Calculation of Fines in India – In search for some guidance

VAIBHAV CHOUKSE·

"Ronald Coase said he had gotten tired of anti-trust because when the prices went up the judges said it was monopoly, when the prices went down they said it was predatory pricing, and when they stayed the same they said it was tacit collusion[964]*."*

1. INTRODUCTION

The history of antitrust law reaches back to the Roman Empire from the enactment of the '*Lex Julia de Annona'*, to the formation of guilds in the middle ages, the enactment of the Sherman Act of 1890 during the industrial revolution, the competition policy guided by the General Agreement on Tariffs and Trade (GATT) and the World Trade Organisation (WTO) and the Treaty of Rome creating the European Economic Community (EEC) - progressive changes have been seen over time that have aided in creating today's global competition regime. In India, the Competition Act 2002 (Competition Act) remained in a state of a flux for a considerable time. However, on May 20, 2009, India notified the twin *ex post* dimensions of the Competition Act, including the prohibition of 'anti-competitive agreements' and the 'abuse of dominant position'. The provisions under the Competition Act are broadly analogous to the provisions on anticompetitive agreements and abuse of dominance under European Union Competition Law and United States Antitrust Law and so far the Competition Commission of India (CCI) has imposed monetary penalty in 4 out of 110 cases. While the Competition Act sets the maximum penalty for a cartel violation at three times a company's profit or 10% of its turnover, whichever is higher, the penalty for other anti-competitive agreements including the abuse of a dominant position should not exceed 10 % of the average turnover of the last three preceding financial years. However, it is unclear that on what basis CCI has calculated the fines. Accordingly, the orders and amount of the fines imposed by CCI in all four cases have come under heavy criticism by competition experts worldwide.

2. INTERNATIONAL FINING GUIDELINES

It should be noted at the outset that many competition authorities worldwide already issued guidelines on the method of setting fines in Competition Cases, which provides guidance as to how these Competition Authorities proceed when calculating fines.[965] Just recently the French Competition Authority has adopted the fining guidelines on May 16, 2011, after the Paris Court of Appeal has criticized it on the ground of lack of apparent methodology while calculating fines. The Belgian Competition Council on October 10, 2011 has launched a public consultation on its proposal for new fining guidelines for the calculation of fines for restrictive practices.

· Author is a Competition Lawyer working with a Law Firm, Vaish Associates, Advocates at New Delhi and holds LL.M in Commercial Law with focus on EU Competition Law from Kings College London. The author would like to thank Professor Richard Whish for all his guidance and support. The authors' views expressed in the article are personal and author is solely responsible for any errors that may remain in this article.

[964] William Landes, '*The Fire of Truth: A Remembrance of Law and Econ* at Chicago, (1981) , p.193

[965] ICN cartel working group 'Setting of fines for cartels in ICN jurisdictions' (2008)

The European Commission has adopted new Guidelines on the method of setting fines in 2006. These Guidelines revise those adopted in 1998, with a view to increasing the deterrent effect of fines. According to the past Competition Commissioner Neelie Kroes "*These revised Guidelines will better reflect the overall economic significance of the infringement as well as the share of each company involved*". The opening paragraph of EU guidelines states that '*the guidelines should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice"*. The European Court of First Instance has observed in 1995 in three of its judgments concerning the *Welded steel mesh*[966] cartel that it would be 'desirable' for the Commission to make more transparent its method for setting fines.

The fining process in the United States is governed by the application of the U.S. Sentencing Guidelines that provide a consistent structure for calculating fines. The U.S. courts consider the Guidelines to be advisory, not mandatory, and allow for judicial discretion. The US enforcement agencies do not have the legal authority to impose civil fines for monopolization violations (which are the counterpart to abuse of dominance violations)[967].

In most jurisdictions, the fine is calculated on the basis of some common factors:

1. Fines are proportionate to the severity of the alleged practices.
2. The importance of the damage to the economy.
3. The financial situation of the offender or the group to which it belongs and the likelihood of reiteration.
4. Undertaking's intent or negligence.
5. The gravity and duration of the infringement.
6. Illegal profit resulting from the infringement.
7. Mitigating Factors[968].

3. CALCULATION OF FINES IN INDIA – CARTEL CASES

In its first fining decision, CCI in *Multiplex Association of India v. United Producers/ Distributors Forum & Ors*[969] imposed a fine of Rs. 1 lakh (approx. US$ 2100) on each of the 27 film producers and distributers after the Multiplex Association of India approached the CCI alleging that the former formed a cartel and colluded against cinema hall owners and stopped the distribution of films to theatres between April and June 2009. In the second fining decision *Uniglobe Mod Travels Pvt. Ltd. vs Travel Agents Association of India & Ors*[970] the CCI on 04.10.2011 imposed a symbolic penalty of Rs. 1 lakh (approx. US$ 2100) after it found that the three largest travel agent associations of India formed a cartel and colluded against a single travel agent by collectively boycotting him from trade association.
In most jurisdictions, cartel fines imposed are higher than fines imposed for other anti-trust violations and in a number of jurisdictions more severe sanctions can be imposed on hardcore cartels than for other infringements of competition law, reflecting the consensus that hardcore cartels are the most pernicious competition law violations and

[966] *Cases T-148/89 Tréfilunion v Commission (Welded steel mesh)*
967 OECD policy brief 'Remedies and Sanctions for Abuse of Market Dominance' (2008)
[968] European Commission 'Guidelines on the method of setting fines' (2006)
[969] Case No. 01/2009
[970] Case No. 03/2009

should be sanctioned as such[971]. Basically the gravity of the infringement should be determined by a case to case basis and hard core cartels infringements are likely to be at the top end of the scale[972] whereas CCI has merely imposed a symbolic penalty on producers and travel agent associations which itself is an exceptional phenomena in cartel cases and that too without giving any rationale for the same.

4. CALCULATION OF FINES IN INDIA - ABUSE CASES

In *MCX Stock Exchange Ltd. & Ors. v. National Stock Exchange of India Ltd. & Ors*[973], CCI charged National Stock Exchange (NSE) with abuse of dominant position in the currency derivatives market to scuttle competition and imposed a penalty of Rs. 55.5 crore (approx US$ 12.3 million). In this case, though CCI may be right in asking the NSE to 'cease and desist' in the waiver of transaction costs but the monetary penalty seems a little excessive. While calculating the turnover of NSE, based on which the penalty was imposed CCI included transaction costs levied in other segments of the exchange such as capital market, equity derivatives and the wholesale debt markets. The worst part of the penalty was that the substantial portion of the turnover used by the CCI to compute the penalty comprises income earned from investments of NSE. Such computation goes against the very mandate of the Competition Act, which defines *turnover* as 'the value of sale of goods and services'. The penalty if any, should have been imposed on the basis of turnover of the NSE in the currency derivatives segment alone *i.e.* the relevant market. The matter has gone into appeal before the Competition Appellate Tribunal which in-turn has imposed a stay on the penalty.

In the forth and most recent decision *Belaire Owner's Association v. DLF Limited*[974], involving the abuse of dominance by DLF Ltd., the CCI imposed a staggering penalty of approx. Rs 6.3 billion (approx. US$ 140 million) on DLF Ltd. In this case, interestingly, DLF was never given the penalty hearing before CCI unlike in NSE & Multiplex Case, for the very reason that the relevant regulation *i.e.* Regulation 48, dealing with penalty hearing provision under the Competition Commission of India (General) Regulations, 2009 was omitted by a recent amendment on April 12, 2011. Rationale for revoking Regulation 48 seems unclear as, on the contrary it deprives the parties of the right to being heard on the issue of quantum of penalty to be imposed.

A study of the recent fines imposed by the CCI in the cases mentioned above, shows that the authority may have erred in calculating the amount of the fines on the basis of the turnover as whole and not considering the turnover of entity involved in the infringement in the relevant market while imposing the fine. In calculating such fines, the CCI should have relied on the established international jurisprudence according to which it should have only considered the turnover of *entity* involved in the infringement on the relevant market *i.e.* the 'relevant turnover' is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last 3 financial years. The basis of this approach is that a corporate responsibility shall be borne only by those entities (including parent corporations) found to have committed or supported the antitrust violation at issue and

[971] ICN cartel working group 'Setting of fines for cartels in ICN jurisdictions' (2008)
[972] Richard Whish: *Competition Law*, 6th edition,2008
[973] Case No. 13/2009
[974] Case No. 19/2010

calculate base fine from only the volume of commerce affected by the violation[975]. Furthermore, it is striking that the CCI has not considered any mitigating or aggravating factors while calculating the fines including the novelty of the issue and effective cooperation.

Worldwide, in civil and administrative cases (which include all abuse of dominance cases), there are three general categories of remedies and sanctions: structural remedies, behavioural remedies, and monetary sanctions and maximum number of competition authorities have a preference for behavioural remedies over structural and monetary remedies[976]. In US, the typical remedy for abuse of dominance cases is injunctive relief, which prohibits the company from continuing to engage in certain conduct. Penalties, particularly large penalties, do present a risk of chilling companies from possibly competing aggressively and so the size of the penalty needs to be looked at very carefully. Now if we take the case of DLF and NSE, in the absence of guidelines on calculation of fines, a 7% and 5% of turnover as penalty on DLF and NSE respectively, is higher than one would ever expect such an infringement to be fined in the EU. In the EU, the highest ever fine imposed on a dominant company was on Intel in 2009 and Intel there was found to have committed some of the most serious breaches of the EC rules i.e. Conditional Rebates, Refusal to Supply which are more serious than the violations or abuses of dominant position in DLF Case. Yet Intel was fined with only 4% of the Turnover *i.e.* $1.45 billion i.e. about 10 times the size of DLF fine.

Another issue is whether any fines should have been imposed on DLF or NSE. There is no established case law or practice in India relating to the alleged violations committed by DLF or NSE. The competition law principles adopted by the CCI in DLF case *i.e.* 'exploitative abuses' are not sufficiently developed in India or elsewhere in the world. Given that the alleged violations are based on novel concepts and principles, they are incapable of having been anticipated for the purpose of compliance. Further, it is the established practice of other competition law regulators that where a concept is novel, no penalties are levied or remedies is ordered. For instance, in the European Union, for the European Commission, competitors' exclusion is the most common abuse and often at the basis of later exploitation, the Commission has made it clear that priority should be given to the former rather than to the latter. As a result, there are only a handful of Commission decisions condemning exploitative abuse: over the 1980-2010 periods, 40 guilty verdicts relate to exclusion but only 11 to exploitation[977]. It is to be noted that European Commission was empowered to impose fines in Competition Cases in 1962, between 1962 and 1969, for almost 7 years, there were no fines at all and when a fine was finally imposed in 1969[978] on an undertaking, it was a symbolic fine.

In a recent order by CCI in *Explosive Manufacturers Welfare Association v. Coal India Limited and its Officers*[979] , CCI held that the government owned Coal India Limited has not violated any provision of the section 3 & 4 of the Act relating to anti-competitive practice and abuse of dominance. But interestingly, in the dissenting order

[975] American Bar Association 'Section of Antitrust Law Comments on French Competition Authority's Draft Notice on Fines' (2011)
[976] OECD 'Remedies and Sanctions for Abuse of Market Dominance' (2008)
[977] Patrick Hubert and Marie-Laure Combet. 'Exploitative abuse: The end of the Paradox?' (2011) pp.44-51
[978] Quinine Cartel (case IV/26.623) [1969] OJ L 192/5. And Dyestuffs Cartel [1969] OJ L 195/11
[979] Case No. 04/2010

by one of the Members of CCI, it was held that Coal India Ltd has violated the provisions of sections 3 & 4 of the Act but while dealing with the issue of penalty, the Hon'ble member held that "*it's a first contravention by Coal India Ltd and imposed a penalty of Rs. 1 Crore (US$ 216788), which is much below the 10% of the average turnover of the Coal India Ltd."* Though being the desisting order, it does not stand but the rationale for not imposing a fine in accordance with the provisions of the Competition Act raises many eye-brows as to whether such preferential treatments to a Public Sector Undertaking having a turnover of Rs. 520 billion (approx. US$ 11.55 billion) in 2009-10, which unfortunately was not accorded to DLF or NSE justified?

5. CONCLUSION & WAY FORWARD

The European Commission imposed fines without having published any guidance until 1997. In its decisions imposing fines the Commission always listed a number of factors which it had taken into account in fixing the amount of the fine, but never explained how these factors had brought it to reach the precise figure of the fine imposed. Those judgments led to the publication by the European Commission of its 1998 Fining Guidelines. However, the Director General of the CCI has already completed the cartel investigation in cement, sugar, steel and tire sectors and the matters are pending for the final hearing before CCI, if proved guilty, the fine on companies can be between Rs 100 crore to Rs 1500 crore, depending on the turnover and production capacity. On the one hand CCI is heavily relying on foreign case law while rendering a judgment but on the other hand have disregarded the established principle laid down by various competition authorities on the calculation of fines. Recently a media report by *Bloomberg*[980] stated that US Department of Justice is working on an agreement (MoU) with India to improve international antitrust enforcement, since the trade between both the countries more than doubled to $37 billion from 2003 to 2009. Many more countries are eying up for similar collaboration with Indian antitrust authority. Hence CCI, like other mature jurisdictions, should aim to develop clear-cut guidelines on how fines will be calculated to ensure transparency and impartiality in its decisions, which in-turn will increase the creditability of CCI in the eyes of the business world as well as its international peers.

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[980] The Bloomberg 'U.S. Pursuing Antitrust Agreement With India' (07.07.2011)