



PULSE 2024

anantlaw briefings

India notifies new regulations for
penalty calculations under the
Indian Competition Act



PENALTY REGULATIONS

Competition Act, 2002, which was amended in April 2023 vide Competition (Amendment) Act, 2023 ("Competition Act") provides for penalties with respect to anti-competitive agreements, abuse of dominance and also regulates combinations and mergers having appreciable adverse effect on competition in India.

Vide notification dated 05 March 2024, the Government of India, further, notified and brought into force amendments to Sections 27(b),

48, 48A, 48B and 48C of the Competition Act.

In pursuance of which, the CCI (on 6 March 2024) issued Competition Commission of India (Determination of Turnover or Income) Regulations, 2024 ("Turnover Regulations") and Competition Commission of India (Determination of Monetary Penalty) Guidelines, 2024 ("Penalty Guidelines"). With the help of key questions, we explain the amendments to sections on Turnover Regulations & Penalty Guidelines.





PENALTY REGULATIONS

What is the nature of penalty that can be imposed on a company/ enterprise for breach of behavioural provisions of the Competition Act?

Section 27(b) of the Competition Act, empowers the CCI to impose penalties on person or enterprise – found in contravention of section 3 or section 4 of the Competition Act.

Vide notification dated 05 March 2024, the Government of India, further, notified and brought into force amended Section 27(b) of the Competition Act – which adds the word “income” in the section.

Further, the amended section 27(b) now provides explanation stating that ‘turnover’ for the purpose of imposing penalty under Section 27(b) of the Competition Act shall mean ‘global turnover’ derived from all the products and services by an enterprise.

Furthermore, the proviso to section 27(b) also mentions that in the cases of cartelisation, the

CCI 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 10% of its turnover or income, as the case may be, for each year of the continuance of such agreement, whichever is higher.

In terms of the Turnover Regulations ‘turnover’ or ‘income’, as the case may be, includes value of sales (or revenue or receipts, and other operating revenue, as per the audited financial statements maintained by such enterprise. While calculating the ‘turnover’ other income, indirect taxes, trade discounts and intra- group sales, if any, shall not be taken into consideration.

In case audited financial statements are not available, turnover or income or relevant turnover or any other financial information, as sought by the CCI, shall be the amount certified by the statutory auditor of the enterprise, or in his absence by a chartered accountant, and supported by an affidavit by a person duly authorised by the enterprise in this regard.

In order to calculate the profit of an enterprise, the CCI shall consider profit after tax.





PENALTY REGULATIONS

Can CCI consider relevant turnover for imposition of penalties under section 27(b)?

The Penalty Guidelines define “relevant turnover” to mean, ‘the turnover derived by an enterprise directly or indirectly from the sale of products and/or provision of services, to which the contravention relates and determined for the purposes of imposition of penalty’.

In terms of the Penalty Guidelines, the CCI may impose a penalty on an amount up to 30% of the average relevant turnover or average income, as the case may be, of the enterprise for the purpose of determination of penalty to be imposed on an enterprise under Section 27(b) of the Competition Act.

Also, for calculating average relevant turnover or average income, the CCI, subject to the facts and circumstances of each case, may consider the relevant turnover or income of three years of the enterprise preceding the year in which the DG’s investigation report is received by the CCI.

The CCI also has a discretion to consider the relevant turnover of three years preceding the contravention.

It also states that where the determination of relevant turnover is not feasible, the CCI may consider the global turnover, derived from all products and services, for the purpose of determination of amount of penalty. Further, If, in view of the CCI, the amount of penalty so determined is not sufficient to create deterrence,

the CCI may, further increase the amount of penalty, subject to maximum 10% of the (global) turnover.

What is the nature of penalty that can be imposed on a person, officer, director, employee of a company/ enterprise that has been found to be in breach of provisions of Competition Act?

Section 48 of the Competition Act has been amended to allow imposition of penalty of up to 10% on the average income (for the last three preceding financial years) of individuals (officers, directors, manager, secretary, partner), if they are found that the contravention has taken place with their consent or connivance or neglect or if they are responsible for conduct of the business of the company.

Furthermore, in case of cartels, the penalty on individuals can be up to 10% of income for each year of continuance of such agreement.

However, under section 48(1) if the person who is responsible for business of the company is able to establish that the contravention was committed without her/ his knowledge or that she/ he had exercised all due diligence to prevent the commission of contravention – then such person shall not be held liable for contravention of the Competition Act. In terms of Penalty Guidelines, for determining the average income



PENALTY REGULATIONS



of the person, the gross total income as per the income tax returns filed under the Income Tax Act, 1961 and rules framed thereunder shall be considered. Such gross total income would exclude: (a) income from house property; and (b) income from capital gains. Further, the CCI shall consider income tax returns of the person for the same years as that of the company for whose conduct such person has been held liable.

Prior to the amendment, section 48 of the Competition Act did not provide for percentage of penalty that may be imposed by the CCI. It simply read “shall be liable to be proceeded against and punished accordingly”. In order to impose penalties on individuals under unamended section 48, the CCI relied upon section 27(b) of the Competition Act.

This led to controversy, as unamended section 27(b) did not include “income”. Erstwhile Competition Appellate Tribunal in several orders set-aside invocation of unamended section 48 by the CCI (the appeal against which is still pending before the Supreme Court of India). Also, in the case of *Tranter India Pvt Ltd. v Competition Commission of India & others* the constitutional

vires of unamended section 48 have been challenged (under Articles 226 and 227 of the Constitution of India) before the High Court of Delhi and which is pending adjudication.

What are the factors to be taken into consideration by CCI for determination of the penalty amount?

The Penalty Regulations state that while determining the amount of the penalty to be imposed, the CCI has to take into considerations the following:

Nature and gravity of the contravention

The nature of the industry or the sector affected by such contraventions and the implications it has on the economy

Any other factor which the CCI may consider appropriate given the facts of the case



PENALTY REGULATIONS

Are there any mitigating and aggravating factors that CCI may consider for imposition of penalty under section 27(b)?

The Competition Commission of India may consider the following factors:

Duration of the contravention and/ or duration of involvement of the enterprise in such contravention

Role of the enterprise in orchestrating the contravening conduct

Recourse to coercive or retaliatory measures on other enterprises to participate in the contravention and/ or any retaliatory measures taken against other enterprise(s) with a view to enforcing the conduct or practices constituting the contravention

Admission of contravention, if any, by the enterprise and the stage at which such admission is made

Furnishing of cogent evidence by the enterprise establishing that its involvement in the contravention was substantially limited

Extent of cooperation by the enterprise during the DG's investigation and/ or proceedings before the CCI

Repeated contravention

Voluntary termination of alleged anti-competitive conduct, under intimation to the CCI

Implementation of a competition compliance programme within the enterprise

Any other factor which the CCI may deem appropriate in the facts and circumstances of each case





PENALTY REGULATIONS

Are there any mitigating and aggravating factors that CCI may consider for imposition of penalty on individuals under sections 48(1) and (3)?

The CCI may consider the following factors for imposition of penalty on individuals under sections 48(1) and (3)

Nature and gravity of contravention by the company, for whose conduct such person has been held liable under section 48

Role, extent and duration of involvement of such person in the contravening conduct

Extent of cooperation by the person during the DG's investigation or the CCI's proceedings

Repeated contravention

Furnishing of cogent evidence showing that his or her involvement in the contravention was substantially limited

Any other factor which the CCI may deem appropriate in the facts and circumstances of each case.

Are there any penalties due to failure of giving notice for combination (under section 43A of the competition act)?

The CCI has been empowered to levy penalty on a person or enterprise who fails to give notice of combination under sections 6(2) and (4) of the Competition Act or contravenes Section 6(2A) of the Competition Act or submits information pursuant to an inquiry under Section 20(1) of the Competition Act, which may extend to one percent of the total turnover or assets or the value of transaction, whichever is higher, of such a combination.

Sections 6(2) and (4) mandate giving a notice for the combination to the CCI and section 6(2A) provides for a duration of 150 days from the date of notice to the CCI, for combination to come into effect.

What factors are considered to calculate the penalty amount under Section 43A?

The CCI, while determining the amount of penalty to be imposed under Section 43A of the Competition Act, may consider the following factors:





PENALTY REGULATIONS

Consummation or part consummation of combination without giving notice

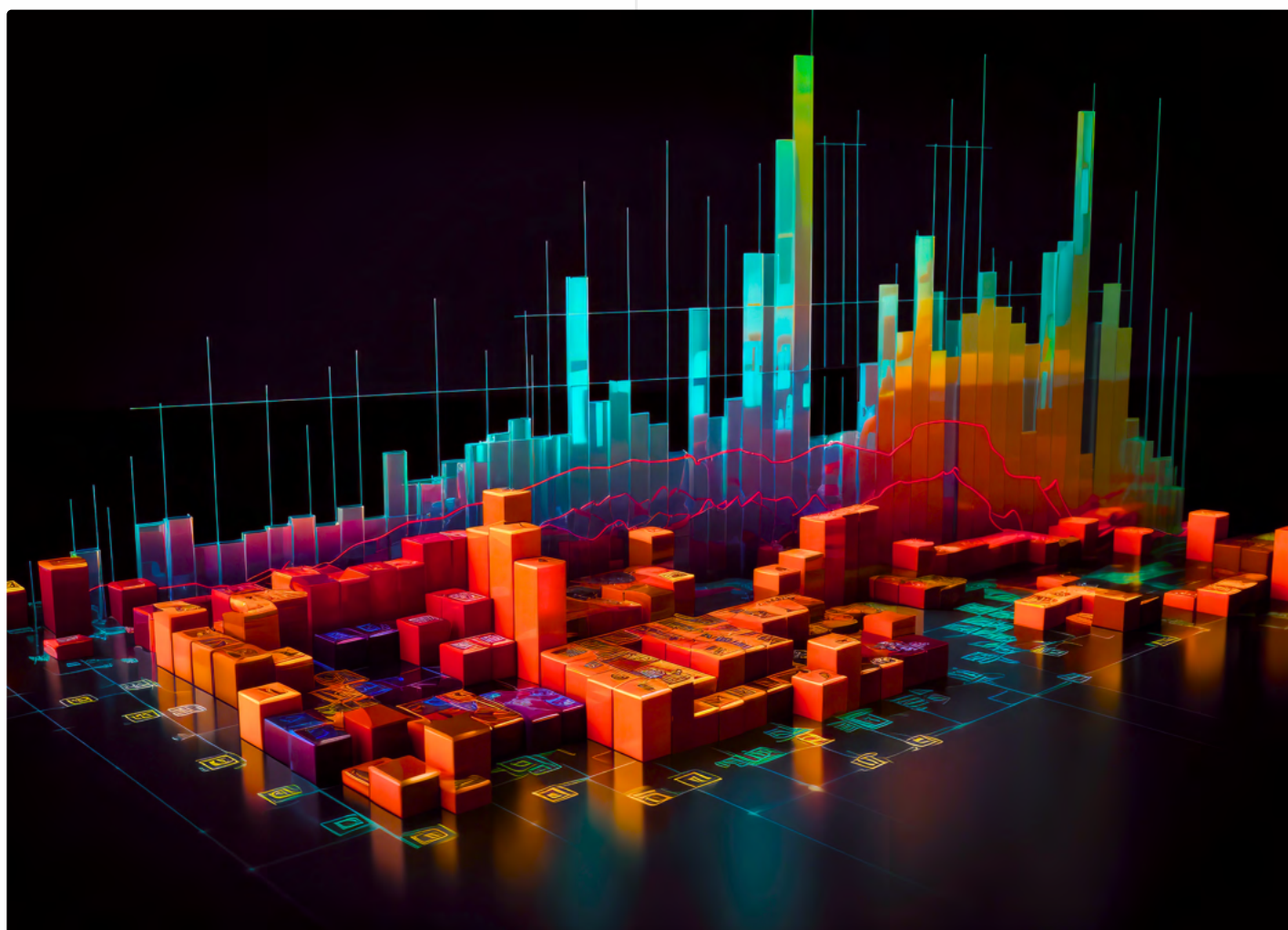
Violation of standstill obligations (substantive or procedural) prior to or after filing notice with the CCI under section 6(2A)

Non-furnishing of information during an inquiry under section 20(1)

Voluntary filing of notice with the CCI

Conduct of the parties including making voluntary disclosures, cooperation during the inquiry, furnishing all requisite material or documents in response to the information sought by the CCI

Any other factor which the CCI may deem appropriate in the facts and circumstances of each case





PENALTY REGULATIONS

Contact Partners

Anu Monga

anu.monga@anantlaw.com

Rahul Goel

rahul.goel@anantlaw.com

Disclaimer

This update is intended to provide an overview of legal and regulatory developments. Efforts have been made to ensure that the contents herein are accurate at the time of writing. The contents are subject to change in future. This update does not constitute legal advice and does not create any relationship (including implied, legal or fiduciary etc.) between the reader and the publisher/ firm/ author. The views and opinions expressed in this update do not necessarily reflect the official position of AnantLaw. Readers are advised to seek specific advice before acting in reliance of the information provided herein.



anantlaw

Solicitors & Advocates