

MAY 2017

SUPREME COURT WEIGHS IN ON 'RELEVANT TURNOVER' FOR DETERMINING PENALTIES

1. INTRODUCTION

The Supreme Court of India (the “**Supreme Court**”) on May 8, 2017¹ held that the ‘relevant turnover’ and not the total turnover should be the basis for determination of penalties under the Competition Act, 2002 (the “**Act**”).

The matter in question related to an allegation of anti-competitive agreement entered into between United Phosphorous Limited (“**UPL**”), Sandhya Organic Chemicals Private Limited (“**SOCL**”) and Excel Crop Care Limited (“**ECCL**”) (the “**Entities**”) whereby the Entities were allegedly engaged in collusive bid rigging and quoting of identical prices for Aluminium Phosphide Tablets (“**ALP**”).

The Supreme Court upheld the order of the Competition Appellate Tribunal (the “**COMPAT**”) confirming that the Entities were guilty of cartel formation and entered into an agreement which directly or indirectly resulted in collusive bidding² and which limited or controlled production, supply, markets, technical development, investment or provision of services.³

The Supreme Court recognised the principle of ‘relevant turnover’ of a company, essentially determining the penalty on the basis of the turnover of the *relevant product*, and not the *total turnover* of the company. The Supreme Court criticised the Competition Commission of India (the “**CCI**”) for taking into account the aggregate total turnover of the infringing parties, observing that such practice would lead to “*disastrous results.*”

2. BACKGROUND

The CCI had on receipt of information from the Chairman and Managing Director of the Food Corporation of India (the “**FCI**”), directed an investigation wherein it was alleged that there was rise in the cost of procurement of ALP tablets, due to anti-competitive agreement amongst the manufacturers of ALP. The ALP tablets were required for safe storage of food by the FCI and other government authorities having similar purpose.

The Director General, CCI (the “**DG**”) investigated the allegation and on analysis of bid data and conduct of the parties, concluded that the Entities acted in a concerted manner to eliminate competition by indulging in collusive bidding in the tender for procurement of goods by the FCI in 2009 and collectively boycotting e-tenders floated by FCI in 2011. Upon consideration of the DG’s findings and the arguments of the parties, the CCI held that the Entities were acting in violation of section 3 (3) (b) and 3 (3) (d) read with section 3(1) of the Act.

¹ Civil Appeal No. 2480/2014

² Section 3(d) of the Act.

³ Section 3(b) of the Act.

3. COMPAT OBSERVATIONS

In appeal, the COMPAT upheld the order of the CCI insofar as the violation under section 3 was confirmed. However, due to uncertainty in the meaning of the term “*turnover*”⁴, the position in varying jurisdictions was examined to cull out the relevant parameters in determining the quantum of penalty.

The tribunal took into account guidelines set out by the European Union and the Office of Fair Trade (the “OFT”) in the United Kingdom. The OFT guidelines require analysis of the “*relevant turnover*” and define relevant turnover as “*the turnover of the undertaking in the relevant product market and the relevant geographic market affected by the infringement in the last business year*”.

The COMPAT accepted the argument that the Entities were multi-product companies of which the sale of ALP constituted a minor portion. Therefore, a penalty based on the *entire turnover* of the Entities would be unfair.

4. KEY HIGHLIGHTS OF THE SC ORDER

The Supreme Court affirmed the observations of the COMPAT on the main issue of collusive bidding and upheld the finding of violation by the Entities.

4.1 Meaning of “relevant turnover”

The Supreme Court observed that the *turnover* of the infringing party in respect of the *infringing products* would be the *relevant turnover* for the purposes of section 27 of the Act.

The apex court examined the principles of interpretation and concluded that adopting the criteria of ‘*relevant turnover*’ for the purpose of determining the penalty is more in tune with ethos of the Act and the legal principles generally relating to the imposition of penalties.

The Supreme Court rejected the contention of the Additional Solicitor General (appearing for the CCI) to give a literal interpretation to the term “*turnover*”, as section 27(b) is a deterrent provision. It was observed that:

*“No doubt, the aim of the penal provision is also to ensure that it acts as deterrent for others. At the same time, such a position cannot be countenanced which would deviate from ‘teaching a lesson’ to the violators and lead to the ‘death of the entity’ itself. If we adopt the criteria of total turnover of a company by including within its sweep the other products manufactured by the company, which were in no way connected with anti-competitive activity, it would bring about shocking results not comprehended in a country governed by Rule of Law.”*⁵

The Supreme Court⁶ set out the following reasons for interpreting “*turnover*” for the purposes of Section 27 of the Act:

- (a) penalty has to relate to the infringing product causing the violation under the Act;
- (b) penal statute has to be interpreted strictly;
- (c) if two interpretations are possible, one that leans in favour of the infringer has to be adopted;

⁴ Section 2(y) of the Act defines turnover as below:
“*turnover*” includes value of sale of goods or services.

⁵ Sikri J, at para 74 (vi) in Civil Appeal No. 2480/2014

⁶ Sikri J, at para 74 in Civil Appeal No. 2480/2014

- (d) the doctrine of *proportionality* while imposing a penalty is aimed at balancing two competing interests: harm caused to society by the infringer (giving justification for penalising the infringer) on the one hand and the right of the infringer not to be disproportionately punished in context of the nature of its acts; and
- (e) the doctrine of *purposive interpretation*, focused on the co-relation between the nature of offence and the benefit derived therefrom, emphasises the link between *damage caused* and the *profits which accrue* from the cartel activity.

4.2 Guidelines for imposing penalty

By a separate concurring judgment, Justice N. V. Ramana illustrated the following eleven factors that should be considered by the CCI while imposing a penalty under section 27(b) of the Act:

- (a) the nature, gravity and extent of the contravention;
- (b) the role played by the infringer (whether the infringer was a *ringleader* or a *follower*);
- (c) the duration and intensity of participation;
- (d) the loss or damage suffered as a result of such contravention;
- (e) the market circumstances in which the contravention took place;
- (f) the nature of the product;
- (g) the market share of the entity;
- (h) the barriers to entry in the market;
- (i) the nature of involvement of the company;
- (j) the *bona fide* acts of the company; and
- (k) the profit derived from the contravention.

Ramana J. added that these factors are “*only illustrative*” to take into consideration while imposing an appropriate percentage of penalty, therefore leaving some flexibility for the CCI and COMPAT in their decision-making.

IndusLaw View:

The Supreme Court order has provided much needed clarity on the issue of imposition of penalties particularly in case of violations by multi brand enterprises.

The observations of the Supreme Court will likely assume considerable significance for real estate giant DLF in the *DLF Belaire association case*⁷ pending before Supreme Court (the “DLF Case”).

The hefty penalty imposed in the DLF Case by the CCI and upheld by the COMPAT was determined on the basis of the position of DLF in the real estate market in a particular geographical location and the impact its dominant behaviour had on consumers affected by the abuse of its dominance.

While the Supreme Court did not opine on the relevant geographical market while considering the *relevant turnover* in the instant case, it will interesting to observe the development of jurisprudence in this regard in the DLF Case.

Further, while a detailed list of factors to be considered in determining a penalty will provide greater guidance to the CCI and the COMPAT, we hope that this does not result in greater protracted litigation at the appellate level where litigants invariably disagree on the relative importance of the eleven illustrative factors in each case.

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⁷ Civil Appeal No. 6328/2014