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THE EXCEL CROP CASE AND RELEVANT TURNOVER IN THE COMPETITION ACT 2002

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I. INTRODUCTION / PENALTIES UNDER THE COMPETITION ACT 2002

The powers of the Competition Commission of India ('CCI') to levy penalties have been brought into focus due to some staggering penalties imposed by it in recent times. For instance, in *Shamsher Kataria, In re*[2] an aggregate penalty of Rs. 2544 crores was imposed on 14 automobile companies in an abuse of dominance case. In this case, the CCI had imposed penalty on 2% of the average annual turnover of each of the automobile companies involved in the violation of the provisions of the Act. However, the Competition Appellate Tribunal ('COMPAT') in *Excel Crop Care Ltd., In re*[3] has indicated that the appropriate measure of penalty in the case of a multi-product company would be *only the turnover of the product or service in relation to which the contravention is alleged*, and not the turnover of the entire multi-product company. This is sometimes referred to as 'relevant turnover'.

In this paper, I propose to argue that the decision of the COMPAT is incorrect, insofar as it is based on a rather stretched reading of the provisions of the Competition Act 2002. I would also argue that the decision in *Excel Crop* can also be faulted for an incomplete reading of the penalty guidelines prevalent in the European Union and the United Kingdom, which guidelines form the principal basis for importing the concept of 'relevant turnover' into Indian competition law. In following the decision in *Excel Crop* as it stands, there is a danger that penalties imposed would be much less than what would be imposed if the EU/UK penalty guidelines were to be applied in their letter and spirit in India.

The *Excel Crop case*: Before turning to the decision of the COMPAT on penalties, it is necessary to give some factual background about the *Excel Crop case*.

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[2] *Shamsher Kataria, In re*, 2014 SCC OnLine CCI 95.

[3] *Excel Crop Care Ltd., In re*, 2013 SCC OnLine Comp AT 149 ("*Excel Crop*").

This was a case concerning public procurement of aluminium phosphide tablets. Aluminium phosphide is a pesticide, rodenticide and fumigant, which has application in the food preservation industry, particularly with respect to preservation of food grains. The case originated out of information received by the CCI from the Chairman & Managing Director of Food Corporation of India (FCI). The CCI took cognizance of the same, and initiated a suo-motu inquiry.

Three manufacturers, Excel Crop, United Phosphorus and Sandhya Organic Chemicals were found to have contravened Sections 3(3)(b)[4] and 3(3)(d)[5] of the Competition Act, 2002 ('the Act') by the majority of members of the Commission. One of the members (R. Prasad) found the three entities to have contravened Sections 3(3)(a) and 3(3)(d) of the Act, but not Section 3(3)(b). It was found that the manufacturers had colluded to rig tenders issued not only by FCI but also other public authorities, and had agreed to quote identical prices in their bids, and also boycott a tender issued by FCI. There was unanimity on the imposition of penalty at the rate of 9% of the average annual turnover of the preceding three years.

The following chart depicts the penalties levied on the three entities by the CCI :

Name of the firms	Average of three years turnover (in Crore)	Penalty at 9% of average turnover (in Crore)
Excel Corp. Care Ltd.	710.09	63.90
United Phosphorus Ltd.	2804.95	252.44

On appeal by the manufacturers, the COMPAT not only upheld the findings of the CCI on merits, but also went on to hold that the manufacturers had contravened sub-sections (a), (b) and (d) of Section 3 of the Act. Since this paper is concerned only with the question of penalty under the Act, there is no need to explore the merits of the case in detail. It is however, relevant to mention here that if the allegations against the aluminium phosphide manufacturers are taken to be established,[6] it would be blatant and serious contravention of the Act. In fact, 'level tendering' of the type seen in this case is a practice rarely seen around the world precisely because it is an obvious form of anti-competitive agreement and likely to rouse the suspicion of competition authorities.[7]

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4 (b) "*limits or controls production, supply, markets, technical development, investment or provision of services*" Section 3(3)(b), Competition Act, 2002.

5 (d) "*directly or indirectly results in bid rigging or collusive bidding*" Section 3(3)(d), Competition Act, 2002.

6 Appeals have been filed by the manufacturers against the findings of the COMPAT on merits before the Supreme Court (C.A. Nos. 2480 of 2014 etc) under section 53-T of the Act and are pending adjudication.

7 Richard Whish and David Bailey, COMPETITION LAW, 536 (7th Edn., 2012).

On the issue of penalty, the COMPAT held that in the case of multi-product companies like Excel Crop and United Phosphorus,[8] only the 'relevant turnover' of the product/service in question – in this case aluminium phosphide tablets – could be taken into account while imposing penalties. The penalty imposed was limited to 9% of relevant turnover for Excel Crop and United Phosphorus.[9] The following chart depicts the reduced penalty imposed by the COMPAT in this case:

Name of the firms	Average of three years turnover (in Crore)	Penalty at 9% of average turnover (in Crore)	Average of three years relevant turnover (Rs crore)	Reduced Penalty at 9% of relevant turnover (Rs. Crore)
Excel Corp. Care Ltd.	710.09	63.90	32.41 crore	2.92
United Phosphorus Ltd.	2804.95	252.44	77.14 crore	6.94

II. WHETHER THE TEXT OF THE ACT SUPPORTS THE CONCEPT OF 'RELEVANT TURNOVER'?

The discussion and findings on the issue of penalty are to be found at paragraphs 43 to 69 of the order of the COMPAT. Unfortunately, this portion of the decision does not clearly demarcate between where the arguments of counsel end, and the analysis and conclusions of the Tribunal begin. The COMPAT had placed reliance on three principal sources or authorities for applying the concept of 'relevant turnover'. These are: -

(i) Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 (2006/C 210/02) issued by the European Commission ('EU Guidelines')

(ii) Guidance as to the appropriate amount of penalty (September 2012) issued by the Office of Fair Trading (OFT), United Kingdom ('OFT Guidelines')

(iii) *Southern Pipeline Contractors* v. *Competition Commission*,[10] decided by the Competition Appeal Court of South Africa

According to the COMPAT, the EU and OFT guidelines were "undoubtedly relevant"[11], and that it agreed with the "sentiment expressed in the relied upon judgment of the South African Tribunal in *Southern Pipeline Contractors* v. *Competition Commission*."[12]

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[8] Sandhya Organic Chemicals was not a multi product company. The penalty imposed on Sandhya was also reduced, though on different grounds.

[9] Paragraph 67.

[10] 2011 ZACAC 6.

[11] Para 62.

[12] 2011 ZACAC 6, para 62 ("*Southern Pipeline Contractors*").

In *Southern Pipeline Contractors*, the Competition Appellate Court, while interpreting Section 59 of the South African Competition Act, 1998 held that there was a 'legislative link' between the contravention and the damage caused, and the profits accruing from cartel activity.[13] The South African court found that Section 59(3) of the Act provided a clear statutory basis for taking into account only the 'affected' or 'relevant turnover', subject to the overall cap of 10% of total turnover stipulated under Section 59(2).

Surprisingly, in *Excel Crop*, the COMPAT did not undertake an analysis of the provisions of the Competition Act, 2002, particularly Section 27 thereof, to determine whether the concept of 'relevant turnover' had any statutory basis. Section 27 is the source of the CCI's power to levy penalties. Section 27(b) is particularly relevant, and raises some interesting questions regarding interpretation of the Act and whether the concept of 'relevant turnover' has any statutory basis in India. Section 27, insofar as it is relevant, is reproduced below:

> "27. Where after inquiry the Commission finds that any agreement referred to in Section 3 or action of an enterprise in a dominant position, is in contravention of Section 3 or Section 4, as the case may be, it may pass all or any of the following orders, namely –
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> (a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be; (b) impose such penalty, as it may deem fit which shall be *not more than ten per cent of the average of the turnover* for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:
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> *Provided* that in case any agreement referred to in Section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of *its* profit for each year of the continuance of such agreement or ten per cent of *its turnover* for each year of the continuance of such agreement, whichever is higher. …"

A plain reading of Section 27 makes it clear that the focus and incidence of penalty is on the "person or enterprise" that is a *party* to the anti-competitive agreement (Section 3) or abuse of dominance. In the case of Excel Crop and

[13] *Southern Pipeline Contractors*, para 51.

United Phosphorus, it was the companies that were parties to the illegal agreements, rather than their respective business sub-divisions or units. This follows from the well-settled principle of company law that a corporation has separate and independent legal personality.[14] Clearly therefore, under Section 27(b) the penalty is leviable on the turnover of the person that was a party to the agreement *i.e.*, the company as a whole. The penalty is to be calculated as a percentage of the turnover of such person(s) or enterprise(s). The expression 'turnover' is not qualified by 'relevant', and nor is it specifically restricted to the product or service of which contravention has been found.

A reading of the proviso to Section 27(b) shows that the intention of the legislature appears to be to levy penalty on the entire turnover of the person or enterprise, rather than a part thereof. The proviso to Section 27(b) specifically relates to cartels (though it was not invoked in the *Excel Crop case*). It gives the CCI the option to either penalise the entire profits of the person involved in the cartel, or penalise ten percent of the turnover, whichever is higher. The use of the expression "its turnover" in the context of each producer, seller, distributor, trader or service provider involved in the cartel indicates that it is the turnover of the entity as a whole that is the basis of levy of penalty, rather than just a unit or part thereof. This argument follows the well established principle of statute interpretation, *i.e.*, if the same word is used more than once in the same provision of a statute, the intention of the legislature must be to give the same meaning to the word at each place where it is repeated.[15]

It is quite interesting to compare the proviso to Section 27(b) with the language of Section 76(1A)(aa)[16] of the Australian Competition & Consumer Act 2010, which provides for penalty of 10% of the annual turnover (which has been defined as turnover from all supplies) in the event the benefits that have been obtained from the cartel activity are not ascertainable. Two things emerge from the comparison: This is an example of a statute using the total turnover standard,

[14] *Salomon* v. *A. Salomon & Co. Ltd.*, 1897 AC 22 (HL); *CIT* v. *Kumbakonam Mutual Benefit Fund Ltd.*, AIR 1965 SC 96 : (1964) 53 ITR 241; *Vodafone International Holdings BV* v. *Union of India*, (2012) 6 SCC 613.

[15] *Bennion on Statutory Interpretation*, 1160 (5th Edn., 2008); *Central Bank of India* v. *Ravindra*, (2002) 1 SCC 367; *Hyder Consulting (UK) Ltd.* v. *State of Orissa*, (2015) 2 SCC 189.

[16] Section 76(1A), Australian Competition & Consumer Act 2010:

"(1A) The pecuniary penalty payable under subsection (1) by a body corporate is not to exceed:

(aa) for each act or omission to which this section applies that relates to section 44ZZRJ or 44ZZRK—the greatest of the following:

(i) $10,000,000;

(ii) if the court can determine the total value of the benefits that have been obtained (within the meaning of Division 1 of Part IV) by one or more persons and that are reasonably attributable to the act or omission—3 times that total value;

(iii) if the Court cannot determine the total value of those benefits—10% of the annual turnover (within the meaning of Division 1 of Part IV) of the body corporate during the period (the *turnover period*) of 12 months ending at the end of the month in which the act or omission occurred."

which is not unknown in foreign jurisdictions.[17] The difference in the proviso under Section 27(b) is that it contemplates stripping the entire profits of the person participating in the cartel, and not just the profits ('benefits') attributable to the cartel activity like in Australia.

Section 27 uses the expressions "person" and "enterprise" to denote as to who would be liable for penalty. Both these expressions are separately defined in the Act, in Sections 2(l) and 2(h) respectively. The 'enterprise' definition specifically includes within its ambit units, divisions and subsidiary companies. Interestingly, the Act does define 'unit' and 'division' of an enterprise,[18] but these expressions are not used in Section 27 of the Act. In my view, this is yet another indicator that the legislature intended to make the entire turnover of the person or enterprise that had contravened either Section 3 or 4 of the Act to be the basis of calculation of penalty.'

Section 2(y) of the Act defines turnover as follows – "turnover includes the value of sale of goods or services." This inclusive definition may be used to support the theory that 'turnover' may mean 'relevant turnover'. However, in my view the reason for having an inclusive definition is to encompass turnover that is measured other than in terms of sales. An example of this would be turnover from intellectual property licensing, or from rent.

From the above, it is quite clear, on a plain reading, that it is the entire turnover of the person or enterprise that is party to the agreement that has to be considered for the purpose of penalty. In my view, the decision of the COMPAT in *Excel Crop* is a clear case of adding words to the statute to alter its meaning.

III. THE PRINCIPLE OF PROPORTIONALITY & POTENTIAL PRACTICAL FALLOUT OF THE EXCEL CROP CASE

Perhaps the best legal ground for applying the concept of relevant turnover is through the invocation of the principle of proportionality. Proportionality is a principle of administrative law. In *Coimbatore District Central Cooperative Bank* v. *Coimbatore District Central Cooperative Bank Employees Assn.*,[19] the Supreme Court explained it thus –

> "'Proportionality' is a principle where the Court is concerned with the process, method or manner in which the

[17] International Competition Network Cartels Working Group, *Setting of Fines for Cartels in ICN Jurisdictions*, Para 4.1.2.

[18] Explanation (c) to Section 2(h), The Competition Act, 2002.

[19] *Coimbatore District Central Cooperative Bank* v. *Coimbatore District Central Cooperative Bank Employees Assn.*, (2007) 4 SCC 669, para 18.

> decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise - the elaboration of a rule of permissible priorities. De Smith states that 'proportionality' involves 'balancing test' and 'necessity test'. Whereas the former ('balancing test') permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter ('necessity test') requires infringement of human rights to the least restrictive alternative."

Indeed, in *Excel Crop*, the COMPAT did invoke this principle to reduce the penalty from 9% of turnover to 9% of 'relevant turnover' –

> "It should also be reiterated at this stage that there should be proportionality in the award of penalty, which principle has been enshrined in several judgments of the Apex Court. It cannot be forgotten that Supreme Court has time and again relied on the doctrine of proportionality while at the same time emphasizing on the aspect of deterrence. Generally the award of penalty should be in proportion to the wrong done. While considering the wrong done, of course the authority would be justified in taking into consideration all the aspects including mitigating and aggravating circumstances. It is to this extent that EU and OFT Guidelines would be relevant."[20]

One of the main problems with the way in which Section 27 has been operationalised in the penalty orders passed by the CCI has been the lack of clarity and set guidelines regarding the imposition of penalties. Of late, the CCI has been passing reasoned orders on penalties after taking into account aggravating and mitigating factors,[21] and this is a welcome step in my view. There can also be no doubt that penalties should not be disproportionate. However, this is a different thing from saying that penalties should be based on relevant turnover. It is possible to have a proportionate penalty based on a percentage of entire/total turnover of the person or enterprise, without using 'relevant turnover' as the *basis* for calculation. After all, the penalty imposed may be anywhere between

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[20] *Excel Crop*, para 63.

[21] See for example, *Maharashtra State Power Generation Co. Ltd., In re*, 2013 SCC OnLine CCI 85: 2013 Comp LR 910 (CCI); *Rohit Medical Store, In re*, 2015 SCC OnLine CCI 19; *Faridabad Industries Assn., In re*, 2014 SCC OnLine CCI 82 . In *Alleged cartelisation in the matter of supply of spares to Diesel Loco Modernization Works, In re*, 2014 SCC OnLine CCI 16, the CCI appears to have considered the fact that the product in question only contributed to a part of the total turnover of the company as a mitigating factor.

0 to 10% of the average annual turnover of the person or enterprise, in terms of Section 27(b). I do not think there is anything inherently disproportionate in using entire turnover as the basis of imposition of penalty.[22]

The biggest flaw in the *Excel Crop* decision is not really the reference to 'relevant turnover' but the fact that the COMPAT appears to have treated this as the sole basis for the calculation. Although the COMPAT holds that the EU and OFT guidelines are "undoubtedly relevant" and it stops short in determining the penalty with reference to these guidelines.

Under the EU & OFT Guidelines, penalty is to be calculated through a step-wise or stage-wise process. Had these guidelines been applied *in toto* to the facts of the case in *Excel Crop*, the penalty would be far in excess of what was awarded by the COMPAT. The following step/stage wise calculation will demonstrate this[23]

A. Step 1: The Basic Amount of Fine

The COMPAT appears to have committed a mistake in assuming that the range for relevant turnover would also be 0 to 10%.[24] In fact, the starting point under the EU guidelines is up to 30% of the relevant turnover, for serious contraventions of competition law.[25] In *Excel Crop*, the COMPAT was of the view that the breach was indeed a "*serious*" one, "*abhorred in the international jurisdiction*".[26] If the starting point were taken at 30% of relevant turnover of Excel Crop, then the amount of penalty would be 9.72 crores approximately. Under the EU guidelines, there is a further multiplier of the number of years of contravention.[27] The evidence suggests[28] that the cartel activity continued at least from 2007 till 2011. However, even if the period is restricted from the date on which Section 3 of the Act was brought into force, the multiplier would be 3 (years). This would bring the basic amount to Rs. 29.16 crores. To this, an addition of 15% to 25%

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[22] There have been at least two instances where the Supreme Court has struck down legislation as ultra vires the Constitution inter alia on grounds of proportionality. See *Collector* v. *Canara Bank,* (2005) 1 SCC 496 and *Anuj Garg* v. *Hotel Assn. of India*, (2008) 3 SCC 1. However, there remain lingering doubts as to what extent the principle has application in India, See, *All India Railway Recruitment Board* v. *K. Shyam Kumar*, (2010) 6 SCC 614.

[23] For the purpose of this analysis, I am referring only to the EU guidelines and the turnover figures relevant for Excel Crop Care Ltd. The OFT guidelines are along similar lines as the EU guidelines.

[24] At para 51, the COMPAT makes an erroneous reference to paragraph 2.8 of the OFT guidelines and concludes that the starting point of the calculation should not exceed 10% of the relevant turnover. This is contrary to 2.5 of the OFT guidelines which corresponds to para 21 of the EU guidelines.

[25] EU guidelines, Para 21.

[26] *Excel Crop,* para 67.

[27] Para 24, EU Guidelines.

[28] *Excel Crop*, para 27.

has to be added for the purpose of general deterrence.[29] If 15% were added, this would bring the basic amount of fine to Rs. 33.5 crores.

B. Step 2: Adjustments for Aggravating & Mitigating Circumstances & Specific Deterrence

The EU Guidelines allow for an increase or decrease for aggravating and mitigating factors.[30] In *Excel Crop*, the COMPAT did not advert to any mitigating factors, but did consider the fact that aluminium phosphide tablets were required for the preservation of food grains (which was a matter of public concern) to be an aggravating factor.[31] The EU Guidelines also allow for an *increase* in the fine if the undertaking has a "particularly large turnover beyond the sales of goods or services to which the infringement relates."[32] Interestingly, United Phosphorus had argued that only about 3% of its turnover was relatable to aluminium phosphide supplies.[33]

On making an adjustment for aggravating factors, the amount of penalty calculated as per the EU Guidelines could be estimated at Rs. 35 crores approximately, which would amount to roughly 5% of the average annual turnover of company as a whole. This is within the legal maximum of 10% of overall turnover and below the penalty of Rs. 63.9 crores imposed by the CCI at the rate of 9%. However, it is well above the penalty of Rs. 2.92 crores imposed on Excel Crop by the COMPAT, which on the basis of this analysis, appears to be highly inadequate.

It is possible to use *Excel Crop* as an authority for the proposition that penalties for a multi-product company cannot exceed 10% of the relevant turnover,[34] even though under the EU and OFT guidelines, even basic fines can be much higher. This would lead to anomalous results where large, multi-product firms are fined disproportionately lower than smaller firms. If deterrence is the purpose of penalties in competition law, then applying the '*ratio*' in *Excel Crop* could result in the purpose of the Act not being met, if not rendering the 2002 Act toothless.

IV. CONCLUSION

In this paper, I have argued that unlike other jurisdictions, in India there appears to be no legislative basis for using relevant turnover as the basis for imposition of penalties. I have advanced this argument by comparing it to South

[29] EU Guidelines, Para 25.
[30] EU Guidelines, Paras 28-29.
[31] *Excel Crop*, para 66.
[32] EU Guidelines, Para 30.
[33] *Excel Crop*, para 54.
[34] *Excel Crop*, paras 51, 67.

Africa & the EU, where there are either specific guidelines, or statutory provisions that support the adoption of the 'relevant turnover' standard for imposition of penalties. The decision in *Excel Crop* is possibly legally flawed on this ground.

On the other hand, the lack of guidance, either in the statute or by relevant regulations framed by the CCI, makes any exercise of discretionary power susceptible to challenge on the ground of proportionality and/or (un)reasonableness. This is also highly problematic. No doubt penalties need to be proportionate. However, the decision in *Excel Crop* suggests that the imposition of penalty on a multi product company has to be subject to a cap of 10% of relevant turnover. I have argued that this results in outcomes that are not satisfactory because resulting penalties would be too low and would not meet the purpose of the Act i.e. deterring enterprises from indulging in anti-competitive practices. This is an outcome that would not even arise from a strict application of the EU and OFT guidelines on penalty, which the COMPAT has relied upon in its order.