CARTEL PENALTIES IN INDIA: DILUTION, DELAYS, AND DIMINISHED DETERRENCE

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ABSTRACT

*This note discusses the track record of India's competition law regime in imposing monetary penalties on cartels. Although India's Competition Act 2002 ("**the Act**") allows for much harsher penalties than in any other jurisdiction, the actual penalties imposed by the Competition Commission of India ("**CCI**") have usually been much lower than the statutorily permitted amounts, and have fallen short of the level required for deterrence. Even for these penalties, long delays are a feature of the appeals process, especially in several cases which were remanded for reconsideration due to procedural errors by the CCI. The overburdening of the National Company Law Appellate Tribunal ("**NCLAT**") with appeals from CCI orders, after the abolition of the erstwhile Competition Appellate Tribunal in 2017, has further slowed down the process. Consequently, only a minuscule fraction of penalties have actually been realised. Some recent amendments to the Act and regulations are unlikely to significantly improve this situation. All this has weakened the deterrent effect of monetary penalties, as well as of the CCI's cartel leniency programme. It has also diminished the value of monetary compensation that should be payable to those who suffer losses on account of cartel activity.*

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I. INTRODUCTION: THE ECONOMICS OF DETERRENT PENALTIES

Cartels, regarded as the 'supreme evil of antitrust', are prohibited in most countries with an antitrust/competition law. Heavy fines are imposed on companies and their top management if they are found to have participated in a cartel. In countries like Australia, Brazil, Canada, the United Kingdom, and the United States, managers who are found to be responsible for their companies' participation in a cartel can even be sent to jail. India's Competition Act 2002 does not provide for jail sentences, but it does lay down monetary penalties that seem much more severe than in other jurisdictions. In this note, I use some very basic economic principles to show that the penalties are considerably diluted in practice. This makes them weak instruments for deterring cartel behaviour.

Economic models of cartel deterrence use the basic framework of law and economics, according to which economic actors, whether firms or individuals, obey laws only if the gain from law-breaking, minus the expected penalty, is less than the benefit of abiding by the law. Some simple algebra shows how this logic helps us to determine the minimum penalty required to deter cartels. The penalty that a firm can expect to pay is the amount of the fine F multiplied by the probability p of its being imposed. If we denote a firm's profit from participating in a cartel as C, and from non-participation as N, then in order to deter cartels, we must have $C - (p \times F) < N$, which implies $F > (C - N)/p$. Because cartels are illegal, any agreement between the firms will be kept secret, so the probability of being fined is $p < 1$. Therefore, the fine must be a *multiple* of the gains from colluding. More sophisticated formulas allow for the fact that cartels may survive for many years, but they may collapse if one or more participants defect in order to avoid the fine and/or grab a short-term profit by undercutting the cartel price. However, the principle that the fine must be a multiple of the gains remains valid.

Antitrust laws in many countries broadly follow this principle, but it requires considerable theoretical and econometric expertise to calculate the counterfactual level of profit N that a firm would have earned without collusion. A proviso to Section 27(b) of the Competition Act 2002 bypasses this problem. It is specific to cartels, and allows for a much harsher penalty of up to three times the profit C (not the excess profits $C - N$) that the firm made in each year that the cartel agreement was in force. However, a comprehensive review of all cartel cases from 2009 to 2021 shows that the CCI never imposed penalties at the maximum rate.[1] In most cases in which a

[1] Aditya Bhattacharjea and Oindrila De, 'Neither Crime nor (Much) Punishment: India's Cartel Penalty Practices' in Kaushik Basu and Ajit Mishra (eds), '*Law and Economic Development: Behavioral and Moral Foundations of a Changing World*' (Palgrave Macmillan 2023).

violation was found, it used the generic penalty formula for all competition offences, laid down in the main clause of Section 27(b): up to ten per cent of the average of the turnover of the preceding three years, on each of the firms which participated in the agreement. In most cases, even if imposed at the maximum limit, this would have resulted in lower penalties than the profit-based formula, but the CCI usually applied it at a rate of less than ten per cent. The reasons for choosing between the specific or generic penalty formulas, or for choosing a particular rate, were seldom explained in the orders, except in a few cases in which penalties were waived for small enterprises, especially during the Covid pandemic. Consequently, the penalties almost always fell short of the levels required for effective deterrence, as derived from economic theory, even if they had been paid up immediately.[2]

Penalties on individual managers who could be held responsible for the contravention were assessed at up to ten per cent of the average of their incomes over the preceding three years, but here also the actual penalty rates were usually lower, for reasons that were seldom explained in the CCI orders. Another factor that led to smaller penalties was that trade associations, which played a major role in organizing cartels by coordinating the behaviour of their members, could only be penalized based on their income, which was derived from membership fees, advertising revenue, etc. This would have been much less than the turnover of their members, who were the real beneficiaries of the cartels.[3]

II. DELAYS DUE TO PROLONGED APPEALS

However, the story does not end with the CCI's imposition of penalties: there is an inordinately long appellate process, after which many penalties were ultimately reduced on appeal, usually with no reasons being recorded, and with disproportionately large reductions for the bigger penalties.[4] After the abolition of the erstwhile Competition Appellate Tribunal (CAT) in May 2017, appeals from CCI orders were heard by the NCLAT, which was already overloaded with appeals under the Companies Act and the new Insolvency and Bankruptcy Code. A detailed quantitative analysis of all appeals against CCI orders which were filed before the COMPAT and the NCLAT up to March 2020 reveals that the NCLAT period witnessed a higher proportion of CCI orders being

[2] ibid.
[3] Aditya Bhattacharjea and Oindrila De, 'Anti-cartel Enforcement in India', 5(2) Journal of Antitrust Enforcement (2017). This study was based on a review of all cartel penalty decisions up to 2016.
[4] ibid.

appealed, but a much slower rate of disposal, resulting in lengthier timelines and a growing backlog.[5] The situation has not improved since then.

The appeals process was further prolonged by the CCI's procedural errors in its earlier years of enforcement.[6] An egregious example is that of the cement cartel, on which record penalties were imposed in 2012. But the enquiry had to be carried out afresh because the CAT found the hearings to be procedurally flawed. After going through additional evidence and fresh hearings, the CCI imposed the same penalties in a new order in 2016. After the abolition of the CAT in 2017, appeals were transferred to the NCLAT, which upheld the revised order in 2018, but the further appeal is still pending in the Supreme Court.[7]

Parties against whom enquiries are pending can also delay the outcome by resorting to the writ jurisdiction of the High Courts to challenge the CCI's procedure, as in the long-running tyre cartel case. The enquiry against the tyre companies began in 2013, on the basis of a letter forwarded by the Ministry of Corporate Affairs ("**MCA**"). After a full enquiry, the CCI was ready with its order in August 2018, but it could not be made public because in the meanwhile, one of the firms had filed a writ petition in the Madras High Court, challenging the validity of the original reference from the MCA. This was dismissed by a single judge bench, but the CCI order had to be kept sealed until appeals were dismissed by a division bench, and then by the Supreme Court after hearing a Special Leave Petition. Only then, in February 2022, could the CCI publish its order, which imposed substantial penalties on five tyre companies and their association. The tyre companies then appealed to the NCLAT, which upheld the finding of contravention in December 2022, but pointed out a flaw in the manner in which the CCI treated the forwarded letter as a 'reference', as well as some arithmetic errors in the Director General's report. It also expressed concern that the penalties could affect the financial health of Indian companies. It remanded the matter to the CCI to reconsider the penalty.[8] The companies as well as the CCI have filed appeals in the Supreme Court, where the matter now rests.

Calculations based on data from the CCI's own annual report for 2018-19 show that only about 0.4% of the penalties imposed from 2009 to 2019 were actually realised.[9] The more recent reports

[5] Navdeep Singh Suhag, Aniket Sarvate, and Abhishek Raj, 'Analysis of NCLAT's Functioning as Competition Law Appellate Tribunal' 2 Competition Commission of India Journal on Competition Law and Policy (2021).
[6] See the detailed discussion in Bhattacharjea and De (n 4 above).
[7] Common order in *Ambuja Cements Ltd. v Competition Commission of India and Ors*, [2018] TA(AT) (Compt) No.22 of 2017, National Company Law Appellate Tribunal, along with related appeals..
[8] Common order in *CEAT Ltd. v Competition Commission of India and Ors,* [2022] Competition Appeal (AT) No.05 of 2022, National Company Law Appellate Tribunal, along with related appeals..
[9] Author's calculation, based on data in Competition Commission of India, *Annual Report 2018-19* (2019) p.19.

provide data on penalties and realisations for only the last three years, rather than the cumulative figures. The number of cases heard and decided by the CCI and NCLAT fell steeply in 2020-21 due to the Covid-19 pandemic. In the few cases in which contraventions were established, the CCI imposed nominal or no penalties. Even after it resumed active enforcement, by March 2023 only Rs 177 crore out of the Rs 1336 crore (13.2%) imposed in 2021-22, and Rs 2.65 crore out of the Rs 2672 crore (0.1%) imposed in 2022-23 were realised.[10] (These data are for all penalties, not just those imposed in cartel cases.) The remaining amounts were under appeal, or in the process of realisation.

III. CONSEQUENCES OF DELAYED RECOVERY OF PENALTIES

For the purpose of this note, the takeaways from these cases are not the legal arguments that were raised in the appeals and writ petitions, but the consequential delays. First of all, even if the Supreme Court ultimately upholds the penalties, their time-discounted value would have drastically shrunk since they were handed down. The CCI can impose simple interest at the rate of 1.5% per month on delayed payments, which would offset the time discount factor. But a recent judgment of the Delhi High Court has held that, according to the CCI's own regulations, interest is payable only from the day after the expiry of the period (which can extend up to 30 days) specified in the CCI's demand notice.[11] That notice is issued only after the period given to the parties to deposit the penalty (usually 60 days after receipt of the order that imposed it). Most CCI penalty orders are appealed to the NCLAT within this 60 day window, before the demand notice can be issued; the NCLAT usually stays their operation until the appeal is decided; if it goes against the companies, a further appeal can be filed in the Supreme Court; and finally the demand notice is issued only after the appeals process is exhausted. So it is in the interest of firms and individuals to prolong the process as long as possible and get the benefits of time discounting without having to pay interest. Of course, they can blame the delay on the huge backlog of appeals in the NCLAT and Supreme Court.

Some recent measures have been taken to address the incentives to prolong the appeals process. A clause in the 2023 amendment to the Act inserted a proviso to section 53B(2), to the effect that the NCLAT will not entertain an appeal against a penalty unless 25% of the amount is deposited in a manner specified by the NCLAT. (The NCLAT earlier required 10% in some cases.) The

[10] Author's calculation, based on data in Competition Commission of India, *Annual Report 2022-23* (2023) p.18.
[11] *GEEP Industries India Pvt Ltd. and Ors. v Competition Commission of India* [2024], W.P.(C) 10332/2023, Delhi High Court, interpreting the Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations, 2011, Regulations 3 and 5 (https://www.cci.gov.in/legal-framwork/regulations/78/0).

amendment also mandated the CCI to issue penalty guidelines, which were notified in March 2024.[12] These guidelines should reduce the arbitrariness involved in penalty calculations, and somewhat weaken the grounds for appeal.

Another change will come about if the CCI implements one of the amendments that it proposes to make in its regulations, on which it has recently invited comments.[13] This will enable the CCI to issue a demand notice along with the Section 27 order which imposes the penalty. In case of default, simple interest at the rate of one per cent per month or part thereof will be payable from the date specified in the demand notice, which must be the date given in the order. This should discourage parties from filing appeals and prolonging the process solely to delay the payment, because they will be liable for interest from the date specified in the order if it is upheld on appeal. However, even this provision is likely be inadequate. If the parties can invest the remaining 75% of the penalty in a safe asset that can be liquidated to pay the balance when the appeal is decided against them, they may still prefer an appeal and prolong the process as much as possible. This is because of the power of compounding: if and when the penalty is finally upheld on appeal, even a relatively low compounded rate of return on the investment can yield a higher amount than the penalty, which will have to be paid only with simple interest. The difference between the realised value of the investment and the penalty amount will be greater, the longer it takes for the case to attain finality with the penalty being upheld. (Of course, a fuller calculation would have to take into account the legal costs of pursuing the appeal, and the probability of its success.) So prolonged appeals are still worthwhile for the parties.

A second consequence of diluted and delayed penalties concerns the leniency programme under Section 46 of the Act, whereby the CCI is empowered to offer cartelists a reduced penalty in exchange for vital information that can be used against other cartel members. But if cartelists anticipate small penalties, that too only if they are detected and convicted, with the penalties payable many years after they earn profits from cartelization, then each one will have little incentive to take advantage of the leniency programme. A detailed analysis of all relevant CCI orders up to 2021 shows that the leniency programme has been badly weakened by the agency's inconsistency in the determination of both the level of penalties and the degree of leniency, the length of time

[12] The Competition Commission of India (Determination of Monetary Penalty) Guidelines, 2024 < https://www.cci.gov.in/legal-framwork/regulations/92/0>. Such guidelines were recommended by the Ministry of Corporate Affairs, *Report of the Competition Law Review Committee* (2019), paras 3.7-3.12. <https://www.mca.gov.in/Ministry/pdf/CLCReport_18112019.pdf>. (Disclosure: I was a member of the Committee).

[13] <https://www.cci.gov.in/images/stakeholderstopicsconsultations/en/draft-amendments-to-the-competition-commission-of-india-manner-of-recovery-of-monetary-penalty1730881437.pdf>.

for a case to reach finality, and the possibility of follow-on private suits for compensation.[14] Another study also documents the inconsistency of the CCI's penalty practices. It persuasively argues that this will weaken the 'leniency plus' provision, whereby a participant who provides information about a cartel can get an additional reduction in the penalty for membership of that cartel if it also reports a second cartel.[15] Leniency plus was introduced in the 2023 amendment of the Act, but no cartel penalties have been imposed since then, so its effectiveness is unknown. From the perspective of the economics of cartels, a debilitated leniency programme enhances cartel stability, as members are less likely to defect. It also places a heavier burden on the CCI to marshal adequate evidence from its own investigation, thus reducing the probability that it can convincingly establish an infringement, and further increasing firms' incentives to violate the law.

A third and final consequence of delayed case resolution is that it pushes further into the future the possibility of enterprises being ordered to pay compensation to parties who can show that they have suffered loss or damage as a result of contravention of the Act. Apart from compensating the injured parties, this can provide a much more severe deterrent than the penalty itself. Indeed, the prospect of having to pay an unpredictably large amount in compensation might be another reason for firms to prolong the appeals process as much as possible. Under Section 53N of the Act, compensation can be ordered only by the NCLAT, on the basis of a separate application after it upholds the findings of the CCI. Presumably, claims for such compensation can be made only after the case reaches finality at the Supreme Court. However, as of November 2024, no compensation order had yet been pronounced, even for a case like *Excel Crop Care* which was finally settled by the Supreme Court as far back as 2017.[16] In any case, compiling and verifying the compensation claims will be a gargantuan task. In the case of the cement cartel, claimants could include all property developers, construction companies, home buyers, industries, and government departments that bought overpriced cement during the period that the cartel was operating. The victims of the tyre cartel would in principle include all public and private bus and truck operators who purchased tyres.

The consequences of delayed compensation are actually more serious than for delayed penalty payments. The notional starting point for the calculation of the discounted value of the penalty is the CCI's initial finding of a violation under Section 27; the end point is the payment of the penalty

[14] T.S. Somashekar and Praveen Tripathi, 'Cartel Leniency Programme in India—Why no race here?' (2024) 12(3) Journal of Antitrust Enforcement.
[15] Anik Bhaduri, 'Sweeter Carrots, Same Stick: Transplanting leniency plus into Indian competition law' 7(1) Indian Law Review (2023).
[16] *Excel Crop Care Ltd v Competition Commission of India and Ors,* (2017) 8 SCC 47 Civil Appeal No. 2480 of 2014, Supreme Court of India.

after exhausting the appeals process. But the victims' losses would have occurred several years before the former, and the payment of compensation would occur several years after the latter. This can be illustrated schematically as follows:

Cartel period → CCI inquiry → Section 27 order → Appeals process → Penalty → Compensation

Thus, the time interval from the victims' losses to receipt of compensation would be much longer, so erosion of the eventual compensation due to time discounting would be even more severe than that of the penalty. For example, the cartel periods in the cement, tyre, and APT cases cited above were 2009-11, 2011-12, and 2009-10, respectively,[17] but the compensation orders remain far in the future. Unlike in the case of the penalty, there seems to be no provision in the CCI regulations for interest on the compensation amount in order to compensate the victims for the time elapsed since their losses. So the time discount factor would not be offset by even simple interest, which could have somewhat strengthened the deterrence effect.

In the European Union and England, compound interest is now payable from the time that the damage occurred, although the precise rate of interest is determined in each individual case by national courts.[18] In the United States, damage amounts are usually not payable with interest, but trebling of damages more than compensates for this. In India, a precedent on payment of interest will be set in the *Excel Crop* case. The sole compensation applicant was the Food Corporation of India, which claimed compound interest at the rate of 18% per annum over an eight year period between the financial years in which the infringement took place and the matter attained finality at the Supreme Court.[19] This interest rate would certainly offset any discount factor based on the rate of return on a safe investment. However, the NCLAT is yet to decide on the application. Moreover, from the perspective of the victims, the real value of the compensation amount would have eroded even more on account of inflation, for which there is no provision to adjust the eventual payout.

Delayed compensation also weakens deterrence in another way. At least some parties who have been overcharged by cartels, such as industry associations or large buyers, may have the resources to gather their own evidence and afford more capable lawyers, which could reinforce their case.

[17] See nn 7, 8, and 16 above, respectively.
[18] Tom Bolster, Amandine Gueret, and Antoine Riquier (2023), 'Calculation of interest in damages claims – compound answers to a (not so) simple question for national courts', <https://www.hausfeld.com/en-gb/what-we-think/competition-bulletin/calculation-of-interest-in-damages-claims-compound-answers-to-a-not-so-simple-question-for-national-courts/>.
[19] *Food Corporation of India vs Excel Crop Care Ltd. and Ors* [2020], Compensation Application (AT) No.01 of 2019, National Company Law Appellate Tribunal, New Delhi, para 7.

But if recovery of monetary compensation is so far off in the future, they will have less incentive to incur these costs. This places a heavier burden of investigation and analysis on the CCI.

IV. SUMMARY AND CONCLUSIONS

This note began by setting out the basic economics of cartel deterrence, which requires that any monetary penalty should be a multiple of the excess profits from cartelization. Although the maximum penalties specified in India's Competition Act are quite harsh by international standards, they have been imposed at much lower rates than the statutory maximum, thus diluting their impact. Their effectiveness has been further reduced by a prolonged appeals process, which has resulted in recovery of only a minuscule proportion of penalties which have been imposed. Such long delays erode their time-discounted value and diminish cartelists' incentive to avail of the leniency programme, thereby enhancing cartel stability and placing a heavier burden on the CCI to obtain adequate evidence. Levying of simple interest on the penalty amount is unlikely to offset the parties' incentive to delay the final decision. Delays also make the prospect of monetary compensation for those who have been overcharged even more distant. The consequent reduction in its time-discounted value further diminishes deterrence, and also reduces the incentive for the injured parties to provide information and analysis which would strengthen the case.

Although, as discussed above, delays on account of protracted appeals have played a major role in weakening the effect of monetary penalties, decision-making in the CCI itself has slowed down tremendously in recent years. Despite being severely understaffed, the CCI managed to investigate and decide most cases in a reasonably timely manner until an unfortunate nine-month hiatus during 2022-23 when a lack of quorum, caused by delayed appointments to replace members who were retiring, prevented it from pronouncing orders. Even after the Commission was reconstituted with a quorum, it has been slow in deciding the mounting backlog of cases. The last order in which a penalty was imposed on a cartel was in June 2022. Thereafter (up to 18 December 2024 when this note was submitted for publication), only cease and desist orders, without any penalty, have been handed down in just four cartel cases in which violations of the Act were found.

It remains to be seen whether the CCI resumes the vigorous pursuit of cartels which marked its early years, and whether the minor modifications introduced in the Act and in the penalty regulations (if notified) will discourage at least some appeals which are filed solely to delay the outcome. However, the analysis in this note suggests that an adequately high rate of compound interest on delayed recovery of penalty and compensation amounts is required. Finally, setting up a dedicated competition bench in the NCLAT, as recommended by the Competition Law Review

Committee in 2019,[20] would speed up the disposal of those appeals that are still preferred. Quicker resolution, and the prospect of receiving compensation within a shorter time horizon, would encourage informants to expend the resources to put up stronger cases, and perhaps even incentivize law firms to take up cases on behalf of those who are unable to do so themselves

[20] *Report of the Competition Law Review Committee* (n 12 above), para 8.6.