|  |
| --- |
| Supreme Court of India curbs CCI's Penal Powers |
|  |
| **15 May 2017** |
|  |
|  |
|  |
| **The Supreme Court holds that penalties imposed by the Competition Commission of India must be based on the turnover of the relevant product/service under inquiry and cannot be based on the total turnover of the offending enterprise.** |
|  |
|  |
|  |
|  |
|  |
| The Supreme Court of India in **Excel Crop Care Limited & Ors v Competition Commission of India & Ors.** has delivered a landmark judgment limiting the extent of penalties that can be imposed by the Competition Commission of India (**CCI**).  Additionally, in this judgment, the Supreme Court has clarified the jurisdictional scope of inquiries under the Competition Act, 2002, and set out a sound conceptual framework for assessing bid-rigging, collusive tendering and cartelization in India. **Brief Facts** The case stems from the CCI's decision dated 23 April 2012 finding 3 Aluminium Phosphide Tablet (**APT**) manufacturers, (collectively **Appellants**) guilty of rigging tenders issued by the Food Corporation of India (**FCI**) for the procurement of APT.  The CCI had imposed penalties of approximately INR 3180 million on the Appellants, calculated at 9% of the average 'total turnover' of each of the Appellants for the preceding 3 years. On appeal, the Competition Appellate Tribunal (**COMPAT**), in its order dated 29 October 2013, upheld the CCI's finding on merit that the Appellants were guilty of collusive-tendering and bid-rigging the supply of APT to FCI, in violation of Section 3(3) read with Section 3(1) of the Competition Act, 2002 (**Competition Act**).  However, the COMPAT substantially reduced the penalties imposed on the Appellants from approximately INR 3180 million to INR 100 million, holding that penalties imposed on enterprises having multiple products should be based on the turnover derived from the product/service under inquiry, i.e., the relevant turnover. The Appellants approached the Supreme Court challenging the COMPAT's finding of bid-rigging and collusive tendering and the CCI approached the Supreme Court appealing the COMPAT's decision on penalties.  **The Judgement** **Penalties must be imposed on 'relevant turnover'** Under Section 27(b) of the Competition Act, the CCI has the power to impose penalties on enterprises that contravene Section 3 (prohibition on anti-competitive agreement) and/ or Section 4 (prohibition on abuse of dominant position) of the Competition Act. Further, under this Section, the CCI has been given the discretion to impose a penalty up to 10% of the average turnover of contravening enterprises for the preceding three (3) financial years in relation to such contraventions. In its judgement dated 8 May 2017, the Supreme Court has clarified that the term 'turnover' under Section 27(b), must be interpreted as meaning 'relevant turnover', i.e., only the turnover from the relevant product/service in respect of which the contravention is committed.  The Supreme Court emphasized the doctrine of proportionality in the imposition of penalties, to hold that penalties imposed on total turnover would have inequitable and disproportionate results.  The Court also applied the principle of strict construction of penal provisions to hold that there would be no justification for including other products/services of an enterprise when imposing penalties for contraventions committed in respect of only one product/service.  Therefore, through this judgement, the Supreme Court has imputed 'relevant turnover' as the meaning of turnover under Section 27(b) of the Competition Act and observed the importance of a link between the damage caused and the profits which accrue from cartel activity.  It has held that there must be a relationship between the nature of offence and benefits derived from it, and that this co-relation must be kept in mind while imposing penalties.  The Supreme Court accordingly upheld the COMPAT's decision on the reduced penalties imposed. Regarding foreign jurisprudence on this issue, the Supreme Court has observed that though penalties for competition law infringements in other jurisdictions such as in the European Union and the United Kingdom are levied considering 'total turnover', these jurisdictions have also enacted detailed guidelines for calculation of penalties, which ensure that any penalties imposed are not disproportionate.  The Court observed that, in the absence of any similar guidelines in India, the consideration of total turnover under Section 27(b) of the Competition Act could have disastrous results. Justice N.V. Ramana, in a separate but concurring judgement delivered in this case, noted that the interpretation of Section 27(b) of the Competition Act requires indigenous consideration, rather than reliance on foreign jurisprudence.  He held that any discretion afforded to the CCI under Section 27(b) of the Competition Act must be regulated and accordingly set out a two-step calculation for imposition of penalties: **Step 1:**  Determination of 'relevant turnover', which is based on the turnover of the entity from the products/services that have been affected by the contravention; and **Step 2:**  Determination of an appropriate percentage based on aggravating and mitigating factors (such as, nature, gravity and extent of contravention, ring-leader status, duration of the agreement/conduct, loss/damage suffered, profits derived from contravention, etc.). **Other Observations** In addition to setting out the jurisprudence on the imposition of penalties by the CCI, the Supreme Court, in this judgement, has also clarified the jurisdictional scope of the CCI's inquiries/investigations and set out key reflections on the law of bid-rigging, collusive tendering and cartelization in India:(a)  Retrospective application: It has been held that the Competition Act has no retrospective application, i.e., agreements or conduct prior to the enforcement of the Competition Act on 20 May 2009 would fall outside its scope.  However, where the effect of the agreement or conduct continues after 20 May 2009, it would fall within the purview of the Competition Act; (b)  Prior practices of cartelization can be relied upon: In this case, the investigative wing of the CCI, the Director General (**DG**), had relied on bid-prices quoted by the Appellants in tenders issued to other customers prior to the enforcement of the Competition Act, to establish the practice of collusive tendering by the Appellants. The Supreme Court held that though the behavior of the Appellants in bids preceding the enforcement of the Competition Act cannot be an infringement, it can highlight the Appellants' history of quoting identical prices in bids and can be used to support the finding of collusion.  Therefore, while conduct that precedes the enforcement of the Competition Act cannot amount to a contravention, such conduct can be used to impute a company's behavioral patterns; (c)  Scope of DG's investigation: In addition to the identical prices quoted by the Appellants in FCI tenders, the DG also investigated an FCI tender of 2011 which the Appellants had collectively boycotted.  This collective boycott was also held to amount to collusive tendering by the CCI, and was further upheld by the COMPAT. The Appellants challenged the DG's power to investigate the 2011 FCI tender, given that it was not the subject of FCI's complaint to the CCI.  In this context, the Supreme Court held that, based on the scope of the CCI's order directing the DG to investigate under Section 26(1) of the Competition Act (**Prima Facie Order**), the DG can examine other incidences of violations of the Competition Act as well.  In this case, the language of the Prima Facie Order was held to be broad enough to empower the DG to investigate all facts until the investigation against the Appellants was completed. The Supreme Court also clarified that the purpose of the DG's investigation is to cover all necessary facts and evidence to assess anti-competitive practices.  If in the process of an investigation, other facts which show a contravention of the Competition Act are revealed, the DG is well within his power to include such actions in the DG investigation report.  Therefore, actions that do not strictly form part of a complaint may still be investigated by the DG based on the Prima Facie Order of the CCI; and (d)  No difference between collusive bidding and bid rigging: The Supreme Court also clarified that the terms 'collusive bidding' and 'bid rigging' are interchangeable and that the explanation given to the term 'bidding rigging' under the Competition Act would equally apply to the term 'collusive bidding', both of which are aimed at illegal anti-competitive activity. **Implications of the Judgement** The Supreme Court's decision provides much needed clarity on the imposition of penalties (based on turnover) by the CCI.  It will also provide relief to those multi-product enterprises that have been penalized based on their total turnover, since such enterprises are likely to have such penalties significantly reduced on appeal.  Further, enterprises having multiple products and currently being investigated before the CCI, will also be subjected to lower potential liabilities if a contravention is found. While the decision makes relevant turnover from the affected product/service the basis for calculating penalties, it remains to be seen how penalties would be imposed on a guilty person/association/trade association that does not generate direct turnover from the relevant product/service.  However, in the absence of any penalty guidelines in India, it is hoped that the CCI will issue guidelines that will clarify such issues. |
|  |