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India: Penalty Framework Rejigged, Commitments and Settlements Go Live

INTRODUCTION

After the Government of India notified the relevant provisions of the Competition (Amendment) Act, 2023 (Amendment Act) to amend the Competition Act, 2002 (Act), the Competition Commission of India (CCI) published certain much-anticipated regulations on 6 March 2024. These regulations (set out below), finalized after public consultation, (i) prescribe the methodology for turnover / income calculation for imposing penalties; and (ii) govern the framework for parties to offer commitments and settlements:

a. the Competition Commission of India (Determination of Turnover or Income) Regulations, 2024 (Turnover Regulations);
b. the Competition Commission of India (Commitment) Regulations, 2024 (Commitment Regulations); and
c. the Competition Commission of India (Settlement) Regulations, 2024 (Settlement Regulations).

Along with these regulations, as a surprise package, the CCI has also finally released the Competition Commission of India (Determination of Monetary Penalty) Guidelines, 2024 (Penalty Guidelines), which set out the methodology for calculating penalty for infringements and will provide guidance to the CCI on the factors to be considered while imposing penalty.

Each of these are briefly discussed below.

CHANGES TO PENALTY REGIME

Calculating Turnover

The amended penalty provision, i.e., Section 27 of the Act clarifies that, other than turnover, the CCI may consider the income of a person or enterprise (e.g., an association) to impose penalties for infringements of the Act. Although the CCI has previously considered income instead of turnover where required, the amendments bring in much needed clarity and provide formal recognition to the CCI's existing practice. Additionally, the amended Act codifies penalty imposition on individuals based on their income.

Crucially, for the purposes of calculating penalty, the amended Act defines the term turnover as "*global turnover derived from all products and services by a person or an enterprise*". Consequently, the CCI is statutorily empowered to impose penalties up to 10% of the average of an entity's global turnover from all products and services for the relevant period.

The Turnover Regulations explain the mechanism for determining turnover / income under Section 27 of the Act. Based on audited financials (consolidated financials must be considered where required to prepare so by law), turnover / income will include the value of sales and other operating revenue but exclude (i) other income, (ii) indirect taxes, (iii) trade discounts and (iv) intra-group sales. Helpfully, the Turnover Regulations provide for a situation where audited financials are not available. In such cases, the amount can be certified either by the entity's statutory auditor or a chartered accountant (CA), supported by an affidavit by any person duly authorized by the entity.

For individuals, the gross total income, excluding (i) income from house property and (ii) income from capital gains, as per income tax returns (ITRs) will be considered. If ITRs are unavailable, a CA can certify the income, along with an affidavit from the individual. The manner of converting turnover / income to INR is also indicated in the Turnover Regulations.

Penalty Computation

The Penalty Guidelines, divided into multiple chapters, provide guidance on the methodology to be adopted for calculating penalties for different types of infringements under the Act. These guidelines also provide insight into the various mitigating and aggravating factors that the CCI may consider while deciding a penalty amount. Prior to the Penalty Guidelines, the primary source on determining penalty amount for the CCI and involved parties alike was the Supreme Court of India's landmark decision in *Excel Crop Care Limited v. CCI and Others* (Excel Crop).

The concept of "relevant turnover", expounded in *Excel Crop*, plays a pivotal role in the Penalty Guidelines, and is defined as an enterprise's direct or indirect turnover from the products / services related to the contravention determined by the CCI.

Under the Penalty Guidelines, as a starting point, after considering the (i) nature and gravity of contravention, (ii) nature of industry / sector affected by the contravention, (iii) implications on the economy because of the contravention and (iv) any other factor which the CCI deems appropriate in the facts and circumstances, the CCI will consider up to 30% of the average relevant turnover / income to determine penalty under Section 27(b) of the Act. The CCI may then impose a penalty by adjusting this amount, subject to the maximum penalty allowed by the Act, after considering the mitigating and aggravating factors provided in the Penalty Guidelines.

Pertinently, if the determination of relevant turnover is not feasible, the CCI can consider the global turnover derived from all products and services to determine penalty under Section 27(b) of the Act. If the CCI determines that the penalty amount arrived at is not sufficient to create deterrence, it can further increase the penalty subject to the statutory maximum.

Separate chapters of the Penalty Guidelines also elucidate the factors to be considered by the CCI while imposing penalties for (i) contraventions by individuals; (ii) gun-jumping; and (iii) non-compliance of orders / directions, making false statements or omitting / suppressing material information.

The CCI can deviate from the Penalty Guidelines in exceptional circumstances after considering the unique / peculiar characteristics of the relevant matter. For imposing penalties either under Section 27, or on individuals, or for gun-jumping in such a scenario; the Penalty Guidelines (in line with the amended Act) require the CCI to record reasons for its divergence.

COMMENT

The clarifications brought in by the amendments to the penalty sections of the Act and Turnover Regulations close the previous gaps in determining the definition and scope of "turnover". The inclusion of provisions allowing for specific alternatives to audited figures and identifying the manner of currency conversion do not leave any room for ambiguity, which will help standardize practice and improve procedural efficiency.

However, despite a specified methodology along with key factors, the CCI retains wide discretion to consider any factors it deems fit to decide penalties for different contraventions under the Penalty Guidelines.

The Penalty Guidelines also permit the CCI to directly jump from considering relevant turnover to global turnover of all products and services to impose penalties if relevant turnover cannot be determined. This rationale for linking relevant turnover (which is based on the concerned products / services) to geography could face legal challenges.

COMMITMENTS AND SETTLEMENTS

Under the Commitment Regulations, an entity under scrutiny for anti-competitive vertical agreements and / or abuse of dominance can offer commitments to the CCI within 45 days of receiving the CCI's *prima facie* order and in any case before it receives the Director General's (DG) investigation report on the matter (DG Report). Further, proceedings must be completed within 130 working days of the CCI receiving the completed application.

Under the Settlement Regulations, any entity facing the CCI's inquiry for anti-competitive vertical agreements and/or abuse of dominance can apply for settlement with the CCI within 45 days of receiving the DG Report. An application for settlement must be submitted before the CCI decides the case and settlement proceedings must conclude within 180 working days of the CCI receiving the completed application.

Key Terms

Requirement of Waiver

An essential prerequisite for filing an application under both, the Commitment Regulations and Settlement Regulations (collectively, C&S Regulations), is submitting an undertaking (i) admitting to the CCI's jurisdiction and right to initiate proceedings under the Act in relation to the alleged contravention(s); (ii) agreeing to the CCI's enforcement of any claims against it arising from any violation of the commitment / settlement order; (iii) waiving the right to take any legal action against the CCI concerning any issues in the commitment / settlement order; and (iv) waiving the right to contest findings of fact and law, appeal or review before the National Company Law Appellate Tribunal (NCLAT) or other courts, and any plea of limitation or laches for the initiation or restoration of proceedings upon violation of the commitment / settlement order.

Crucially, as per the C&S Regulations, the applicant will continue to be bound by such undertakings and waivers even if the CCI ultimately rejects its application.

Assessment of the Application

Apart from filing requirements and provisions for rectifying defects, the C&S Regulations establish a detailed framework for accepting or rejecting applications. Importantly, the CCI must provide an opportunity of being heard before rejecting any application. An application can also be withdrawn before the CCI's final decision.

The C&S Regulations mandate the CCI to invite comments, objections, and suggestions on the commitment / settlement proposal from concerned parties, the DG, and any other parties. While deciding an application, the CCI must assess the (i) nature, gravity, and impact of the alleged infringement; (ii) commitment / settlement proposal; and (iii) objections and suggestions received (if any). To assess #(i) and#(ii) above, the CCI must consider the following factors:

a. nature of conduct, type, duration and extent of the alleged infringement(s);
b. whether the terms offered address the alleged contravention(s);
c. effective and expeditious implementation of terms;
d. ease of monitoring the proposal;
e. increase in contestability of the markets as a result of terms offered;
f. procedural efficiencies, self-executing term, and early correction of market distortions;
g. previous contraventions, previous settlement / commitment applications and pending inquiries;
h. modifications in conduct and policies;
i. steps taken to minimize future violations or lapses; and
j. any other factor that the CCI deems appropriate considering the facts and circumstances.

Interestingly, while a settlement application must necessarily cover all contraventions alleged in the DG Report, the Commitment Regulations allow applicants to submit selective commitment proposals in respect of some of the contraventions in the CCI's *prima facie* order. The CCI's inquiry in relation to the remaining contraventions not part of the commitment proposal can continue.

Effect of Commitment / Settlement Decision

As per the C&S Regulations, a CCI order agreeing to the commitment / settlement proposal cannot be construed as a finding of contravention against the applicant. If the CCI rejects the commitment / settlement application, proceedings against the applicant will continue. Further, as per the Act, the CCI's decision cannot be appealed to the NCLAT.

A successful applicant under the Settlement Regulations will be effectively entitled to a 15% discount on the base penalty amount determined by the CCI in accordance with the Penalty Guidelines. However, the applicant cannot challenge the decided settlement amount. The CCI will only pass an order agreeing to the settlement terms after the applicant pays the settlement amount.

Power to Monitor Proposal Implementation, Revoke Orders and Use Information

The CCI is empowered under the C&S Regulations to appoint monitoring agencies to oversee the implementation of the commitment / settlement proposal.

If (i) an applicant fails to comply with the CCI's directions or has not made full and true disclosure during proceedings; or (ii) there is a material change in facts; subject to a show-cause notice, the CCI's commitment / settlement order shall be revoked. In such a scenario, (i) the applicant will be liable to pay legal costs incurred by the CCI up to a maximum of INR 10 million (USD ~120,000) and (ii) the CCI can restore inquiry against the applicant and use the information and documents provided in the application in such proceedings. In any event, the C&S Regulations authorize the CCI to use the information supplied in an application against other parties to the inquiry who are not part of the commitment / settlement proceedings.

Filing Fee

The application fee, depending on the applicant's total turnover in India in the preceding financial year, is either (i) INR 250,000 (USD ~3,000), (ii) INR 1 million (USD ~12,000), or (iii) INR 5 million (USD ~60,000).

COMMENT

The C&S Regulations are a welcome addition to the country's antitrust enforcement framework. The commitments and settlement mechanism offers parties facing CCI scrutiny alternative paths to speedily resolve inquiry / investigation and potentially reduce litigation costs. The implementation of this regime brings Indian competition law at par with international standards and practices and enables swift closure of matters.

Yet, certain provisions in the C&S Regulations could disincentivize potential applicants. The expansive scope of waivers requires applicants to completely waive their rights to contest the CCI's decisions without any checks and ousts the jurisdiction of other courts. As per the C&S Regulations, the waiver continues to apply even if the application is rejected. Apart from disincentivizing applications, such unrestrained waiver requirements risk being challenged for violating constitutional rights.

Additionally, the possible benefits of an approved commitment / settlement may not adequately incentivise applications considering the bar on appeals, extensive filing requirements, various instances in which the application may be rejected, opportunity for the DG and "any other party" to object to the proposal, non-refundable filing fee and risk of imposition of legal costs. Specifically for settlements, a 15% discount on penalty may not appear sufficiently attractive.

It remains to be seen whether parties under investigation will be willing to trade off the possibility of appeal and potential reversal of a finding of contravention with an approved commitment / settlement proposal.

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