



Between the law and recovery
Penalties under India's Competition Act

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Penalties for anti-competitive agreements and abuse of dominance (Competition Act, Section 27 (b))

- After a finding of a contravention of Sections 3 or 4, the Commission may (apart from directing the enterprise(s) to discontinue the agreement or abuse) :
- “impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse”...



Special clauses for penalties on cartels

“... Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher”.

-- *Apparently* much harsher than US or EU cartel penalties



Penalties on individuals (Section 48)

- “Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.”
- -- in practice, executives have been fined upto 10% of average income of the last 3 years in a few cartel cases.
- No provision for imprisonment for a contravention of Sections 3 or 4.



Leniency

(Section 46)

- Allows for 'lesser penalties' on cartel participants who have made "full, true and vital disclosures", upto the time the investigation report is received, provided they continue to cooperate with the Commission.
- 'Lesser Penalty Regulations' provide for a marker system, and reduction of penalty by upto
 - 100% for the first applicant
 - 50% for the second, and 30% for later applicants (if they provide significant added value")
- Leniency granted in 4 cases so far; about 100 more are in the pipeline.



Damages (Compensation)

(Section 53N)

- The Appellate Tribunal may award compensation for any "loss or damage" suffered by the government, or any enterprise or person, "as a result of any contravention of" Sections 3-6, after it is established by the CCI.
- -- no case so far.



Other penalties (Sections 42-45)

- Monetary penalties on *enterprises* for non-compliance with Commission's orders. Also provision for compensation to those harmed by non-compliance.
- *Individuals* may also be subjected to monetary penalties for non-compliance, as well as imprisonment for upto 3 years. They can also be penalised for:
 - non-cooperation in investigations,
 - suppressing or falsifying evidence



Why has deterrence not been effective in India?

- CCI has usually imposed penalties from 1 to 10% of average turnover, very rarely the harsher profit-based penalty allowed for cartels. (Cement case: 0.5 x profits rather than the maximum allowable 3 x profits.)
- It has refrained from imposing penalties in some cases on state-owned enterprises, recognizing broader policy objectives.
- Role of trade associations in attenuating penalties in many cases (esp. drugs and film distribution):
 - Substantially lower penalties because association has no profits, and even 10% of its turnover (membership fees, advertising revenue) is a very small fraction of its members' profits.
 - Even in cases of recidivism by associations, the fine has been trivial.



Setbacks on appeal

- *Less than 1% of the total penalties imposed by the CCI since 2009 have been paid.*
- Many CCI orders imposing high penalties were either set aside, or remanded, or had fines substantially reduced by the Appellate Tribunal on procedural or evidentiary grounds.
- According to Section 3(3), even hard-core cartels are only *presumptively* anti-competitive. COMPAT has set a high standard to establish AAEC, by accepting non-implementation of an agreement by some parties as exculpatory; or rejecting 'plus factors' such as
 - fixation of distributors' margins,
 - overt price signalling,
 - identical bids by parties with very different costs.



Setbacks on appeal (cont'd)

- COMPAT & Supreme Court have restricted 'relevant turnover' for calculating the penalty base to only the turnover in the affected product, not total turnover of the company.
- In many cases, penalties have been stayed pending the appeals process.
- No compensation awards yet, as cases have not attained finality.
- Fundamental differences over whether fines are meant to be deterrent...



“Another error committed by the Commission is that even though it took cognisance of the mitigating factors highlighted by the appellants and others, it brushed aside the same simply because they were found guilty of forming a cartel and indulging in bid-rigging. **The fact that many of the appellants were small scale units was also not given due weightage by the Commission while passing the impugned order.** The impression which we gather from the impugned order is that **the Commission proceeded to decide the issue of penalty with a determination that the appellants who were found to be guilty of formation a cartel/ collusive bidding must be punished so that others may learn a lesson from this. This approach is wholly inconsistent with the objective sought to be achieved by the Act, which is not only aimed at preventing practices having adverse effect on competition, but also to promote and sustain competition in market and to protect the interest of consumers. The Commission could not have overlooked the fact that the appellants had reduced their rates after negotiations with IOCL and there was no evidence that they had made unwarranted profits by supplying cylinders at the particular rates.**”

--M/s ECP Industries vs CCI, COMPAT order of 1.3.16, paras 31-32.



“... the purpose and objective behind the Act is to discourage and stop anti-competitive practice. Penal provision contained in **Section 27 of the Act serves this purpose as it is aimed at achieving the objective of punishing the offender and acts as deterrent to others.** Such a purpose can adequately be served by taking into consideration the relevant turnover. It is in the public interest as well as in the interest of national economy that industries thrive in this country leading to maximum production. **Therefore, it cannot be said that purpose of the Act is to ‘finish’ those industries altogether by imposing those kinds of penalties which are beyond their means.**”

-- Excel Crop Care vs CCI, Supreme Court, 8 May 2017, para 74

Doctrine of Proportionality



Thank you!

- Further details:

- “Cartels and the Competition Commission”, *Economic and Political Weekly*, 1 September 2012.
- “Anti-cartel Enforcement in India”, *Journal of Antitrust Enforcement* 5: 166-196, 2017.
- “Competition Law and Competition Policy in India: How the Competition Commission has Dealt with Anticompetitive Restraints by Government Entities” (with Oindrila De and Geeta Gouri), *Review of Industrial Organization*, forthcoming [<https://rdcu.be/1ihl>]

(All three articles written jointly with Dr Oindrila De)

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