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A Study Beyond the See-Saw of Relevant and Global Turnover: Finding a Mechanism for Adequate Penalty

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Abstract

The Competition Act, 2002 (the Act) is the governing legislation to enforce compliance against antitrust practices in the Indian market using multiple tools, the primary being the imposition of penalties. Penalties have the effect of punishing offenders and deterring others. Under the current legislation, one of the crucial aspects while computing the amount of penalty is determining the "turnover" of the undertaking, as it is used as a proxy to determine the base fine. There exist other proxies, but "turnover" is the most accepted globally. The act of imposing a penalty is also accompanied by ensuring a balance i.e., the fine should be adequate to deter and should not be excessive to break the undertaking. Hence, the imposition of a penalty is not a mere mathematical exercise but a judicious one. With this backdrop, focusing on the Indian Competition Law, the authors in this paper will comprehensively analyze the concept of "turnover" along with an evolutionary analysis of its different shades i.e., relevant, and global turnover, and how they have failed to help in fulfilling the core objectives of the penalty regime. In the latter part of the paper, the authors provide an alternative perspective based on foreign jurisprudence to argue that "turnover" is not the only proxy available and demonstrate the best practices from around the world. Lastly, having understood the strengths and weaknesses of relevant and global turnover and gained an international perspective, the authors will be suggesting a flexible approach in the context that Indian antitrust authorities will have multiple tools/proxies at their disposal for tackling every situation with the best possible approach, but this flexibility will be exercised within a particular framework/guideline. This holistic approach is essential, as considering just relevant or global turnover would eventually defeat the very purpose of imposing penalties.

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1. Introduction

Let us consider a situation where entity 'A' acquires a dominant position in the telecom industry and drives all its competitors out of the market, or two largest social media platforms, 'P' and 'Q', together curb the entry of any new player in the industry. In such an economy, the consumer will have drastically reduced product choices, and the lack of any competition in the said industries will lead to reduced incentives for innovation and ultimately stagnation of the market, wherein the lack of alternatives forces the consumer to consume whatever is available.

States are aware of such problems and to avoid such miserable situations and have a thriving market economy, policymakers have enacted antitrust laws to foster sustainable competition in markets, protect consumers' interests, and ensure free trade among market players. The effects of tampering with competition in the market are scathing for the market,consumers, workers, and the economy (Council of Economic Advisers, 2016). Hence, violation of competition law is sought to be deterred by both civil (fines and behavioural remedies) and criminal action (prosecution and imprisonment) (Aghion *et al.*, 2009). There are provisions for criminal sanctions in jurisdictions like Australia, Ireland, Chile, Japan, Korea etc. (OECD, 2016b) and there is a contemporary shift towards criminalisation of 'hard-core' cartel conduct (Beaton-Wells and Parker, 2012). However, it must be noted that predominantly violating antitrust laws results in civil action, more specifically in the form of penalties/fines.

A penalty under the antitrust laws is sought to be levied for achieving two objectives: firstly, to punish the offender for distorting competition in the market, and secondly, to deter offenders along with other market players from indulging in anti-competitive practices in the future (OECD, 2016a). This twin objective is to be balanced with the proposition that the quantum of the penalty should not be too high or too low. The fine imposed should not be so burdensome that it financially breaks down an undertaking, ultimately resulting in the elimination of the market player. Such a reduction in the number of market players will hurt reducing the competition in the market (OECD, 2013a). On the other hand, we can see that non-adherence to competition laws emerges from the greed of market players to earn more profits, if the quantum of the penalty is not adequate to offset the illegal gains. Then the antitrust violation will be profitable for the undertaking, creating an economy wherein the fines are treated as a mere fee for conducting business (European Commission, 2006a).

We can see that the act of imposing a penalty is a complex act of balancing, on one hand, achieving the objective of punishing the offender and creating a deterrence factor that prevents market players from engaging in anti-competitive practices, and on the other hand, ensuring that the quantum of the penalty sought to be levied is not too burdensome and not a nominal fee. This makes it extremely important to lay down a systematic approach for imposing monetary sanctions on undertakings for violations by market players.

One of the most accepted systems of determining the quantum of the penalty generally involves a four-step process (OECD, 2019b). Firstly, a base fine will be calculated as a certain percentage of the initial measure of fine. Secondly, the base fine will be adjusted according to aggravating and mitigating factors. Thirdly, additional adjustments will be made according to the maximum statutory limits according to municipal laws, the ability of the undertaking to pay the penalty etc. Lastly, consideration of leniency scheme or settlement and commitment scheme will be considered (OECD, 2019b). The culmination of the determination of the base fine and the required additions and deductions made to the same in consonance with statutory law and judicial discretion based on the fact situation is the penalty that is sought to be imposed because of the violative conduct.

The core of the present discussion is centred around the initial measure of fine, which is used in calculating the base measure of fine. The first and foremost step for levying a penalty is determining the illegal gains enjoyed by an offender or cartel as the case may be. It is extremely difficult to determine the exact illicit gains. Hence, antitrust authorities use proxies for determining this initial measure of illegal gains that were enjoyed on account of anti-competitive conduct. Many jurisdictions use the turnover of corporations as a proxy for determining the said initial measure.

The definition of turnover differs among jurisdictions. Furthermore, there is an everlasting debate about using the concepts of relevant turnover and global turnover. Relevant turnover is usually concerned with the amount of sale of goods or services about which there has been infringement. Global turnover does not have an accepted definition. In Brazil, it is concerned with gross revenue in the affected business sector (OECD, 2019a), whereas in Turkey, it is associated with the annual gross revenue of an undertaking (OECD, 2019b). More broadly, the term global turnover refers to the consolidated turnover of 'all' the products and services of the concerned undertaking, whereas relevant turnover refers to the sales proceeds only from the 'infringing' product and service in the relevant geographic market (International Competition Network, 2017).

In India, the antitrust authority i.e., the Competition Commission of India (CCI) had earlier transitioned from the concept of global turnover to relevant turnover. Before 2017, the 'global' turnover of the undertaking was considered while calculating the quantum of penalty, whereas, from 2017 onwards, the 'relevant' turnover of the infringing product or service is taken into consideration. Although the governing legislation did not specify the kind of turnover to be used for computation of penalties, the Hon'ble Supreme Court of India in the case Excel Crop Care v. Competition Commission of India 2017, interpreted the term to mean 'relevant' turnover bringing India's penalty regime in line with other major jurisdictions (Sodhi *et.al*, 2020). But with the recent overhaul in the Indian Competition Act vide Competition Amendment Act, 2023, it has now been clarified that the term turnover is to be interpreted as global turnover i.e., turnover derived from all the products and services (The Competition (Amendment) Act, 2023). Hence, once again, the CCI will be using the yardstick of global turnover. It is important to understand that all legislation must abide by the constitutional principles and any penal provision must conform to the doctrine of proportionality. In this regard, the aforementioned amendment raises concerns about the potential unfairness and constitutionality of penalizing an entity's entire turnover, including that portion which has been earned outside India, for anti-competitive conduct within the country. This approach could lead to irregular penalties owing to the different sizes of the entities committing the same offence and will go against the principles of Article 14 of the Indian Constitution and the Doctrine of Proportionality. The Hon'ble Supreme Court in the Excel Crop Care case relied upon Coimbatore District Central Co-operative Bank v. Coimbatore District Central Co-operative Bank

Employees Assn. to highlight that penalties should be based on equitable considerations and not exceed "what is appropriate and necessary for attaining the object". The localisation of the anti-competitive conduct generally harms competition in a particular geographic market, imposing a penalty for anti-competitive conduct in one region of India based on the turnover earned in another market or the sum of turnover across all markets served by the entity would potentially violate Article 14 and the doctrine of proportionality and attract constitutional challenges.

The objective of this paper is to provide an understanding of the development of the penalty regime in India with a specific focus on the debate surrounding 'global' and 'relevant' turnover triggered by the new amendment and highlight the ineffectiveness of the existing 'relevant' turnover framework considering recent cases and the problems and ambiguity in the enforcement of 'global' turnover as being introduced by the recent amendment. With this understanding, the authors seek to go beyond the discourse of the merits and demerits of relevant and global turnover to the core of the issue and identify solutions afresh which will fulfil the goal that is sought to be achieved by using relevant turnover and global turnover as proxies for determining penalties under antitrust laws i.e., determination of an adequate quantum of a penalty and consequently put forth our suggestions to strengthen the penalty regime in the Indian antitrust landscape.

2. The Transition to Relevant Turnover

The Indian antitrust framework has its genesis in the Monopolistic and Restrictive Trade Practice Act (MRTP Act) of 1969. The primary objective of the MRTP Act was to ensure that the operation of the market system does not result in the concentration of economic power in one hand, which is detrimental to the common interest (Ministry of Corporate Affairs, 2008). For this reason, the MRTP Act prohibited monopolies themselves, which hindered economic growth as companies did not want to expand operations because of the fear of being penalised. With the onset of globalisation, economies around the world started developing at a fast pace and there was a policy shift from curbing monopolies to promoting competition in the market (Jha, n.d). With this shift came the new Indian Competition Act, of 2002.

The new legislation brought a major change in the perspective of viewing monopolies. Being a monopoly or having a dominant position in the market is not, prima facie, illegal anymore. It is only the abuse of such a dominant position that is prohibited. It was along these lines that a new penalty regime was also developed, which was intended as a punishment and deterrence measure, not only for the abuse of dominant position in the market but also for ensuring deterrence against any form of conduct that would be violative of the antitrust policies. Anti-competitive conduct attracted heavy penalties and structural/behavioural remedies as the newly formed Competition Commission of India deemed fit.

As we have already discussed, the Indian penalty regime is fundamentally structured around the notion of "turnover". This concept serves as an indicative measure, suggesting that if a company engages in anti-competitive behaviour, it might experience an increase in sales or profits. Essentially, turnover is employed as a representative metric to gauge the potential financial benefits a company might reap from such unfair practices. The rationale behind this is to ensure that companies don't gain an undue advantage by engaging in anti-competitive actions. By linking penalties to turnover, the system aims to deter businesses from such behaviour, as the potential financial repercussions could outweigh the short-term gains from unfair competition.

To ensure effective deterrence within the market, penalties must be judiciously calibrated. They should neither be exorbitantly high, risking the financial stability of an entity, nor trivially low, rendering them merely as nominal business fines. Consequently, the accurate determination of an enterprise's "turnover" becomes a cornerstone for penalty calculation. Hence, it is important to understand the meaning of the term "turnover". The interpretation of this term has historically been a subject of debate within the Indian Antitrust framework. The bone of contention is that with the rise of multi-product companies there arose a question concerning whether the value of all the goods or services produced by the company will be considered for "turnover" or will be limited to the extent of the good or service which is gaining/has gained undue advantage due to anti-competitive conduct. This represented two distinct concepts within the umbrella of turnover i.e., global turnover and relevant turnover respectively. There being an inextricable relationship between turnover and the penalty mechanism, it becomes important to ascertain the specific category of turnover that is to be considered for levying a penalty.

On perusal of the pre-amendment provisions of Section 27(b) of the Act, one possible view that can be developed is that the penalties are to be based on the entire turnover of the undertaking and not merely a part thereof. This view stands in contrast and as a criticism of the opinion formed by the Hon'ble Supreme Court in the Excel Crop Care case. The proviso attached to the said provision particularly refers to cartels, where it gives the option of penalizing the entire profits gained from the cartel's agreements or ten per cent of the turnover, whichever is higher. As per this opposing view, the interpretation of turnover as relevant turnover would not align with the legislative intent and would defy the principle of statutory interpretation. Furthermore, it is also important to note that Section 27(b) of the Act provides for the imposition of a penalty which shall "not be more than ten per cent of the average turnover for last three preceding years upon each of such person or enterprises". The fine is to be imposed on the turnover of the "person or enterprise" and not the product or service offered by such person or enterprise (Arjun, 2015). However, such an opposing view must be understood considering that the interpretation rendered by the Hon'ble Supreme Court in the relevant circumstances was to align the penalising provision with the Constitution and the doctrine of proportionality.

Considering this contrary reasoning, it may be possible to state that it was based on this understanding and interpretation of the provision that global turnover was considered as the metric for setting initial measures from the inception of the Indian Competition Act till the Excel Crop Care judgement by the Hon'ble Supreme Court of India in 2017. From 2017 onwards, the term turnover was interpreted as "relevant" turnover because of the said ruling. As stated earlier, this was intended to secure an equitable balance between the penalty and the offence.

This landscape has once again changed with the introduction of the Competition (Amendment) Bill, of 2023. This recent amendment clarifies that the term turnover means 'global' turnover. This is a monumental shift, as it will substantially amplify the magnitude of fines levied, profoundly impacting the future trajectory of penalized entities. At this juncture, another important aspect that must be understood is the difference between 'national turnover' and global turnover. The global turnover of a company will also include the money earned by it in other jurisdictions, whereas the national turnover will only be limited to the turnover generated on account of business activities in a particular country.

The interpretation of the term 'turnover' is of monumental significance for the penalty regime, as it is the interpretation of 'turnover' which will define the initial measure based on which the penalties are levied.

3. The Era of Global Turnover (Before 2017)

The penalty provision stipulated under Section 27 of the Act, is not based on any fixed amount. As mentioned above, the bare reading of the provision under Section 27(b) of the Act states that the penalty imposed shall not be more than ten per cent of the average turnover for the last three preceding financial years. Whether this turnover meant 'relevant' turnover or 'global' turnover was left to the discretion of the regulatory authorities. In the initial years of the enactment of the Act, to maintain a deterrent effect in the market, it seems that the CCI levied penalties based on the yardstick of global turnover as demonstrated in the DLF case (Delaire Owners' Association v. DLF Limited, Huda and Ors, 2010) and Kapoor Glass (Kapoor Glass Pvt. Ltd. v. Schott Glass India Pvt. Ltd., 2010).

This application of global turnover proved to be counterintuitive to the purpose of the act in several instances, whereby, considerably high, and often, different quantums of penalties were imposed on different parties for the same offence. For instance, in the case of Excel Crop, the CCI used 9% of the total turnover of the entities, while in another bid-rigging case, the penalties imposed on cement manufacturers were just 0.3% of their total turnover (Director, Supplies and Disposals, Haryana v. Shree Cement and Others, 2017). Similarly, in cases involving price fixation, the Bengal Chemists and Druggists Association was penalized 10% of their total turnover (Bengal Chemists and Druggist Association, 2014). Whereas the price-fixing of fuel surcharges in airlines only invited 1% of the total turnover of the enterprise (Express Industry Council of India v. Jet Airways (India) Limited, 2015). Although the penalties were imposed by considering the facts and circumstances in each case, the judicial discretion in determining the penalty has led to a wide range of disparities in deciding the quantum of penalties. Moreover, it has been noted by the Competition Law Review Committee that the decisions by CCI are being appealed before NCLAT, Hon'ble High Courts and Hon'ble Supreme Court and one of the causes for the same is that the penalty being imposed seems disproportionate (Competition Law Review Committee, 2019).

4. Post-2017: The Genesis of 'Relevant' Turnover

It is to solve this problem of disproportionality, the Hon'ble Supreme Court in consonance with the doctrine of proportionality read with Articles 14 and 21 interpreted the term turnover to mean 'relevant' turnover.

By the principle of proportionality for a multi-product undertaking, it is important to consider which product/range of products or services has violated the antitrust regulations to ascertain the illegal gains and remedy them accordingly. The guidelines issued by the Apex court concerning applying relevant turnover as the metric for determining an initial measure of fine might have given a specific approach to the regulatory authorities in the calculation of the penalty; however, there were instances where the penalties levied on undertakings were so low that it barely made any deterrent for them and consequently for others. A similar problem has also been identified in the EU (Smuda, F., 2012).

This highlights the most fundamental problem with the application of relevant turnover in the case of multi-product enterprises. It has been noted that earlier, the calculation of the turnover of an undertaking was not a tedious task as most of the entities were single-product companies, and hence the complexity of determining the 'relevant' product never came into question (OECD, 2018). But now, with the rise of multi-product companies, multi-sided digital platforms and even ecosystem economies, the concept of relevant turnover needs to change. This problem has also provided an escape route for anti-competitive players.

5. Relevant Turnover: An Escape Route

During the last decade, the CCI has imposed penalties on numerous companies and their undertakings that were indulging in anti-competitive practices, the heftiest of them being on digital companies (Press Information Bureau, 2022a and 2022b). As previously discussed, it was in the case of Excel Corp Care where the "turnover" under Section 27 was interpreted as “relevant turnover”. This has given rise to situations where a large multi-product enterprise may be fined less than smaller companies. For instance, if a multi-product company with a total turnover of Rs. 10,000 crores engage in anti-competitive practice to advance its business in a new relevant market with the relevant turnover being only Rs. 100 crores, the maximum possible fine would be Rs. 10 crores which is a meagre amount for an enterprise with a total turnover of Rs. 10,000 crores. On the other hand, if there was a single-product company, the total turnover and relevant turnover would be the same thing. Hence, a small company with a relevant turnover of Rs. 100 crores would be penalised Rs. 10 crores. The liability of the multi-product company is a mere 0.1% of its total turnover, whereas it is 10% of the smaller company.

Even in the Excel Crop Care case, the initial penalty imposed by CCI on UPL was Rs. 252.44 crores (based on global turnover) but it was reduced to a mere Rs. 6.92 crores whereas the total turnover for UPL from APT tablets was Rs. 77.14 crores. We can see that in this case, for a multi-product company, UPL, which has huge resources and a total turnover of Rs. 2804.95 crores, a penalty of Rs. 6.92 crores is a mere 0.2% of the total turnover of the company. Such low fines allow a company with huge resources to indulge in anti-competitive practices in a new product/ offering of the company and since there is no or very low turnover of that good/service the fine imposed based on relevant turnover will fail to achieve its objective of punishment and deterrence. A potential solution to this problem may involve establishing guidelines for penalty computation incorporating the usage of variable percentages for penalty which is directly correlated with the size of the business i.e., the bigger the business, the higher the percentage applied for computing penalty.

Therefore, applying the concept of relevant turnover has resulted in drastically disproportionate fines (Arjun, 2015). Moving a step further, we are witnessing cases wherein digital companies are claiming to have zero revenue in the relevant market, as these are multi-sided platforms. For example, an entity may offer free services and generate data which can be commercially exploited in a different market, herein, the market where free services are being offered is different, and the market where revenue is being generated is different. Hence, the entity may engage in anti-competitive practices in the market wherein it is offering free services and argue that no penalty is leviable as there is no relevant turnover. In such a situation, there is a need to study the relationship between the violative conduct and the resulting increase in revenue rather than looking at the situation with a myopic and straitjacket understanding.

Let us take a closer look at two specific instances where relevant turnover has proved to be inadequate and highlighted the law in the penalty regime.

6. Cover Bidding: No Relevant Turnover

Cover bidding is a common type of bid-rigging wherein some parties submit exceptionally high bids which are completely unacceptable to ensure success and protect a low bidder, this creates a façade of the competitive process but in fact, is a case of collusion (Thomson Reuters Practical Law, n.d.). Now, if the entities that are placing the exceptionally high bids are not even engaged in the relevant market, there arises no case of relevant turnover as it does not even exist. Hence, they cannot be penalised if caught. This was exploited by different undertakings indulging in anti-competitive practices.

For instance, in Nagrik Chetna Manch v. Fortified Security Solutions, two opposite parties claimed to have no relevant turnover/profits as they were not engaged in the market of the infringing product. The CCI stated that the Excel Corp Case provided for the penalty to be proportionate to the offence and since the case at hand was of cover bidding, the said interpretation of turnover would not be applicable (Nagrik Chetna Manch v. Fortified Security Solutions, 2015). We can see that the CCI could not even use the concept of relevant turnover at all on account of the said reasoning and eventually ended up considering the total revenue of the companies.

7. New Age Multi-sided Tech Giants

The Indian digital ecosystem has witnessed unprecedented growth where, unlike conventional offline markets, the growth of tech giants is not constrained by the boundaries of the nation and is spread across jurisdictions. When the products and services offered by the tech giants are intertwined and dependent on each other through economies of scale and scope, there arises a need to widen the scope of relevant turnover according to judicial discretion. A mechanism which needs to be expanded to accommodate the needs of changing times should warrant reconsideration and remodelling to adapt to the changing scenario.

The CCI is facing constraints in imposing penalties on technological companies. In XYZ v. Alphabet Inc., 2020, the CCI stated that for ascertaining relevant turnover for multi-sided platforms, it is important to also take a look at the business model as well, where multiple sides are inextricably linked with each other and enjoy the benefits of economies of scale and scope, but the common factor is the platform operator, but all the products/services are being offered by a common operator in such a situation, the entire platform has to be taken as a whole (XYZ v. Alphabet, 2021). Furthermore, the CCI in another case held that in a multi-sided technological platform which derives strength based on network effects, positive feedback loop etc. the competition is between ecosystems, thereby concluding considering the total revenue generated to impose fines. The entities in such situations stand to benefit on a larger or overall scale, essentially. Therefore, the penalties are being imposed on total turnover being treated as relevant turnover due to the extremely interconnected nature of the business the entire turnover becomes relevant (Umar Javeed v. Google LLC, 2018).

Similarly, as we have already discussed, the CCI, in Matrimony v. Google, has opined that relevant turnover is an inadequate measure for imposing penalties on multi-sided technological companies like Google (Matrimony.com Limited v. Google LLC, 2012).

The measure taken by CCI in considering the entire platform as one unit and considering the turnover based on that is centred around treating the entire entity as one, which will consequently mean that the relevant turnover is global. The Indian penalty regime needs to evolve to cope with the changes in market structures and dynamics and fulfil its objective of punishing the offender and ensuring deterrence. Let us look at the most recent change in the penalty regime brought about by the Competition (Amendment) Act, 2023 i.e., the re-introduction of global turnover, which is possibly aimed at adopting the penalty regime to the digital markets.

8. Global Turnover

It is clear from the discussion that even before the amendment, the CCI was leaning towards levying penalties based on the total turnover of the companies to fulfil the objectives of levying penalties in situations where the entire turnover was relevant. Similarly, it is evident that relevant runover is not the gold standard and a "one size fits all" approach cannot be utilized in every case i.e., relevant turnover is not the most appropriate method of computing penalty in each situation.

9. Revival of Global Turnover: The Competition (Amendment) Act, 2023

The re-introduction of global turnover in the Indian Competition Law is surprising. This alteration was originally not a subject of discussion by the parliamentary standing committee as it was not included in the original amendment bill on which public comments were invited (Singh and Parashar, 2023). It must be noted that although the Competition Law Review Committee discussed the Nagrik Chetna Manch case, stating that the entities to be fined had no relevant turnover in the market, in such a situation, interpreting turnover to mean relevant turnover would defeat the purpose of competition law (Competition Law Review Committee, 2019). However, it was never concluded that there had been a need for legislative amendments to transition to global turnover.

This shift should be accompanied by the introduction of penalty guidelines which were a recommendation by the Competition Law Review Committee to ensure a fair, transparent, and predictable mechanism for imposing penalties. Such guidelines are being used by anti-trust regulators in the United Kingdom and Germany wherein, while determining the penalty, the size of an undertaking is also considered (OECD, 2022). This change will also help in dealing with the inadequate quantum of penalties being imposed based on relevant turnover, along with dealing with cover bidding cases.

Conclusively, we can see that the original operation of global turnover as the standard was considered overburdening and not proportional to the offence in traditional markets, but with the rise of digital markets and even more expansion shortly, if the twin objectives are to be fulfilled, relevant turnover cannot be considered a standard either.

10. Solving the Proportionality Conundrum

The revival of global turnover will again raise the same concern which was raised in the Excel Crop Care judgement i.e., imposing penalties based on global turnover is against the doctrine of proportionality. There have been no specific changes to ensure that the penalties based on global turnover are proportionate. Here we interject and argue that the contemporary interpretation of the doctrine of proportionality is that the penalty imposed should be proportionate, keeping in mind the offence and only the business/department/division of the entity engaging in the violative conduct. Here we interject and argue that another interpretation is possible that will be better aligned with the goals of competition policy. We suggest that the doctrine of proportionality in the penalty regime should be considered in the context of the proportion between the offence and the size of the business instead of a particular division. For instance, as we discussed earlier, for a multi-product entity and a single product entity who have committed the same offence, but the relevant turnover for both entities are same, the total liability will be less on the multi-product entity as it has multiple sources of revenue and for a single product entity, the relevant turnover would be its total turnover. Essentially, the liability of the multi-product entity and the single-product entity will be different and will not be proportionate. Therefore, if we ensure that the ultimate liability (as a percentage of their financial power) on both entities is the same because they have committed the same offence, we can say that the penalty imposed is proportional. This approach allows us to escape the narrow understanding of the doctrine of proportionality in the context of infringing product/service.

If we are to analyse this framework in the context of the twin objectives of levying a fine, we can see that firstly, the offender is being punished for the offence and secondly, the penalty being levied will help in achieving the object of deterrence. A multi-product entity will be severely punished if it uses its vast resources to enter a new market and employ anti-competitive practices to advance its interests. This objective will be balanced with the duty of ensuring that the burden of penalty does not financially break the undertaking. This type of approach is being practised in the United Kingdom (Competition and Markets Authority, 2021) and Germany (Bundeskartellamt, 2021) wherein the penalty guidelines ensure that the penalties are proportional to the size of the anti-competitive player. They provide specific statutory provisions which empower the regulator to consider the size of the entity and even increase the penalty than what is determined to ensure effective deterrence and proportionality in penalizing enterprises.

Though it must be accepted that this system might also have slightly different punishments for the same offence the difference will be justified based on peculiar facts and circumstances of the case as judged by the CCI (OECD, 2019b). This approach will ultimately fulfil the twin objective of imposing a penalty.

11. The Problem with Global Turnover

The rationale behind imposing a penalty is to offset the illegal gains earned by a company and restore the competitive balance in the market. The illegal gains are accrued in a particular jurisdiction, and it may result in imposing penalties based on turnover accrued to a company through the sale of goods or services in another jurisdiction (Avimukt *et al.*, 2023). For instance, consider a situation where two entities, A and B, A being an Indian company and B being a multinational company, cartelized in the Indian markets of mobile handsets. In such a case, even though A has earned more revenue from the cartelized activity than B, because of B's global presence and diverse offerings of multiple products across different countries, B will be subject to higher penalties than A simply because of the application of global turnover. This problem tampers with the accurate economic impact assessment of an anti-competitive practice thereby, imposing a penalty on turnover which did not arise from the specific market/country. Moreover, using 'global' turnover can also lead to 'double jeopardy'. For instance, if B abuses its dominant position in both the Indian and United Kingdom (UK) markets, although B will be penalised in the UK based on their sanctioning methodologies, in India, due to the applicability of 'global turnover', the turnover from both the Indian and UK markets, along with the other markets where B has its presence, will be considered while computing the amount of penalty. Let us consider that entity B has a turnover of Rs. 1000 crores in both markets individually. The entity has already been penalised in the UK market but due to the application of global turnover in India, the entity will be penalised not only to the extent of turnover in India but the UK as well i.e., Rs. 2000 crores. In other words, in this situation, entity B has already been penalised for the harm done in the UK and the consequent illicit gains/ profits that they have made but due to the application of global turnover in India, the entity will not only be penalised for the harm done in the Indian market but also for the gains made by the entity in the UK market, thereby the entity is being punished twice for the same conduct. The plight of the entity would also increase many folds if both the concerned markets use the standard of global turnover. Therefore, while using the yardstick of global turnover, it is imperative to ensure that such a situation does not arise, which will require appropriate guidelines and coordination with other anti-trust authorities for competition enforcement in India.

Thus, the implications of global turnover can, in several instances, devastate an entity having a global presence, irrespective of whether that entity is incorporated in India or not. This might also hinder the Foreign Investments of global conglomerates in the Indian market, as they might be apprehended with the stringent penalty regime followed by the Indian Antitrust authorities. Hence, irrespective of the intention behind maintaining deterrence in the market, the plain application of global turnover by the regulatory authority can go against the policy of Ease of Doing Business and encouraging Foreign Investments in Indian markets. Having understood the Indian context, we shall look at how other major jurisdictions are engaging with the changing market structure and evolving their penalty regimes to ensure proper punishment and deterrence in the market.

12. An Alternative Perspective: Foreign Jurisprudence

It must be noted that the concept of turnover is used as a proxy for setting the initial/base measure in a lot of antitrust jurisdictions. Let us look at the foreign jurisprudence on the aspect of 'turnover' to gain an alternative perspective on the issue at hand.

If we take a glance at the methodologies in foreign jurisdictions, in the European Union, the starting point/basic amount of fine for levying the penalty is based on 30% of the relevant market turnover, the base amount is further aggravated or mitigated based on external circumstances where the total turnover of the undertaking is considered (European Commission, 2006b). This shows how high the bar has been set by the EU so as not to reduce the penalty to just a mere fine for carrying on a business. The United Kingdom's Competition and Markets Authority (CMA), also provides that the base fine should not exceed 30% of the relevant turnover.

The anti-trust policy also provides for some interesting provisions that are worth adopting such as total turnover considered as an indicator of an entity's market power, to ensure a higher penalty on a larger undertaking. Furthermore, they are also statutorily empowered to increase penalties to ensure deterrence in a situation where an undertaking has a significant proportion of its turnover outside the relevant market, or the fine is too low (CMA, 2021).

In Germany, the size of the company is also taken into account and the anti-trust regulator has the power to increase the fine to ensure that it serves as an adequate deterrence measure, furthermore, the anti-trust authority also has the power to see the economic viability and reduce the penalty, defer the penalty or allow payment in instalments, this allows the penalty regime to fulfil the twin objective and maintain a balance (Bundeskartellamt, 2021). Furthermore, in Columbia, the sale receipts generated in an infringed market are considered rather than a product and in Mexico the market size, market share of the offender and the duration of violation are the key factors in determining the penalty (OECD, 2019b).

The bottom line is whether to weigh relevant turnover or total turnover; the objective of deterrence should not be reduced to a mere cost of doing business. Jurisdictions like the EU and the UK, as discussed above, despite considering relevant turnover, still managed to keep deterrence in the market, but the same is not the case with India. In India, after 2017, there was a strict approach of levying penalties based on the relevant turnover of the undertaking, which at times proved counterproductive for the regulatory authorities, as mentioned above, and provided a side route for the undertakings to indulge in anti-competitive practices and eventually escape the liability. The result was that there was an insignificant amount of penalty imposed.

After having understood the workings, positives, and negatives of both relevant and global turnover, along with an understanding of measures being adopted by other anti-trust jurisdictions in imposing penalties to ensure proper punishment and deterrence, we see that no single system can be sufficient. Hence, against the backdrop of understanding relevant turnover and global turnover and their interplay with the penalty regime, we propose the following to strengthen the penalty regime in India.

13. Conclusions and Recommendations

From the above discussion and the prevailing circumstances, our policy recommendation would be to adopt a flexible, reasonable, and fair approach while calculating the quantum of penalty. Modifications can be made to the existing system, such as where the penalties are being imposed based on relevant turnover, an appropriate percentage of the relevant turnover may be considered for computation of penalty and such a percentage is proportional to the size of the entity being investigated. More such changes can be made to the framework of relevant turnover. Still, here our focus would be on a different tangent, which is looking at the other alternatives available because the standardization of fines completely based on relevant turnover or global turnover proves to be counterproductive at various levels, as evident from the previous sections. Apart from turnover, there can be other proxies that could be used to determine the quantum of penalty. For instance, if a company's sales have an average growth rate of 5% but after engaging in anti-competitive conduct, the growth rate is 15% for three years, in such circumstances, it is possible to ascertain the quantum of penalty using the sales figures. However, there exists information asymmetry between the enterprise to be penalised and the CCI and such an approach becomes extremely difficult, but if accurate data is available, this approach may be utilized. Essentially, an assessment approach should be based on the judicial discretion of the market regulator depending on the circumstances of the case, giving due consideration to the information available to them. Similarly, we can also look at unique methods used by other jurisdictions such as Columbia or Mexico as discussed above, wherein the total revenue gained from sales in the infringed market is considered rather than simply a particular product and market size, market share of the offender and duration of violation are also considered in determining the penalty.

Instead of restricting the market regulator to a fixed proxy, the regulator should have the ability to choose from multiple assessment approaches or develop methodologies and even collaborate with other jurisdictions to arrive at an appropriate method. As we discussed earlier, the process of determining the quantum of the penalty proceeds in four steps, which involve determining the initial measure and a base fine, then ascertaining aggravating and mitigating factors, for example, the fine imposed may be higher, if, due to the anti-competitive conduct, there has been a reduction in market players or mitigating factors like the leniency regime, whereby there is a certain reduction in the fine for the informant or that entity which has cooperated with the anti-trust regulator. Thereafter, adjustments are made based on the maximum statutory limit, and in jurisdictions such as the United Kingdom (CMA, 2021) and Germany (Bundeskartellamt, 2021) the authorities are even empowered to increase the penalty to ensure deterrence. Lastly, leniency or settlement and commitment schemes will be considered in determining the final quantum of penalty (OECD, 2019b).

Furthermore, in the context of cartels, Indian competition policy can also adopt the concept of "duration multiplier" as used by the European Union in cases of cartelization (European Union, 2006). This will come at the second stage of the computing penalty. The duration multiplier involves increasing the base penalty by considering the duration of the infringement. The multiplier is calculated by the number of days participating in the cartel. The possibility of using the duration multiplier even outside the cases of cartelization should also be explored. For cartels which have caused grievous damage to the market, the regulatory authority could consider the alternative of turnover, where the legislation provides for the imposition of penalties based on the profits earned from the existence of that cartel. As far as the concept of turnover is concerned, there are several instances, especially in the case of trade associations, where the association has no profits or turnover. In such cases, the profits, and turnovers of the members of such associations should form the basis of penalty calculations. In such a situation, it is also possible to use this approach through the formulation of appropriate guidelines for the computation of appropriate penalties according to the relevant turnover of the members of the associations.

Another important aspect which indicates that there exists a dire need to revise the penalty mechanism is the recovery rate of penalties (Competition Commission of India, 2019). As per the CCI's annual report for 2018–2019, roughly 0.4% of the penalties imposed since 2009 (Rs. 126.92 crores out of 13,881.73 crores) have been realized by the commission. Furthermore, in the period from 2019-20 to 2022-23, a penalty of Rs. 4,460.48 crores was imposed, but only Rs. 198.08 crores (1.1% of the total penalty) were realised. The Competition Law Review Committee has attributed this low rate of recovery to the orders being appealed before the NCLAT, Hon'ble High Courts and Hon'ble Supreme Court because of the disproportionate imposition of penalties (Competition Law Review Committee, 2019). Therefore, we need to arrive at a proportionate and equitable penalty mechanism.

We can clearly understand that, whether it be relevant turnover or total turnover, both extremes leave room for problems and have their own set of situations in which they would be rendered ineffective. The penalty regime will be strengthened by allowing the regulator to have more tools at its disposal instead of one standardized proxy of relevant or global turnover. They are allowing multiple proxies to be used as per the facts and circumstances, along with detailed guidelines for imposition of penalty as suggested by the Competition Law Review Committee like the framework in Europe, the UK or Germany.

Such a system which helps in effectively taking away illegal gains through the usage of appropriate tools and has a deterrence factor will help in fulfilling the twin objective of fines that we understood at the very onset of our discussion. Conclusively, we can see that there exist different methodologies for computing penalty and there are a plethora of facts and circumstances which are to be considered while determining the penalty. This will create a degree of variation in penalties, but such a degree of variation will be limited to a particular range if there is a systematic framework. The flexibility and the limits within which the flexibility is used will create a stronger penalty regime as compared to sticking with one measure and standardizing the process, assuming that it will be appropriate in every situation.

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