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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

FROM "RELEVANT" TO "GLOBAL" TURNOVER: EXAMINING THE BASIS FOR PENALTY UNDER THE COMPETITION (AMENDMENT) ACT, 2023

AUTHORED BY - YASHRAJ SINGH

Introduction

Recently Parliament has introduced the Competition (Amendment) Act, 2023 which aims to amend the Competition Act, 2002. The Amendment Act will bring significant changes in India's anti-trust laws. The Amendment bill was passed in Rajya Sabha on 03.04.2023. The bill received the assent of the President on 11.04.2023.¹ The Amendment introduced several key changes such as the broadening of the definitions of 'enterprise' and 'relevant product market,' and the introduction of penalties based on global turnover. Ministry of Corporate Affairs has notified that on March 6, 2024 Sections 20, 35 and 40 of the Competition (Amendment) Act, 2023 will come into force.²

In the Amendment Act global turnover is taken into consideration for calculation of the penalty. Before the Amendment Act relevant turnover was taken into consideration for calculation of penalty under this Act. This amendment has introduced several new provisions such as settlement and commitment provisions which have enhanced the powers of the Competition Commission of India (CCI). The Act aims to create a comprehensive framework for addressing anti-competitive agreements and this Act also aims to prevent abuse of dominant positions. The article will discuss what is the basis of these amendments and will discuss the implications of these amendments.

¹ “Nishith Desai Associates The Competition (Amendment) Act, 2023” <<https://www.nishithdesai.com/NewsDetails/9599>>

² Taxmann, “MCA Notifies March 6, 2024 as Effective Date for Enforcement of Sections 20, 35 and 40 of Competition (Amendment) Act, 2023” (Taxmann Blog, March 7, 2024) <<https://www.taxmann.com/post/blog/mca-notifies-date-for-enforcement-of-sections-20-35-and-40-of-competition-amendment-act/>>

Principles of Penalty Calculation under Competition Law

The Competition (Amendment) Act, 2023 has changed the method for calculation of penalties. Prior to the Amendment Act, relevant turnover was taken into consideration for the calculation of penalty under this Act. After the Amendment global turnover is taken into consideration for the calculation of the penalty. In this section, we will try to understand the basis for the penalty imposed under this Act:

Global Turnover as the Basis for Penalty Calculation

- The Amendment has introduced significant changes by allowing the Competition Commission of India (CCI) to impose fines based on the global turnover of an entity, compared to the previous method of using relevant turnover. It is to ensure that penalties are appropriate according to the scale of the entity and also appropriate according to the gravity of the offence.
- Before this amendment, penalties imposed under this Act were calculated on the basis of relevant turnover which was the turnover of the entity in India. However, the CCI only had the power to impose fines up to 10% of the ‘relevant turnover’ in cases where the entities abused their dominant position in the market.³

Principle of Proportionality

- Before the Excel Crop case, there was an ambiguity regarding the interpretation of Section 27 of the Competition Act, 2002. CCI used to levy penalties based on the total turnover of the entity. However, In the case of *Excel Crop Care Limited. V/s CCI & Ors.*, 8 SCC 47 (2017)⁴, the central legal question was whether the CCI had the authority to impose penalties based on the “relevant turnover” of the companies rather than their “total turnover.” The Supreme Court ruled that the punishment for anti-competitive practices should be assessed based on the “relevant turnover” of the business, not the total turnover. The penalty calculation should consider the turnover specifically related to the product involved in the cartel, rather than the overall turnover of the companies. The Supreme Court applied the Doctrine of Proportionality,

³ “Concurrences” <<https://awards.concurrences.com/en/awards/2024/business-articles/india-cci-penalties-on-global-turnover-relevant-and-proportionate>>

⁴ Excel Crop Care Limited. V/s CCI & Ors., 8 SCC 47 (2017)

in this case, to ensure that penalties for infringements are reasonable and commensurate with the severity of the offence.

- In the case of *Western Coalfields Limited v. SSV Coal Carriers Private Limited*, 2017 SCC OnLine CCI 45, 14-09-2017⁵, the CCI held that the penalties are aimed to deter anti-competitive practices and ensure fair competition in the market. CCI held that the penalty must correspond to the gravity of the offence. It also held that penalties serve as a corrective measure to prevent future occurrences of such anti-competitive conduct.
- In the case of *S.N. Mukherjee v. Union of India*, (1990) 4 SCC 594⁶, the Supreme Court held that administrative authorities exercising quasi-judicial functions are to record reasons for their decisions, emphasizing transparency and accountability.

The Supreme Court in various cases has consistently upheld that penalties must be proportionate to the crime, aligning with fundamental rights and the principle of proportionality. The Competition (Amendment) Act, 2023, introduces penalties based on worldwide turnover, which may lead to disproportionate penalties and potential contravention of the right to equality before the law. The Amendment Act has to pass the test of the principle of proportionality to be valid.

The reason behind the recent Amendment

- In the case of *Nagrik Chetna Manch v. Fortified Security Solutions*, CCI, Case No. 50 of 2015⁷, the CCI held that cover-bid agreements could not be subjected to the relevant turnover. The CCI reasoned that applying penalties based on relevant turnover would practically lead to no penalties being imposed on the infringing parties, which would defeat the objectives of the Competition Act.
- In the case of *Matrimony.com Limited and Another v. Google LLC and Others*, CCI, Case Nos. 07 and 30 of 2012⁸, the CCI held that for digital or technology-driven enterprises the concept of relevant turnover may not be suitable. In this case, CCI recognized that applying relevant turnover standards in multi-sided markets would undermine the very purpose of the

⁵ *Western Coalfields Limited v. SSV Coal Carriers Private Limited*, 2017 SCC OnLine CCI 45, 14-09-2017

⁶ *S.N. Mukherjee v. Union of India*, (1990) 4 SCC 594

⁷ *Nagrik Chetna Manch v. Fortified Security Solutions*, CCI, Case No. 50 of 2015

⁸ *Matrimony.com Limited and Another v. Google LLC and Others*, CCI, Case Nos. 07 and 30 of 2012

Competition Act, 2002 and expressed the need for another metric to impose penalties in the concerned situations.

- In the case of *XYZ v. Alphabet Inc. and Others, CCI, Case No. 07 of 2020*⁹, the CCI recognized that relevant turnover might not capture the full impact of anticompetitive conduct in platform-based ecosystems. In platform markets, the dynamics are complex, and the value generated extends beyond specific products or services. The CCI imposed a penalty on Google on its global turnover in this case.

Report of the Competition Law Review Committee (CLRC)

The Competition Law Review Committee (CLRC) released its report in July 2019. The report recognized the limitations of the existing system of penalty calculation based solely on relevant turnover. It proposed a more balanced approach by considering the global turnover of the entity as a base for calculating the penalty. The report by CLRC suggested that while calculating turnover, intra-group sales, indirect taxes, trade discounts, and revenue generated outside India should be excluded.¹⁰

The following are the key Insights of this report:

- The committee has recommended increasing the number of members on the CCI and creating more specialized units to focus on specific types of anti-competitive conduct.
- The Committee has recommended that the CCI should be empowered to settle cases through the use of commitment and settlement mechanisms.
- The Committee has recommended changes to the definition of "relevant market" under the Competition Act, to make it more effective in addressing non-horizontal mergers and anti-competitive conduct.

Analyzing the Implications of Global Turnover Penalty

The new method for calculation of penalties under the Competition (Amendment) Act, 2023 based on "global turnover" will bring about significant implications for companies, especially for multinational companies. Here, we will try to understand the potential changes and impact that will

⁹ *XYZ v. Alphabet Inc. and Others, CCI, Case No. 07 of 2020*

¹⁰ "Committee Reports" (PRS Legislative Research) <<https://prsindia.org/policy/report-summaries/report-competition-law-review-committee>>

arise from this Amendment.¹¹¹²

- **Increased Financial Exposure:** Multi-national companies (MNCs) can face heavy fines due to this amendment because now CCI can use global sales for calculating the penalties. This Amendment is made to make sure that penalties are fair and deter the companies from entering into Anti-competition Agreements. It also makes sure that companies do not face an insignificant penalty compared to their global revenue. However, this could potentially reduce the ease of doing business for MNCs and deter them from investing in India.
- **Strategic Adjustments in Legal and Compliance Frameworks:** Companies with a global presence may choose to settle with CCI when accused of unfair practices or unfairly limiting competition to avoid getting hit with heavy fines and will co-operate with CCI to get a lighter punishment. This will reduce the burden of cases on courts. However, there shall be regulations in place to ensure that there is no corruption within CCI and that the company and CCI officials face appropriate punishment if they are involved in corruption.
- **Domestic vs. Global Operations:** The introduced amendment may result in lesser penalties for domestic companies and higher penalties for MNCs for the same breach. This could lead to unfavourable outcomes for multinational corporations resulting in the creation of unfair competition in the market.

The Competition Commission of India (Determination of Monetary Penalty) Guidelines, 2024

The Competition Commission of India issued a notification to assess penalties based on certain principles mentioned in the guidelines on 6th March 2023.¹³The following are the key general principles that have been mentioned in this notification¹⁴:-

¹¹ CBCL, “Implications of CCI’s Power for Imposing Penalties on Global Turnover” (CBCL, June 24, 2023) <<https://cbcl.nliu.ac.in/competition-law/implications-of-ccis-power-for-imposing-penalties-on-global-turnover/>>

¹² “Penalties on Global Turnovers: Implications for Businesses - Azb” (Azb, August 30, 2023) <<https://www.azbpartners.com/bank/penalties-on-global-turnovers-implications-for-businesses/>>

¹³ Chatterjee O, “Determination of Monetary Penalty: Decoding CCI’s Guidelines” (Fox Mandal, March 13, 2024) <<https://www.foxmandal.in/determination-of-monetary-penalty-decoding-ccis-guidelines/>>

¹⁴ Kriti, “CCI (Determination of Monetary Penalty) Guidelines, 2024 | SCC Times” (SCC Times, March 11, 2024) <<https://www.sconline.com/blog/post/2024/03/11/cci-notifies-cci-determination-of-monetary-penalty-guidelines-2024-legal-news/>>

- The gravity of the violation plays an important role in determining the penalty. More severe violations will attract higher penalties. Therefore, penalties will be calculated based on the nature and severity of the violation.
- The length of time an entity or individual was involved in the violation is taken into consideration. Violations that continue for a longer time generally come with higher penalties. Therefore, penalties will also be determined based on the length of time involved.
- The role of the company or individual is also a determining factor. Those who are in a prominent role will face more punishment. Therefore, the penalty will also be determined based on the performance of the entity or individual.
- The extent to which an entity or individual cooperates with the CCI in its investigation may affect the penalty. If the entity co-operates during the investigation, their punishment will be reduced. Therefore, penalties will also be determined based on the extent of cooperation in the investigation.
- In the case of a cartel, the penalty may extend to three times the profit or 10% of the turnover, for each year of the existence of the cartel, whichever is greater.

These principles make sure that penalties are appropriate. They also discourage entities from engaging in anti-competitive practices.

International Perspective

In this section, we will try to understand what methods are used for calculating penalties by the Competition Commission of different countries. We will look at the method employed by European Union (E.U.), and Singapore in calculating penalties. This will give us a better understanding of the Competition (Amendment) Act of 2023: -

European Union:

In the following steps, the European Commission calculates penalties for companies that abuse their dominant position:¹⁵

1. Dominant Position Assessment:

Under the Article 102 of the Treaty on the Functioning of the European Union (TFEU) companies

¹⁵ “Penalties on Global Turnovers: Implications for Businesses - Azb” (Azb, August 30, 2023) <<https://www.azbpartners.com/bank/penalties-on-global-turnovers-implications-for-businesses/>>

that hold a dominant position in a specific market cannot abuse their position. The Commission's first step is to assess whether the company is dominant. This step involves defining the relevant product market and geographic market.¹⁶

2. Investigation and Enforcement:

The Commission will do an investigation as per regulation 1/2003, also known as the Antitrust Regulations to assess whether the entity abused its dominant position. If an infringement is established, the Commission can impose fines.

3. Calculating Fines:

The fine will be calculated based on a certain percentage of the company's annual sales of the infringing product. It can be a maximum of up to 30% of the annual sales of infringing products. This percentage will then be multiplied by the duration of the infringement. Whether the infringement was a repeat offence will also affect the quantum of the fine. However, the European Competition Commission has the power to impose penalties on a company that abuses its dominant position up to 10% of its global annual turnover.

The provision of the Competition (Amendment) Act, 2023 for a maximum penalty of up to 10% of global turnover is inspired by the E.U.'s existing regulations.

Singapore:

In the following steps, the Competition Commission of Singapore (CCS) calculates penalties for companies that abuse their dominant position in the market:¹⁷

1. Dominant Position Assessment:

It is not anti-competitive to be a dominant player in a market if a company maintains dominance through innovation or economies of scale. It is not considered an abuse of dominance. However, when a dominant company tries to protect its dominant position with Anti-competitive conduct, Such conduct may constitute an abuse of dominance and infringe under Section 47 of the Singapore

¹⁶ "Fines" (Competition Policy) <https://competition-policy.ec.europa.eu/index/fines_en>

¹⁷ "Financial Penalty Framework | CCCS" (CCCS) <<https://www.ccs.gov.sg/legislation/competition-act/financial-penalty-framework>>

Competition Act, 2004.

2. Calculating Fines:

The CCS employs the ‘hypothetical monopolist test’ to define the relevant market. The penalty imposed by CCS can go up to 10% of the turnover of the business of the undertaking in Singapore for every year of infringement. The penalty imposed by CCS can be for a maximum of three years. CCS takes into consideration various factors while determining the suitable penalty, including the severity and duration of the infringement, the infringing party's turnover, and any other aggravating circumstances.

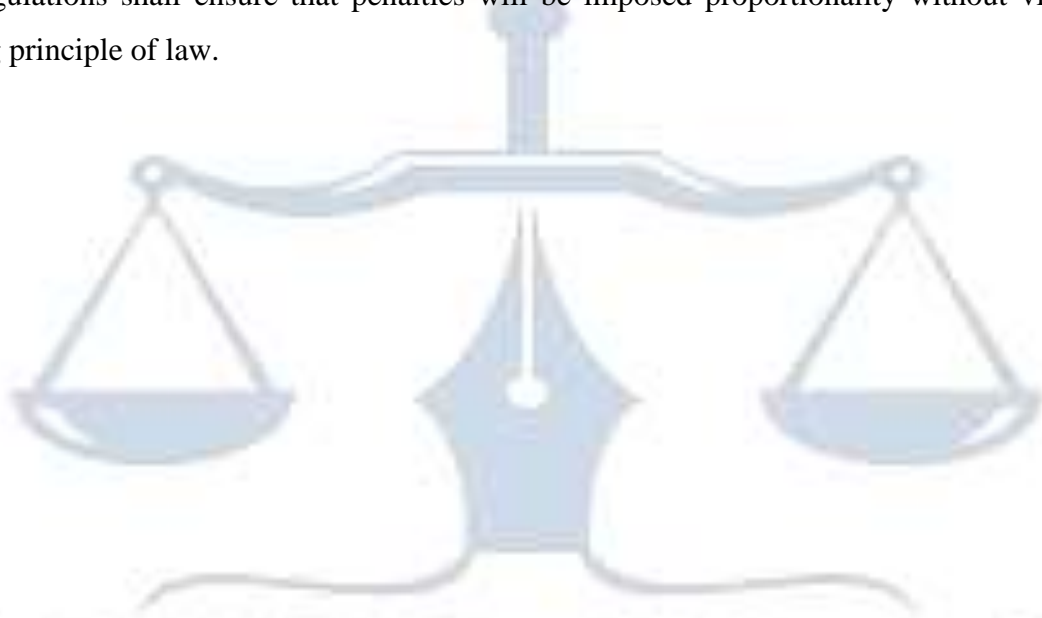
Insights from European Union and Singapore Models

From the analysis of the competition laws of Singapore and the European Union, we can take the following insights and implement them in the Indian competition laws. They are the following:

- Both Singapore and the European Union have a transparent method that provides a step-by-step method on how the penalty is to be calculated. India should implement similar regulations to make sure that penalties are not levied arbitrarily. If we look into section 27 of the Competition Act, 2002 it provides that the maximum penalty imposed by CCI cannot exceed 10% of the global turnover from all the products and services by the entity. However, it does not provide a method for the calculation of the penalty.
- The competition laws of the European Union start calculating the fine on a certain percentage of annual sales of ‘Infringing products’. However, the provisions of the Competition Act, 2002 do not mention whether the penalty will be calculated on the turnover of all the products of the entity or only on the infringing products of the entity. If it is not clarified the Competition Act, 2002 will provide an arbitrary power to the CCI to impose penalties on its accord.
- India should also adopt the ‘hypothetical monopolist test’ to determine the relevant market. It will ensure consistency and transparency in identifying the affected relevant market. This will ensure that penalties can be imposed proportionality without violating the existing principle of law.

Conclusion

In conclusion, the Competition (Amendment) Act, 2023 has introduced penalties based on global reforms rather than relevant turnover, aimed at ensuring that the penalties are appropriate with the size of the entity and the seriousness of the offence. However, the amendment has to pass the test of the principle of proportionality otherwise it will contravene the right to equality before the law. The amendments could lead to an increased risk of financial loss for MNCs. The Competition Commission of India has issued guidelines on how penalties are to be assessed depending on the seriousness of the breach, the duration, the role of the organization and the extent of investigative cooperation. However, CCI regulations shall ensure that penalties will be imposed proportionality without violating the existing principle of law.



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