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DISCLAIMER

NAVIGATING THE COMPLEXITIES OF PENALTY DETERMINATION UNDER THE COMPETITION ACT: AN ANALYSIS OF THE ROLE OF GLOBAL TURNOVER

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Abstract

The Competition Act of 2002 aims to deter anti-competitive practices. The 2023 amendment introduces global turnover as the basis for penalties, raising concerns about proportionality, equity, and arbitrary application. The study analyzes the implications of this transition, focusing on the Indian Constitution's Articles 14, and 20. The research argues that the current position of law violates the principle of proportionality and the Adjudicating Authority's abuse of power. The article suggests amending the current law to consider factors when applying global turnover, considering the ongoing concerns of businesses.

Keywords

Article 14, Competition Law, Global, Relevant, Turnover

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INTRODUCTION

The Competition Act of 2002 refer as the Act was introduced to promote freedom of trade and sustain competition in the economy. The Act aims to deter entities from engaging in any anti-competitive practices that are detrimental and have adverse effects on the growth and development of the economy. Section 3[2] of the Act bars the company from entering into anti-competitive arrangements that are likely to have negative effects within India, limit or control the production and distribution of goods in the market, and so forth. Section 4[3] of the Act also states that entities must not abuse their superior position in the market and unfairly control the prices in the market.

The Act was introduced to prevent the abuse of position in the market and to foster and promote the growth of entities in the economy. The Act establishes the Competition Commission of India, which is a regulatory body entrusted with the task of eliminating such practices having adverse effects on the economy and protecting the freedom of trade as per Section 18[4] of the Act.

The Section 27[5] of Act imposes a penalty for contravention of Sections 3[6] and 4[7] it addresses anti-competitive behavior or exploiting their superior position. The basis for imposition of penalty as per the original act was based on the average turnover not exceeding 10% of the last 3 preceding years. While determining the average turnover, the Commission and the Courts employed the concept of the relevant turnover of the enterprise. However, the same was never explicitly stated in the Act. As per relevant turnover, the penalty is imposed on the enterprise on the basis of the relevant product or service in which they have engaged in anti-competitive practices.

However, the Competition Amendment Act, 2023 [8] seeks to substitute turnover with global turnover for the imposition of a penalty. The Penalty which is based on worldwide turnover is computed only by taking all the accounts of all the products and services that are sold by the organizations rather than simply the portion of their business that was harmed by the violation.

[2] The Competition Act (2002), S. 3
[3] The Competition Act (2002), S. 4
[4] The Competition Act (2002), S. 18
[5] The Competition Act (2002), S. 27
[6] Supra note 1
[7] Supra note 2
[8] The Competition (Amendment) Act, 2023

The Amendment Act [9] is complemented by the Competition Commission of India (Determination of Monetary Penalty) Guidelines, 2024[10] hereinafter referred to as the Guidelines which seeks to augment and clarify the penalty imposition procedure.

OBJECTIVES OF THE AMENDMENT

One of the main aims of imposing a penalty for contravention is to provide a deterrent effect to others who are likely to engage in such acts that shall contravene the details and whatever is stated in the Act. The Act of Competition strives to achieve the same by imposing a penalty on the enterprise for their actions that violate the law. The determination of such penalty was initially not attributed solely to turnover and rather the Commission as well as the Courts had a certain level of discretion while computing the penalty.

In the case of the Federation of Hotels & Restaurant Associations of India,[11] twin objective was stated by the Commission regarding the penalty imposition;

(a) depicting the seriousness of the violation or infringement,

(b) ensuring to deter individuals from infringing the undertakings and to threaten them from attempting similar acts.

Additionally, it was highlighted that the severity of the penalty should align with the heinous crime that has been committed. The determination must consider both the mitigating and the aggravating factors relevant to the offense and case. It aligns with the Legislature's intent in setting penalties for such enterprises.

While there was no explicit mandate that turnover was the sole mode of determination of punishment, it was the most appropriate mode of punishment when the specific product or service was identifiable. It was deemed to be the preferred mode of determination of penalty as it did not impose any excessive penalty on the enterprise so as to jeopardize its existence as a going concern. Rather, it sought to provide a deterrent effect while still facilitating the continuance of the business.

[9] *Id.*
[10] The Competition Commission of India (Determination of Monetary Penalty) Guidelines (2024)
[11] *Federation of Hotels & Restaurant Associations of India v. MakeMyTrip*, (Case No. 14 of 2019, Competition Commission of India.)

However, the need for the introduction of global turnover arose in situations wherein relevant turnover was not ascertainable. In such cases, violating enterprises argued that they were immune from any penalty as they were not directly associated or dealing with the particular product or service in which such infringement took place. This was observed in the case of *Nagrik Chetna Manch*[12] wherein the opposite parties employed the same argument based on the decision of the Supreme Court in the *Excel Crop case*[13].

In the *Excel Crop case* [14], the majority held that according to the doctrine of proportionality, the Court should lean in Favor of relevant turnover as opposed to global turnover as the latter would lead to inequitable results. Further, Justice N.V Ramana in his supplementing opinion laid down a 2-prong test for computation of penalty which is to firstly determine relevant turnover, and secondly, to determine the appropriate percentage of penalty based on aggravating and mitigating circumstances. However, such an interpretation can only be considered in cases wherein relevant turnover is determinable. In cases wherein relevant turnover is not ascertainable, the entire test becomes inapplicable solely because the violating enterprise is not directly engaged in that specific business. This circumstance led to a significant loophole in the test and thus the legislature thought that an alternate mode of determination was required to fill the gaps in the law.

In the cases of Hub & Spoke agreements, the Hubs may not have the relevant product or service in their portfolio and thus may be immune from punishment despite forming part of a cartel engaging in acts that are in contravention of the Competition Act. The same problem arises in cases of collusive bidding wherein the enterprises engaging in such activities are not directly engaging in the business of the relevant goods or services.

In order to ensure that all enterprises that are associated with such anti-competitive practices are held accountable for their actions, the concept of global turnover became pertinent. In such cases, wherein relevant turnover cannot be ascertained, global turnover can be used to compute the penalty on the basis of all the products and services that the infringing enterprise is engaged in.

[12] *Nagrik Chetna Manch v Fortified Security Solutions & Ors.* (CCI Order dtd 1.05.2015, Case no. 50 of 2015)
[13] *Excel Crop Care Ltd. v. CCI, (2017) 8 SCC 47*
[14] *Id.*

While the amendment to section 27[15] is ambiguous regarding the application of global turnover, the same was clarified in the Guidelines[16], wherein Guideline 3(6)[17] of Chapter 2 clearly states that global turnover shall be applicable only in such cases wherein relevant turnover is not feasible i.e., a penalty based on global turnover is merely an exception. Furthermore, the guidelines are disproportionate in nature as it is silent on the determination of penalty based on the global turnover when it's not feasible to identify the relevant turnover of any one entity.

Further, Guideline 3(1)[18] clarifies the fact that relevant turnover of up to 30% shall be the primary basis for the computation of penalty and there are express factors laid down for the same in order to ensure proportionate and equitable punishment. However, the same is absent for global turnover. The intricacies and implications of the amendment are discussed further in the article.

CONSTITUTIONALITY OF GLOBAL TURNOVER

In the *Excel Crop Case*, the Supreme Court interpreted turnover u/s 27[19] as 'relevant' turnover. The Court shed light on the doctrine of proportionality under the Art. 14[20] and 21[21] of the Indian Constitution and the 'purposive interpretation' of statutes to arrive at such a conclusion. Through the Amendment Act of 2023 [22] , the Legislature rejected such an interpretation to substitute 'relevant' turnover with 'global' turnover.

Although the move is to achieve a better sense of competition and deterrent behaviour, the amendment roots various issues, as explained below:

1. **Violation of Article 14:** The Doctrine of Proportionality is entrenched with the principles of justness and equity, and states that a punishment must be proportional to an offence. Construing along the same lines, the Court in the *Excel Crop Case*[23] held the 'relevant' turnover to be proportional.

[15] Supra note 4
[16] Supra note 9
[17] The Competition Commission of India (Determination of Monetary Penalty) Guidelines (2024), Chap. II Guideline 3(6)
[18] The Competition Commission of India (Determination of Monetary Penalty) Guidelines (2024), Chap. II Guideline 3(1)
[19] Supra note 4
[20] The Indian Constitution (1950), Art. 14
[21] The Indian Constitution (1950), Art. 21
[22] Supra note 7
[23] Supra note 12

According to the test laid down in *Anwar Ali Sarkar*[24], there is an *intelligible differentia* between relevant and global turnover, the current position of such *differentia* does not provide a rational nexus to the object of the Act. It provides the CCI with a free hand of unbridled power, which is *prima facie* arbitrary in nature.

It must be noted that the Court did not adopt such an interpretation merely because the law was silent on the basis of penalty *i.e.*, the bench also dwelled upon the biased implications and rationality of 'global' turnover which would include a penalty on all goods and services, regardless of the infringement, and without any specified guidelines or indicators.

1.1 *Benchmark of 10%*: According to S. 27 [25], a penalty of not more than 10 percent of the average global income from the past three financial years must be imposed on the organizations that are responsible for infringement.

Since global turnover levies a rather higher sum of penalty, there must be defined conditions to impose such penalty.

For instance, any penalty must be between 1-10%, however, *there must be certain circumstances that identify the basis of levying such a percentage*. It must not solely rest on the CCI's discretion, without any objective criteria. Such an approach is inconsistent and might lead to 'excessive delegation' on CCI.

2. **Article 20** [26] : Furthermore, such an imposition might also stem the issue of '*double jeopardy*' *i.e.*, being punished for the same offence more than once. It is because the Multinational Companies operating across multiple jurisdictions risk facing multiple penalties. It is particularly pertinent given the absence of specific guidelines regarding penalties in India.

Analysis: It must be noted that this amendment was not a part of the Original Bill introduced in the Parliament and thus no discussion, debates or exams were performed by the Committee on Finance prior to any adoption.

[24] *State of W.B. v. Anwar Ali Sarkar*, (1952) 1 SCC 1
[25] Supra note 4
[26] The Indian Constitution (1950), Art. 20

If such a position of law is accepted and enforced without any modifications, the amendment would be nothing short of being discriminatory, disproportional, and *ultra vires* the principles of the Indian Constitution.

EXAMINING THE POSITION ACROSS GLOBAL JURISDICTION

1. **European Union:** The European Commission (EC) is empowered to penalize up to 10% of the global/total turnover of an undertaking. During such a process, it recognizes the EC Guidelines which involves the determination of a basic amount of penalty, and then adjusting the same through aggravating and mitigating factors.
   This two-prong test was stated by *J. N.V. Ramana* in his supplementing opinion in the *Excel Crop Case*[27].
2. **United Kingdom:** Similar to the EU, the UK also relies on the penalty guidelines issued by the *Competition Market Authority* (CMA). It takes into account relevant factors such as a starting amount of 30% of an entity's relevant turnover, duration of infringement, deterring factors, etc. Furthermore, it also considers the *viability of an enterprise* to pay the fine imposed and maintain it as a *going concern*.
3. **Analysis:** The jurisdictions that impose a penalty based on total, or global turnover, rely on certain guidelines issued by the authorized body. It is done by the authorities to legally sanction such high penalties consisting of the principle of proportionality and perpetual business life. Considering the objective of the Act, in addition to providing a deterring mechanism, such an approach is crucial in maintaining a healthy, and unbiased economy of a country.

SUGGESTIONS

I. ***Background***:

(i) Under Chapter II of the guidelines[28] issued by the Legislature, the Commission would first and foremost consider an amount up to 30% of the identifiable average relevant turnover or income as the determination of penalty u/s 27(b)[29] of the Amendment Act[30].

[27] Supra note 12
[28] Supra note 17
[29] The Competition Act (2002), S. 27(b)
[30] Supra note 7

On a harmonious construction of S. 27[31] and the Guidelines[32], in cases where relevant turnover is identifiable, such an approach would be followed and *if not*, the company would be penalised based on the global turnover.

(ii) Furthermore, the guidelines[33] r/w S. 27(b)[34] provides that in case the relevant turnover is not identifiable, the global turnover for such companies shall be computed and the same shouldn't exceed 10%. Such a position of law is problematic.

This is because the 10% benchmark is itself ambiguous. The guidelines only provide for the factors to be considered while computing relevant turnover, but there is no such mention for calculating the global turnover, which is *prima facie* vague, and arbitrary.

II. When Relevant Turnover is Identifiable:

Since the Act *applies to all companies*, the guidelines must recognize a distinction of the starting point (30% benchmark) for computing the penalty u/s 27(b)[35]. Consequently, it must provide for different benchmarks for each type of infringing company *i.e.*, small, medium, and large.

Any other interpretation would be detrimental and arbitrary in its application. Such an approach would reflect '***un-equals being treated equally***', and in clear violation of Art. 14[36].

By analysing the income and commercial viability of such entities, the benchmark must be fixed which would also *maintain the company as a going concern*, and not one that only provides for a deterrent mechanism.

After identifying such a starting point, the global turnover may be introduced by taking into account important factors such as the *nature and duration of the infringement, contribution* in such a process, *market conditions, etc* [37]. These factors may only be illustrative in nature, and other relevant conditions shall be considered.

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[31] Supra note 4
[32] Supra note 16
[33] *Id.*
[34] Supra note 28
[35] *Id.*
[36] Supra note 19
[37] Supra note 12

III. When Relevant Turnover is not Identifiable:

On computing the global turnover for infringing companies:

(i) The guidelines must be amended to include a *set of indicators* or *factors* that would guide the Courts in imposing the penalty. Such an amendment is crucial as a penalty based on global turnover is inherently higher than relevant turnover, and to ensure justness in such imposition, a checklist or list of indicators is non-negotiable. Furthermore, the term '*any other factor which the Commission may deem appropriate*' is highly vague in terms of such determination.

(ii) For the contravention u/s 3[38] and 4 of the Act[39], there is a high possibility that the parties involved in such infringement pay varyingly unequal penalties for the same infringement, *merely because one company's relevant turnover is not identifiable*. *For instance*, there are two companies: A & B, wherein A's net-worth is greater than B, and the former's relevant turnover is identifiable, while the same is not feasible for the latter.

In such a case, A ends up being doubly benefitted both in terms of net-worth, and the penalty based on relevant turnover, as compared to B, which stands disadvantaged in both aspects.

Therefore, in such situations, the identifiable relevant turnover of one company, or companies (whichever is appropriate based on the guidelines issued) must be paid by the infringing companies proportional to their average income for the three preceding financial years.

CONCLUSION

Thus, it can be observed that as per the Guidelines[40], global turnover is strictly considered as an exception and shall only be applicable in such cases wherein relevant turnover is not feasible. Whereas global turnover was required to fill the gaps that are not relevant turnover could not, it is explicitly laid out factors for the safe and smooth application of global turnover to ensure the adjudicating authority does not abuse its power when determining the quantum of punishment.

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38 Supra note 1
39 Supra note 2
40 Supra note 9

The lack of guidelines regarding the application of global turnover may result in future challenges as it leads to the possibility of exorbitant penalties that may be detrimental to the enterprise and hinder it from continuing as a going concern.