ONE STEP FORWARD, THREE STEPS BACK: A CRITIQUE OF THE SHIFT FROM 'RELEVANT' TO 'GLOBAL' TURNOVER IN LIGHT OF THE CCI (DETERMINATION OF MONETARY PENALTY) GUIDELINES, 2024

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ABSTRACT

The Competition (Amendment) Act, of 2003 marked a shift in the calculation of penalties for anti-competitive agreements and abuse of dominance under Sections 3 and 4 of the Competition Act, 2002 respectively, from a 'relevant' turnover approach to a 'global' turnover approach. Despite the acute influence of EU jurisprudence on Indian competition law, this amendment is at odds with the former. It is, however, quite surprising to note the changing contours of legislative intent as the CCI (Determination of Monetary Penalty) Guidelines, 2024 envisions the usage of the 'relevant' turnover approach, with the 'global' turnover being an alternative in case it is not feasible to calculate the 'relevant' turnover, which is in line with the existing stance of the Indian Supreme Court as in the Excel Crop Care Ltd. case, which is ultimately in line with the EU guidelines on the same.

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I. INTRODUCTION

The computation of penalty for an enterprise under Section 27 of the Competition Act, 2002 ("Act") was amended vide Section 20 of the Competition (Amendment) Act, 2023.[1] This effectively marked the shift of the method of imposing penalties from 'relevant' turnover to 'global' turnover.[2] The impugned turnover has been qualified as global, being inclusive of all the products or services by a person or an enterprise. Turnover for determining the penalty is categorized into two types: global turnover and relevant turnover. Global turnover encompasses all the revenue generated by an enterprise from its various goods and services, whereas relevant turnover pertains specifically to the revenue derived from the particular goods or services affected by the infringement.

For several years, the Competition Commission of India ("CCI") has been imposing fines based on its interpretation of Section 27 of the Act, considering that penalties should be levied on the entire global turnover of the concerned entity. However, the Competition Appellate Tribunal, in the case of *Excel Crop Care Ltd., In re*, has indicated that for a multi-product company, the appropriate measure of penalty should be limited to the turnover associated with the product or service involved in the alleged contravention, rather than the turnover of the entire company.[3]

In the case of *Excel Crop Care Ltd. v. CCI* ("Excel Crop Care Ltd. case"), the Supreme Court upheld this decision, primarily relying on the principles of strict interpretation and proportionality.[4] According to the principle of strict interpretation, when multiple interpretations of a statute are plausible, the one favouring the alleged infringer must be favoured.

The exact monetary quantification of the turnover, however, has been prescribed under the powers conferred by the Act through regulations. On 6th March 2024, the CCI notified the CCI (Determination of Turnover or Income) Regulations, 2024[5] and CCI (Determination of Monetary Penalty) Guidelines, 2024,[6] ("Regulations") which provides for the method and factors to be considered while determining the penalty under Section 27 for anti-competitive agreements and abuse of dominance.

[1] The Competition (Amendment) Act 2023 [hereinafter, *"the Act"*].
[2] Competition (Amendment) Act, 2023, s 20 Explanation 2.
[3] Excel Crop Care Ltd., In re [2013] SCC OnLine Comp AT 149.
[4] Excel Crop Care Limited v. Competition Commission of India and Anr. (2017) 8 SCC 47 [hereinafter, *"**Excel Crop Care case**"*].
[5] CCI Notification, No. 05 of 2024, notified on 06.03.2024.
[6] CCI Notification, No. 05 of 2024, notified on 06.03.2024.

As per the CCI (Determination of Turnover or Income) Regulations, 2024, the turnover of an enterprise for Section 27 is inclusive of the value of sales but does not include other income, indirect taxes, trade discounts and intra-group sales[7]. As per the CCI Guidelines, "relevant turnover" is defined as the "*turnover derived by an enterprise directly or indirectly from the sale of products and/or provision of services, to which the contravention relates and determined for the imposition of penalty*". It further provides the methodology to determine the penalty under Section 27(b) of the Act, one of which is to impose up to thirty per cent of the average relevant turnover,[8] further, adjust it about additional factors and increase it if the CCI is of the view that the final penalty is not sufficient to create deterrence.[9]

The Regulations, however, provide for a circumstance in which the relevant turnover cannot be feasibly ascertained, and in such a case, the global turnover can be considered.[10] In light of the methodology conferred by the Regulations, the pressing question of the clarification relating to the consideration of global turnover in the amended Section 27 arises. Thus, this paper effectively seeks to argue that the amendment to Section 27 in combination with the Regulations and the supposed shift from 'relevant' to 'global' turnover is a misnomer.

II. INJECTING OBJECTIVITY VIS-À-VIS GUIDELINES AND 'RELEVANT' TURNOVER APPROACH

The Competition (Amendment) Act, 2023 is by no means a whimsical passing of legislation by the Parliament, but is instead based on the report of the Competition Law Review Committee which observed that the 'relevant' turnover approach did not cover several types of anti-competitive practices such as a hub and spoke arrangement wherein the ancillary businesses would be exempted from penalties despite having a direct involvement in the issue at hand.[11] It further recommended implementing the two-step approach of determining penalties based on the computation of the basic amount and an additional sum for deterrence.[12] In the *Excel Crop Care Ltd.* case, Justice N. V. Ramana observed the non-objectivity in determining penalties as follows:

> *"At this point, I would like to emphasise the usage of the phrase "as it may deem fit" as occurring under Section 27 of the Act. At the outset, this phrase is indicative of the discretionary power provided for the*

[7] Competition Act 2002, s 3.
[8] Competition Act 2002, s 3(1).
[9] Competition Act 2002, s 3(2).
[10] Competition Act 2002, s 3(6).
[11] Report of Competition Law Review Committee (July 2019), Ministry of Corporate Affairs, Government of India.
[12] Vidhi Madaan Chadda, 'The Competition (Amendment) Act, 2023: Power, Penalties, Perplexity and Proposal' [2023] ICSICS 46, 48.

> *fining authority under the Act. As the law abhors absolute power and arbitrary discretion, this discretion provided under Section 27 needs to be regulated and guided so that there is uniformity and stability with respect to the imposition of penalty. This discretion should be governed by the rule of law and not by arbitrary, vague or fanciful considerations."*

Further, these penalties varied between 1% and 10% of turnover, with no apparent pattern correlating the severity of the offence to the imposed penalty.

Consequently, the penalty amounts involved were substantial, and frequently, different parties would be penalized varying (and occasionally disproportionate) sums for the same offence. For instance, in a case concerning bid rigging for tenders related to the supply of aluminium phosphide tablets (APT), three companies faced penalties. United Phosphorous Limited (UPL) was penalized 9% of its total turnover, amounting to INR 252.44 crores (USD 30.84 million), Excel Crop Care Limited faced a penalty of INR 63.90 crores (USD 7.80 million), and Sandhya Organics Chemicals Private Limited incurred a much smaller penalty of INR 1.57 crores (USD 0.24 million). Notably, Excel Crop Care Limited and UPL operated as multi-product companies, and APT represented a minor proportion of their overall business, as low as 0.3% in the case of UPL.[13] This inconsistency was perceived as severe and disproportionate.[14]

Penalties determined by the global turnover of enterprises may not align proportionately with the level of harm identified in India. The amendment affects multi-product companies more significantly than those focusing on a single product. This adjustment could result in unjust outcomes and create disparities between domestic companies and multinational entities, as the global turnover might encompass export revenues or other turnovers unrelated to India.

In contrast to conventional penal provisions, the penalty prescribed by the Competition Act is not a fixed sum. Instead, it is intricately tied to the value of the goods or services (interpreted as success) of the violating enterprise. During its early stages, the CCI sought to encompass the highest feasible figure for determining penalties, using total turnover as the yardstick.

Section 27 of the Act envisages the imposition of a penalty on enterprises that have entered into an anti-competitive agreement as per Section 3 or abused their dominant position as per Section 4 which "*shall be not more than ten per cent of the average of the turnover for the last three preceding financial years*". The interpretation of 'turnover' and its calculation has been the subject of much debate with

[13] In Re: Aluminum Phosphide Tablets Manufacturers, CCI, Suo Moto Case No. 02 of 2011 (23 April 2012).
[14] Supra note 3, para 70.

courts adopting diverse methodologies to determine the same. In *Shamsher Kataria, In re*[15], the CCI imposed a penalty of 2% of the average *annual* turnover on automobile companies which had abused their dominant position.

However, in *Excel Crop Care Ltd., In re,* it was held that the appropriate measure of penalty in the case of a multi-product company would be only the turnover of the product or service about which the contravention is alleged and not the turnover of the entire multi-product company- this is oftentimes referred to as the 'relevant turnover' of the company.[16]

The application of such penalties based on total turnover, or global turnover, could also potentially result in "double jeopardy" in certain scenarios. For instance, if company B abuses its dominance both in India and the United States, while any penalty imposed in the United States would be calculated based on its turnover specifically in that country, in India, the penalty would be determined based on its total turnover, including the turnover from the United States for which it has already been penalized. This effectively entails that company B would face penalties twice for a single instance of misconduct.

III. ASSESSING EXCEPTIONAL PENALTIES: THE 'GLOBAL' TURNOVER APPROACH

An argument which has been put forth against considering 'relevant' turnover is that the turnover cannot be qualified as 'relevant' when there is an explicit penalty on the person or enterprise, not on the violating sub-division or unit. Since the company as a whole engages in these acts, the turnover cannot merely be restricted to just the goods and services which relate to the contravention.[17] This legislative intent has been clarified by the Act, presumably overturning the *Excel Crop Care* case.

However, the recent Regulations essentially reinforce the principles laid down in the *Excel Crop Care* case since it introduces the doctrine of proportionality and takes into account the myriad of criticisms leading up to it. Even before the enactment of the Regulations, it was not alien for the CCI to indirectly consider certain factors when arriving at the penalty such as the fact that the impugned product only contributed to a portion of the company's total turnover.[18]

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[15] Shamsher Kataria v. Honda Siel Cars India Ltd. [2014] SCC OnLine CCI 95.
[16] Supra note 3.
[17] Arjun Krishnan, 'The Excel Crop Case and Relevant Turnover in the Competition Act 2002' (2015) 27 NLSIR 125, 129.
[18] Maharashtra State Power Generation Co. Ltd., In re [2013] SCC OnLine CCI 85; Rohit Medical Store, In re [2015] SCC OnLine CCI 19; Faridabad Industries Assn., In re [2014] SCC OnLine CCI 82.

In Federation of Hotel & Restaurant Associations of India & Anr. v. MakeMyTrip India Pvt. Ltd. & Ors., the CCI imposed a penalty of Rs. 392.36 crores on MakeMyTrip, Go-Ibibo and OYO, amounting to five per cent of their aggregate turnovers, since it was not possible to separate the instances of predatory pricing on digital platforms. It was observed as follows:

> *"In the case of digital market platforms, restricting revenue to just one segment would not appropriately capture the interdependent and integrated nature of the ecosystem…Accordingly, in such markets, for revenue determination, the entire platform has to be taken as one unit."*[19]

The total turnover methodology was also employed in *Matrimony.com Ltd. v. Google*, where the CCI observed that "*the application of relevant turnover is not sufficient for such technology-based platforms and indicated the need for another metric to impose the penalties in the concerned situations*".[20]

A penalty applied to relevant turnover might seem proportional in cases of anti-competitive agreements under Section 3 of the Act, where identifying a specific product involved is more straightforward. However, in instances of abuse of dominance under Section 4, delineating such a product becomes challenging. Any dominant enterprise could leverage its position in one market to influence competition in others, making it hard to impose a penalty solely based on relevant turnover.

IV. DOCTRINE OF PROPORTIONALITY & CONSIDERATION OF APPROPRIATE TURNOVER UNDER VARIOUS JURISDICTIONS

The doctrine of proportionality, firmly established in administrative law, underscores fairness and reasonableness by asserting that "*a punishment should be proportional to the offence committed.*" It emphasizes that penalties should be balanced and rational. Additionally, it is highlighted that proportionality is a constitutionally safeguarded right, firmly embedded in both Article 14 and Article 21 of the Constitution of India. The Supreme Court specifically articulated that the doctrine of proportionality aims to achieve a "proportional result" or strict proportionality.[21] This approach is result-oriented, assessing whether the outcome of the law effectively balances two conflicting

[19] Federation of Hotel and Restaurant Associations of India and Others v. MakeMyTrip and Others, CCI, Case No. 14 of 2019 (19 October 2022).
[20] Matrimony.com Limited and Another v. Google LLC and Others, CCI, Case Nos. 07 and 30 of 2012 (08 February 2018).
[21] Ashutosh Pandey, 'Testing the Penalty Yardstick of the Amended Competition Law Against the Dogma of Doctrine of Proportionality' (SCC OnLine Times, 16 October 2023).

interests: the harm inflicted on society by the wrongdoer, justifying their penalty, and the right of the wrongdoer to avoid punishment that may be excessive given the seriousness of the offence.

In the landmark case of *Excel Crop Care Ltd.* in 2017, the Supreme Court examined the scope of penalties through the lens of principles such as equity, rationality, and proportionality. In another case the Court emphasized that the constitutionally acceptable doctrine of proportionality must (a) strike a balance between two conflicting interests, namely, the harm caused to society and the rights of the infringing party; and (b) ensure that the latter does not face a penalty disproportionate to the gravity of the conduct.[22] It was further acknowledged that imposing penalties based on the principle of proportionality is a constitutionally safeguarded right, falling under (i) equality before the law; and (ii) protection of life and personal liberty.

The influence of other jurisdictions in the framing of competition laws and regulations is undeniable, with the introduction of the 30% upper limit on the relevant turnover by the European Commission Guidelines[23] ("ECG"). These guidelines also provide for adjustment for aggravating or mitigating factors. compute the penalty which commences with a base penalty and further accounts for subsequent adjustments for the duration, aggravating or mitigating factors, specific deterrence, proportionality and application of reduction.

The current Indian stance is in line with the ECG since an upper limit of thirty per cent of the average relevant turnover has been prescribed[24], which is identical to the ECG's upper limit. It also envisages a two-step process of calculation, taking into consideration various factors such as the nature and gravity of the contravention, the nature of the industry or sector affected because of the contraventions, etc. It also allows for adjustment in the second step after accounting for aggravating or mitigating factors. Paragraph 3(6) of the Guidelines clearly states that global turnover should be taken into consideration only if the determination of relevant turnover is not feasible.

The case of *Southern Pipeline Contractors v. Competition Commission,* which forms a part of South African jurisdiction, insisted on a legislative link between the penalty imposed and the damage caused and it was decided based on several factors such as the nature, duration, gravity and extent

[22] Western Coalfields Ltd. v SSV Coal Carriers (P) Ltd., [2017] SCC OnLine CCI 45.
[23] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02).
[24] CCI (Determination of Monetary Penalty) Guidelines, 2024, ¶ 3(1).

of contravention, the loss or damage as a result of this contravention, behaviour of the respondent, level of profit derived from the contravention, etc.[25]

V. CONCLUSION

Thus, the Competition (Amendment) Act, 2023 was understood to overturn the 'relevant' turnover approach laid down by the Supreme Court in the *Excel Crop Care Ltd.* case, but the notification of the Regulations and guidelines for computing monetary penalty by the CCI effectively overturned that notion. These guidelines brought back the 'relevant' turnover approach, with the 'global' turnover approach to be used in exceptional cases. Thus, the amended legislation in this regard proves to be misleading since the second proviso to Section 27 of the Act mandates that turnover be presumed as 'global' in nature whereas the guidelines reinforce the 'relevant' nature of the turnover.

The current guidelines read with the Act uphold the observations of the court in the *Excel Crop Care Ltd.* case and provide for the calculation of penalty in a two-step process, commencing with the 'relevant' turnover as done in the European Union. It not only favours the 'relevant' turnover approach with additional adjustments as per the relevant factors, but it also prohibits the usage of the 'global' turnover approach unless the former is not feasible.

Thus, the pseudo-shift from 'relevant' to 'global' turnover is a step back in competition law jurisprudence as the turnover is wrongly qualified, leading to an inherent bias towards global turnover despite a contrary legislative intent as exhibited by the corresponding regulations. This additionally poses a problem while interpreting further matters relating to the process of penalisation for anti-competitive agreements and abuse of dominance since Indian competition laws are largely derived from their EU counterpart. Hence, taking a step away from the latter by amending and reinforcing a contrary view, i.e. global turnover, will be detrimental to the process of imposition of penalty.

[25] Southern Pipeline Contractors v. Competition Commission, Case No. 105/CAC/Dec 10; 106/CAC/Dec 10.