

PENALISING ANTI-COMPETITIVE AGREEMENTS AND ABUSE OF DOMINANCE

*P.K. Basu Majumdar**

With the liberalisation of the economy and trade in India, the new competition law – the (Indian) Competition Act, 2002 – modelled after the European law on competition and the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, decriminalised antitrust offences, but enhanced the limits of penalties for certain anti-competitive practices. This paper notes that the Competition Commission of India, which has the responsibility of enforcing the Competition Act, has been meting out heavy penalties. But the CCI has often been criticised by the Competition Appellate Tribunal, for not considering relevant factors while calculating fines and not giving reasons for imposing these penalties. It is noted that the law only fixes ceiling limits of penalties. A suggestion has been made by the bar in an appeal matter before the COMPAT to adopt the European/British guidelines on imposing penalty. Predictably, this has not found unconditional acceptance by COMPAT, which has only accepted the proposition of calculating fines based on ‘relevant turnover’. In this paper, I have examined the legal provisions and relevant case laws from the Supreme Court and competition authorities to map the present procedure for setting fines in competition cases in India. I have also analysed the European law on the subject, and explored how these processes can be adopted in India. Can a procedure be devised to bring transparency and predictability to the procedure for setting fines for antitrust offences in India?

I. INTRODUCTION

India gained independence in 1947, after British rule for more than two centuries. The newly independent nation’s economic policies and laws were directed towards dispersal of industrial production and controlling the expansion of existing industries,¹ controls on production and prices, and curbs

* The author is a practicing lawyer in India, and looks after the competition law practice of a very old and large firm of Advocates & Solicitors in India – Fox & Mandal. He had earlier been the General Counsel (Executive Director) of Steel Authority of India Ltd., the largest public sector steelmaker of India. He holds a Master’s degree in European Competition Law from King’s College, London.

¹ This was done to promote development of ‘backward’ areas and less developed states. Besides the licensing tool, fiscal incentives in the form of tax rebates and cheaper loans were also offered both by State and Central Governments.

on the growth of monopolies (except State-run undertakings). The legal instruments of choice were the Industries (Development and Regulation) Act, 1951 ('IDRA'), which authorised the Government to regulate the setting up and expansion of industries through licenses, and later, the Monopolies and Restrictive Practices Act, 1969 ('MRTP Act'),² which attempted to curb the growth of monopolies and unfair or restrictive practices that monopolies and oligopolies indulged in. Other European colonies in Asia and Africa were also being granted political independence, but the developed countries, including the former colonial masters, tied much-needed economic aid to the newly independent 'developing' countries to export of raw materials and primary products and import of manufactured goods from developed countries by them.³ To counter this, the developing nations used the forum of the United Nations General Assembly to push for a new economic order.⁴ At their insistence, the United Nations Conference on Trade and Development ('UNCTAD')⁵ was organised on a regular basis.⁶ Further, to increase their bargaining strength, they formed the 'Group of 77' ('G-77') at the end of the first session of the UNCTAD in 1964.⁷ In the 1980 conference, organised by UNCTAD, such discussions held by the UN members on 'Restrictive Business Practices' led to formulation of the 'UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices' ('UN Set').⁸ Thereafter, the UN General Assembly further reviewed them in 1985, 1990, 1995, and 2000. The objectives included creation, encouragement and protection of competition, control of the concentration of capital and/or economic power, and

² The MRTP Act was enacted subsequent to and in pursuance of recommendations of the much delayed 1964 report of Prof. P. C. Mahalanobis Committee, the subsequent 1965 report of the Monopolies Inquiry Commission headed by Justice K. C. Dasgupta, and the 1967 report on industrial licensing by Prof. R. K. Hazari of the Planning Commission.

³ See KATIE WILLIS, *THEORIES AND PRACTICES OF DEVELOPMENT* (2nd edn., 2005) (The multinational corporations (MNCs) based in the developed world drove global economic policies. The MNCs needed access to the markets of the newly independent developing countries).

⁴ The New International Economic Order ('NIEO') was a set of proposals put forward during the 1970s by some developing countries through the UNCTAD to promote their interests by various means, including improving their terms of trade, increasing development assistance, tariff reductions by developed countries, and replacing the Bretton Woods system which had benefited the leading states that had created it, especially the United States of America.

⁵ The first UNCTAD was held in Geneva in 1964. The conference was institutionalised to meet every four years, with intergovernmental bodies meeting between sessions. The UNCTAD was provided a permanent secretariat and necessary substantive and logistical support. It is responsible for dealing with development issues, particularly international trade.

⁶ See R.P. Anand, *A New International Economic Order for Sustainable Development in INTERNATIONAL LEGAL ISSUES ARISING UNDER THE UNITED NATIONS DECADE OF INTERNATIONAL LAW* 1209-1248 (Najeeb Al-Nauimi eds., 1995).

⁷ The G-77 originally had 77 members, including India. Currently the group has 134 members, but still goes by the appellation 'G-77'.

⁸ United Nations Conference on Trade and Development, *UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, UNCTAD/RBP/CONF/10/Rev.2, (2000).

encouragement of innovation.⁹ The UN Set required enterprises to refrain from anti-competitive practices and ‘abuse’ of dominant position.¹⁰

Parallel to these global developments, there was introspection about the merits of a command economy and emphasis on ‘distributive justice’ in India. Advocates of pro-market strategy reasoned that ‘a competitive, open and efficient economy’ would lead to higher rates of economic growth on the back of labour-intensive industrialisation.¹¹ This led to liberalisation of the Indian economy in 1991, with its focus on creation of wealth. As a logical corollary, there was an increase in internal competition, while liberalisation of the ‘licence permit *raj*’ brought fresh investments and new players (including global players) into the market.

With the changing economic scenario, the MRTP Act “was not only found to be inadequate but also obsolete in certain aspects, particularly in the light of international economic developments relating to competition law”.¹² The (Indian) Competition Act (‘the Act’) was, therefore, enacted in 2002 to protect and nurture competition in the internal markets in India. The principles of the UN Set¹³ were incorporated in the Act.¹⁴ §§3 and 4 of the Act are also remarkably similar to Articles 101 and 102 of the Treaty on the Functioning of the European Union (‘TFEU’)¹⁵ and other relevant competition regulations¹⁶ which have been framed by the European Council for ease in understanding and implementing the above Articles. The Competition Act has created a seven-member Competition Commission of India (‘CCI’), which is a regulatory and adjudicatory forum, and a three-member Competition Appellate Tribunal (‘COMPAT’), chaired by a sitting or retired Chief Justice of a High Court or Judge of the Supreme Court, to hear appeals from orders of the CCI and to adjudicate on claims for compensation. It gives the CCI and COMPAT wide discretionary powers to deal with transgressions of the law. The CCI can (i) pass ‘cease and desist’ orders¹⁷ in respect of anti-competitive practices, as well as orders to modify such anti-competitive agreements¹⁸; (ii) impose heavy

⁹ *Id.*, clause A. 2.

¹⁰ *Id.*, clauses D.3 & D.4.

¹¹ See Atul Kohli, *Politics of Economic Growth in India, 1980-2005 – Part I: The 1980s*, XLVIII(4) EPW 1251 (2006).

¹² Competition Commission of India v. SAIL, (2010) 10 SCC 744, ¶3.

¹³ See *supra* note 8 (In fact, the UN Set is remarkably detailed and contains explanatory notes for its operationalisation).

¹⁴ *Id.*

¹⁵ Articles 101 & 102 of the TFEU respectively contain provisions relating to prohibition of anti-competitive agreements and association and abuse of dominance in the “internal market”.

¹⁶ See European Council, *Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty*, OJ L 1/1-25, Arts. 1 & 2 (January 4, 2003).

¹⁷ The Competition Act, 2002, §27 (a).

¹⁸ The Competition Act, 2002, §27 (d).

monetary penalty (calculated as percentage of turnover or multiple of profit)¹⁹ on enterprises that violate the law; (iii) impose fines and/or imprisonment for not complying with an order/direction of the Director General ('DG') and the CCI.²⁰ The COMPAT can award compensation for any loss or damage suffered by a person as a result of an enterprise violating directions issued by the CCI or contravening any decision or order of the CCI under §§27, 28, 31, 32, and 33 of the Act.²¹ It is to be noted that competition law does not lay down guidelines on how the CCI is to calibrate the amount of penalty/fine to be imposed. The Act, under §27(b), merely prescribes a ceiling.²²

In order to streamline the penalty/fine imposition, the Bar has suggested²³ that the competition authorities borrow from guidelines on setting fines adopted by the European Commission and/or the Office of Fair Trading ('OFT'),²⁴ where competition law is more developed. The response of the COMPAT has been understandably guarded:

"[...] those guidelines [OFT] are undoubtedly relevant in arriving at the issue of deciding upon the turn over. However, those guidelines cannot be treated as be all and end all in the matter and would have to be considered in the light of the facts of each case."²⁵

As will be seen later, when penalties imposed by the CCI have been challenged in appeals before the COMPAT, some have been drastically reduced by the COMPAT on various grounds. This leads to confusion among enterprises and competition law advisors about the likely financial impact of a proceeding before the competition authorities. This uncertainty raises serious concerns, as enterprises would like to be able to do legal risk analysis of business decisions with some degree of certainty. European law, it will be seen, has attempted to put in place some guiderails for the authorities that impose fines. I will therefore, seek an answer to the question: can the EU guidelines

¹⁹ The Competition Act, 2002, §27 (b) (along with the *proviso*).

²⁰ The Competition Act, 2002, §§42 (2), 42 (3), 43, 43A, 44, 45 & 46 (However, if the person fails to pay the fine as ordered by the CCI, he is liable to be imprisoned up to three years and/or fine imposed up to Rs. 25,00,00,000 under §42 (2) of the Act. This order is to be passed by the Chief Metropolitan Magistrate, Delhi).

²¹ The Competition Act, 2002, §§42A & 53N.

²² The ceiling prescribed in §27 (b) is ten percent of the average of turnover for the last three preceding financial years. However, in the case of cartel offence, the proviso to the section prescribes a higher ceiling of up to three times of profit of the enterprise for each year of continuance of the cartel agreement or ten percent of turnover for each year of continuance of such agreement, whichever is higher.

²³ *Excel Crop Care Limited v. Competition Commission of India*, [2013] Comp AT 146, ¶43.

²⁴ The OFT was responsible for protecting consumer interests and handling competition matters throughout the United Kingdom. It closed in April, 2014, with its responsibilities passing to a number of different organisations including the Competition and Markets Authority.

²⁵ *Excel Crop Care Limited v. Competition Commission of India*, [2013] Comp AT 146, ¶62.

be adopted and adapted for use by competition authorities in India, keeping in view the laws in India?

In this paper, while dealing with the penalty that may be imposed by the CCI for violating §§3 and 4 of the Act, I will make a comparative study of the guidelines developed in European jurisdiction, and the relevant jurisprudence in India.²⁶ The various sections of this article will cover the following areas: *first*, existing legal provisions in India and relevant case laws on imposing penalties/setting fines; *second*, the COMPAT modification of fines imposed by the CCI, and reasons therein; *third*, methodology for setting fines in the European competition jurisdiction; *fourth*, comparison of laws and regulations in India and Europe relating to fines in competition matters; *finally*, a roadmap for introducing changes in India.

II. PENALTY FOR ANTI-COMPETITIVE PRACTICES

The power of the CCI to impose monetary penalty is derived from §27(b) of the Act, which allows it to “impose such penalty, as it may deem fit which shall be not more than ten per cent of the average of the turnover²⁷ for the last three preceding financial years [...]”. However, the Act takes a more serious view of cartel misconduct and the proviso to §27(b) empowers the CCI to impose a higher penalty, and that too for each year of the continuance of the cartel agreement.²⁸

In the Act, the words ‘penalty’ and ‘fine’ have both been used. In Black’s Law Dictionary,²⁹ a ‘penalty’ has been defined to be “a statutory liability imposed on the wrongdoer in amount which is not limited to damages suffered by party wronged”.³⁰ On the other hand, a ‘fine’ has been defined as “a pecuniary punishment or penalty imposed by a lawful tribunal upon person convicted of crime or misdemeanour”.³¹ The word ‘fine’ is therefore generally associated with criminal misconduct. This word has been used in the Act in §§42(2) & (3), 43 and 45, in the context of punishing a “person”, as defined

²⁶ Although the USA has more experience in antitrust matters, its legislation treats antitrust practice as a felony offence, and hence the American system of awarding punishment, although very methodical and predictable, is not suitable for comparative study.

²⁷ *Excel Crop Care Limited v. Competition Commission of India*, [2013] Comp AT 146, ¶62 (It has been decided by the COMPAT that the ‘turnover’ should relate to the turnover of the relevant product in the relevant geographic market. However, a reading of the relevant portion of the judgment makes it apparent that this is a rule *in personam*, in the “peculiar circumstances” of the case).

²⁸ The Competition Act, 2002, §§42A & 53N.

²⁹ BLACK’S LAW DICTIONARY 1133 (6th ed., 1990).

³⁰ In the Act there is a separate mechanism for award of compensation under §§42A and 53N of the Act, and the COMPAT alone can award such compensation.

³¹ See *supra* note 29, 632.

in §2(1) of the Act, for flouting a direction or order of the CCI or omitting to furnish information or furnishing wrong information about combination. In the Indian jurisdiction, the CCI can impose both penalty and fine. Only under §42(3),³² when the punishment is a fine up to Rupees twenty-five crores and/or imprisonment up to three years, are the proceedings to be held before the Chief Metropolitan Magistrate, Delhi (under the Code of Criminal Procedure, 1973 ('the CrPC')). However, these terms seem to have been used interchangeably by the CCI and the COMPAT in their orders.³³ A corollary of this is that competition law jurisprudence can borrow principles of punishment under criminal law.

Regarding the quantum of penalty that may be imposed, the COMPAT has observed that “under Section 27(b), the only rider is that penalty should not be more than 10 percent of the average turnover for the last three preceding financial years.”³⁴ It has been left to the discretion of the CCI to impose penalty/fine within the prescribed ceiling limit. However, the COMPAT has also observed that the CCI is bound to take into account aggravating or mitigating circumstances and exercise its discretion judicially.³⁵ Under the Act, penalty is related to turnover, and the COMPAT has said that where a particular concern is a “multi-commodity company”, the “relevant turnover” of the goods or service in question should be considered and not the total turnover.³⁶

An important proposition in imposition of sanctions for transgression of law is that of “just punishment” or “deserts”.³⁷ This proposition incorporates the concepts of “proportional equality”³⁸ and “the somewhat hazy requirement that like cases be treated alike”.³⁹ Since, in criminal law,

³² §42(3) deals with punishment for failure to comply with direction or order of the CCI or failure to pay fine imposed by the CCI.

³³ *M/s Magnolia Flat Owners Association & Ors. v. M/s. DLF Universal Limited*, [2014] CCI 54, ¶ 32 (The CCI has rightly used the word “fine” in the context of punishment imposed under §42(2) of the Act for violation of directions of the CCI under §§27, 28, 31, 32, 33, 42A and 43A. It has used the word “penalty” in several orders under §27(b) of the Act. In a separate dissenting order in *Kapoor Glass Private Limited v. Schott Glass India Private Limited*, [2012] CCI 15, ¶10; the word “fine” has been used by the Hon. Member in the context of penalty imposed under §27(b) for breach of §§4(2)(b) & 4(2)(c) of the Act. The COMPAT too, in *Shree Cement Limited v. Builders’ Association of India*, [2014] Comp AT 17, ¶ 1, has used the word “fine” in the context of penalty imposed by CCI under §27(b) for breach of §§3(3)(a) & 3(3)(b) read with §3(1) of the Act. The COMPAT has done so in several other orders as well).

³⁴ *M/s International Cylinder (P) Ltd v. Competition of India & Ors.*, [2013] Comp AT 166, ¶56.

³⁵ *Id.*, ¶57.

³⁶ *Id.*

³⁷ See Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 Nw. U.L. REV. 19 (1987) (Robinson was a former Commissioner, United States Sentencing Commission and distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey).

³⁸ Franklin E. Zimring, *Principles of Criminal Sentencing, Plain and Fancy*, 82 Nw. U.L. REV. 73 (1987) (Zimring was Professor of Law and Director, Earl Warren Legal Institute, University of California at Berkeley).

³⁹ *Id.* (quoting H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968)).

punishment may involve periods of incarceration and even capital punishment, often coupled with fine, the Supreme Court has understandably been keen on that notion that criminal sentences be just.⁴⁰ The doctrine of proportionality is germane to the concept of just punishment.⁴¹ While reviewing imposition of capital punishment, the Supreme Court has on several occasions invoked the doctrine of proportionality. The Court has stated that “if a law provides for imposition of a sentence which is disproportionate to the offence, it would be arbitrary and irrational, for it would not pass the test of reason and would be contrary to the rule of law and void under Articles 14, 19 and 21”.⁴² The doctrine of proportionality has been more simply put by the Supreme Court – that the sentence imposed by the courts should be commensurate with the seriousness of the offence.⁴³

Importing this legal principle into competition jurisprudence, the COMPAT has observed that the “Supreme Court has time and again relied on the doctrine of proportionality” and has held that generally the award of penalty should be in proportion to the wrong done.⁴⁴ In a recent case too, the COMPAT has deprecated that the CCI has violated the “principle of proportionality”.⁴⁵ It is trite, therefore, that proportionality is fundamental to imposition of penalty. Professor Zimring has added the concept of ‘parsimony’⁴⁶ to that of ‘proportionality’. The principle of parsimony involves “restricting those punishments inflicted to the absolute minimum that is necessary”.⁴⁷

The Supreme Court has observed that the punishment should have regard “to the aggravating and mitigating circumstances”⁴⁸ However, while enhancing a “flea-bite” sentence awarded by the lower court, the Supreme Court has also cautioned that considerations of undue sympathy will lead to miscarriage of justice.⁴⁹ The COMPAT has incorporated this principle in competition jurisprudence and observed that the CCI must consider the mitigating

⁴⁰ *Gopal Singh v. State of Uttarakhand*, (2013) 7 SCC 545: (2013) 3 SCC (Cri) 608, 18 (The Supreme Court in this case has observed that “the principle of just punishment is the bedrock of sentencing in respect of a criminal offence”).

⁴¹ *Id.* (In the context of just punishment, the Supreme Court has also observed that the punishment should not be “disproportionately excessive”).

⁴² *Bachan Singh v. State of Punjab*, (1982) 3 SCC 24, ¶36 (*per* P.N. Bhagwati, J., when speaking for the Constitution Bench).

⁴³ *State of Karnataka v. Sharanappa Basanagouda Aregoudar*, (2002) 3 SCC 738: AIR 2002 SC 1529, ¶6.

⁴⁴ *Excel Crop Care Limited v. Competition Commission of India*, [2013] Comp AT 146, ¶63.

⁴⁵ *All India Organisation of Chemists and Druggists v. CCI*, Appeal No. 56/2014 (COMPAT) (Unreported), ¶23.

⁴⁶ Zimring, *supra* note 38.

⁴⁷ *Id.* (This concept operates as a limiting principle).

⁴⁸ *Ronny v. State of Maharashtra*, (1998) 3 SCC 625: AIR 1998 SC 1251, ¶40.

⁴⁹ *State of Karnataka v. Krishna*, (1987) 1 SCC 538: AIR 1987 SC 861, ¶7.

circumstances and then only come to the final conclusion regarding the quantum of punishment.⁵⁰

As seen above, the principle of ‘just deserts’ serves as the foundation of criminal jurisprudence.⁵¹ Do the above concepts bring us any closer to specifying the value of penalty in competition law that would satisfy the criteria of ‘just deserts’? This is the question I will explore. In this paper, the term ‘just deserts value’ has been used to denote this value.

In competition law, for the purpose of defining the ceiling limits for imposition of penalty under §27(b) of the Act, all transgressions are divided into two broad categories – (i) cartel behaviour; and (ii) all other anti-competitive behaviour, including vertical and horizontal agreements (other than cartels). In neither case is there a floor in the matter of awarding punishment. The seven members of the CCI are expected to sit together and arrive at a consensus regarding the quantum of punishment. It would be pertinent that this should have certainty and reproducibility. I shall examine whether any empirical formulation for computation of the ‘just deserts value’ emerges from the CCI orders on penalty, and their subsequent modifications by the COMPAT.

A. CALCULATION OF PENALTY/FINE FOR CARTEL OFFENCE

The proviso to §27(b) of the Act, pertains to penalising cartel members. The penalty may be computed for each producer, seller, distributor, trader, or service provider included in the cartel on an annual basis for each year of the continuation of the cartel (after May 20, 2009),⁵² either as a percentage of the turnover for that year or profit for that year,⁵³ keeping in view the cut-off ceiling of three times the profit for each year of the continuance of agreement or ten percent of the turnover (whichever is higher). The aggregate fine for each cartel member would be the sum of the fines in respect of each year of continuance of the cartel agreement, subject to application of the cut-off on an annual basis.⁵⁴

⁵⁰ M/s. Gulf Oil Corporation Ltd. v. Competition Commission of India & Ors., [2013] Comp AT 122, ¶64.

⁵¹ Ruli Ram v. State of Haryana, (2002) 7 SCC 691, ¶23.

⁵² See Ackruti City Limited v. Reliance Infrastructure Limited, [2010] CCI 12, ¶6 (Allegation of violation prior to enforcement of §3 or §4 of the Act, i.e., before 20-5-2009, cannot be entertained by CCI).

⁵³ Although the CCI has the discretion to impose such penalty ‘as it may deem fit’, reading the proviso to §27(b) as a whole, and applying the rule of *ejusdem generis*, such calculation of penalty is to be based on percentage of turnover or multiple of profit on an annual basis for each year of continuance of cartel. In my view, nothing prevents the CCI from using either method of computation for different years that the cartel continues to operate. Nothing in §27(b) compels the CCI from continuing with the same method for all the years of continuance of cartel.

⁵⁴ In Builders Association of India v. Cement Manufacturers’ Association & Others, [2012] CCI 42, the CCI has in fact imposed penalty of “0.5 times of net profit for 2009-10 (from

Plea-bargaining is a concept introduced in the CrPC in 2006.⁵⁵ Prior to this amendment, the Supreme Court had taken a position that confession obtained through a promise of advantage, immunity cannot constitute evidence against “the maker of the confession”.⁵⁶ After the amendment in 2006, plea-bargaining can reduce the punishment to one-fourth,⁵⁷ plus compensation to the victim.⁵⁸

Leniency programmes in cartel investigations include appreciation of the role of the “person” involved in cartel conduct, the person’s subsequent conduct, and whether the “person” is making full disclosure voluntarily. The classic view is that “leniency programmes can break the code of silence among cartel conspirators”.⁵⁹ Competition authorities worldwide have, therefore, developed leniency programmes to encourage cartel members to come forward and disclose such anti-competitive agreements and thus escape the rigours of cartel punishment. It has been argued that when at least one member of the cartel has confessed and gets leniency, confession thereafter becomes the preferred strategy for the other members.⁶⁰ Under the Act, if the CCI “is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated §3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital”,⁶¹ the CCI may impose lesser punishment.⁶² Briefly, the leniency programme envisages full disclosure, no destruction of evidence, and continuous co-operation till conclusion of proceedings by the enterprise,⁶³ and there are reduced incentives for whistle-blowers after the first confession. The reduction in levels of fines is as follows: (i) up to one hundred percent for the applicant who is the first to make a ‘vital’ disclosure;⁶⁴ (ii) up to fifty percent for the applicant who

20-05-2009) and 2010-11 in case of each cement manufacturer named as Opposite Parties”, after determining that in the particular case, the amount of three times of net profit is higher than ten percent of the turnover. However, in *Shri Shamsheer Kataria v. Honda Sael Cars India Ltd.*, [2014] CCI 26, the CCI did not report a finding of cartelisation, but found that all fourteen car manufacturers had indulged in similar violations of §§3 and 4 of the Act, and slapped penalty of two percent of average turnover of three years, aggregating Rupees 2545 crores.

⁵⁵ The Code of Criminal Procedure, 1973, §§265A-265L inserted vide The Criminal Law (Amendment) Act, 2005 (w.e.f. January 11, 2006) (Prior to this, only compounding of offences listed in §320 of CrPC was permissible).

⁵⁶ *State (NCT of Delhi) v. Navjot Sandhu*, (2005) 11 SCC 600 (DB): (2005) 122 DLT 194, ¶29.

⁵⁷ See The Criminal Procedure Code, 1973, §265E.

⁵⁸ The Criminal Procedure Code, 1973, §265D.

⁵⁹ Organisation for Economic Co-operation and Development, *Using Leniency to Fight Hard Core Cartels*, September 2001, 1, available at <http://www.oecd.org/daf/ca/1890449.pdf> (Last visited on August 2, 2014).

⁶⁰ Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453 (2006).

⁶¹ The Competition Act, 2002, §46.

⁶² The Competition Commission of India (Lesser Penalty) Regulations, 2009, Reg. 4 (The extent of leniency to be shown is given in these regulations).

⁶³ *Id.*, Reg. 3.

⁶⁴ Disclosure which allows the CCI to form *prima facie* opinion under §26(1) of the Act, or establish contravention of §3 of the Act.

is second in ‘priority status’⁶⁵ who may provide significant added value to the evidence already in possession of the CCI or the Director-General (‘the DG’) to establish the existence of the cartel; and (iii) up to thirty percent for the applicant who is third in ‘priority status’,⁶⁶ who may provide significant added value to the evidence already in possession of the CCI or the DG to establish the existence of the cartel.

B. CALCULATION OF PENALTY/FINE FOR OTHER OFFENCES

For other types of offences, as noted earlier, the ceiling limit of fine under §22(b) is “10 percent of the average turnover for the last three preceding financial years”. The questions that arise are fourfold. *First*, what would be the appropriate ‘turnover’ for a multi-business organisation, where one of the units has been found to be in violation of the Act? *Second*, should computation be done on the unit turnover or total turnover? *Third*, should the ceiling/cut-off be applied on the unit turnover or total turnover? *Lastly*, what other factors should be considered for computing the ‘just deserts value’? These issues are examined in the succeeding sections in the light of actual sentencing done by the CCI and the COMPAT.

III. PENALTIES IMPOSED BY THE CCI AND THEIR MODIFICATION BY THE COMPAT

Some of the cases in which penalties had been imposed by CCI have been reviewed by the COMPAT and some are still under review. Till October, 2014, the COMPAT had passed final orders in eleven cases in which the CCI had passed orders holding violation of Competition Act, and imposing penalty.⁶⁷ While, in four cases, the COMPAT had overturned the findings of violation of competition law, in four other cases, the COMPAT modified the quantum of fine imposed. In three cases, the COMPAT has agreed with both the finding and the quantum of punishments awarded. I shall examine each of these cases in the subsequent sub-parts.

⁶⁵ The Competition Commission of India (Lesser Penalty) Regulations, 2009, Reg. 5 (The extent of leniency to be shown is given in these regulations). (The ‘priority status’ is marked by the CCI in accordance with Regulation 5, after the enterprise approaches the ‘designated authority’ with the information).

⁶⁶ *Id.*

⁶⁷ In *Shri Gulshan Verma v. Union of India & Ors.*, [2012] CCI 28 (Case No. 40/2010), the CCI did not award any penalty in view of penalty awarded for similar violation by the same parties in *A Foundation for Common Cause & People Awareness v. PES Installations Pvt. Ltd. & Ors.*, [2012] CCI 21 (Case No. 43/2010). Also in the DLF cases, the CCI has adopted a similar position. *See infra* note 92.

A. REDUCTION IN CCI-IMPOSED PENALTY BY THE COMPAT

1. In Re: Aluminium Phosphide Tablets Manufacturers⁶⁸

In this *suo motu* case against the Opposite Parties ('OPs'), the CCI found bid-rigging and boycott of FCI Tender by M/s. Excel Crop Care Limited, M/s. United Phosphorous Limited, and M/s. Sandhya Organic Chemicals (P) Limited,⁶⁹ in breach of §3(3)(a) (determining purchase price), (b), and (d) (bid-rigging). In a separate order,⁷⁰ Member R. Prasad also found infringement of §3(3)(a) and (d). The CCI imposed a penalty of nine percent of the turnover. Calculating the amount on the total turnover of the offending enterprises, the fine imposed by the CCI aggregated to Rupees 317.94 crores. On appeal, in *M/s. Excel Crop Care Limited v. Competition Commission of India*,⁷¹ the COMPAT confirmed breach of §3(3)(d) and §3(3)(a). However, the COMPAT held that penalty was to be computed on "relevant turnover".⁷² As explained below, this was far less than the "total turnover":

Turnover of Excel Crop.	In Rupees (Crores)			
	2008-09	2009-10	2010-11	Average
Total Turnover	730.43	650.83	749.02	710.00
Relevant turnover (ALP tablets)	26.74	38.88	31.61	32.42

On computing the fine based on relevant turnover, the 'average of turnover' for the purpose of §27(b) in case of Excel Crop was reduced to Rupees 32.43 crores, and this reduced the penalty from Rupees 63.90 crores to

⁶⁸ Aluminium Phosphide Tablets Manufacturers, In Re, [2012] CCI 24 (The OPs were three of four known manufacturers of Aluminium Phosphide ('ALP') tablets, which are used in its silos by Food Corporation of India ('FCI') for preservation of the 'central pool' food grains. The CCI took up *suo moto* investigation of collusive bidding by the OPs, on receipt of a letter containing allegations by Chairman-cum-Managing Director ('CMD') of FCI).

⁶⁹ Another supplier, M/s. Agrosynth Chemicals Limited, had not participated in Tenders since 2007, *i.e.*, before enforcement of §§3 & 4 of the Act.

⁷⁰ Aluminum Phosphide Tablets Manufacturers, In Re, [2012] CCI 23.

⁷¹ See *Excel Crop Care Limited v. Competition Commission of India*, [2013] Comp AT 146.

⁷² The COMPAT accepted the argument that those (EU and OFT) guidelines are undoubtedly relevant in arriving at the issue of deciding upon the turnover, especially for multi-product companies. It agreed that "in the circumstances of this case" the 'relevant turnover' should relate to the relevant product and the relevant geographic area. It had, however, earlier rejected the concept of a 'restricted turnover' based on any stratum of the market in *MDD Medical Systems India Private Limited v. Foundation for Common Cause & People Awareness*, [2013] Comp AT 56, ¶23.

There is a clear distinction made in EU jurisprudence about using 'relevant' turnover in the initial stages of calculation of fine, and then applying the concept of 'total turnover', even 'worldwide turnover for applying the ceiling or cut-off, needs to be considered in the Indian jurisdiction. A ten percent limit is not applied in the initial stages by the EC. There is nothing said to the contrary, even in §27(b) of the Act.

Rupees 2.92 crores. In the case of United Phosphorus, the fine came down from Rupees 252.44 crores to Rupees 6.94 crores. M/s. Sandhya Organic Chemicals (P) Limited had not pleaded that it was into other business as well, but even in that case, there was *ad hoc* reduction to only one-tenth of the fine imposed (from Rupees 1.57 crores to Rupees 15.70 lakhs only). The aggregate penalty came down from Rupees 317.91 crores to Rupees 10.02 crores.⁷³

*B. COAL INDIA LIMITED (CIL) V. GULF OIL CORPORATION LTD. (GOCL), HYDERABAD*⁷⁴

The CCI had found that by boycott of the Electronic Reverse Action⁷⁵ and bid-rigging, the OPs had violated § 3(3)(b) and (d). The CCI, therefore, imposed a penalty of three percent of the average turnover of three years, aggregating to Rupees 58.83 crores. On an appeal,⁷⁶ filed by nine explosives suppliers, the COMPAT agreed with the CCI's order on breach of §3(3) (d), but held that the CCI had not considered 'mitigating circumstances'.⁷⁷ The COMPAT then reduced the penalty to ten percent of the amount as per the CCI order (*i.e.*, Rupees 5.88 crores).⁷⁸

*C. A FOUNDATION FOR COMMON CAUSE & PEOPLE AWARENESS V. PES INSTALLATIONS PVT. LTD.*⁷⁹

The CCI relied on circumstantial evidence for finding bid-rigging in supply and installation of Modular Operation Theatre ('MOT'), like common errors in bids.⁸⁰ The CCI also considered the adverse comments of the Central Vigilance Commission and the Comptroller & Auditor-General *qua*

⁷³ See Excel Crop Care Limited v. Competition Commission of India, [2013] Comp AT 146, ¶62 (The CCI has filed an appeal against COMPAT order in the Supreme Court, being CA No. 2480/2014. The matter is pending in the court).

⁷⁴ Coal India Limited (CIL) v. Gulf Oil Corporation Ltd. (GOCL), Hyderabad, [2012] CCI 20.

⁷⁵ This process is often used in public procurement, and orders are placed on the bidder who quotes the lowest sale price. In this case, the Informant had used ERA to procure explosives for use by the Informant in coal mining. The OPs were explosive manufacturers.

⁷⁶ See M/s. Gulf Oil Corporation Ltd. v. Competition Commission of India & Ors., [2013] Comp AT 122, ¶64.

⁷⁷ See Municipal Council, Ratlam v. Vardichand, AIR 1980 SC 1622, ¶9 (The Supreme Court has observed that exercise of "discretion becomes a duty when the beneficiary brings home the circumstances for its benign exercise").

⁷⁸ Appeal is pending before the Supreme Court. There is stay of recovery of penalty.

⁷⁹ A Foundation for Common Cause & People Awareness v. PES Installations Pvt. Ltd., [2012] CCI 21.

⁸⁰ The Informant was an NGO, 'A Foundation for Common Cause and People Awareness', and the 'Information' related to a tender floated by the Safdarjung Hospital, New Delhi for supply and installation of pre-fabricated Modular Operation Theatre and Medical Gases Manifold System ('MGMS') to Sports Injury Centre prior to 2010 Delhi Commonwealth Games. The Informant alleged that the three bidders, M/s. PES Installation Pvt. Ltd., M/s. MDD System (India) Pvt. Ltd. and M/s. Medical Product Services had formed a cartel and had indulged in complementary bidding/bid rotation. MDD was the successful bidder.

these bidders in other contracts. It found breach of §3(3)(d) read with §3(1), and imposed a penalty of five percent of turnover on the OPs, aggregating Rupees 3 crores. On appeal, in *MDD Medical Systems India Private Limited v. Foundation for Common Cause & People Awareness*,⁸¹ and related appeals, the COMPAT noted the CCI findings and agreed that there was meeting of minds and breach of §3(3)(d).

On the quantum of punishment, the COMPAT observed that the CCI should have considered the aggravating as well as the mitigating circumstances while inflicting the penalty. The COMPAT also observed that the CCI should also take into consideration the fact that competition jurisdiction is in its nascent stage in India.⁸² The COMPAT considered that the parties were cartelising for the first time. The COMPAT also noted that the MOT worked well during the prestigious Delhi Commonwealth Games and gave credit to MDD for this. With respect to the fine, penalty was reduced to three percent of turnover, aggregating Rupees 1.81 crores.⁸³

D. IN RE: SUO-MOTU CASE AGAINST LPG CYLINDER MANUFACTURERS⁸⁴

The CCI found evidence of cartelisation by all except two LPG cylinder manufacturers.⁸⁵ It held them guilty of bid-rigging in breach of §3(3) read with §3(1). It imposed penalty of seven percent of turnover, aggregating Rupees 165.59 crores. On appeal, in *M/s International Cylinder (P) Ltd. v. Competition Commission of India & Ors.*⁸⁶ and related appeals by forty-four LPG cylinder manufacturers, the COMPAT confirmed breach of §3(3)(d).

On the question of penalty, the COMPAT noted that “where a particular concern is a multi-commodity company, the relevant turnover should be considered and not the total turnover.”⁸⁷ The COMPAT also noted some other points that were argued before it, *viz.*, this being a nascent jurisdiction, the companies were first time offenders, and the possibility of industrial activity being

⁸¹ *MDD Medical Systems India Private Limited v. Foundation for Common Cause & People Awareness*, [2013] Comp AT 79.

⁸² *Id.*, ¶28.

⁸³ The matter is pending in appeal before the Supreme Court.

⁸⁴ In re: Suo-motu case against LPG cylinder manufacturers, [2012] CCI 11 (The case was against fifty LPG cylinder manufacturers and their association).

⁸⁵ The OPs were fifty LPG cylinder manufacturers & their Association. The LPG cylinder manufacturers were bidders in tenders floated by Indian Oil Corporation Ltd. (‘IOCL’), and also in tenders floated by other public sector oil companies, for procurement of cylinders for filling with Liquefied Petroleum Gas (‘LPG’) for selling to consumers. The CCI *suo motu* investigated possible collusive bid-rigging and market division by OPs, which had come to light when CCI had investigated a complaint by an unsuccessful bidder against IOCL.

⁸⁶ *M/s International Cylinder (P) Ltd. v. Competition Commission of India & Ors.*, [2013] Comp AT 166.

⁸⁷ *Id.*, ¶57.

choked because of the hefty penalties ordered. The COMPAT noted that these issues had not been raised before the CCI. As an exception, it permitted the parties to go back before the CCI with the arguments, and ordered re-assessment of penalty by the CCI.

By an order dated August 6, 2014 in Case No. 3/2011, the CCI has, after re-consideration, re-imposed the earlier fines, except for correcting a factual error for M/s. Confidence Petroleum, whose penalty was reduced from Rupees 23,27,92,445 to Rupees 12,58,55,126 only.

E. FINDINGS AND PENALTY UNCHANGED

1. FICCI - Multiplex Association of India v. United Producers/Distributors Forum⁸⁸

The CCI found “cartel-like conduct” by the OPs in breach of §3(3) (a) & (b).⁸⁹ It imposed penalty of Rupees 1 lakh on each of the twenty-seven persons.⁹⁰ In Appeal No. 11/2011, *Nandu Ahuja & Ors. v. Competition Commission of India & anr.*,⁹¹ the COMPAT agreed with findings of the CCI and left the penalty unchanged, as it was “insignificant and tends to be on the lenient side”.

2. Belaire Owners’ Association v. DLF Limited⁹²

The CCI found that DLF enjoyed a dominant position in the relevant market and had abused its position of dominance in breach of §4(2) (a)(i) & (ii). It imposed penalty of seven percent of average turnover of three years amounting to Rupees 630 crores. In the appeal, *M/s. DLF Limited v. Competition Commission of India*,⁹³ filed by DLF, the COMPAT agreed with finding of infringement of §4(2)(a)(i) & (ii), but on different grounds.

⁸⁸ FICCI-Multiplex Association of India v. United Producers/Distributors Forum, [2011] CCI 32.

⁸⁹ It was alleged by the Informant that the OPs, who were members of OPI, United Producers/Distributors Forum, had stopped release of new films to members of the Informant. It was alleged that this boycott by the cartel was in furtherance of a trade dispute on revenue sharing between the Informant and OPs.

⁹⁰ The Informant was FICCI-Multiplex Association of India. These persons who were proceeded against were the key persons in film production and distribution enterprises.

⁹¹ *Nandu Ahuja & Ors. v. Competition Commission of India & Anr.*, [2013] Comp AT 101.

⁹² Case No. 19/2010 (CCI) (Unreported) (In that case, DLF had allegedly imposed one-sided conditions in their agreements with the buyers of apartments in their projects, and unilaterally changed various parameters of their projects to the detriment of the buyers. Other similar cases decided the CCI in line with judgment in 19/2010 are (A) 67/2010, (B) 18, 24 & 30-35/2010, (C) 46/2012, (D) 13 & 21/2010, 55/2012. The cases were filed by Resident Welfare Associations (RWAs) & Ors. of DLF projects alleging that DLF had abused its dominant position and introduced anti-competitive and anti-consumer clauses in the sale agreements, unilaterally altered the terms of the agreements, delayed delivery of units, etc.).

⁹³ *M/s. DLF Limited v. Competition Commission of India*, [2014] Comp AT 12.

On the issue of penalty, the COMPAT noted that “this certainly was not a fight between the equals” and observed that “if the consumer is exploited by a mighty builder, then such mighty builder cannot claim soft attitude from the State”.⁹⁴ The COMPAT therefore maintained penalty of seven percent of turnover plus nine percent interest from the date of order (12/8/2011) till the date of payment.⁹⁵

3. Uniglobe Mod Travels Pvt. Ltd. v. Travel Agents Federation of India & Ors.⁹⁶

The Informant was a travel agent and was selling tickets of Singapore Airlines. The OPs were three associations of travel agents. The Informant was a member of two such associations, who were the OPs. It alleged that the OPs had called for boycott of Singapore Airlines because of a dispute regarding commission for selling tickets, and were threatening the members with suspension and expulsion to enforce the boycott call. The CCI found that the OPs had boycotted Singapore Airlines in breach of §3(3)(b) read with §3(1). It imposed penalty of Rupees 1 lakh on each of three OPs. On appeal, *Travel Agents Association of India v. Uniglobe Mod Travels (P) Ltd.*,⁹⁷ the COMPAT held that §3(3) applied to ‘agreement’ as well as to ‘practice’. It upheld the findings of the CCI as well as the penalty awarded.⁹⁸

F. ANALYSIS OF THE ORDERS

Even though most of the matters above are in appeal before the Supreme Court of India under §53T of the Act and, to that extent, have not acquired finality, the object of the above analysis was to find out the differences in approach between the competition authorities primarily with regard to award of penalty. In four cases, the COMPAT reduced the penalty awarded on the grounds that the CCI had not computed penalty on ‘relevant turnover’ or that the CCI had not considered ‘mitigating circumstances’ etc., and in three cases it upheld both the finding and the penalty awarded by the CCI.⁹⁹

⁹⁴ *Id.*, ¶125.

⁹⁵ *M/s. DLF Limited v. Competition Commission of India*, [2014] Comp AT 12 (Although the OP, DLF Ltd., has filed a Civil Appeal in the Supreme Court, the court has not stayed the award of penalty, but by order dated August 27, 2014, has directed it to pay upfront Rupees 50 crores, and the rest of the amount within three months. It had to file an undertaking regarding payment of accumulated interest afresh. The matter, however, will be heard in the appeal).

⁹⁶ *Uniglobe Mod Travels Pvt. Ltd. v. Travel Agents Federation of India & Ors.*, [2011] CCI 64.

⁹⁷ *Travel Agents Association of India v. Uniglobe Mod Travels (P) Ltd.*, [2013] Comp AT 110.

⁹⁸ IATA Agents Association has filed an appeal before the Supreme Court, which is pending.

⁹⁹ The above analysis excludes those cases where the findings of the CCI regarding violation of competition law have been overturned on appeal by the COMPAT.

Nature of infringement	Penalty by CCI	Penalty by COMPAT
Bid-rigging		
Aluminium Phosphide supply	9%	3.15%
Explosives supply to CIL	3%	0.3%
MOT supply	5%	3%
LPG cylinder supply	7%	-
Anti-competitive agreement		
Boycott of multiplexes by film producers	Rs. 1 lakh X 27	Unchanged
Boycott of airline by travel agents	Rs. 1 lakh X 3	Unchanged
Abuse of dominance		
DLF case	7%	7%

No pattern or empirical formula emerges from the penalties imposed. There are several more cases where the CCI has awarded penalties, and are in appeal before the COMPAT. It is seen that the CCI has hit the seven percent and nine percent marks in some cases. In fact, in *Reliance Big Entertainment Limited v. Tamil Nadu Film Exhibitors Association*¹⁰⁰ and *Varca Druggist & Chemist & Others v. Chemists & Druggists Association, Goa*,¹⁰¹ which were sale price maintenance cases, the CCI has even imposed a ten percent penalty.

As in the EU jurisdiction, the ceiling in the Indian jurisdiction is ten percent. High levels of fine imposed by the CCI, as noted above, beg the question as to whether they can reflect 'just deserts values'. In the context of EC fines, Wouter Wils is of the view that if antitrust fines were to be regularly capped at ten percent of the undertaking's turnover, then the fines would cease to reflect the difference between nature of infringements and the role of the concerned undertakings in an infringement.¹⁰² In other words, such values would not be just deserts values. The fact, however, is that there are no guidelines for the exercise of discretion by the CCI while awarding penalty except for applying the statutory ceiling.

¹⁰⁰ *Reliance Big Entertainment Limited v. Tamil Nadu Film Exhibitors Association*, [2013] CCI 90.

¹⁰¹ *Varca Druggist & Chemist & Others v. Chemists & Druggists Association, Goa* Case No. C-127/2009/DGIR(4/28) (CCI) (Unreported).

¹⁰² See Wouter P. J. Wils, *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, 33 (1) W. COMP. 10 (2010).

IV. SETTING FINES AS PER EUROPEAN COMPETITION LAW

The Treaty on the Functioning of the European Union ('TFEU')¹⁰³ contains the framework for basic competition law in Europe. Articles 101¹⁰⁴ and 102¹⁰⁵ prohibit anti-competitive agreements, cartels and abuse of dominance. The aims set out in the EU treaties are achieved through several types of legal acts including regulation, which extend the treaty provisions. A look at the rigorous procedure for adopting a 'regulation' shows why it is good law in the EU.

A. REGULATIONS & GUIDELINES FOR COMPUTATION OF 'JUST DESERTS VALUES'

Before a regulation is adopted, the proposal is mooted by the European Commission ('EC') to the European Council¹⁰⁶ and the European Parliament¹⁰⁷, along with an 'Impact Assessment Report'.¹⁰⁸ Once adopted by both the European Council and the European Parliament, it becomes immediately enforceable as law in all member states simultaneously. Article 103 of the TFEU authorises the European Council to lay down "regulations [...] making provisions for fines and periodic penalty payments".¹⁰⁹

¹⁰³ Treaty on Functioning of European Union, March 30, 2010, OJ 2010/C 83/47 (The Lisbon Treaty of 2007 (w.e.f. 2009) changed the name of the Treaty on European Community to the Treaty on the Functioning of the European Union).

¹⁰⁴ See, e.g., Treaty of European Community, December 24, 2002, C 325/33, Art. 81.

¹⁰⁵ See, e.g., Treaty of European Community, December 24, 2002, C 325/33, Art. 82.

¹⁰⁶ The European Council consists of the Heads of State or Government of the Member States, together with its President and the President of the European Commission. The High Representative of the Union for Foreign Affairs and Security Policy takes part in its work. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission.

¹⁰⁷ The European Parliament is the directly elected parliamentary institution of the European Union. The Parliament comprises 751 members, who represent the largest trans-national democratic electorate in the world. It has been directly elected every five years by universal suffrage since 1979.

¹⁰⁸ An Impact Assessment sets out the economic, social and environmental impact that proposals may have and present the findings in an autonomous report. Stakeholders are consulted on all key aspects of impact assessments and final impact assessment reports are public. A formal Impact Assessment is required for regulatory proposals included in the Commission's Work Program.

¹⁰⁹ See *supra* note 103, Art. 103:

- “1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.
2. The regulations or directives referred to in paragraph 1 shall be designed in particular:
 - (a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments [...].”

Article 23 of Council Regulation No 1/2003¹¹⁰ formulated under this authority sets out the method of imposing fines for infringement of Articles 81 or 82. It sets out three conditions, *viz.*, the ceiling limit of fine for each undertaking and association of undertakings is not to exceed ten percent of total turnover in the preceding business year, the ceiling limit of fine for an association is not to exceed ten percent of the sum of the total turnover of each member active on the relevant market, and regard is to be had both to the gravity and to the duration of the infringement.

To compute the value of fine, the EC has developed ‘Guidelines’ to ensure transparency and uniformity in application of the above regulations. The original guidelines were revised in 2006 (‘2006 Guidelines’). The 2006 Guidelines¹¹¹ lay down a methodology for setting the fine to be imposed on undertakings or associations of undertakings which infringe the antitrust provisions of the TFEU.

1. Stage – I

The ‘basic amount’ of fine is set with reference to the ‘value of sales’ of the relevant product by the defaulting undertaking in the relevant geographic market.¹¹² The basic amount is computed as a proportion of the value of sales depending on the gravity of the infringement and multiplied by the number of years of infringement.¹¹³

To start with, the proportion is set between zero to thirty percent of the value of sales. The factors to be considered for determining this multiplying factor or proportion are nature of infringement, combined market share of the undertakings involved in the infringement, geographic scope of the infringement, and whether or not the infringement has been implemented.¹¹⁴

¹¹⁰ European Council, *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, OJ L 1/1 (January 4, 2003).

¹¹¹ European Commission, *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003*, OJ 2006/C 210/02 (September 1, 2006).

¹¹² *Id.*, ¶13 (The Commission will take “the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA” for the purpose of calculating the basic amount of fine. The EEA, established on January 1, 1994, provides for the free movement of goods, persons, services and capital through three of four member states of the European Free Trade Association (‘EFTA’) and twenty-seven of twenty-eight member states of the European Union (‘EU’). The competition rules are applicable to this area).

¹¹³ *Id.*, ¶19 (The basic amount of the fine will be “related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement”. As given in ¶13, such ‘value of sales’ is the “value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA”).

¹¹⁴ *Id.*, ¶22.

The factor is set at thirty percent (or 0.3) in case of serious infringement of the nature of “horizontal price-fixing”, “market-sharing” and “limiting output”.¹¹⁵

An ‘entry load’ may be added to the above basic amount, which is a sum of between fifteen percent and twenty-five percent of the value of sales, “irrespective of the duration of the undertaking’s participation in the infringement”, in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output limitation agreements.¹¹⁶

2. Stage – II

The EC also takes note of circumstances that may increase or decrease the basic amount as determined above. The basic amount may be increased if there are “aggravating circumstances”¹¹⁷ like repeat infringement of the same type – the basic amount may be increased by up to one hundred percent for each such infringement established” refusal to co-operate in investigation/obstructing the EC, the enterprise was the ‘ring leader’/instigator, the enterprise has taken retaliatory measures against undertakings to enforce infringement, and continuing the illegal practice even after EC intervention.

The basic amount may be reduced if there are mitigating circumstances¹¹⁸ like the infringement was terminated by the undertaking as soon as the EC intervened, involvement of the undertaking in infringement was limited/avoided, infringement was committed as a result of negligence, the undertaking effectively co-operated with the EC outside the scope of the ‘Leniency Notice’, and ‘anti-competitive’ conduct was encouraged by public authorities.

3. Stage – III

The EC may increase the fine, if the undertaking has a particularly large turnover beyond the sale of goods and services to which the infringement relates,¹¹⁹ *i.e.*, if the enterprise has deep pockets. The EC may also increase the fine so that the fine exceeds the amount of gains made as a result of the infringement.¹²⁰

4. Stage – IV

Since the final amount of the fine cannot exceed the limit laid down in Article 23(2) of EU Regulation 1/2003, *i.e.*, ten percent of the total

¹¹⁵ *Id.*, ¶23.

¹¹⁶ *Id.*, ¶25.

¹¹⁷ *Id.*, ¶28.

¹¹⁸ *Id.*, ¶29.

¹¹⁹ *Id.*, ¶30.

¹²⁰ *Id.*, ¶31.

turnover of the undertaking,¹²¹ this cut-off is applied after Stage – III above.¹²² In exceptional cases, the EC may take account of the undertaking's inability to pay in a specific social and economic context.¹²³ Such reduction can be granted solely on the basis of objective evidence that imposition of the fine, as provided for in the 2006 Guidelines, would severely and irretrievably affect the economic viability of the undertaking and extinguish that value of its assets.¹²⁴

B. PUNISHING CARTELS IN THE JURISDICTION OF THE EU

In the case of 'worldwide cartels' the 2006 Guidelines note that "relevant sales of the undertakings within the European Economic Area ('EEA')¹²⁵ may not properly reflect the weight of each undertaking in the infringement".¹²⁶ Therefore, in such cases, as in worldwide (larger than an EEA, geographically) market-sharing arrangements, the EC may determine the share (proportion) of sales of each undertaking to the aggregate sales of the goods or services on the "worldwide" market, and may apply this share to the aggregate sales within the EEA. The result would be taken as the value of sales for the purpose of setting the basic amount of the fine.¹²⁷

C. LENIENCY PROVISIONS FOR CARTELS

The EC has published a leniency notice in 2006,¹²⁸ the benefits of which are available to cartel members who turn whistle-blowers. The leniency policy encourages companies to hand over inside evidence of cartels to the EC. The first undertaking may be granted immunity from fines altogether, if that undertaking submits information and evidence which would enable the EC to

¹²¹ See Damien Geradin and David Henry, *The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments*, The Global Competition Law Centre Working Papers Series, GCLC Working Paper 03/05, 2005 (Note that for calculating the 'basic amount', the expression 'value of sales' has been used, while in calculating the ceiling, the expression 'total turnover' has been used. The EC fine must "stay within the confines of the statutory ceiling of ten percent of the worldwide turnover of the undertaking in question").

¹²² The ten percent limit may be based on the turnover of the group to which the company belongs if the parent of that group exercised decisive influence over the operations of the subsidiary during the infringement period.

¹²³ See Hubert de Broca, *infra* note 145, 6 (The undertaking will have to show that the imposition of a fine 'would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value').

¹²⁴ See *supra* note 111, ¶35.

¹²⁵ The EEA is the 'internal market' comprising the areas of the EU Member States and the three EFTA States (Iceland, Liechtenstein, and Norway), which are governed by the same basic rules as the EU members.

¹²⁶ See *supra* note 111, ¶18.

¹²⁷ *Id.*

¹²⁸ European Commission, *Commission Notice on Immunity from fines and reduction of fines in cartel cases*, OJ 2006/C-298/11, (December 8, 2006).

carry out a targeted inspection in connection with the alleged cartel or find an infringement of Article 81.¹²⁹ The EC can exercise leniency even after commencement of proceedings. The level of reduction can be between thirty to fifty percent for the first undertaking to provide significant added value to evidence collected by the EC; between twenty to thirty percent for the second undertaking to provide significant added value; and up to twenty percent for subsequent undertakings that provide significant added value.¹³⁰

Success of leniency programmes has been mixed. In Latin America, countries have had varying degrees of success, with Brazil being most successful, and Mexico being least.¹³¹ In Europe, the EC is of the view that the Leniency Programme had been crucial in detection of cartels and enticing more whistle-blowers to come forward.¹³² However, there have been contrary views that the programme may not have contributed in reducing investigation time.¹³³ Since 2008, however, companies found by the EC to have participated in a cartel can settle their cases by acknowledging their involvement in the cartel and getting a smaller fine in return.¹³⁴ For the EC, it reduces investigation time thus freeing resources; for the enterprise, there is possibility of reduction of proposed fine by ten percent.¹³⁵

V. COMPARING STATUTORY PROVISIONS IN INDIA AND EU

In the Indian jurisdiction, by analysing Supreme Court decisions and the various rulings of the COMPAT mentioned in this article, it can be concluded that while imposing penalty under §27, the CCI is required to ensure that the quantum of penalty should be proportionate to the nature of the offence,¹³⁶ be supported with reasons,¹³⁷ take into account aggravating and mitigating circumstances,¹³⁸ and have a deterrent effect on the potential wrongdoers.¹³⁹

¹²⁹ *Id.*, ¶8.

¹³⁰ *Id.*, ¶26.

¹³¹ Javier Tapia, *Increasing deterrence in Latin American competition law enforcement regimes* in *NEW COMPETITION JURISDICTIONS: SHAPING POLICIES AND BUILDING INSTITUTIONS* 158 (Richard Wish & Christopher Townley eds., 2012).

¹³² LEE MCGOWAN, *THE ANTITRUST REVOLUTION IN EUROPE: EXPLORING THE EUROPEAN COMMISSION'S CARTEL POLICY* 164 (2010).

¹³³ *Id.*

¹³⁴ European Commission, *Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases*, OJ L 171/3 (July 1, 2008).

¹³⁵ European Commission, *Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases*, OJ C 167, 1-6, ¶32 (July 2, 2008).

¹³⁶ See *supra* note 42, ¶36.

¹³⁷ *Excel Crop Care Limited v. Competition Commission of India*, [2013] Comp AT 146, ¶43.

¹³⁸ *Id.*, ¶63; See *M/s. Gulf Oil Corporation Ltd. v. Competition Commission of India & Ors.*, [2013] Comp AT 122.

¹³⁹ *Bachan Singh v. State of Punjab*, (1982) 3 SCC 24, ¶36.

By imposing fines as a percentage of turnover, competition law, to an extent, takes care that enterprises with deep pockets are made to pay more in absolute terms for transgression of the law. As seen earlier, there is similarity between the Indian law and European law regarding the ceiling limit of fine that may be imposed for anti-competitive practice/act. It is pertinent to note that this is true for certain other jurisdictions as well. It is noted that for fixing ceiling of fine/penalty for ‘antitrust offence’,¹⁴⁰ different systems are followed in different countries¹⁴¹:

- (i) Specific monetary amount: Canada – Canadian \$ 10 million; Japan – 500 million Yen; Mexico – 1,500,000 times the general minimum wage in the Federal District.
- (ii) Percentage of turnover: Norway, the EC, and a significant number of EU member countries including Austria, Hungary and Italy – ten percent of the firm’s worldwide turnover during the last financial year; Brazil – thirty percent of the gross revenue of the last financial year; Serbia – ten percent of the total annual income realised in the preceding year; Switzerland – ten percent of the turnover achieved by the enterprise in Switzerland in the last three business years, and Turkey – up to ten percent of the annual gross revenue of undertakings and associations of undertakings or members of such associations generated by the end of the preceding financial.
- (iii) Percentage/proportion of cartelised sales: Jordan – five percent, Russia – one-fifteenth of sales.
- (iv) In the USA, maximum limit of fine for a company is US \$ 100 million. Antitrust practice is treated as a felony offence in USA. Under §3571(d) of USC 18, the amount of fine can be enhanced to twice the gross gain to the offending company or twice the gross loss suffered by affected entities. For an individual, the limit of fine is US\$ 1 million and also ten years imprisonment.

The Indian system of penalty is akin to the EU system, and incorporated in §27(b) of the Act. Despite this, as mentioned earlier, there is no prescription in that section for the CCI to calibrate the penalty with the nature of offence. The CCI can impose such penalty as it deems fit. In the EU, the procedure for setting out fines in accordance with Article 23(2) of Council

¹⁴⁰ This term is used in the USA, and is synonymous with anti-competitive act or practice.

¹⁴¹ Report to the 7th ICN Annual Conference, *Setting of fines for cartels in ICN jurisdiction*, April 14-16, 2008, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc351.pdf> (Last visited on November 10, 2014).

Regulation No. 1/2003¹⁴² has been laid down in the 2006 Guidelines.¹⁴³ This has evolved over time, and introduces four changes over the 1998 guidelines:¹⁴⁴ a basic amount for simply committing the infringement¹⁴⁵; an amount related to the value of sales involved in the infringement; correlation between the fine and the duration of the infringement; and, higher fines in the event of recidivism. The reason for these changes was correction of some anomalies.¹⁴⁶ *First* the 1998 categorisation of infringements as ‘minor’, ‘serious’ and ‘very serious’ seemed to an unnecessary initial step. In practice, ‘minor’ classification was rare, while cartel cases deserved to be classified as ‘very serious’.¹⁴⁷ *Second*, the economic importance of the infringement as a whole as well as the relative weight of each undertaking participating in the infringement was not adequately reflected. *Finally*, duration of infringement had marginal impact on the level of the basic amount of the fine.

The objective of the European Commission, in laying down regulations and public guidelines to ensure consistency in the fining policy and provide undertakings with some degree of legal certainty, is unexceptionable. These regulations, guidelines and notices could be the basis of developing guidelines even in the Indian jurisdiction. Under §64(1) of the Act, the CCI has the power to frame and notify regulations.¹⁴⁸ However, as provided in §64(1) of the Act and the law laid down by the Supreme Court, these regulations have to conform to the provisions in the Act.¹⁴⁹ Hence, although the finer calibration is missing in §27(b) of the Act, this gap can be filled by the CCI by notifying appropriate regulations. The CCI, in exercise of this power, has already made a number of regulations.¹⁵⁰ The Supreme Court has taken a view that the rule-making power, if it is “for carrying out the purpose of the Act” is a general

¹⁴² See 2003 Council Regulation, *supra* note 110.

¹⁴³ See 2006 Guidelines, *supra* note 111.

¹⁴⁴ European Commission, *Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty*, OJ 1998/C 9/03, (January 14, 1998).

¹⁴⁵ Hubert de Broca, Competition Policy Newsletter, *The Commission revises its Guidelines for setting fines in antitrust cases*, Autumn 2006, 6, available at http://www.ec.europa.eu/competition/publications/cpn/2006_3_1.pdf (Last visited on October 20, 2010) (“The relevant sales are those achieved in the territory where the infringement took place. [...] It can therefore be either the whole EEA or one or more Member States”).

¹⁴⁶ *Id.*, 1-6.

¹⁴⁷ Indicative basic amount of fines based on gravity of infringement were (a) ‘minor’ - ECU 1,000 to ECU 1 million; (b) ‘serious’ - ECU 1 million to ECU 20 million; and (c) ‘very serious’ - above ECU 20 million.

¹⁴⁸ While §64(2) lists out specific matters on which the CCI may notify regulations, and the CCI has covered most of those matters, the list is inclusive, without prejudice to the generality of the powers under § 64(1).

¹⁴⁹ See *Indian Express Newspapers v. Union of India*, (1985) 1 SCC 641; AIR 1986 SC 515, ¶75.

¹⁵⁰ The regulations already made by the CCI in exercise of this power are: (i) CCI (General) Regulations, 2009; (ii) CCI (Determination of Cost of Production) Regulations, 2009; (iii) CCI (Lesser Penalty) Regulations, 2009; (iv) CCI (Manner of Recovery of Monetary Penalty) Regulations, 2011; (v) CCI (Meeting for transaction of Business) Regulations, 2009; (vi) CCI (Procedure of Engagement of Experts and Professionals) Regulations, 2009; (vii) CCI

delegation.¹⁵¹ The extent of power of the regulation-making authority is to be interpreted keeping in view the provisions of the Act.¹⁵² Keeping in view the provisions of the Act that the CCI can make regulations and rules “to carry out the purposes of this Act”,¹⁵³ it is trite that such a general delegation does not create further constraints on the authority of the CCI, except that those regulations and rules must be “consistent with this Act”.¹⁵⁴

VI. CONCLUSION

As can be seen from the above analysis, the Indian competition regime is still a work-in-progress. There are, of course, a number of rulings of the COMPAT, but these are under challenge before the Supreme Court, and still a far cry from establishing a formula for calibration of fine which is transparent and reproducible. Even the anticipated Supreme Court rulings cannot be expected to address all issues because all relevant issues are not *sub judice* before it. These issues which need separate decisions include calibration of a basic amount depending on the nature of the violation, the depth of the pockets of the violator and recidivism, etc. These are areas where lessons from Europe can be useful in the Indian jurisdiction.

The COMPAT interference with the quantum of fine imposed by the CCI has not given us clear empirical formulæ for setting fines, though they have raised certain flags which are to be noted when imposing punishment. It is, therefore, suggested that the developing jurisprudence on penalising anti-trust practices in India can be supplemented by regulations framed by the CCI. It is to be noted contextually that the COMPAT has, in many cases, reduced the level of fines. Since the state of the Indian economy and stage of enforcement of competition policy in India share a symbiotic relationship, the percentage range (of turnover) to be applied at each stage of calculation of penalty in a system thus modelled after the European model has to be decided by the CCI, keeping in view Indian realities and considering the ‘nascent stage’ of implementation. This obviously means wide consultations before framing the proposed regulations. Having said that, developing such guidelines, rather than deciding each case anew based on unstated principles, even if some reasons are given, would bring transparency and stability to the system of imposing penalty.

(Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011.

¹⁵¹ *Global Energy Ltd. v. Central Electricity Regulatory Commission*, (2009) 15 SCC 570: AIR 2009 SC 3194, ¶25.

¹⁵² *Id.*, ¶27.

¹⁵³ See The Competition Act, 2002, §64.

¹⁵⁴ The Competition Act, 2002, §64.