
TURNOVER TSUNAMI: WHY GLOBAL TURNOVER PENALTIES SINK COMPETITION, NOT ANTITRUST

Aadithya J Nair & Ram Sreekumar, National University of Advanced Legal Studies, Kochi

ABSTRACT

This paper conducts an analysis of the recent amendment that has been incorporated into the competition act that allows for global turnover to be considered instead of relevant turnover for computing penalties. This paper reveals through doctrines, case study and an example as to why such a measure would do more harm than good and instead suggests reintroducing relevant turnover with an additional aspect.

Keywords: Competition Law, Doctrine of Proportionality, Relevant & Global Turnover, Vertical Integration.

INTRODUCTION

India has one of the largest and most competitive markets in the world, with a retail market estimated at 1.2 Trillion dollars¹, it becomes necessary to regulate competition and prevent anti-competitive practices.

As a result, the Competition Act of 2002 has been a staple in regulating competition in India,² and the latest amendment, through the Competition (Amendment) Act of 2023,³ seeks to discourage further anti-competitive practices by cartels. The amendment improved various aspects of Competition Law in India, including new deal value thresholds, three-year limitation periods for entertaining information, etc. It is undoubtedly true that offenders who breach the contract must be penalized, but when does a penalty become inequitable? One of the minor changes that caused a major ripple was the change in the calculation of the penalty imposed on people or enterprises who violated the provisions of the Act. Prior to the amendment; as per Section 27(b), the turnover for the past three financial years was used as the basis for calculating the penalty amount imposed by the Competition Commission of India.⁴ However, in the new amendment, an explanation was inserted through Section 20, which clarified that the penalty imposed should be calculated based on “global turnover”.⁵

This clarification is critical to how penalties are to be calculated as relevant turnover uses the turnover from the product or service in issue. In contrast, global turnover uses the turnover for all products and services across the world. However, why can such a change be problematic?

RELEVANT VS. GLOBAL TURNOVER

As per the definition under the Competition Act, “turnover” is an inclusive definition that includes the value of the sale of goods or services.⁶ It does not define “relevant” or “global” turnover, and as a result, the Commission has been strictly interpreting the content of Section 27(b) and, therefore, used “relevant” turnover as the means for calculating the penalty amount. The Act allows for penalties up to 10% of the turnover amount for the past three years. The Competition Commission in *In Re: Western Coalfield Ltd. vs. SSV Coal Carriers Pvt. Ltd.* laid

¹ A. Minhas, Retail in India - Statistics & Facts, STATISTA, (Dec. 19, 2023), <https://www.statista.com/topics/8208/retail-in-india/#topicOverview>.

² The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

³ The Competition (Amendment) Act, 2023, No. 9, Acts of Parliament, 2023 (India).

⁴ §27, The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

⁵ §20, The Competition (Amendment) Act, 2023, No. 9, Acts of Parliament, 2023 (India).

⁶ §2, The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

out two important reasons why the penalty should be imposed.⁷ Firstly, to highlight seriousness of the infringement, and secondly, to use penalties as a deterrent. However, when the basis of calculation changes from relevant to global turnover, justice can quickly become unjust - the fine will become punitive in nature. In *Belaire Owners' Association vs Dlf Ltd. & Ors.*,⁸ the Commission passed an order which fined DLF Ltd. an amount equating to 630 Cr. rupees for their abuse of dominant position - this was upheld by the Supreme Court in 2014, but the basis of the penalty was seven per cent of the average turnover for the past three years, in India. When it comes to penalties calculated based on global turnover, the Supreme Court, in the landmark judgement of *Excel Crop Care Ltd. vs. Competition Commission of India*, ruled that the basis of the penalty must only be done on relevant turnover, not on the total turnover, citing the doctrine of proportionality and purposive interpretation.⁹ In this case, the offender engaged in collusive bidding in the aluminium phosphode tablet insecticide market. The Food Corporation of India raised a complaint stating that Excel Crop Care Ltd. and three other businesses had quoted the same price in tenders for several years, thus being accused of cartel-like behaviour. The Supreme Court ruled that while the company did engage in anti-competitive practices, the method of calculation of penalty was disproportionate and inequitable – as it was made on the basis of “total turnover”, which drastically alters the quantum of punishment. The Court ruled that when interpreting the statute, a strict interpretation is to be taken, and the doctrine of proportionality is to be applied.

DOCTRINE OF PROPORTIONALITY

With regard to the Doctrine of Proportionality, if such unreasonable penalties are imposed, then a company's financial assets stand jeopardized. The question of whether it would be fair to charge a person such a hefty fine that causes a strict burden on the offender, on the basis of infringement must be answered; and to do so, it becomes necessary to look into relevant judgements that the Supreme Court passed. In *Modern Dental College & Research Centre vs. State of Madhya Pradesh*¹⁰, a three-pronged test was developed on the basis of its Canadian counterpart, *R. vs. Oakes*¹¹. These precedents establish that measures adopted must be rationally connected to the objective of the action, should not impair the right it seeks to enforce, and the measures taken to carry out those rights must be proportional to the objective

⁷ *In Re: Western Coalfield Ltd. vs. SSV Coal Carriers Pvt. Ltd.*, 2017 SCC OnLine CCI 45 (India).

⁸ *Belaire Owners' Association vs. Dlf Ltd.*, 2011 CompLR 0239 (CCI) (India).

⁹ *Excel Crop Care Ltd. v. CCI*, (2017) 8 S.C.C. 47 (India).

¹⁰ *Modern Dental College and Research Centre vs. State of Madhya Pradesh*, (2016) 7 S.C.C. 353 (India)

¹¹ *R. vs. Oakes*, (1986) 1 S.C.R. 103 (Canada).

sought. A similar view was taken in cases¹² such as *Justice K. S. Puttuswamy & Anr. vs. Union of India*¹³ as well as *Association for Democratic Reforms & Anr. vs. Union of India & Ors*¹⁴. It is the right of any person to conduct trade under Article 19(g),¹⁵ and the Right to Livelihood maybe derived from the right to life under Article 21,¹⁶ therefore, any attempt to penalize business interests needs to be reasonable and non-cumbersome, to the penalized, and must stick within the legal ambit of the legitimate goal sought to be achieved. With this regard, the decision in Excel Crop Care case is relevant in preventing disproportionate penalties, and the 2023 Amendment would simply uproot the principles established in that case. It can also be argued that it contradicts the preamble of the Act, which states that the objective of the act is to ensure freedom of trade¹⁸, but such drastic penalties would only serve to hinder multinational corporations from investing in a country like India.

COMPARING THE INDIAN OUTLOOK TO THE REST OF THE WORLD

When comparing the Amendment Act to its global counterparts, we can find that there is a severe lack of adjustment for aggravating and mitigating factors. The European Union and the United Kingdom both have guidelines when determining the extent of the liability of the offender. The European Commission Guidelines (ECG) in the EU and Penalty Guidance issued by the Competition Market Authority (CMA) in the UK adjust for aggravating and mitigating factors after calculating the amount.¹⁹ Further, the CMA adjusts specific deterrence and proportionality to ensure that the punishment imposed is unreasonable. A similar view was taken in the case of *Southern Pipeline Contractors and Another vs. Competition Commission of South Africa*,²⁰ where the Court ruled that aggravating and mitigating factors must be considered, and there is no need to punish a cartel member with the same ferocity as a cartel leader for an infringement, as such, the Theory of Deep Pockets comes to relevance. The Deep Pocket Theory states that the offender with the most wealth or “deepest pockets” is the one on

¹² Gauri Kashyap, Proportionality: Tried and Tested, SUPREME COURT OBSERVER, (Feb. 19, 2024), <https://www.scobserver.in/journal/proportionality-tried-and-tested/>.

¹³ Justice K.S. Puttaswamy vs. Union of India (UOI) (2019) 1 S.C.C. 1 (India).

¹⁴ Association for Democratic Reforms vs. Union of India (2024) I.N.S.C. 113 (India).

¹⁵ INDIA CONST. Art. 19, cl.(g).

¹⁶ INDIA CONST. Art. 21.

¹⁷ Olga Tellis vs. Bombay Municipal Corporation, (1986) A.I.R. 180 (India).

¹⁸ B. S. Chauhan, Indian Competition Law: Global Context, 54 JSTOR 315, 318-320 (2012). https://www.jstor.org/stable/pdf/44782475.pdf?refreqid=fastly-default%3A037266f29b1570d5c74ac8d9789f69a4&ab_segments=&origin=&initiator=&acceptTC=1

¹⁹ Naman Aggarwal, Examining the Correct Basis of Penalty Relevancy of ‘Relevant Turnover’ After Competition Amendment Act, 2023, CCLE, (2023), <https://www.icle.in/resource/examining-the-correct-basis-of-penalty-relevancy-of-relevant-turnover-after-competition-amendment-act-2023/>.

²⁰ Southern Pipeline Contractors vs. Competition Commission, (2011) 105/CAC/Dec10 (South Africa).

whom liability is fixed. It has its roots in torts and environment law, initially propounded in India through *M. C. Mehta vs. Union of India*.²¹ However, it is well established that the deep pocket theory now stands under a shadow of doubt, as seen in *Charan Lal Sahu vs. Union of India*.²² As the principle is one of decline, why must companies be liable to pay exemplary fines on the basis of declining principles?

DETRIMENTS OF GLOBAL TURNOVER – A CASE STUDY

An essential case that discusses the detriments of global turnover-based penalty is *L.H Hiranandani Hospital vs Competition Commission of India*.²³

In the case, the facts were such that the appellant in question, i.e. L.H Hiranandani Hospital was a multi-specialty hospital chain. Due to handling pregnancies, the hospital had a supply of umbilical cords and entered into an agreement with Life Cell International Private Limited, a stem bank facility, for the same.²⁴ After two years, the hospital entered into a different agreement with Cryobank. Mrs Manju Jain had entered into an umbilical cord service agreement with Life Cell but didn't disclose this agreement to the appellant. Hence, the appellant was unable to abide by her agreement owing to its exclusive agreement with Cryobank; subsequently, a complaint was filed.²⁵

The Competition Commission of India found the appellant guilty and, based on applying the global turnover principle, charged the appellant with a penalty of 3.81 crores.²⁶ On appeal to the Competition Appellate Tribunal (COMPAT), the nature of turnover utilized for penalization was considered.

The tribunal didn't find any anti-competitive practice pursued as the agreement between the appellant and Cryobank²⁷ didn't affect the public at large or wasn't controlling the market at

²¹ *M.C. Mehta vs Union Of India*, (1986) 1987 A.I.R. 1086.

²² *Charan Lal Sahu vs. Union of India* (1989), 1990 A.I.R. 1480.

²³ *Dr. L.H Hiranandani Hospital vs. CCI* (2015), Appeal No. 19/2014 (India).

²⁴ Aman Malik, CCI holds Hiranandani Hospital guilty of monopoly abuse, *LIVEMINT*, (Feb. 20, 2014, 09:47 PM) <https://www.livemint.com/Companies/pPWgTeoRAfYH51ET1A6LJP/CCI-holds-Hiranandani-Hospital-guilty-of-monopoly-abuse.html>

²⁵ Ayushi Chaudhary, *Hiranandani Hospital V. Competition Commission Of India & Ors.*, (Appeal No. 19/2014) *Compat Order*, *COMPETITIONLAWOBSERVER*, (Aug. 20, 2016) <https://competitionlawobserver.wordpress.com/2016/08/20/hiranandani-hospital-v-comeptition-commission-of-india-ors-appeal-no-192014-compact-order/>

²⁶ *Supra* note 25.

²⁷ D. Daniel Sokol & Ruchit Patel, *Lessons from COMPAT's judgement in Hiranandani*, *KLUWER COMPETITION LAW BLOG* (Feb. 5, 2016) <https://competitionlawblog.kluwercompetitionlaw.com/2016/02/05/lessons-from-compats-judgment-in-hiranandani/>

large. The most important part of the tribunal decision was the criticism of the way in which the Competition Commission handled the penalty provision.

The Court discussed the *Excel Crop Care Ltd vs. Competition Commission* and the South African case of *Southern Pipeline Contractors and Another vs. Competition Commission*, and held in the most-clearer terms that penalization cannot be based on total turnover and has to be specifically focused on the sources connected to the infringement.²⁸ The tribunal assessed the scope of the hospital services itself to hold that, entirety of the hospital most of which has no relation or connection to either the third party or the alleged infringement of the competition law cannot be charged under the penalty and only that part of the hospital chain that directly interacted with the third party alone can be held responsible.

This was a crucial observation of the tribunal that not only highlighted the jurisprudence of previous cases but also raised valid and rational points as to why penalizing components or sales of a company that have no direct relation to infringement is wrong and unfair to the cause of a company. The tribunal also chided the Commission for overlooking crucial aspects and arbitrability, penalizing the entirety of the company's sales.

IMPLICATIONS OF GLOBAL VS RELEVANT TURNOVER

The Supreme Court in the case of *Coal India Limited and Ors. Vs. Competition Commission of India and Ors*²⁹ recognized that free and fair competition drives fierce economic growth forward. While the market players need to be regulated and penalized for anti-competitive practices, the same doesn't mean such harsh penalties that dissuade companies from even investing in the market are imposed.

To give an example, the total revenue of Reliance Group in the last three financial years comes up to Rs. 20,44,729 crore rupees.³⁰ Now in case Reliance Jio Financial Services Ltd, a subsidiary the company committed competition law infringement. If the global turnover concept was to be applied, the penalty for 10 per cent would amount 2,04,473 crores rupees. On the other hand, Reliance Jio Financial Services Limited, a subsidiary company had a total

²⁸ *Supra* note 27.

²⁹ Coal India Limited. vs. Competition Commission of India, (2023) Civil Appeal No. 2845/2017.

³⁰ Reliance Industries Ltd., Profit & Loss Account of Reliance Industries (in Rs. Cr.), (MONEYCONTROL, 2023). <https://www.moneycontrol.com/financials/relianceindustries/profit-lossVI/RI>

revenue amounting to 539.91 crore rupees in the last three financial years³¹. So, in case relevant turnover was to be considered, the penalty for 10 per cent would amount to 54 crores rupees.

In such a case, the difference in the percentage of the penalty is nearly 200 percent. Such a harsh penalty regime will kill any chance for prospective investment, especially for multi-product foreign companies, rendering India incompatible with doing business. Product diversification and incentive to invest depend on the sustainability of the market environment that a country provides.³² The harsh penalty regime under the scope of global turnover will be a massive impediment for future investment.

VERTICAL INTEGRATION - THE ANTIDOTE

Another very interesting observation of the tribunal in the case of *L.H Hiranandani Hospital vs Competition Commission of India*, was its discussion of the concept of vertical integration while assessing the production value the hospital contributed in the exclusive agreement with the stem bank cell. The Court referenced that vertical integration or the ability of a firm to control various sectors of its production and supply chain is crucial in determining liability.³³ The tribunal emphasized that such vertical integration necessarily required a specific reference point, which would be the final consumable product into which a company integrates its market channels.³⁴

Vertical integration, as mandated by the tribunal, was pivotal in defining the specific sources directly implicated in infringement, thus expanding the scope of relevant turnover for penalty determination. Every aspect of a firm that has been vertically integrated into the production chain that finally produces the product that has been the scope of contention with respect to anti-competitive practices can be systematically included in calculating the relevant turnover cost to reach a much more balanced and transparent approach to penalization than putting the entirety of the company's sales which was vague and unfair.

³¹ Profit & Loss Account Of Jio Financial Services (in Rs. Cr.), (MONEYCONTROL, 2023). <https://www.moneycontrol.com/financials/jiofinancialservices/profit-lossVI/JFS>

³² Michael A. Hitt et. al., International Diversification: Effects on Innovation and Firm Performance in Product-Diversified Firms, 40 JSTOR 767, 768-772 (2023). https://www.jstor.org/stable/pdf/256948.pdf?refreqid=fastly-default%3Ad1fd288f1f48ff44b23c0ceceaa78a85&ab_segments=&origin=&initiator=&acceptTC=1

³³ Michael H. Riordan, Competitive Effects of Vertical Integration, (COLUMBIA UNIVERSITY DEPARTMENT OF ECONOMICS DISCUSSION PAPER SERIES, 2005), 5-8.

³⁴ Herbert J. Hovenkamp, The Law of Vertical Integration and the Business Firm: 1880-1960, 95 Iowa L. Rev. 863, 865-870 (2010). https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2784&context=faculty_scholarship.

This approach can also serve as an antidote to some of the criticism that has been put forward against the concept of relevant turnover, where it has been argued that often companies attempted to use the concept of relevant turnover to evade high penalties by lying about the extent of their services involved in the infringement process. For example, in the case of *Matrimony.com Limited and Another v. Google LLC & Ors.*³⁵, the Competition Commission of India observed that the relevant turnover model of the Excel Corp case could not be applied as in case of tech platforms, the system of use and revenue generation operates in two different sides of the market.³⁶ In which case, technological giants could get away with paying any penalties citing relevant turnover and how the affected aspect and the revenue from sales is from two different sides of the market. Here, the test of vertical integration can be used to detect the money trail can end up being very crucial as it allows for the regulatory body to trace all the production and marketing activities to the final product and ensure nothing outside the trial is considered and hence, fairness is ensured. A strict application of the concept of vertical integration by the Competition Commission can allow for a more balanced approach wherein just penalties proportional to the scope and extent of infringement alone is considered.

CONCLUSION

Competition law regulation is a critical need, and it is vital to ensure that companies do not violate the fundamental spirit of competition. But this cannot also mean that the same comes at such a considerable price of disincentivizing investment by charging such disproportionately high amounts as penalties. This is a massive risk for India to take, when it seeks to build upon its reputation as a country that promotes business and investment. The legislators, hence, need to reevaluate the scope of penalties that should be imposed and instead attempt to pursue relevant turnover concepts along the lines of the vertical integration method to ensure the fairest penalization system.

³⁵ *In Re: Matrimony.com Limited vs. Google L.L.C.*, (2018) CCI Case Nos. 07 and 30 of 2012 (India).

³⁶ Aman Singh Sethi & Perna Parashar, Worldwide: CCI Penalties On Global Turnover – Relevant And Proportionate?, MONDAQ, (Jul. 23, 2023) <https://www.mondaq.com/india/antitrust-eu-competition-/1347152/cci-penalties-on-global-turnover--relevant-and-proportionate>.