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Identifying the Bottom Line: What Guides the Imposition of Antitrust Penalties in India?

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By Anisha Chand & Alisha Mehra[1]

With the ebbing of the pandemic's second wave, the Indian competition authority (Competition Commission of India ("CCI")) is back to full throttle. Nearly 50 percent of the CCI's penalty orders[2] since the onset of the COVID-19 pandemic were issued in the previous three months.[3] A common thread in the recent penalty orders is the weightage afforded to the pandemic's impact on the contravening parties, particularly in cases involving MSMEs.[4] In this article, we review the impact of emergent circumstances on the CCI's contravention orders. In the process, we also identify discernible trends (or the absence thereof) in the CCI's penalty imposition, some of which predate the pandemic.

A Rocky Foundation?

In the absence of criminal sanctions, monetary penalties remain the only effective tool to serve as a deterrent under Indian competition law. Consistent with international standards, a breach of competition rules in India can expose an entity to a penalty of up to 10 percent of the average turnover for the "last three preceding financial years" or in case of cartels – "up to 3 times the profits for each year during which the cartel subsisted." Given the mammoth extent of penalties that the CCI is empowered to impose, it sure does make for a powerful enforcement weapon to check anticompetitive behavior.

Taking the bull by its horns and making a statement about its arrival, the CCI imposed headline grabbing fines in the *Cement Cartel* case,[5] *DLF* case,[6] *NSE* case,[7] and the *Auto-parts* case[8] – all of which are pending in appeal before the Supreme Court of India ("SC"). The quantum of fines imposed sent shockwaves across business houses in India until the SC, in its landmark *ALP Tablets* judgment,[9] clarified that fines should be determined based on "relevant turnover" or the revenue accruing from the business unit infringing the relevant provisions of the Act. This golden rule became the guiding light for the CCI (over and above the doctrine of proportionality, factoring in mitigating and aggravating circumstances) while quantifying penalties in futures cases.

For a number of decisions thereafter, the CCI religiously applied the relevant turnover test to impose fines. For instance, the relevant turnover in a case concerning the public procurement of LPG cylinders was the revenue realized from the sale of LPG cylinders.[10]

Typically, the CCI discloses its methodology in imposing fines – the benefits of which are three-fold: (i) promotion of the CCI's accountability, (ii) facilitation of effective appeals to penalty orders, and (iii) provision of certainty to stakeholders.

However, of late, certain orders of the CCI haven't identified a relevant turnover or disclosed the methodology adopted based on which the party was penalized.

For instance, in February 2021, the CCI imposed an INR 0.2 million penalty on an association of publishers and booksellers for

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[2] Orders under Section 27 of the Competition Act, 2002 (Act).
[3] 8 out of 16 orders under Section 27 of the Act issued through March 2020 and November 2021 were passed between August 2021 and November 2021. Interestingly, this is a higher rate of activity than recent pre-COVID periods (2018-2019).
[4] MSMEs refers to Micro, Small & Medium Enterprises.
[5] *Builders Association of India v. Cement Manufacturers' Association and Others* (Case No. 29 of 2010).
[6] *Belaire Owner's Association v. DLF Limited and Others* (Case No. 19 of 2010).
[7] *MCX Stock Exchange Limited v. NSE Limited and Another* (Case No. 13 of 2009).
[8] *Shri Shamsher Kataria v. Honda Siel Cars India Limited and Others* (Case No. 03 of 2011).
[9] *Excel Crop Care Limited v. Competition Commission of India* (Civil Appeal No. 2480 of 2014).
[10] *In Re: Alleged cartelisation in supply of LPG Cylinders procured through tenders by Hindustan Petroleum Corporation Limited* (*Suo Motu* Case No. 01 of 2014).

collusion.[11] More recently, in August 2021, the CCI penalized Maruti Suzuki India Limited with INR 2000 million for implementing discount control policies (*Maruti* case).[12]

A conspicuously missing piece in both orders is the relevant turnover and percentage of the relevant turnover on which the fine was imposed by the CCI. Admittedly, Section 27 of the Act[13] allows the CCI to impose penalties "*as it deems fit*" and does not explicitly require the CCI to disclose any methodology. However, Section 27 of the Act must be read in conjunction with Section 36 of the Act – which requires that the CCI be guided by the principles of natural justice. A cardinal principle of natural justice is that orders passed in the discharge of adjudicatory functions must be reasoned orders.[14] This serves a two-fold purpose: first, reasoned orders enable the party against whom a decision is passed to effectively challenge the CCI's orders; and second, reasoned orders act as a check on arbitrariness. Here, we also draw attention to an observation in the *ALP Tablets* judgement.[15] The judgment categorically notes that "*the discretion provided under Section 27 of the Act needs to be regulated…so that there is uniformity and stability with respect to imposition of penalty.*"

Therefore, in the absence of a rational explanation, consistent application as well as disclosure of the CCI's methodology, these penalties may not only be seen as arbitrary but could also invite challenges before appellate authorities. The *Maruti* case[16] is also of particular significance since it is the second case which found a contravention of resale price maintenance ("RPM") in India and was therefore, expected to set the tone for RPM enforcement. Perhaps, disclosure of the penalty methodology could've even better signaled the stringency with which the CCI views RPM.

Rejection of "Relevant Income"

The SC's order in the *ALP Tablets* case[17] is the cornerstone of penalty imposition in India since it laid out the concept of relevant turnover (discussed above). Statistics reveal that 35-40 percent of the CCI's penalty orders explicitly reference the *ALP Tablets* case[18] when reasoning the penalty imposed on enterprises.

In stark contrast, only one order (dated February 2021)[19] referenced the *ALP Tablets* case[20] during determination of individual penalties. In said case, an association argued that no penalty could be imposed on its office bearers because the office bearers did not earn an income from the association. Therefore, their "relevant income" was nil.

Adopting a formalistic interpretation of *ALP Tablets* case,[21] the CCI reasoned that "relevant turnover" and not "relevant income" was the subject of the *ALP Tablets* case[22] and altogether rejected the idea of relevant income. It remains, however, unclear why the principle of proportionality should extend itself to enterprises (who benefit from the concept of relevant turnover resulting in trimmed fines) and not individuals (who are penalized based on their entire income).

This position also stands at odds with the practice in leniency matters, where the amnesty granted to the leniency applicant (even prior to

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[11] *International Subscription Agency v. Federation of Publishers' and Booksellers' Associations in India* (Case No. 33 of 2019).

[12] *In Re: Alleged anti-competitive conduct by Maruti Suzuki India Limited in implementing discount control policy vis-à-vis dealers* (*Suo Motu* Case No. 01 of 2019).

[13] Section 27 of the Act enables the CCI to impose penalties for a contravention of the Act.

[14] See Judgment of the Supreme Court of India in *M/s Kranti Association Private Limited v. Masood Ahmed Khan and Others* (SLP (C) No. 12766 of 2008).

[15] *Supra* note 9.

[16] *Supra* note 12.

[17] *Supra* note 9.

[18] *Id.*

[19] *Supra* note 11.

[20] *Supra* note 9.

[21] *Supra* note 9.

[22] *Id*.

the amendments to the "Lesser Penalty Regulations" in 2017)[23] was automatically extended to include employees of the leniency applicant – who were not necessarily named as applicants.

Double Whammy for Individual Penalties

Questions surrounding relevant income aside, much like the rocky foundation based on which penalties for enterprises are determined – recent orders of the CCI remain silent on the percentage used for computing penalties on individuals.[24]

Consider the following string of cases.

In November 2021, the CCI imposed a "*symbolic*" fine of INR 0.5 million on several paper manufacturers for indulging in cartelization.[25] The CCI, however, deemed it fit to impose nil penalties on the office bearers of the contravening enterprises. The office bearers were, instead, let off with a warning with no rationale on the differential treatment meted to the office bearers *vis-à-vis* the paper manufacturers.

Interestingly, in October 2021 (not one month prior to the *Paper Cartel* order[26]), the CCI imposed a cumulative penalty of INR 0.15 million on the office bearers of two companies for engaging in bid-rigging.[27] The CCI reasoned that the penalties were "*symbolic*" and sufficient to "*achieve the ends of justice in the facts and circumstances of the case.*" Here, unlike the *Paper Cartel* order,[28] a symbolic penalty was imposed on both, the contravening companies and their office bearers. Along similar lines, a March 2021 order imposed a penalty of INR 10,000 on individuals for indulging in bid-rigging. The amount was determined as sufficient to meet the "*larger goal of swift market correction.*"[29] Finally, a February 2021 order imposed a penalty of INR 0.1 million on office bearers of an association citing (rather unsurprisingly) the appropriateness of the penalty based on "*the facts and circumstances of the present case.*"

Repeated emphasis on the specific facts and circumstances of a particular case as a guiding factor evidence the subjectivity involved during penalty imposition. We expect the CCI to maintain this tenor in its upcoming orders.

Timeline Dissonance

Section 27 of the Act enables the CCI to impose penalties "as it deems fit" – subject to the prescribed maximum permissible limits. Specifically, for anticompetitive conduct (other than cartels), an enterprise may be penalized at 10 percent of the average turnover for the "last 3 preceding financial years." However, Section 27 of the Act doesn't provide guidance on the relevant period constituting the "last 3 preceding financial years" – leaving this determination entirely on the discretion of the CCI instead.

This could possibly explain why the CCI's practice is mysterious when it comes to which "last 3 preceding financial years" will be considered for penalty determination. Equity and logic dictate that the period would coincide with the last 3 years during which the parties engaged in anticompetitive activity. However, a closer look at some of the instances (listed below) reveal the *ad-hoc* connotation being afforded to expression "last 3 years" – which could mean "3 years preceding the submission

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[23] Amendment to the Competition Commission of India (Lesser Penalty) Regulations, 2009 *vide* notification dated August 22, 2017.

[24] For context, Section 27 of the Act prescribes the penalties that can be imposed on "enterprises." The Act defines "enterprises" to include individuals, companies, associations, firms, etc. Therefore, the quantum of penalty that can be imposed on both, individuals and entities (such as, a company), is dictated by Section 27 of the Act. Note that, individuals can be penalised under Section 27 of the Act for "directly" or "vicariously" contravening the Act. So far, the CCI has only investigated individuals for "vicariously" contravening the Act. Under Section 48 of the Act, vicarious liability can be imposed when the key managerial personnel or employees of a company – conducted themselves in a manner that permitted / facilitated a contravention by the company.

[25] *In Re: Anti-competitive conduct in the paper manufacturing industry* (Case No. 05 of 2016).

[26] *Id.*

[27] *GAIL (India) Limited v. PMP Infratech Private Ltd. and Others* (Case No. 41 of 2019).

[28] *Supra* noted 25.

[29] *People's All India Anti-Corruption and Crime Prevention Society v. Usha International Limited and Others* (Case No. 90 of 2016).

of the investigation report" or "3 years preceding the date of the final order" or "3 years preceding the last known date of contravention." The only perceptible pattern therefore that comes to light is the absence of one. This dissonance in application of fundamental principles has plagued the CCI's orders since before the pandemic and see no signs of abatement to date. The broad construct of Section 27 of the Act cannot be interpreted in a manner that permits (i) inequitable outcomes during penalty imposition; or (ii) disproportional penalty imposition. This position is aligned with the principles of statutory interpretation recognized by the SC in the *ALP Tablets* case.[30] As such, the absence of a perceptible pattern could arguably fall foul of both principles.

Illustrative Cases

Case	Penalty on enterprise	Penalty on individual	Duration of contravention
LPG case dated August 2019 [31]	1% of its average relevant turnover from FY 2014 to FY 2016	1% of their average income for from FY 2014 to FY 2016	From 2011 to 2013
MPCDA case dated June 2019[32]	1% of the average of the revenue turnover from FY 2015 to FY 2017	1% of the average of gross total income from FY 2015 to FY 2017	From 2014 to 2016

Conclusion

With great power comes great responsibility – as an economic regulator wielding the power to impose the highest pecuniary fines, a measured and reasoned approach is the bare minimum burden that the CCI must discharge.

Effective deterrence depends, in part on the uniformity and predictability of fines. After 12 years of active enforcement experience, the CCI would likely benefit from the introduction of penalty guidelines akin to its foreign peers.[33] Further, most of the CCI's global counterparts have in place a "base penalty" mechanism which the CCI could take a leaf out of. The CCI could design a formula that can serve as a starting point to determine such base penalty premised on the seriousness of the infringement, duration of the conduct, etc. leaving the adjustments attributable to the aggravating and mitigating factors on a case-by-case basis.

The adoption of fining guidelines promises to achieve multiple goals – it will balance the objective of bringing in uniformity and deterrence, without compromising the need for flexibility and individualized assessment; and increase transparency by limiting the discretion vested with the authority. The recommendation to introduce penalty guidelines was also formally proposed in the report of the Competition Law Review Committee (set up in 2019) – a recommendation which found place in the draft Competition (Amendment) Bill, 2020 (Bill).[34]

An optimal and just penalty system is truly need of the hour; and until the extant laws are amended, the CCI should consider self-regulation as a means to bring in a semblance of consistency and predictability in its penalty orders.

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[30] See Para 74 of the *ALP Tablets* case (*supra* note 9).
[31] *Supra* note 10.
[32] *Madhya Pradesh Chemists and Distributors Federation v. Madhya Pradesh Chemists and Druggist Association and Others* (Case No. 64 of 2014).
[33] See European Commission's "*Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1 of 2003*"; and the Competition & Market Authority's "*Guidance as to the appropriate amount of a penalty.*"
[34] The Bill proposes the insertion of a new provision (i.e. Section 64B) which directs the CCI to publish guidance as to the appropriate amount of penalty for contravention under the Act.