

Lexology - Sanctions for cartel activity in India

Sanctions

Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

There are no criminal sanctions for engaging in cartel activities under the Competition Act 2002 (the Act).

However, if a person fails to comply with certain orders or directions issued by the Competition Commission of India (CCI) under the Act, section 42(2) empowers the CCI to impose a penalty of up to 100,000 rupees for each day of such non-compliance, which can extend to a maximum of up to 100 million rupees. A subsequent failure to pay this penalty, can result in criminal sanction under section 42(3) in the form of imprisonment up to three years, or with a fine that may extend up to 250 million rupees, or both.

Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The Competition Commission of India (CCI) may impose civil sanctions by:

- requiring the parties to cease and desist from the infringing conduct;
- modifying agreements to the extent necessary;
- requiring that parties comply with certain directions of the CCI; and
- passing any other order that it deems fit.

The CCI may also impose a monetary penalty of 10 per cent of the average turnover for the three preceding financial years upon each individual or enterprise that is a party to an anticompetitive agreement.

Alternatively, in the case of cartels, the CCI may impose a penalty of up to three times the profit for each year of the continuance of such an agreement or 10 per cent of the turnover or income for each year of the continuance of such an agreement, whichever is higher. This may result in higher penalties than those for other anticompetitive conduct.

Generally, sizeable penalties are imposed for entering into anticompetitive agreements. The CCI has made a few exceptions, for example, by considering the covid-19 pandemic and its impact on business as a mitigating factor, thus reducing the amount of the penalty. It considers repeat offences an aggravating factor that justifies higher levels of penalty.

Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Yes. On 6 March 2024, the CCI issued the [Competition Commission of India \(Determination of Monetary Penalty\) Guidelines, 2024](#) (Penalty Guidelines) pursuant to newly-amended provisions of the Act. They provide clarity on the methodology, the amount and the factors to be used by the CCI in the computation of penalties. Although the Penalty Guidelines are not legally binding on the CCI, it is a significant step in bringing transparency in the method of calculating penalties.

The [CCI \(Determination of Turnover or Income\) Regulations, 2024](#) were also recently notified, which provide the parameters for calculation of turnover or income for enterprises and/or individuals for the purposes of imposing penalties.

The Penalty Guidelines stipulate that the base to be considered by the CCI for determination of the penalty is up to 30 per cent of the average relevant turnover (ie, the turnover relating to the product (or service) in respect of which the provisions of the Act have been contravened), or average income. In cases where it is not possible to determine the ‘relevant turnover’, the CCI has the power to levy a penalty on the global turnover of the enterprise, covering turnover from all products and services. Although the Amendment Act empowers the CCI to impose higher penalties (on global turnover), the Penalty Guidelines uphold the principle of proportionality.

In determining the base penalty, the relevant or global turnover (as the case may be) will be considered for a period of three years preceding the year in which the DG submits its investigation report to the CCI. The CCI may, for reasons to be recorded in writing, deviate from this and consider the three years preceding the contravention. While determining the base penalty, the CCI can also consider factors such as the nature and gravity of the contravention; nature of the industry or sector affected because of the contravention and its implications on the economy; and/or any other factor which the CCI may deem appropriate.

Once the base penalty is calculated, the CCI may adjust the penalty to be imposed based on additional aggravating and mitigating factors (although the overall penalty is subject to the maximum legal cap). Based on the CCI’s jurisprudence, such aggravating and mitigating factors include exigent economic circumstances, such as the outbreak of the covid-19 pandemic and its impact on businesses and the relevant industry (especially for those enterprises that have a small annual turnover or an unstable financial position), the size of the enterprise (whether the enterprise concerned is a micro, small or medium enterprise), continued cooperation during the investigation, parties admitting their infringing conduct (which helps expedite the investigation), low or no turnover including the parties’ submissions that they do not hold any funds, whether the contravening enterprise has taken steps to cease the conduct, whether parties are habitual offenders or first-time offenders, etc.

Further, the Penalty Guidelines also empower the CCI to impose a higher penalty (up to the maximum legal cap) if the penalty derived after all the calculations is found to be insufficient to

create a deterrent effect. Deviation from the Penalty Guidelines is only allowed in ‘exceptional circumstances’ and the CCI must record its reasons for deviation in writing.

The changes brought by the Amendment Act and new regulations are in line with the Supreme Courts’ jurisprudence in [*Excel Crop Care Limited v Competition Commission of India \(Civil Appeal No. 2480 of 2014\)*](#), where it was held that the principle of proportionality shall be applied when imposing penalties. Penalties have usually been determined against the turnover of an enterprise that is relative to the market in which the cartel conduct took place, not the overall turnover of the enterprise. Penalties may extend to individuals or officials of an enterprise.

The Penalty Guidelines set out certain aggravating and mitigating factors which the CCI is to consider while imposing a penalty under the Act. These include:

- the duration of the contravention and/or duration of involvement of the enterprise in such contravention;
- the role of the enterprise in orchestrating the contravening conduct, the 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;
- repeated contravention by the enterprise, the admission of contravention, if any, by the enterprise and the stage at which such admission is made;
- furnishing of cogent evidence that the enterprise’s involvement in the contravening conduct was limited, extent of cooperation by the enterprise during the DG’s investigation and/or proceedings before the CCI;
- the implementation of a competition compliance programme within the enterprise; and
- voluntary termination of alleged anticompetitive conduct, among others.

However, these factors are not exhaustive and are applied by the CCI considering the facts and circumstances of each individual case. Further, the CCI considers a combination of the above factors, and may not consider a stand-alone factor as a basis to refrain from imposing a penalty.

Recently, in [*Amreesh Neon Private Ltd and Manish Thakkar v CCI and Ors*](#) (Competition Appeal (AT) No. 30 of 2022 & I.A. No. 2242, 2243 of 2022), the National Company Law Appellate Tribunal (NCLAT) noted that the Supreme Court’s judgment in *Excel Crop* laid down the principle of relevant turnover for calculation of penalties in the context of multi-product companies only. In *Excel Crop*, segregation of turnover of a particular segment was possible, since the manufacturing companies had segment-wise reporting in their balance sheets. The NCLAT emphasised that in the cases where segregation is not possible, like in the present case, where the main business of the appellants is that of signage and the turnover derived from other items relates to the same activity, artificial distinction in segmental turnover is not permissible.

In *M/s Toyfort v CCI* (Competition Appeal (AT) 34 of 2022), the NCLAT held that where the ‘relevant turnover’ from the line of business being investigated is nil, the CCI may impose a penalty on the entire turnover of the enterprise. The NCLAT was ruling on an appeal from a case where the CCI imposed a penalty on Toyfort for placing cover bids for soil testing activities, despite being primarily a toy retailer and having no soil testing activities. As Toyfort’s income from soil testing was nil, the NCLAT held that applying the relevant turnover to calculate the penalty would allow the enterprise to go scot-free. The NCLAT upheld the CCI’s approach of calculating the penalty based on the enterprise’s total turnover. This position is now reflected in provisions of the Act enabling the CCI to impose penalties based on global turnover.

Compliance programmes

Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Internal compliance programmes are seen as a mitigating factor by the CCI in its Penalty Guidelines. However, a reduction in penalty is at the discretion of the CCI and assessed on the basis of the facts of each case.

Director disqualification

Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Since cartel activity is not an ‘offence’ under the Act and is rather a civil infringement, individuals involved in cartel activity are generally not subject to orders from the CCI prohibiting them from serving as corporate directors or officers.

However, under the [Companies Act 2013](#), individuals who have been sentenced to imprisonment or to a fine exceeding one thousand rupees for the conviction of an offence are disqualified from being appointed as a managing director, whole-time director, or manager. Non-compliance by individual directors or officers with CCI orders or directions can result in criminal proceedings and/or a fine up to 250 million Indian rupees. In case of imprisonment or if the penalties for such offences exceed those set out in the Companies Act 2013, disqualification may follow.

Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment from government procurement may occur as a discretionary sanction or on the basis of the conditions set out by the government for specific tenders, but such debarment is not an automatic consequence of an infringement decision.

Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

The Act only contemplates civil penalties for cartel activities.