# Section B

# Articles

## SC on Penalty of Violations of Competition Law

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*For quite some time there has been quite an intense speculation as to which way the decision of Hon'ble Supreme Court, on the issue of the basis of imposition of penalty in matters of competition law violations, would come. This was on account of the matter having been heard by Hon'ble Supreme Court on the issue some time back and the order awaited. Ever since Competition Appellate Tribunal(COMPAT) ruled that the penalty to be imposed in cases of violations of competition law has to be based only that component of turnover which is involved in that particular competition law violation, such as bid-rigging or anticompetitive agreement, on the basis of facts and circumstances of the case and not necessarily on the total turn over of the enterprise as could be interpreted on a plain reading of the Act, and the Appeal having been filed by the Commission against the order, this was a long awaited decision.*

*The author, as some one who had been an insider and has been in the thick of things when the matters relating to imposition of penalty on the very first cases of competition law violations were being considered, inside the Commission, and who was fortunate enough to have seen the functioning of all the divisions of the Commission from a very vantage point, shares his take on the issue.*

May 8, 2017 shall remain an extremely important date in the history of evolution of competition law jurisprudence in India. With the single stroke of the proverbial mighty pen, Hon'ble Supreme Court has given a soothing touch not only to the Excel Crop Care Limited ("Excel Crop Care") the company whose case it was hearing in an appeal filed by the Competition Commission of India

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("Commission" or "CCI") against the order of the Competition Appellate Tribunal ("COMPAT") but a whole lot of similarly placed enterprises who had suffered penalty at the hands of the Commission for some alleged anticompetitive practices resulting in violations of competition law. While delivering its judgement in Civil Appeal No. 2480 of 2014, in the case of *Excel Crop Care Limited* v. *Competition Commission of India & Anrs*., Hon'ble Supreme Court of India (SC), from a bench consisting of Justice A.K. Sikri and Justice N.V. Ramanna gave a judgement which is historic in many respects. Along with this Civil Appeal No. 2480 of 2014were included Civil Appeal Nos. 53-55 of 2014, Civil Appeal No. 2874 of 2014 as well as Civil Appeal No. 2922 of 2014. All these appeals arose out of a common order, dated 29.10.2013, passed by the COMPAT.

Before delving into various aspects of this judgement of Hon'ble Supreme Court, it may be worthwhile to recall history a bit briefly. It may be recalled that Competition Commission of India (CCI) was given partial powers to enforce competition law on May 20, 2009.The first information of violation of competition law landed before the CCI almost in the same month. Following this, the first investigation report by the then Director General (DG) was submitted in September 2009. Despite a very clear report of the DG submitted to the Commission in which the DG found United Producers and Distributors Forum (UPDF), a loose outfit representing the interests of the grouping of film producers and distributors, to have been indulging in an open anticompetitive conduct by way of arm twisting FICCI Multiplex Association into agreeing for slightly higher profit sharing ratio in favour of the film producers and distributors. The stand off between two sides was quite widely covered in media at that time. During this time, the multiplex screens were denied new release good films which were only being provided to single screen theatres.

It may be recalled that the information submitted by FICCI Multiplex Association before CCI was a result of an ongoing agitation between FICCI Multiplex Association on one hand and the producers and distributors of Hindi films on the other. Earlier, a particular ratio of revenue sharing was existing between the producers and distributors and the multiplex theatre owners. There was an agitation from the side of film fraternity consisting of film producers and distributors who felt that the revenue sharing ratios were lopsided and were not in their favour and more tilted towards the multiplex owners. This being so, the producers and distributors started an agitation in which they boycotted the multiplex theatres and did not supply film prints to the multiplex theatres leading to a considerable slow down in the film exhibition in multiplex cinemas. It was in this context that, after a long agitation, there was a flurry of activity resulting in substantial amount of goings on behind the scene and talk of solidarity among films producers and distributors culminating in a meeting in one of the five star hotels in Mumbai where, under a collective umbrella and showing multiplex owners that there is the unity in the film fraternity because of which the boycott against the multiplex owners has been sustained for quite sometime, an agreement was arrived at under the aegis of United Producers and Distributors Forum (UPDF) and a revised revenue sharing ratio, more favourable to film fraternity, was put in place and which was honoured by all the parties involved. After having arrived at this agreement, the boycott of the multiplex owners going on, prior to the existence of the agreement, at the behest of UPDF, was called off.

It was during the course of this agitation and boycott that the information was filed before the CCI which was titled as case

no. 1 of 2009 or case no. 01/2009. This case was investigated in record time, speed and, in the second week of September 2009, the investigation report was submitted to the Commission by DG. However, despite submission of a clear investigation report which included not only the documentary evidence of the meetings and acting in concert for arriving at a favourable revenue sharing ratio but also the video evidence in the form of meeting being conducted was also submitted along with the investigation report. It was indeed almost a foolproof case as far as the standards of the investigation are concerned and the parties charged for anti-competitive conduct hardly had any scope to escape. However, despite the report having been submitted as early as September 2009, the Commission could not come out with any positive order till as late as May 20, 2011. Surprisingly, widely believed first order of the Commission on anti-competitive conduct, on 23.06.2011, imposing penalty of Rs. 55.5 Crores on the National Stock Exchanges or the other order on August 12, 2011, imposing a penalty of Rs. 630 Crores on DLF were not the first orders of the Commission. The first order imposing penalty for anti-competitive conduct was none of these two but an order penalising the UPDF, its members involved in collusion, and its office bearers in case no. 1 of 2009 on 20.05.2011.

Inter-alia, the reason the first few cases were delayed and the penalty orders were not announced earlier was because the Commission was deliberating whether to pass an order imposing penalty or not in absence of monetary penalty levying guidelines needed for the purpose. This issue was taken up inside the Commission and the task of preparing internal guidelines for imposing penalty was assigned. However, after study of more than forty jurisdictions, it was found out that with the only exception of one country, in a relatively newer juridiction, all other mature jurisdictions starting enforcing competition law without having any penalty imposing guidelines in place. It was only after getting enough experience- some times decades or more - in the matter of enforcement that the different guidelines emerged and the process was codified in these jurisdictions. Not only was this study done at the behest of the Commission but draft guidelines for imposition of monetary penalties on erring enterprises were also prepared and submitted to the Commission. As it turned out, after having seen the presentation on the subject, comparing so many jurisdictions, the Commission agreed with the practice followed by other mature jurisdictions to carry on its tasks without having any formal guidelines for imposition of monetary penalties.

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During the course of this presentation, the Commission was also informed that a penalty order in South Africa was challenged and the court held that, in absence of any guidelines for imposing monetary penalties on erring enterprises, the least competition agency could do was to pass a detailed speaking order in which the basis of imposing a particular penalty has been made absolutely clear. In view of this status and the presentation, the

Commission decided that framing of guidelines, at this stage of enforcement of competition law in the country, could be premature and, therefore, the basis of imposition of penalty would always be detailed in the penalty imposing order in a speaking manner till such time the Commission has considered it appropriate to draft guidelines for imposition of monetary penalties and placed them in public domain after gaining sufficient experience in enforcement. Recapitulation of this past progression becomes appropriate to have a sense of the background of the matter and understand many subsequent developments which are quite important. So, it is not true that the Commission was sleeping over and did not frame guidelines but that fact is Commission is well aware of their importance but was waiting for the right time.

When this matter was earlier being heard before COMPAT, it is understood that COMPAT wanted to know the status of the guidelines for imposing monetary penalties. It is gathered that the COMPAT was informed that the guidelines for imposing penalties were not in existence. It will remain a speculation only as to what would have been the approach of COMPAT if these guidelines were in existence at the time of query but may be a different outcome have been arrived at if the internal efforts of preparing guidelines and then not using them on purpose was known and shared with the COMPAT ? It goes without saying that the basic necessity of passing speaking orders on the part of the Commission, giving the basis of imposing penalty, cannot be done away with. If the penalty orders are really detailed and speaking orders, even in the absence of guidelines for imposing monetary penalties, the reader can exactly know why a penalty of a particular figure had been imposed in that particular case. It is really difficult to comment on the orders being passed by the Commission and whether they are speaking orders or not as far the imposition of monetary penalty on enterprises is concerned because that precisely is the job of the higher appellate bodies and they deal with this as and when the time comes.

Thus in the order of the COMPAT, one of the aspects which, perhaps, could have had a hand in the final outcome is likely to be the absence of the monetary penalty levying guidelines and the amount of penalty on one of the enterprises being three times its total turnover in the product of Aluminium Phosphate. The turnover of Aluminium Phosphate business of this particular enterprise was nearly Rs. 77 crores whereas the penalty imposed on this enterprise turned out to be Rs.225 crores. This really attracted the attention of Hon'ble COMPAT and it was held that the penalty imposed on the enterprise cannot be so excessive. The COMPAT, in its wisdom, came with the concept of relevant market consisting of relevant geographical and relevant product market. COMPAT ruled that the penalty imposable on the enterprise should be on the basis of the relevant turnover which was explained by COMPAT to be affected turnover. This affected turnover relating to that part of the business in which anti competitive conduct was reported was the subject matter of discussion in the aforementioned judgement of Hon'ble Supreme Court dated May 8, 2017.

Hon'ble Supreme Court, while going into the issue, did briefly comment on the history of the case in which a letter written by the Food Corporation of India (FCI) to the CCI complaining of a perceived anti-competitive agreement arrived at between Ms/ Excel Corp Care Limited, M/s United Phosphorous Limited, M/s. Sandhya Organic Chemical Limited and Agro Synth Chemical Limited. This letter also gave particulars of how all the four enterprises, believed to be in agreement with each other, followed the same figures in the bids submitted against the tenders floated by FCI in

which every year the price of all the four apparent competitors would be identical or nearly identical. Having taken cognizance of this particular letter, for forming a *prima facie* opinion that a case exists under competition law, the Commission directed the DG to carry out an investigation. After having carried out the investigation, the DG submitted his investigation report on October 14, 2011 giving his *prima facie* findings in which the allegations of FCI were confirmed and were held to be violative operative of Section 3(3) of the Competition Act, 2002 ('the Act').

After having received the report of DG, CCI went into its own examination into the issue. After having gone through into the entire appeal and arguments of both the parties on the both types, Hon'ble Supreme Court decided to adjudicate in this appeal. The issues distilled for consideration are being given here under:

*(i) Whether the dispute regarding violation of Section 3 of the Act by the appellants could not be gone into in respect of tender of March, 2009, as Section 3 was operationalised only by notification dated 20th May, 2009?*

*(ii) Whether CCI was barred from investigating the matter pertaining to the tender floated by FCI in March, 2011 because of the reason that FCI in its complaint dated 4th February, 2011 given to the CCI had not complained about this tender?*

*(iii) Whether, on the facts of the case, conclusion of CCI that the appellants had entered into an agreement/arrangement and pursuant thereto indulged in collusive bidding by forming a cartel, resulting into contravention of Section 3(3)(a), 3(3)(b) and 3(3)(d) read with Section 3(1) of the Act, is justified?*

*(iv) Whether penalty under Section 27(b) of the Act has to be on total/entire turnover of the offending company or it can be only on "relevant turnover", i.e., relating to the product in question?*

Out of the above issues outlined by Hon'ble Supreme Court, it did hold that not only the CCI had jurisdiction in this matter but there is no dispute about the Appellant having entered into the anti-competitive agreement to ensure getting bids at a higher price. Thus, out of the four issues, the first two related only regarding jurisdiction. On this, Hon'ble Supreme Court, relying on their judgements of Kingfisher and continued conduct, held that CCI indeed have jurisdiction that third issue being whether there was an anti-competitive agreement or not was also not interfered with by Hon'ble Supreme Court of India.

*Hon'ble Supreme Court did take notice on the fact of the maximum penalty imposable on the competition law violation is 10% of the turnover which is prescribed maximum penalty under Section 27(b) of the Act, there being no provision for minimum penalty*

The issue of a huge material significance was the one which already stood decided by COMPAT. This was the issue which was going to affect not only this matter but all subsequent matters. This was issue no. four and that related to whether COMPAT was right in imposing penalty under Section 27(b) of the Act to be on the turnover relating to product in question, called 'relevant turnover' by COMPAT or it should have been the whole turnover of the enterprise involved ? In this write up, we are concerned about this fourth issue and nothing else.

This issue no. 4 has been dealt with by Hon'ble Supreme Court in page 54 onwards of the order. Hon'ble Supreme Court did take notice on the fact of the maximum penalty imposable on the

competition law violation is 10% of the turnover which is prescribed maximum penalty under Section 27(b) of the Act, there being no provision for minimum penalty. Apparently, though Hon'ble Supreme Court has not gone into it but not mentioned, the minimum penalty would be zero. The imposition of 9% of penalty on total turnover came in for examination of Hon'ble Supreme Court. Hon'ble Supreme Court did agree that going by the language of the Act there is no reason for us to infer anything else. However, they also held that this question essentially relates to the interpretation of statue more than anything else and, in especially in view of the fact that in one of the instances, the total penalty imposed was nearly three times the affected turnover in which the allegation of anti-competitive conducts were made by FCI. This action was also not in consonance with the principles of proportionality.

No doubt, the arguments made on behalf of the CCI did include that the penalty was to be an example of deterrent penal consequences for hard core cartel behaviour which is deprecated by various world multilateral bodies. Hon'ble Supreme Court also took note of the fact that various jurisdictions have not limited this need of turnover to affected turnover or relevant turnover. The fact that wherever the statue wanted to use the word 'relevant' purposefully and the fact but relevant has not been used before turnover either anywhere else or from the purpose of imposition of penalty under Section 27(b) of the Act. It was claimed on behalf of CCI that it will be wrong to infer and introduce a word 'relevant' before the turnover only for the imposition of penalty. Hon'ble Supreme Court also relied on the guidelines for imposing penalty on European Union or other jurisdictions.

Taking note of the argument on being a deterrent effect, the Hon'ble Supreme Court also took a similar position which has been the basis of EU guidelines for imposition of monetary penalties on enterprises and observed as under:

> *"No doubt, the aim of the penal provision is also to ensure that it acts as deterrent for others. At the same time, such a position cannot be countenanced which would deviate from 'teaching a lesson' to the violators and lead to the 'death of the entity' itself."*

After starting from a basic figure of penalty, in different cases, the EU Guidelines for Imposition of Monetary Penalty add or reduce the final penalty figure on the basis of different factors. 'capacity to pay' is one of such prominent factors in determination of penalty. From the above observations, it is quite obvious that Hon'ble Supreme Court also, in a way, did not disapprove of imposition of penalty on total turnover but it also did not approve of imposition of penalty which may wipe out the enterprise itself. Thus, it can be seen that this is a kind of convergence between the practice of imposing penalty for violations of competition law in India and EU.

Irrespective to what step is taken by the CCI and whether it decides to go in for review of the order or some other action, the fact is that, as of now, the concept of 'capacity to pay' has been incorporated in the competition law jurisprudence in the country for imposition of penalties. It may be mentioned that Justice N.V. Ramnna, while agreeing with the judgement, passed a separate note in which he has suggested a two step calculations to be followed while imposing penalties under Section 27 of the Act. As step one, Justice Ramnna has pointed out, the Commission should identify the entity's turnover pertaining to the products and services that have been affected by any contravention. For this audited financial statements or, if they are not available, any other reliable records reflecting the relevant turnover or its estimates of the entity should be looked into. The step two of

determination of penalty has been held by Justice Ramnaa to be consideration of an appropriate percentage after taking into consideration nature, gravity, extent of contravention, role played by the infringer (ring leader or follower) etc, the duration of participation, intensity of participation, loss or damage suffer as a result of such contravention, market circumstances in which the contravention took place, nature of product, market share of the entity, barriers to enter in the market, nature of involvement of a company, *bona fides* of the company, profits derived from the contravention etc. Thus, like the guidelines for imposition of penalty of EU, mitigating and aggravating factors have to be considered as step two. Thus, the determination of penalty in case of India appears to have become slightly more legal with the ceiling being the affected turnover and not total turnover. No doubt, in case of the other jurisdiction also such as EU, the actual penalties imposed as starting point is the complete turnover but it is considerably toned downed with various factors in which 'capacity to pay' is also one of the factors but nonetheless the static point remains the complete turnover of the enterprise. To this extent, the regime in India which is emerging appears to be becoming more moderate. Interestingly, in an order passed by the Commission imposing penalty of Rs. 87 Crores on Hyundai motors, in the second week of June, 2017, the concept of Relevant Turnover, has been used by the Commission itself making that the very first case wherein this concept has been followed by Commission itself.