartels. It outlines specific market place outcomes that would be expected to occur as a result of agreements like cartels. For instance, price fixing cartels are associated with stable market shares, reduced price variations, increased margin variations and higher prices downstream. Moreover, econometric analysis can provide quantitative estimation of costs and prices in cartelization cases.

9. How can the effect on competition be demonstrated in the case of abuse of dominance?

The Indian competition regime is based on an effect-based approach i.e. they assess the impact of anti-competitive activity on consumers and market outcomes. Abuse of dominance amounts to abusing the dominant position in the relevant market with respect to practices like limiting or restricting production of goods, predatory pricing, etc. The first step in any case that may involve the abuse of dominance is to delineate the relevant market and assess the dominance of an entity. As a second step, one has to establish that effective competition is being curtailed in the relevant market and/ or how consumers are being/ will be harmed due to the conduct. Some of the factors that can help in assessing impact of competition are creation of entry barriers, foreclosure of competition by hindering entry, driving efficient players out of the market, etc.

10. In the case of cartels (which are mostly alleged in the case of oligopolistic markets) there is always the issue of an oligopolistic market structure defense. As such, it becomes difficult to establish a cartel based on economic reasoning. Your comments please.

An oligopolistic market structure is associated with a small number of suppliers where a decision taken by one firm affects the others and firms interact strategically in the market to take output and price decisions. In such a market, cartels can be established by direct evidence like email exchanges and oral statements given by cartel participants. However, it is difficult to obtain such direct evidence. In the absence of direct evidence, facilitating factors like price parallelism, steep price reductions, conduct of the industry, market structure evidence, stable market shares and recommended resale prices need to be appraised.

11. Do you agree with the airlines fuel surcharge cartel penalty?

While we cannot comment on any specific case, in order to examine collusion with respect to pricing or quantity restrictions, one should analyze three things. First, assess if the conditions in the industry are conducive for cartelization to occur. Price parallelism alone is not sufficient to prove cartelization and other factors like stable market shares, higher margins, countervailing buyer power need to be examined. Second, a systematic basis of costing has to be provided to establish that the pricing was contingent on the market forces. Third, in cartel cases AAEC (appreciable adverse effect on competition) is assumed. Thus, parties have to rebut the claim that any AAEC has occurred i.e., effect on market outcomes (in form of higher downstream prices, etc.) needs to be evaluated.

12. Can there be any 'finding' on cartelization without there being any evidence of agreement between the parties?

In cartel cases, "agreement" or "concerted action" between parties has to be established. The agreement may be in the form of any arrangement or understanding whether or not formal. The understanding may be tacit and the definition covers situations where the parties act on the basis of a nod or a wink. In most cases, direct documentary evidence is difficult to find. In such cases, where direct documentary evidence is difficult to find, economic analysis can aid in evaluating indirect evidence. Economic and empirical analysis can help evaluate the plausibility of cartels. It outlines specific marketplace outcomes that would be expected to occur as a result of agreements like cartels. For instance, price fixing cartels are associated with stable market shares, reduced price variations, increased margin variations and higher prices downstream. Moreover, econometric analysis can provide quantitative estimation of costs and prices in cartelization cases.

For any further queries, please feel free to reach out to us

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