



ESSO CROP CARE AND OTHERS vs. COMPETITION COMMISSION OF INDIA*

INTRODUCTION

The term 'relevant turnover' has recently enriched the jurisprudential domain of competition law in India by providing an insight into a more economic friendly way of imposing penalty. In the recent judgment of *Esso Crop Care and Others V. CCI*¹, the Supreme Court upheld the order of COMPAT, however, while accepting and affirming that the companies were violating Section 3(3) (d) of the Competition Act, the COMPAT failed to see the rationale of imposing heavy penalties based on the average total turnover and proposed penalties based on relevant turnover specifically for multi-product companies such as United Phosphorus.

This judgment was in accordance with the international standards and has come as a relief to multi-product companies² while also being applauded as it washes away the inconsistencies and ambiguities related to penalty imposition. These ambiguities were, in the recent past, due to the lack of consensus about the term turnover as Section 2(y) of the Competition act fails to conclusively reflect upon the same. This could also be discerned from the inconsistency in the penalties levied by the CCI³ and the plethora of appeals to the COMPAT.

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¹Appeal no. 79 of 2012 under competition appellate tribunal.

Under Section 53B of the Competition Act, 2002 (Act 12 of 2003) against the order dated 23.4.2012 passed by the Competition Commission of India in Case No. 2/2011

<http://compat.nic.in/compat-old-site/CAT-07-2013/upload/PDFs/judgement-orders-2013/29.10.13%20Appeal%20No.79%20to%2081%20of%202012.pdf> (last accessed on 20th July, 2017)

²Avaantika Kakkar, *Supreme Court Clarifies Scope of Penalties and Other Provisions under the Competition Act*, MONDAQ, June. 2017.

³Incentivise India Inc. for competition compliance', *The Indian Express*, 10th June, 2013, Available at <http://www.indianexpress.com/news/incentivise-india-inc-for-competition-compliance-/1126974/0>(last accessed on 17th July, 2017)

However, in the case at hand, the penalty for United Phosphorus was reduced from a whopping 252.44 crores to a mere ₹6,94,26,000. The learned counsel for the appellants, Shri Ravi Narain, had pointed that the considerable turnover from the ALP tablets for United is “insignificant”. The turnover from the tablets, for United Phosphorus, was 84.99 crores while the penalty as aforementioned was reduced to a mere .25% of the total turnover from the tablets, how would that be a significant amount for an enterprise when more than 10 times that amount was characterised as “insignificant”? This raises the issue that a lack of deterrence could creep in and make commonplace the plague of cartelisation.

The fine imposed for cartels is myriad and differs with jurisdiction, with the most distinctive being that of the United States, where individuals convicted of cartel formation are treated as serious criminals⁴. In the US, the Sherman Act relies upon the principle of effective deterrence to ensure that individuals and enterprises alike are reluctant to circumvent the laws because of the grave consequences⁵. While all forms of anti- competitive activity become hard to detect, this problem gets exacerbated in the case of cartels where diligent effort is taken to masquerade collusion, making it difficult to find the tacit paper trail and the only evidence to fall back on is circumstantial in nature⁶. The classic view taken here is that “leniency programmes can break the code of silence among cartel conspirators”⁷. It could hence, also be argued that the CCI’s leniency programme is an effective tool to ensure the disclosure of cartels, however, the policies in the Lesser Penalties Regulation 2009 read in conjunction with Article 46 of the Competition Act has not been sufficient for individuals to disclose their involvement or the existence of cartels⁸, this could be attributed to the lack of trust that the industry places in the leniency programme itself⁹. Smitha Jhingran, secretary of the CCI, has recently announced the

⁴ Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 Geo. Wash. L. Rev. 693, 714 (2001)

⁵ibid

⁶Lipsky, Abbott B. “DETERRING CARTEL BEHAVIOR: HARMONIES AND DISHARMONIES, PROBLEMS AND SOLUTIONS.” *Antitrust Law Journal*, vol. 60, no. 2, 1991, pp. 563–569. *JSTOR*, www.jstor.org/stable/40841389.

⁷*Using leniency to fight hard core cartels*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, September 2001. Available at <http://www.oecd.org/daf/ca/1890449.pdf> (last accessed on 23rd July, 2017)

⁸ Udai S Mehta, *Designing effective Leniency Programme for India; Need for an hour*, CUTS INTERNATIONAL, JANUARY 2016.

⁹Cyril Shroff, *Cartel enforcement in India; standard and burden of Proof*, CPI Antitrust Chronicle, Feb 2013. Available at <https://www.competitionpolicyinternational.com/assets/Uploads/IndiaFeb-131.pdf> (last accessed on 20th July, 2017)

rolling out of revised policies for whistle-blowers aimed at stronger confidentiality and removal of ambiguity¹⁰, however the implementation and effectiveness of the same cannot be assessed at this stage.

Effects of this decrease in deterrence, coupled with the weak leniency programme, could lead to a subsequent rise in cartel formation, the effects of which are multifarious, all of which would be diametrically opposite to the objectives of the Competition Act. The objectives, as can be gauged from the preamble, are twofold: to promote competition in markets, and secondly, protecting the interests of the consumers¹¹. While the detrimental effects of cartelisation to competition are obvious, considering it even falls under the per se rule, it's essentially harmful for the consumers too. In the case being discussed, the innocent beneficiaries of the PDS would've suffered as the government was the purchaser of ALP tablets which are imperative for storing food grains. The brunt of the excess money spent by the government would have to be faced by the tax payers, again, another aspect which would negatively affect consumers. Hence, this significant reduction in the amount of penalty imposed could possibly adversely affect the deterrence while also directly endangering the aim of meeting the objectives of the Competition Act.

While the implications of imposing penalties based on the relevant turnover would depend heavily on the specific facts and circumstances it can be said that adequate attention wasn't allocated to evaluating the regime and the prevailing conditions. Thus, even though this judgment is in accordance with matured regulatory jurisdictions and seeks to reduce the arbitrariness of the CCI in imposing penalties, the difference between those jurisdictions and our nascent Competition Act and its organs is colossal and needs consideration. In the case of cartels, the TFEU and the South African Competition Commission (in the Aveng decision) has calibrated a six stage elaborate process for penalty evaluation while no such guidelines exist in India.

For instance, in the case of *Makers v OFT*¹², the OFT added, in the third stage, an amount of £520,000 over and above the penalty levied reached after relying on the relevant turnover, this

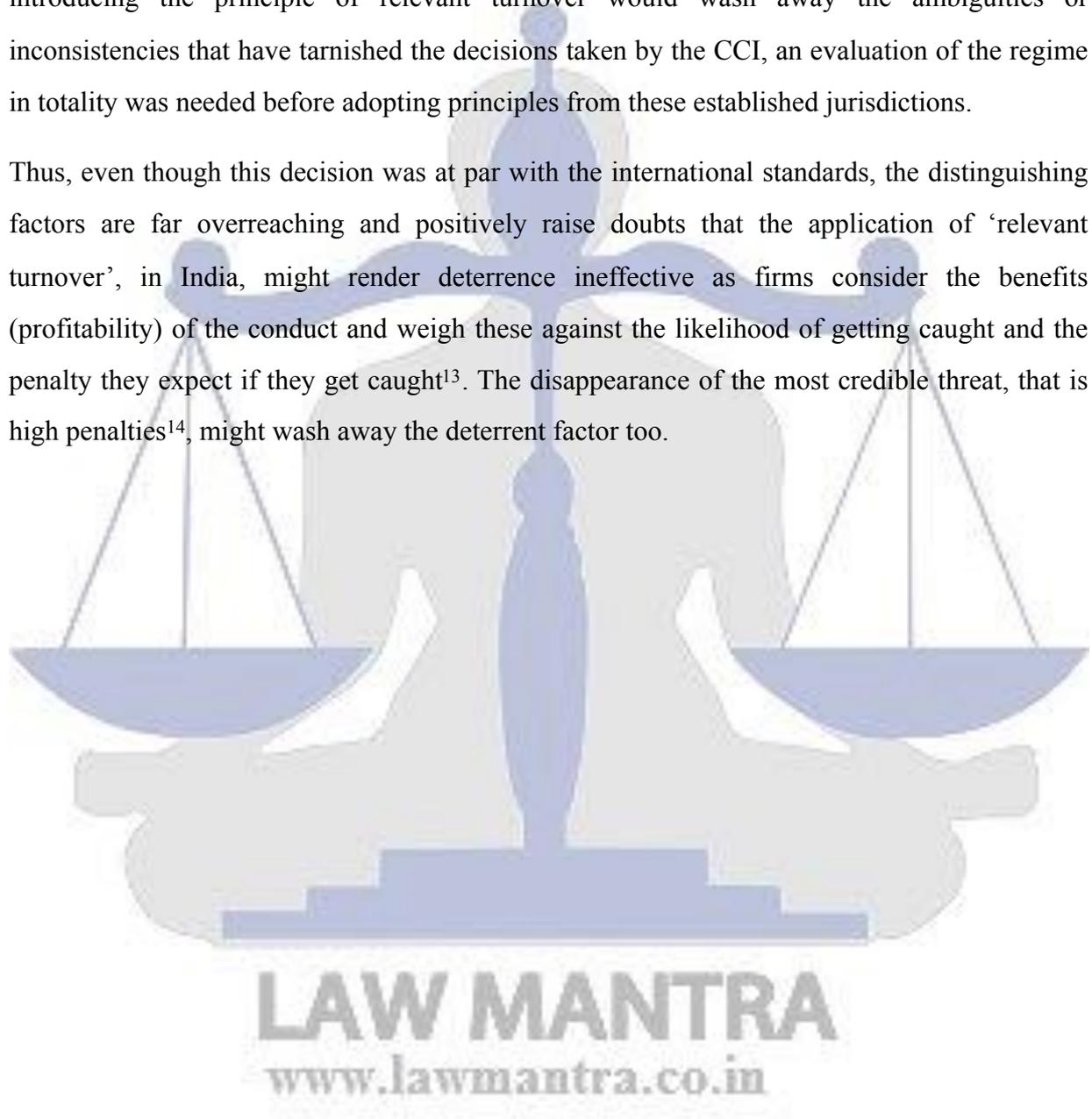
¹⁰ K.V.L Akshay, CCI reviews leniency policy for companies that blows the whistle on cartels, economic times, May 2017. Available at <http://economictimes.indiatimes.com/news/economy/policy/cci-reviews-leniency-rules-for-cos-that-blow-the-whistle-on-cartels/articleshow/57722691.cms> (last accessed on 21st July, 2017)

¹¹Preamble, THE COMPETITION ACT of 2002.

¹² MAKERS UK LIMITED vs. OFFICE OF FAIR TRADING, [2007] CAT 11

is because the OFT kept in mind that culpability and deterrence must be balanced and furthermore, considers that if the penalty from the relevant market is less than 15% of the total turnover then the same doesn't amount as enough deterrence, thus, an amount is added in the third stage to meet the Minimum Deterrence Threshold (MDT). Hence, while the aim behind introducing the principle of relevant turnover would wash away the ambiguities or inconsistencies that have tarnished the decisions taken by the CCI, an evaluation of the regime in totality was needed before adopting principles from these established jurisdictions.

Thus, even though this decision was at par with the international standards, the distinguishing factors are far overreaching and positively raise doubts that the application of 'relevant turnover', in India, might render deterrence ineffective as firms consider the benefits (profitability) of the conduct and weigh these against the likelihood of getting caught and the penalty they expect if they get caught¹³. The disappearance of the most credible threat, that is high penalties¹⁴, might wash away the deterrent factor too.



¹³ Thando Vilakazi, *Cartels Settlements Leniency and penalties in African jurisdictions*, CCRED, May 25, 2017. Available at <http://www.competition.org.za/review/2015/5/25/cartel-settlements-leniency-and-penalties-in-african-jurisdictions> (last accessed on 24thJuly, 2017)

¹⁴ Paolo Buccirossi, *Deterrence In competition Law*, GESY, Discussion Paper no.285. available at <http://www.sfbtr15.de/uploads/media/285.pdf> (last accessed on 20th July , 2017)