PENALTIES FOR INFRINGEMENT OF
COMPETITION LAW

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INTERNERSHIP PROJECT REPORT

COMPILED AND SUBMITTED BY:
MEHAK GUPTA
CAMPUSS LAW CENTRE, FACULTY OF LAW
UNIVERSITY OF DELHI

UNDER THE GUIDANCE OF:
Dr. SATYA PRAKASH
DIRECTOR (LAW)

COMPETITION COMMISSION OF INDIA
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Mehak Gupta

Campus Law College,

University of Delhi,

New Delhi.
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Mehak Gupta
**Table of Contents**

<table>
<thead>
<tr>
<th>Description of Contents</th>
<th>Page No.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CHAPTER 1</strong></td>
<td></td>
</tr>
<tr>
<td>1.1 INTRODUCTION</td>
<td>7</td>
</tr>
<tr>
<td>1.2 OBJECTIVE</td>
<td>7</td>
</tr>
<tr>
<td>1.3 RESEARCH METHODOLOGY</td>
<td>8</td>
</tr>
<tr>
<td>1.4 PROCESS OF EVOLUTION</td>
<td>8</td>
</tr>
<tr>
<td><strong>CHAPTER 2 – CONCEPT OF PENALTY</strong></td>
<td></td>
</tr>
<tr>
<td>2.1 CONCEPT OF PENALTY-AN OVERVIEW</td>
<td>9</td>
</tr>
<tr>
<td>2.2 OBJECTIVE OF PENALTY</td>
<td>9</td>
</tr>
<tr>
<td>2.3 TYPES OF PENALTIES</td>
<td>10</td>
</tr>
<tr>
<td>2.4 PENAL PROVISION- INTERPRETATION</td>
<td>11</td>
</tr>
<tr>
<td><strong>CHAPTER 3 – INDIAN SCENARIO</strong></td>
<td></td>
</tr>
<tr>
<td>3.1 WHEN DOES COMISSION HAVE POWER TO PASS ORDER U/S 27 OF THE COMPETITION ACT?</td>
<td>12</td>
</tr>
<tr>
<td>3.1.1 SECTION 3: Anti Competitive Agreements</td>
<td>12</td>
</tr>
<tr>
<td>3.1.2 SECTION 4: Abuse of Dominant Power</td>
<td>12</td>
</tr>
<tr>
<td>3.1.3 SECTION 5 &amp; 6: Combinations &amp; Regulation of Combinations</td>
<td>14</td>
</tr>
<tr>
<td>3.2 SECTION 27: ORDERS BY COMMISION AFTER INQUIRY INTO AGREEMENTS OR ABUSE OF DOMINANT POSITION</td>
<td>14</td>
</tr>
<tr>
<td>3.2.1 The Legislative background of Section 27 of the Competition Act, 2002</td>
<td>15</td>
</tr>
<tr>
<td>3.2.2 Scope of Section</td>
<td>16</td>
</tr>
<tr>
<td>3.2.3 Provisions of Section 27 of the Act are Remedial or Penal?</td>
<td>17</td>
</tr>
<tr>
<td>3.3 COMMISSION POWER TO IMPOSE PENALTY FOR CONTRAVENTION</td>
<td>17</td>
</tr>
<tr>
<td>3.4 CONSEQUENCES FOR NON-COMPLIANCE OF ORDER(s) PASSED BY THE COMMISION</td>
<td>22</td>
</tr>
<tr>
<td>3.5 CONCLUSION</td>
<td>24</td>
</tr>
<tr>
<td><strong>CHAPTER 4: INTERNATIONAL SCENARIO</strong></td>
<td></td>
</tr>
<tr>
<td>4.1 USA COMPETITION LAWS</td>
<td>25</td>
</tr>
<tr>
<td>4.1.1 Legislation</td>
<td>26</td>
</tr>
<tr>
<td>4.1.2 Authority to Enforce Antitrust Laws in USA: Penalties under US Antitrust Laws</td>
<td>27</td>
</tr>
<tr>
<td>4.1.3 Antitrust Deterrence in the United States</td>
<td>28</td>
</tr>
<tr>
<td>4.1.4 How the Penalty is calculated under the USA Competition Law</td>
<td>31</td>
</tr>
<tr>
<td>4.2 EU COMPETION LAW</td>
<td>34</td>
</tr>
<tr>
<td>4.2.1 Application of Articles 101 and 102 TFEU</td>
<td>46</td>
</tr>
<tr>
<td>4.2.2 Development of Commission Fining Policy on Method of Setting Fines</td>
<td>47</td>
</tr>
</tbody>
</table>
### PENALTIES FOR INFRINGEMENT OF COMPETITION LAW

| 4.2.3 Guidelines on method of setting fines | 52 |
| 4.2.4 Powers of the European Commission | 62 |

### 4.3 UK COMPETITION LAW

| 4.3.1 Enforcement of competition law | 64 |
| 4.3.2 Legislations | 66 |
| 4.3.3 Penalties under UK Law | 69 |
| 4.3.4 Method of Calculation of Penalty | 70 |
| 4.3.5 Conclusion | 76 |

### CHAPTER 5- COMPARITIVE STUDY OF INDIA WITH USA, EU AND UK

<table>
<thead>
<tr>
<th>COMPETITION LAW PENALTY REGIMES</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5.1 FINE LEVELS</td>
<td>77</td>
</tr>
<tr>
<td>5.2 INDIVIDUAL SANCTIONS</td>
<td>78</td>
</tr>
<tr>
<td>5.3 LENIENCY</td>
<td>79</td>
</tr>
<tr>
<td>5.4 SETTLEMENT</td>
<td>80</td>
</tr>
<tr>
<td>5.5 COMPARISON OF FINING PRACTICES CROSS JURISDICTIONS</td>
<td>80</td>
</tr>
</tbody>
</table>

### CHAPTER 6- FINDINGS, CONCLUSION & RECOMMENDATIONS

| 6.1 FINDINGS | 83 |
| 6.2 RECOMMENDATIONS: | 87 |
| 6.3 CONCLUSIONS | 91 |

### BIBLIOGRAPHY

|  | 92 |
LIST OF ABBREVIATIONS

AAEC- Appreciable Adverse Effect on Competition
ACPERA- Antitrust Criminal Penalty Enhancement and Reform Act of 2004
CAT- Competition Appellate Tribunal
CA, 1998- Competition Act, 1998 (UK)
CCI – Competition Commission of India
DG-Director General
DIN- Director Identification Number
DOJ- Department of Justice United States
EC – European Commission
EU- European Union
FTA- Fair Trading Act.1973
FTC – Federal Trade Commission
MNC- Multi National Company
MRTP Act- Monopolies and Restrictive Trade Practices Act, 1969
GOI - Government of India
OECD- Organization for Economic Co-operation and Development
OFT- Office of fair trading
ROC- Registrar of Companies
SoS- Secretary of State
TEU – Treaty of European Community
TEFU- Treaty on the Functioning of the European Union
TEU-Treaty of European Union
USSG- United States Sentencing Guidelines
CHAPTER - 1

1.1 INTRODUCTION

The Competition Law in the form of ‘Monopolistic Restrictive Trade Practices Act, 1969’ (hereinafter referred as ‘MRTP Act’) were introduced in India in 1969 for first time. The fact is that when India opened its economy to the global players from 1992 onwards, the than prevalent law known as MRTP Act became redundant and ineffective, and in order to protect competition, the Competition Act, 2002,(hereinafter referred as ‘the Act’) was enacted and MRTP Act was repealed. Thus, with the increasing integration of the Indian economy and markets with the international economy, by promulgating the Competition Act, the Government of India has also acquired a wider perspective on regulation of market from merely curbing monopoly to promoting competition.

Competition Commission of India (CCI) is a quasi-judicial body, formed under the provisions of ‘the Act’, with the main objective to ensure that nation’s markets are vigorous, vibrant, efficient, and free from restrictions that harm trade and industry and also the end consumers. This has, indeed, become a task of prime importance in the context of present day global markets, high technology innovations and the fast changing economic landscape.

The penal provisions under any Act are the principle tool behind enforcement of any law as it creates deterrence to do a prohibited act under any law. There has been an evolution from the reformative measures provided under MRTP Act to punitive measures under the provisions of ‘the Act’ due to changing economic and global scenario.

Infringements of Competition Law cover a wide range of practices of varying degrees of seriousness that includes abuse of dominant market positions, vertical restraints, horizontal price fixing, etc., Cartels, in the strictest sense, are the most extreme form of horizontal price fixing and are considered the most serious infringement. Therefore, competition law has to adopt constantly to keep pace with globalization and changing practices.

1.2 OBJECTIVES:

This report aims at bringing out the various penalty regimes followed in United States of America, European Union, United Kingdom and India with specific emphasis on the analysis of term “TURNOVER” defined under section 2(y) of the Act with reference to section 27 (b). My main focus is on the adequacy and inadequacy of penal provisions under ‘the Act’ keeping in mind the Indian scenario vis-a-vis penal provisions in EU, U.K. and USA. USA is an obvious jurisdiction for study for the reason it has oldest Anti-trust regime in place, EU since it is the
largest and the most diverse union in the world and UK which follows the Common Law system, from which India has derived most of its laws.

The assessment of penalties for infringements of Competition Law in India vis-à-vis penalty provisions in Western World have been compared in this paper.

1.3 RESEARCH METHODOLOGY:

The researcher during her research has adopted analytical, descriptive and comparative methodology for this report and reliance has been placed on books, journals, newspapers and online databases and the views of different writers in the discipline of Competition law. The doctrinal method of research has been used, which involve collection of data from both primary and secondary sources; primary sources like statutes, reports of the commissions and committees related thereto and Secondary sources like books written by various eminent authors and articles found in the journals and websites, e-journals. Use of internet also became very relevant to find out the most updated, relevant and apt information which helped me in exploring the subject from various dimensions.

1.4 PROCESS OF EVOLUTION (Development)

The political governance has been equated with the economic governance even in ancient times, as observed from ‘Arthashashtra’ written by Chanakya, in 3rd Century, which emphasized fair trade as one of the mainstay of good governance. Our Constitution provide freedom to trade or practice any profession as a fundamental right and as per Constitution, the State has a power to make laws including power to impose curbing concentration of economic power to protect the common-good and make laws under Article 38 and 39 of Indian Constitution.

The first Anti-Competitive Law, known as MRTP Act, 1969 was enacted to protect the monopolization and unfair trade practice, which were sufficient prior to 1992 as they were applied in a controlled economy. When Government of India (GOI) opened its economy for global players, slowly it was found that MRTP Laws are not enough and to protect the fundamental rights and rights of consumer and to promote competition, and with this objective Competition Act, 2002 was enacted which came into effect in 2009.

The development of economy and development of laws are related to each other and therefore, the enactment of ‘the Act’ was to promote competition and prevent manipulation of markets by the enterprises on account of their dominance and / or by way of forming Cartels, as defined in section 3 and 4 of ‘the Act’, and non-observance of such provisions of the Act, the penalty provisions have been incorporated under the Act and the adequacy and inadequacy of those penalty provisions is the subject matter of this report.
CHAPTER – 2

CONCEPT OF PENALTY

2.1 CONCEPT OF PENALTY- AN OVERVIEW

"There is an immense need to have a proper regulatory mechanism for prevention of anti-competitive agreement which not only affect the market economy leading to monopolistic approach but also victimizes the consumers and thereby cause harm to the entire economy creating hindrance to the competition in the market."

-Adam Smith

The above quote of Adam Smith is absolutely true in today’s global conditions and ‘the Act’ takes care of the approach suggested by Adam Smith.

The term ‘Penalty’ has been defined in Oxford Dictionary as – ‘punishment imposed for breaking a law, rule, or contract or a disadvantage or unpleasant experience suffered as the result of an action or circumstances’

Penalty, being punitive measure incorporated in an Act / Law are the essence to follow a law. The Competition Laws around the world contains the penalty provisions for infringement of Competition Law as a rule, and ‘the Act’ is not an exception to such rule.

The infringement of competition law in the form of abuse of dominant position, anti-competitive agreements, Cartel agreements are damaging to economy of any country / union and are also against the spirit of consumer welfare around the world and this is the reason that the object of the Competition Laws and Penalty provisions under those laws have the same object and effect.

Therefore, the Penalty provisions under the Competition Act acts as a deterrence to achieve the ultimate objective of enactment of Competition Laws around the world.

2.2 OBJECTIVE OF PENALTY:

The Penalty provisions are not only deterrence but it also acts for Retribution and Education & denunciation, which are summarized as below:
DETERRENCE:

Penalty acts as deterrence as it prevents people from committing an offence, deterring previous offenders from re-offending. The measures of penalty under any Act are the measurement of deterrence from infringement of Competition Law.

RETRIBUTION:

It can be a measure of retributive justice where it helps to (i) try to rebalance any unjust advantage gained by an offender; or (ii) suffering to the enterprise or cartels if such advantage gained could not provide restorative benefit for the victim(s).

EDUCATION & DENUNCIATION:

The penalty provisions under the Act can act as a mean for society to publicly express denunciation of an action as being wrong, besides educating the public at large that what is not an acceptable behavior under ‘the Act’. Thus, it serves dual objective i.e. (i) preventing vigilant justice by acknowledging public behavior and (ii) deterring future activities of an enterprise by stigmatizing the offending enterprise / Cartel.

The most and important aspect under the Competition Laws is that, how and what quantum of the penalty should be determine against an offending enterprise(s) directly responsible for infringement of Competition Laws, and what is the positions of penalty provisions in Indian Competition Act, 2002 vis-à-vis other Competition Laws of Western world, is the subject matter of this study.

2.3 TYPES OF PENALTIES:

There are two types of penalties are provided under the Competition Laws i.e. (I) Financial Penalty and (II) Criminal Liability.

Financial Penalty:

The financial penalty imposed under the Competition Act for infringement of competition laws and benefit earned by the enterprise and / or cartels by entering into anti-competitive agreements, which is calculated by taking into various factors such as duration of abuse of such dominant power and / or period of subsistence of anti-competitive agreements etc. etc.
Criminal Penalty:

The Criminal Liability under the Competition Act, 2002 arises only when the orders passed under the Competition Laws are not acted upon, i.e. as provided under chapter VI of ‘the Act’ (Sec 42-Sec-48)

2.4 PENAL PROVISION- INTERPRETATION

A penal provision has to be construed strictly and narrowly and not widely or with object of advancing the object and intention of the legislature. The statute must be construed within the terms and language of particular statute. This is called the principle of strict interpretation.

In Tuck and Sons v/s Priester (1887) 19 QB 629, Lindley L.J. said: "The well settled rule that court will not hold that the penalty has been incurred unless the language of the clause which is said to impose it so clear that case must necessarily be within it." ¹

The Supreme Court in Tolaram Relumal v/s State of Bombay AIR 1954 SC 496 held that "It is not competent to the court to stretch the meaning of an expression used by the legislature in order to carry out the intention of Legislature". ²

The above principles are applicable to penalty provision which is quasi-criminal in nature and the same cannot be imported while deciding the cases of civil nature. Therefore, nature of proceeding has to be examined having regard to under which liability is created. If the liability reveals the civil liability only to ensure compliance through a coercive manner, then it is definitely a civil liability. But as soon as criminal liability is imposed by reason of default in compliance of a particular provision and some element of criminality is involved in case of default, then it is quasi-criminal.

Thus, the penalty under the Competition Laws in EU, UK and India are civil in nature and when there is a default in compliance then it is quasi-criminal whereas in UK & USA penalties are both civil & criminal.

¹ Taxmann’s Competition Law & practice- D.P. Mittal
² Taxmann’s Competition Law & practice- D.P. Mittal
CHAPTER – 3

INDIAN SCENARIO

The Penalty provisions for infringement of section 3 & 4 of the Competition Act, (which prohibits anti-competitive agreements as contemplated u/s 3 or the abuse of dominant position as contemplated u/s 4) are enshrined under section 27 of the Competition Act, 2002.

3.1 WHEN DOES COMMISSION HAVE POWER TO PASS ORDER U/S 27 OF THE COMPETITION ACT?

The Competition Commission can pass order(s) when it has arrived at a finding that there is a contravention of section 3 or 4 of the Competition Act, after a proper enquiry and investigation.

3.1.1 SECTION 3: Anti Competitive Agreements:

The Commission while making inquiry and investigation in order to ascertain that whether there is an existence of Anti-Competitive Agreement(s) or not, as contemplated u/s 3 of the Act, it has to determine that whether such an agreement has an element of conspiracies and monopolizes against consuming public and such unfair trade practice that unfairly disadvantageous to competitors or injure the consumers.

Thus, it prevents of entering into such agreements in respect of goods or services which causes or likely to cause an appreciable adverse effect on competition in India. It is pertinent to note that such agreements are termed void u/s 3(2) of the Competition Act and section 3(3) deals with horizontal agreement i.e. Cartel’s whereas section 3(4) deals with vertical agreements. However, exceptions are provided u/s 3(5) of the Act. Section 2(c) provides that ‘cartel’ includes an association of persons, sellers, distributors, traders or service providers who by an agreement amongst them limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

The term AAEC has not been defined in the Act, but section 19(3) of the Act provides for certain factors to be given due regard by the commission while determining whether an agreement have AAEC or not, namely, creation of barriers to new entrants in the market or driving existing competitors out of the market or foreclosure of competition by hindering entry into the market, etc.
3.1.2 SECTION 4: Abuse of Dominant Power:

This section provides that no enterprise shall abuse its dominant power. Dominant power is said to be abused when an enterprise or a group imposes unfair or discriminatory condition in purchase or sale of goods or services or its price.

The commission while making inquiry and investigation, has to take into consideration the following factors, as enumerated u/s 19(4) of the Act to determine the dominant position as contemplated u/s 4 of the Act, which inter alia includes:

i. Market share of the enterprise;
ii. Size and resources of the enterprise;
iii. Size and importance of the competitors;
iv. Economic power of the enterprise including commercial advantages over competitors;
v. Vertical integration of the enterprises, or sale or service network of such enterprises;
vi. Dependence of consumers on the enterprise;
vii. Monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
viii. Entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
ix. Countervailing buying power
x. Market structure and size of market;
xi. Social obligations and social costs;
xii. Relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
xiii. Any other factor which the Commission may consider relevant for the inquiry.

After taking into consideration the above factors, the Commission has to determine about the dominant position of an enterprise and the dominant position has been defined u/s 4(2) of the Act as "a position of strength, enjoyed by an enterprise in the relevant market in India which enables it to;
i. Operate independently of competitive forces prevailing in the relevant market, or;

ii. Affect its competitors or consumers or the relevant market in its favor."

3.1.3 SECTION 5 and 6: Combinations & Regulations of Combinations

Section 5 provides that the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises or persons or enterprises and provides the conditions as to value of assets or turnover which needs to be fulfilled to come within the purview of this section.

Section 6 of the Act provides some rules and regulations to be fulfilled while entering into a combination and provides that any combination which causes or is likely to cause an appreciable adverse effect on competition within relevant market in India would be void.

3.2 SECTION 27: ORDERS BY COMMISION AFTER INQUIRY INTO AGREEMENTS OR ABUSE OF DOMINANT POSITION

Once, the Commission is satisfied that there is an existent of dominant position and abuse of dominant position, or there is an existent of Anti-Competitive Agreements as contemplated under the Act, the Commission can pass the order(s) as contemplated u/s 27 of the Act, i.e.

"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:—

(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;

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.

(c) Omitted by Competition (Amendment) Act, 2007
(d) Direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission

(e) Direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

(f) Omitted by Competition (Amendment) Act, 2007

(g) Pass such other order or issue such directions as it may deem fit.

**Provided that** while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.”

**Explanation (b) Section 5:** "Group" means two or more enterprises which directly or indirectly, are in a position to exercise twenty six percent or more of the voting rights in the other enterprise or appoint more than fifty percent of the members of the board of directors in the other enterprise or controls management or affairs of the other enterprise.

**3.2.1 The Legislative background of Section 27 of the Competition Act, 2002:**

The Monopolistic and Restrictive Trade Practices prior to applicability of Competition Act, 2002 were governed by MRTP Act, 1969. A close look of two enactments would show that what is contemplated u/s 3 of the Competition Act, 2002 was incorporated in section 37 of MRTP Act, 1969. The penalties u/s 37 was based on the recommendation of MRTP Commission if it finds the restrictive and unfair trade practice are applied by enterprises. Sachar Committee while considering the amendments in the then MRTP Act suggested to empower the MRTP Commission to pass order even when an agreement has been determined for clearance of trade practice and recommendations. Similarly the Competition Commission is entitled to pass such order now under the Competition Act, 2002, where the Commission is competent to pass order for inquiry, and upon inquiry if it is found that there is contravention of section 3 or 4 of the Act, the Commission is entitled to pass an order of penalty u/s 27 of the Act.

**In 2007, the Competition (Amendment) Act, 2007,** amended section 27 relating to orders by the commission after inquiry into agreement or finding of abuse of dominant position, the power to award compensation were conferred to the Appellate Tribunal by new section 53N and as a result of this, the sub clause (c) and (f) of section 27 of the Competition Act were omitted. 

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3.2.2 Scope of Section:

As stated above upon completion of inquiry by Director General (DG) u/s 26(7) or by the commission itself u/s 26(8) of the Act in case of abuse of dominant position and u/s 29 to 31 of the Act in case of combination, commission can pass various orders as provided under Sec. 27.

It is a settled position of the law that the Commission is vested with the power of the Civil Court u/s 36(2) of the Act (though for limited purpose) or can evolve its own procedure u/s 36(1) of the Act. Similar powers of commission are vested with DG under Sec 41(2) of the Act.

Upon completing the inquiry in accordance with law, as mentioned above, the Commission is required to pass such order(s) as it may deem appropriate in the facts and circumstances of each case in terms of section 27 of the Act which deals with various order(s) including an order to a person / enterprise or association to discontinue or not to re-enter in such agreements, imposing financial penalties, directing the modification of the agreement(s) or complying with its direction including payment of cost, if any. Or in other words, the Competition Commission can pass the following order(s) amongst others:

(a) Cease and desist order:

It includes direction(s) to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position as the case may be;

(b) Imposition of penalties:

Impose financial penalty, as the commission may deem fit, upon each of such person or enterprises which are parties to such agreements or abuse. The section 27(b) provides that penalty shall not be exceeding 10% of the average of turnover for three last preceding financial years.

However, in case of a ‘Cartel’, penalty is stringent. It is imposed upon each producer, seller, distributor, trader or service provider included in that ‘cartel’ up to three times of its profits or of 10% of its turnover, whichever is higher, for each year of the continuance of the agreement.

(d) Modification of agreement:

The commission is also empowered to direct that agreements shall stand modified to the extent and in the manner as may be specified in order to ensure that the enterprise brings the contravention to the end in order to achieve the objective of the Act.

(e) Issue of directions:

The commission has the power to direct the concerned enterprises to abide by such orders as the commission may pass and comply with the directions, including payment of costs, if
any. The commission may pass such order(s) which are not mentioned above in order to bring end to the contravention.

(g) Residuary powers of commission:

The commission has the power to pass such order or issue directions as it may deem fit.

Thus, the Commission has powers to pass two types of order(s) i.e. (i) imposing financial penalties and (ii) direct the enterprise/association to remove/modify/amend the clauses of an agreement which are infringing the provisions of Competition Act.

3.2.3 Provisions of Section 27 of the Act are Remedial or Penal?

Though the word ‘penalty’ has been used in section 27(b) of the Act, however, it can be safely presume that the provisions of section 27 are remedial in nature as these pertain to a remedy provided under the Act for contravention/infringement of section 3 and/or 4 of the Act. The Penal provisions are those provisions which are provided u/s 42-48 of the Act and mainly for contravention of order(s) passed by the Commission. Thus, the provisions of section 27 are ‘remedial’ in nature and provisions of section 42-48 of the Act are Penal in nature. However, for study purposes, both the provisions have been explained in detail in terms of penalty provisions under the Competition Act.

3.3 Commission Power to impose Penalty for Contravention [Section 27 (b) of the Competition Act, 2002:]

Sub section (b) of Section 27 of the Act provides that the Commission is empowered to impose penalty-

i. Subject to maximum of 10% of the average of turnover of last three preceding financial year(s) on such person or enterprise which are the parties to such agreement or abuse.

ii. In case if the penalty is to levied in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon a penalty on each producer, seller, distributor, trader or Service provider included in that cartel:
   a. A penalty up to three times of its profits for each year of the continuance of such agreement, or
   b. 10% of its turnover for each year of the continuance of such agreement, whichever is higher.

If we look at the above penalty provisions, there are three important terminologies have been used in the Act, i.e.:

i. There should be a ‘person’ or ‘enterprise’ or ‘cartel’ and the member of such cartel.
ii. The term ‘Turnover’ is a paramount consideration while the penalties are determined in relation to a person or enterprise not forming the part of a Cartel and even in case of a cartel where the profits are compared with the % of turnover.

iii. The term ‘Profit’ is an important term in case if penalty is levied on a cartel and each of its members, as the provision says penalty equivalent to three times of profits for each year of continuance of such agreement.

**Interpretation of term ‘Turnover’**

The term ‘Turnover’ is of great significance for section 27(b) and so it’s interpretation is essential as to whether it means turnover of relevant product or of the total enterprise.

The term ‘Turnover’ has been defined u/s 2(y) of the Act which specifies:

‘Turnover’ includes value of sale of goods or services

a. Term ‘turnover’ has not been qualified by the word ‘relevant market’ which is defined u/s 2® as follows:

‘Relevant Market’ means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets’.

The term ‘Relevant Geographic Market’ has been defined in section 2(s) which means a market comprising the area in which the conditions of competition for supply of goods or provisions of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas.’ This term has been used in section 3 of the Act to ascertain the share of market in a given geographical area.

So, no correlation of the term ‘turnover’ has been made anywhere in the Act in relation to ‘Relevant Market’ or ‘Relevant Geographic Market’ and these terms have been used in the Act only to determine the dominant position as contemplated u/s 4 of the Act. Therefore the term ‘turnover’ contemplated by the Act and incorporated under the Act shows that the legislative intention of the term ‘turnover’ defined u/s 2(y) requires literal meaning and that means the turnover recorded in the financial books of a person or enterprise or a member of cartel is the turnover on which the penalty u/s 27(b) is to be calculated.

b. Now the question arises that what is the meaning of turnover in case of an enterprise.

The term ‘enterprise’ has been defined u/s 2(h) of the Act which specifies:

“ ‘enterprise' means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution,
acquisition or control of articles or goods, or the provision of services of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government divisions or subsidiaries, whether such unit or division or subsidiary not including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defense and space."

The above definition is a very wide definition which includes a division, unit and subsidiary.

c. The fact that the term ‘turnover’ is interpreted as turnover of entire enterprise is very clear in Commission’s orders in specifically Belaire Owners Association v/s DLF Ltd (as discussed below).

In the short span of about three year, the Commission has investigated the complaints and have passed order in number of cases, but the following are the remarkable orders / judgments wherein the Commission has pass orders U/s 27(a) restraining the orders for restraining any enterprise or association of person / enterprise, levied penalty u/s 27(b) as % of the Turnover and % of the profits, and some of the most highlighted cases are as under:

**U/s 27(a) of the Act: Restrain Order:**

*Vijay Gupta vs. Paper Merchant Associations*4

**U/s 27 (b) of the Act: Penalty in relation to turnover on an enterprise:**

i. *Belaire Owners Association vs. DLF Limited*6


iii. *GKB Hitech Lenses Private Limited vs. Transition Optical India Private Limited* 7


v. *Print India vs. Springer (India) Private Limited*9

**U/s 27 (b) of the Act: Penalty in relation to profit on an enterprise, being member of a cartel:**

*Builders Association of India vs. Cement Manufacture Association & Others*10

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4 http://www.cci.gov.in/menu/OrderVijay150411.pdf
6 http://www.cci.gov.in/May2011/OrderOfCommission/Case22of2010MainOrder.pdf
7 http://www.cci.gov.in/May2011/OrderOfCommission/Case01of2010MainOrder.pdf
9 http://www.cci.gov.in/May2011/OrderOfCommission/CaseNo16of2010MainOrder.pdf
**PENALTIES FOR INFRINGEMENT OF COMPETITION LAW**

**Belaire Owners Association vs. DLF Limited**

The facts of the case are that DLF being dominant position, has abused its dominance in the following manner amongst others:

- Constructed 29 floors against 19 floors as per original plan;
- Originally earmarked facilities for allottees had been substantially compressed;
- Abnormal delay resulting huge financial loss to the allottees under the guise of agreement that there is a contractual obligation on DLF to pay a penalty of Rs. 5/- per square feet, per month, in case of delay.
- The fact was that this penalty amount comes to peanut when it is compared with the investment made and paid to DLF by its investors / customers, whereas in case of delay of payment of installment by the allottee, the allottee is liable to pay 18% interest for delay period to DLF.

And upon finding the fact that the Company / enterprise has violated the provisions of section 4 of the Act, the Commission in case of Belaire Owners Association (Supra), calculated the average turnover of DLF of preceding three years at Rs. 9,006.27 Crores and levied penalty @ 7% of turnover, as against maximum penalty prescribed @ 10% of turnover, at Rs. 630 Crore. The turnover of DLF Limited has been calculated at Rs. 9,006.27 Crores by the Commission in the following manner:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount (In INR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Turnover for year ended 31.03.2009</td>
<td>Rs 10,035.39 crores</td>
</tr>
<tr>
<td>Turnover for year ended 31.03.2010</td>
<td>Rs 7,422.87 crores</td>
</tr>
<tr>
<td>Turnover for year ended 31.03.2011</td>
<td>Rs 9,560.57 crores</td>
</tr>
<tr>
<td>Total</td>
<td>Rs 27,018.83 crores</td>
</tr>
</tbody>
</table>

10 http://www.cci.gov.in/May2011/OrderOfCommission/CaseNo29of2010MainOrder.pdf
The Commission has made it immense clear in the order itself in para 1.6.2 that ‘DLF Ltd.’ implies and includes the entire Enterprise or Group of DLF. So, it is clear that the term ‘turnover’ has been interpreted as ‘total turnover of entire enterprise’ and not just relevant product.

Thus, the figures in the above table clearly shows that the turnover so taken for calculation of penalty is the turnover of entire enterprise/group of DLF and not just the area to which infringement related.

The Commission after the case of DLF has also imposed certain penalties on other companies / enterprises u/s 27(b) of the Act, and some of them are referred hereinafter:

*In case of Kapoor Glass Private Limited vs. Schott Glass Private Limited, in its order dated 02.04.2012* has levied a penalty of 7% of average turnover of preceding three year for contravention of the provisions of Competition Act.

*In case of GKB Hitech Lenses Private Limited vs. Transition Optical India Private Limited in its order dated 30.05.2012*, the Commission has levied a penalty of Rs. 10,59,109/- being 5% of its preceding three year average annual turnover.

*Kasan News P. Limited Vs. Fastway Transmission Private Limited & Ors- in its order dated 03.07.2012*, the commission levied a penalty of Rs. 8,04,01,141, which is equivalent to 6% of their average turnover of last three years.

*In case of Print India vs. Springer (India) Private Limited, in its decision dated 03.07.2012*, has levied a penalty of 5% of the average of the turnover for the last three preceding financial years is imposed upon Springer India for deliberately entering, into exclusive agreement which led to the foreclosure of the competition and abuse of its dominance which led to the limiting and restricting the provision of services, technical and scientific development and denial of market access to others.

From the above trend, it appears that the Commission is imposing penalty by taking into total turnover of the enterprise / company and therefore, it is very much evident that the Competition Commission in India is taking into consideration the entire turnover of the company or enterprise and not the turnover of the product that infringes the competition law.
Cartel Case:

Builders Association of India vs. Cement Manufacture Association & Others

This case of the Builder Association was against 11 large Cement Manufacturing companies wherein the allegation was that the Cement Manufacturing Association has violated the provisions of the Competition Act through anti-competitive agreements including Cartels, whereby these companies reduced their production intentionally and deliberately. The allegations were found to be true in investigation by the Director General and that resulted in violation of provisions of section 3 of the Competition Act. The Commission levied the penalty @ 0.5 times of their profit (as against three times of profit as provided under the Act) on each company found guilty, for the Financial Year 2009-10 and 2010-11, amounting to Rs. 6,000 Crore approximately.

Effect of above orders passed by the Commission:

Now most of these companies have filed appeal before the Competition Appellate Tribunal (COMPAT), against the order passed by the Competition Commission, being aggrieved, and there is a discussion amongst the legal fraternity as well that whether the turnover of the company/enterprise/person should be the turnover of the related product or the company/enterprise as a whole.

3.4 Consequences for Non-Compliance of Order(s) Passed by the Commission:

As stated above, the penal provisions have been enshrined in chapter VI, section 42 to 48 of the Competition Act, which are mainly for contravention of order(s) passed by the Commission. These penal provisions are:

Section 42: Penalty for Contravention of Orders of Commission:

According to this section, if any person, without reasonable clause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may extend to Rs. 1,00,000/- per day, during which such non-compliance occurs, subject to a maximum of Rs. 10,00,00,000/- (Rs. Ten Crores), as the Commission may determine, or in case if such person fails to pay fine imposed above, or fails to comply the direction, then there is a provision of imprisonment up to three years or fine up to Rs. 25,00,00,000/- (Rupees twenty-five crore), or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit:

Section 42A: Compensation in case of contravention of orders of commissions:
PENALTIES FOR INFRINGEMENT OF COMPETITION LAW

This section provides that a person may make an application to Competition Appellate Tribunal for recovery of compensation from an enterprise for any loss or damage suffered by him for violating the directions u/s 27, 28, 32, 33 and 41 of the Act.

Section 43: Penalty for failure to comply with directions of Commission and Director General.

Under this section, if any person has not complied with the directions of the Commission / DG in terms of section 36(2) and 36(4) or u/s 41(2) of the Act, a penalty of Rs. 1 lakh per day subject to maximum of Rs. 100 lakhs has been provided in this section.

Section 43A: Power to impose penalty for non-furnishing of information on combinations.

This section provides that if any person or enterprise has failed to give notice to the Commission u/s 6 (2) of the Act, in respect of any amalgamation / merger / acquisition, then such person or enterprise is liable to pay penalty imposed by the Commission subject to a maximum of 1% of total turnover or assets, whichever is higher of a combination.

Section 44: Penalty for making false statement or omission to furnish material information.

This section contemplates that in case if a person, being a party to the combination, fails to make a particular statement or makes the false statement to his knowledge, then he is liable to pay Rs. 50 lakh, as penalty which may be extend to Rs. 100 lakh.

Section 45: Penalty for offences in relation to furnishing of information.

According to this section, if any person makes a false statement knowingly or omits to state any material knowingly or willfully alters, suppress or destroys any document which is required to furnish, he may be punished with a penalty / fine of Rs. 1,00,00,000/-.

Section 46: Power to impose lesser penalty.

The Commission on being satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations. However, the benefit of such lesser penalty benefit will be given provided the person making the disclosure continues to cooperate with the Commission till the completion of the proceedings.

Section 47: Crediting sums realized by way of penalties to Consolidated Fund of India.

All sums realized by way of penalties under this Act shall be credited to the Consolidated Fund of India.
Section 48: Contravention by companies.-

This section provides with special provisions relating to offences committed by firms and companies or any of its Director / Partner / Officer / Manager or Secretary has committed the contravention of any of the provisions of this Act and who was in charge and was responsible for conduct of business of a company or firm, then each such person of that firm or company and company / firm shall be liable to proceed against them and punish them accordingly.

However, this section provides an exception that if any proves that he was not in charge of the affairs of firm / company a firm or such contravention has not taken place with his consent or connivance, then the penalty provision of this Act shall not be applicable on that person.

From the above synopsis of penalty provisions under the Competition Act, 2002, it is very much clear that the Act does not contemplate the penalties for contravention of provisions of section 3 and 4 of the Act, but also contains fines / penalties for non-observance of commission order(s), rules and / or furnishing of false and incomplete information during the process of investigation and even after any order is passed by the Commission.

The most important aspect of the penalties is that how the penalty is to be determined. As regards to penalty provisions under section 42 to 46, they are very specific with leniency provisions under section 46 of the Act. The most important and critical part is that how the penalties shall be determined u/s 27 of the Act keeping in mind the basic objective of the Act, legislative intention and what penalty on what quantum shall be levied.

3.5 CONCLUSION

Since competition Law is global Law, so the study of other foreign jurisdictions Laws and cases like US, UK and EU and thus a comparative study of provisions of Competition Act on the basis of which penalty under the Competition Law has been provided under the USA, UK and EU are as discussed hereinafter.
CHAPTER – 4

INTERNATIONAL SCENARIO

This chapter is intended to study the objective of economic policy i.e. to maintain genuine competition and the penalties imposed for infringements of competition laws. This objective is set out in most of the legislation in force, yet there is a great deal of debate about its application, especially with the onset of the world economic crisis in 2007 and 2008. Consideration of method of imposing fines for infringements of competition law has become vital issue that calls for an exacting approach.

4.1 USA COMPETITION LAWS:-

Competition law in USA is known as ‘Antitrust laws’. The antitrust laws are the original and in many ways and are most important components of the United States Federal Economic Regulatory Scheme.

Sherman Act is the original and principle antitrust statute of the US and was the earliest in the world, enacted in 1890, and called as ‘Sherman Antitrust Act, 1890’.

Two great ideologies of the market and the state have shaped the evolution of antitrust laws in USA since 1890, namely ‘Evolutionary and Intentional Vision’. Evolutionary vision views the market, framed solely by common law rules of property and contract and the intentional vision views the market as a mechanism within which powerful interests can coerce consumers, labor, and small businesses; markets in this vision, tend toward monopoly unless government intervenes.

However Sherman Act embodied a legislative compromise between these two visions. The influence of versions of these ideologies is apparent throughout the competition history in the world.

After Sherman Act, Chicago school of thoughts came into being, which laid down two propositions which emphasized firstly that Markets are superior to any form of governmental, including judicial intervention and judicial interventions have no coherent analytical basis. These two propositions are said to be centre for understanding the background of the limits of antitrust.
US Court observed that antitrust laws in general and the Sherman Act, in particular are the ‘Magna-Carta’ of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights to the protection of our fundamental personal freedom.

4.1.1 Legislation

Sherman Act is the premier article of federal law. It is the original, principal, and foremost antitrust statute in the United States, setting forth the broad statutory proscriptions that act as a "charter of the marketplace" and "constitution of competition law" in American jurisprudence. The Sherman Act in its current form provides both civil remedies and criminal penalties for the principal antitrust violations -- conspiracies to restrain trade, monopolization, attempted monopolization, and conspiracies to monopolize. The key provisions of the Sherman Act are contained in section 1 and section 2 which are respectively analogous to Article 101 and 102 of the EU treaty and section 3 and 4 of Indian Competition Act. Section 1 of the Sherman Antitrust Act deals with anticompetitive conduct and prohibits agreements in restraint of trade--such as price-fixing, refusals to deal, bid-rigging, etc., whereas Section 2 of the Sherman Act deals with end results that are anticompetitive in nature and forbids monopolizing or attempting to monopolize.

After the Sherman Act, Congress enacted two new antitrust laws in 1914. First, Congress enacted the Federal Trade Commission Act, which created the Federal Trade Commission and gave it the authority to enforce U.S. antitrust laws i.e. to enforce the Sherman Act, the Clayton Act, and the Robinson-Patman Act. Significantly, Section 5 of the FTC Act confers additional authority on the FTC, allowing it to test the limits of antitrust policy. An aggrieved firm that concludes that it has no civil remedy under the Sherman Act or Clayton Act might decide that its best recourse is to complain to the FTC, asking that it invoke its authority under Section 5 of the FTC Act in order to investigate the matter and initiate administrative proceedings in order to enjoin the challenged conduct. It is a 'catch all enactments’ which has been construed to includes all the provisions of the other Antitrust Laws and in addition it may be utilized to fill what may appears to be loopholes in the more explicit regulatory statues.

Second, Congress enacted the Clayton Antitrust Act, which was intended to supplement and strengthen enforcement of antitrust laws. It added new forms of prohibited conduct, such as “mergers and acquisitions where the effect may substantially lessen. This Act carries only civil penalties. Indeed, it was this Act that established a private right of redress for civil relief under the Sherman Act (at 15 U.S.C. § 15). In addition, the Clayton Act usefully allows the courts to enjoin anti-competitive conduct before it actually causes harm.

The Clayton Act has been amended several times over the years, first by the Robinson-Patman Act of 1936, to ban certain forums of discriminatory business conduct, and then again by the
Hart-Scott-Rodin Act in 1976, to require companies intending to merge to notify the federal government before consummating the transaction in order to enable enforcement agencies to review the competitive effects of the merger. If a firm wishes to conduct a transaction that is covered by the Hart-Scott-Rodin Act, it must first make prescribed disclosures to the FTC and Department of Justice-Antitrust Division, either of which can thereafter object to the transaction, grant conditional approval or decline to object within the statutory deadline.

The Clayton Antitrust Act is comprised of §§ 12, 13, 14-19, 20, 21, 22-27 of Title 15, and §§ 13a, 13b, and 21a comprise the "Robinson-Patman Price Discrimination Act" (1936). The Robinson-Patman Act, 15 U.S.C. § 13a, also provides criminal sanctions of not more than 1 year of imprisonment and unto a $5000 fine, for price discrimination for purpose of destroying competition or eliminating a competitor.

Sections 15c - 15h and 18a compromise part of the "Hart-Scott-Rodino Antitrust Improvements Act of 1976.

Also in addition to these, each state in US has its own antitrust statutes. These statutes, which govern intrastate commerce, typically incorporate the statutory proscriptions and case law interpretations of the Sherman Act, which remains the statute of reference and premier article of antitrust legislation in the United States.

Thus, US Antitrust laws are mainly set forth in three principle federal statues i.e. : (i) The Sherman Antitrust Act, 1890; (ii) The Clayton Act, 1914, (iii) Federal Trade Commission Act, 1914 and these antitrust laws applies to all companies and / or individuals doing business in the USA or affecting USA Commerce, that means these laws have extra territorial jurisdictions.

The main importance of USA Competition Laws is that it contains the Sentencing guidelines that apply to a number of illegal practices and define the method for calculating fines. There is a specific chapter of the sentencing guidelines for antitrust offences.

4.1.2 Authority to Enforce Antitrust Laws in USA:

The Authority to enforce the antitrust laws in USA is shared between the Federal Trade Commission (FTC) and US Department of Justice (DOJ). They share responsibility for investigating and litigating cases under the Sherman Act and they both also review potentially anticompetitive mergers under the Clayton Act. While there is not a formal system by which the DOJ and the FTC divide their enforcement responsibilities, the agencies typically devote resources to particular industries where they have investigated or litigated in the past. For example, typically the DOJ will review mergers in transportation industries, such as airlines or railroads, as well as the telecommunications industry. The FTC generally focuses its enforcement responsibility in the oil and gas, pharmaceutical, and health care industries.
The Federal Trade Commission Act of 1914 (15 U.S.C §§ 41-58, as amended) established the Federal Trade Commission (FTC), a bipartisan body of five members appointed by the President of the United States for seven year terms.

The FTC can file antitrust law suits in either federal court or in an administrative hearing. Final decisions issued by the Commission may be appealed to a U.S. Court of Appeals and, ultimately, to the U.S. Supreme Court. If the Commission’s position is upheld, the FTC, in certain circumstances, may then seek consumer redress in court. If the company violates an FTC order, the Commission also may seek civil penalties or an injunction. The injunction preserves the market’s competitive status quo.

In some circumstances, the FTC can go directly to federal court to obtain an injunction, civil penalties, or consumer redress.

The FTC also may refer evidence of criminal anti-trust violations to the DOJ. The US DoJ has direct authority to enforce s 1, as well as exclusive authority to prosecute criminal violations and impose penalties under the Sherman Act, the main antitrust law.

However, in many cases, conduct that violates s 1 of Sherman Act may be subject to enforcement actions taken by the FTC under s. 5 of the FTC Act, or by civil suits by private parties (including foreign corporations and foreign nationals) under s. 4 of the Clayton Antitrust Act 1914.

In case of matter falling under Hart-Scott-Rodino Act, State Attorney Generals can file antitrust law suits in state or federal court.

Whereas Clayton Act is enforced jointly by the DOJ-Antitrust Division and FTC which also provides for a private suit in federal courts for damages and to restrain further violations.

Federal Trade Commission Act is solely administered by the FTC, and in case the orders issued by FTC are not followed then the FTC is empowered to impose significant financial fines.

The antitrust laws are also enforced by private parties. Under both federal and state antitrust law, any person who is “injured in his business or property” by a violation of antitrust laws is entitled to bring an action in court.

4.1.2 Penalties under US Antitrust Laws (four basic antitrust laws)

a. **Penalty under Sherman Antitrust Act, 1890:** (As amended by the 2004 ACPERA amendments)

The penalties under US Antitrust Laws, the Sherman Act provides for the penalty in the form of financial fines as well as imprisonment and which are enshrined in Section 1 and 2, which
PENALTIES FOR INFRINGEMENT OF COMPETITION LAW

specifies the anti-competitive agreements as well as abuse of its dominant position, which are mentioned herein below: ¹¹

§ 1 Sherman Act, 15 U.S.C. § 1 Trusts, etc., in restraint of trade illegal; penalty

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”

§ 2 Sherman Act, 15 U.S.C. § 2 Monopolizing trade a felony; penalty

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.’”¹²

From the above it can easily be inferred that the penalties for contravention of competition laws in USA invites both, criminal and civil penalties, which may be up to USD 100 million and / or imprisonment up to 10 years.

Only the DOJ has the authority to criminally prosecute individuals for violation of Sherman Act.

Before 1994, the largest corporate fine ever imposed for a single Sherman Act count was $6 million. However, today Sherman Act violations have yielded 81 criminal fines of $10 million or more, including 18 fines of $100 million or more. ¹⁴

b. Penalty under Clayton Act, 1914

The Clayton Act is a civil statute (as it carries no criminal penalties) and provides that civil actions may be brought by the U.S. Government or by private parties to enforce the federal antitrust laws, including the Sherman Act. Such civil actions to enforce the Sherman Act are the most frequent type of antitrust litigation.

¹¹ www.appliedantitrust.com/02_criminal/acpera/oracle/oracle_ndcal_strike_opp6_10_2011dec_exA.pdf

PENALTIES FOR INFRINGEMENT OF COMPETITION LAW

Individuals injured by antitrust violations can sue the violators in court for **three times the amount of damages actually suffered.** These are known as treble-damages, and can also be sought in class-action antitrust lawsuits. Damages also include attorneys' fees and other litigation costs.

Civil penalties can be imposed u/s 11(1) for violating judicially ordered cease and desist orders with $5000 fine per violation and $11000 per day for Hart-scott Rodino reporting violation as per section 7A(g)(1) of Clayton Act.

The US DOJ may make an officer liable for corporate violation of penal provisions u/s 14 of the act.

This act also provides for the claim of damages and compensation including the litigation fee and cost (15 U.S.C. § 15). The Clayton Act also provides for suits for injunctive relief u/s 16.

c. **Penalties under Federal Trade Commission Act, 1914**

The Federal Trade Commission Act, adopted in 1914, prohibits “*unfair methods of competition*” and “*unfair or deceptive acts or practices.*” The Federal Trade Commission was established to enforce the statute.

Supreme Court said that all violations of Sherman Act also violates FTC Act.

Section 5 of the FTC prohibits unfair methods of competition and authorizes the FTC to seek cease and desist against essentially any violation of the letter or spirit of the antitrust laws. “Unfair methods of competition” may include conduct that violates the Sherman or Clayton Acts as well as some restrictive conduct that does not violate the literal terms of those Acts. This Act does not provide any criminal penalty but is a primary enforcement tool for correcting and / or desist the unlawful activities. Under section 5(b), the commission may challenge such unfair methods. FTC can order ‘administrative cease and desist order’ as per 15 U.S.C. s.41 and US DOJ can make prosecution as per the s.1 and 2 of Sherman Act. FTC can only make a referral to DOJ for imposition of criminal penalties under section 16(b).

In case if any company becomes subject to an FTC enforcement order, any violation of that order may give rise to penalties, including fines of $11,000 per violation u/s 5(l), with each day of noncompliance considered a separate violation as per section 45.

d. **Penalty under Robinson-Patman Act, 1936**

As stated above that The Robinson-Patman Act, 1936 is an amendment to Section 2 of the Clayton Act which was primarily intended to protect small businesses from price discrimination and is aimed to recover the treble damages. The FTC has statutory authority to enforce the Robinson-Patman Act, but has largely left enforcement to private plaintiffs in the last 20 years.
e. **Violations of state antitrust laws**

State antitrust laws often prohibit the same kinds of conduct as the federal antitrust laws. As a result, the penalties state laws impose are also similar and can range from criminal to civil sanctions.

**Measurement of Damages:**

The measurement of Damages has been prescribed u/s 4D of Hart - Scott - Rodino Antitrust Improvements Act, 1976 wherein it has been prescribed that 'in any action u/s 40(a)(i), (15USC 15D) in which there has been a determination that a defendant agreed to fix prices in violation of the Sherman Act, (15 USC 1-7), damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought. 13

**Distribution of Damages**

Section 4E provides that the civil penalty / monetary relief recovered in an action u/s 40(a) (i) shall be distributed in such manner as directed by the court OR be deemed a civil penalty by the court and deposited with state as general revenue subject to that any distribution procedure adopted afford an opportunity to each person to secure his / her appropriate portion of the net monetary relief.

Also, in the US, the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) was signed into law on 9 June 2010. ACPERA limits the civil liability of cartel members that are accepted into the Department of Justice's Leniency Programme. With the extension, damages in associated civil litigation are limited to 'actual damages' suffered by the plaintiff as a result of the defendant's conduct, rather than the treble damages and joint-and-several liability ordinarily imposed under the Sherman Act.

**4.1.4 ANTITRUST DETERRENCE IN THE UNITED STATES (U.S. Approach to Deterrence)**

In recent years, there has been a remarkable convergence of global thinking on the evils of price-fixing, bid rigging and market allocation agreements among competitors and on the need to eliminate and deter such hard core cartels. It has been clearly concluded by the OECD that hard core cartels "are the most egregious violations of competition law" and has urged the member countries to "ensure that their competition laws effectively halt and deter hard core

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PENALTIES FOR INFRINGEMENT OF COMPETITION LAW

cartels" particularly through "sanctions of a kind and at a level adequate to deter both firms and individuals from participating in such cartels."

United States, being members of the OECD Council is a strong proponent of the 1998 Recommendation. The antitrust laws of USA subjects the participating enterprises to the possibility of criminal prosecution and high monetary fines and subjecting responsible individuals to the possibility of criminal fines and incarceration, besides private damage suits against cartel participants and also provides for treble damages awards.

Congressional recognition of the need to take away the pecuniary incentives of corporations to engage in cartel activities was reflected in the 1974 amendments to the Sherman Act. Those amendments created for the first time a two-tier fine structure for antitrust crimes -- maximum fines against individuals were set at $100,000, while maximum fines for organizations were set at $1,000,000,000 (as amended by ACPERA of 2004).

However, it was the issuance of the Sentencing Guidelines in 1987, with subsequent amendments in 1989 and 1991 that marked the true coming-of-age of an economically-based deterrence approach to antitrust crimes in the United States. The Sentencing Guidelines include a special section on antitrust offenses, setting out appropriate ranges for organizational fines, as well as levels of fines and prison sentences for convicted individuals. The Sentencing Commission believed that the loss to society caused by price-fixing and other hard-core antitrust violations is larger than the excess profits gained by the participating organizations, 20% of the volume of commerce is usually used as the base fine level for convicted organizations under the Guidelines. Depending on the culpability factors for the organization and other circumstances, the Guidelines allow for a fine of up to 80% of the volume of commerce in antitrust cases.

In other words, criminal fines can be up to 8 times the assumed illegal profit of 10%. Unique to the Antitrust Offenses section, the Sentencing Guidelines set out a minimum fine multiplier for antitrust offenses be equal to 0.75 i.e.15% of the affected volume of commerce. This provision reflects the Sentencing Commission's desire to ensure an effective deterrent to antitrust offenses.

The Guidelines' sentencing range is, of course, subject to the Sherman Act's statutory maximum fine, which in 1987 was $1 million for organizations. Since, the $1 million maximum was inconsistent with the Sentencing Guidelines emphasis on eliminating the economic incentives of antitrust crimes, Congress, in 1990 increased the maximum organization fine to $10 million, which is now $100 million.

"Alternative Fine Based on Gain or Loss", 18 U.S.C. § 3571(d) of the “Alternative Fines Statute" states:
"If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." 14

Although this alternative fine statute did allow for an alternative maximum fine of twice the gain to the offender or twice the loss to the victims, an alternative that could have exceeded the maximum fine cap of Sherman Act, this provision was, up to that time, rarely, if ever, used for antitrust corporate sentencing because of the difficulty of proving the gain or loss.

When infringements are large, the DoJ can invoke the Alternative Sentencing Guidelines under which there is no upper limit on fines. Under these guidelines fines are determined in relation to twice the gain or twice the harm caused by the infringement and cartel participants may be jointly and severally liable for the maximum of these amounts. In practice, in the US most of the final fines are determined under plea bargains. Court determination of fines would be a burden on the Doj's resources as the burden of proof makes it very difficult to determine either the gain to infringers or the harm caused by the infringement.

During the year 1995-1999, the Antitrust Division succeeded in obtaining fines of $10 million or greater against 27 companies. In recent years, criminal fine levels have hit new heights, including a $500 million fine against F. Hoffmann-La Roche, Ltd., a Swiss company, for its participation in the nine year international vitamin cartel. The increase of penalty up to $ 100 million with criminal sentencing is looked as an enough deterrent to anti-competitive laws in USA.

Besides this, the revised Corporate Leniency Program has been particularly successful in attracting applicants into the program and has had a major impact on the Division's ability to uncover and prosecute domestic and international

In the last few years, the Antitrust Division has been receiving approximately one application per month for acceptance into the Leniency Program. So, actual deterrence appears to exist.

Under the Sherman Act (and the 2004 ACPERA amendments), the statutory maximum corporate fine is $100 million, and individual fine is $1 million. However, the Sentencing Guidelines provide an Alternative Fining Statue i.e. 18 U.S.C. § 3571(d). Thus, civil and criminal penalties both exist under US Antitrust Laws:

a. Individuals: A fine up to $1 million and/or up to 10 years of imprisonment. (Sherman Act)

b. Co-operations: A fine up to $100 million fine or ‘Alternative fining Statues’ which provides for penalty equal to “twice the pecuniary loss or twice the pecuniary loss’ which is not subject to the $100 million maximum of Sherman Act.

But, if in latter case if anyone goes for trial then ‘gain’ or ‘loss’ must be proven by government to jury beyond reasonable doubt.

4.1.5 **How the Penalty is calculated under the USA Competition Laws:**

The Sentencing guidelines define the method for calculating fines. There is a specific section of the sentencing guidelines for antitrust offences i.e. chapter 2, Part-R. It is interesting to note that the method for calculating those fines is to some extent similar to that used in European countries. This Part-R provides the following:

§2R1.1. **Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors**

“(a) Base Offense Level: 12

(b) Specific Offense Characteristics

(1) If the conduct involved participation in an agreement to submit non-competitive bids, increase by 1 level.

(2) If the volume of commerce attributable to the defendant was more than $1,000,000, adjust the offense level as follows:

<table>
<thead>
<tr>
<th>Volume Of Commerce (Apply the Greatest)</th>
<th>Adjustent to Offense level</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) More than $1,000,000</td>
<td>add 2</td>
</tr>
<tr>
<td>(B) More than $10,000,000</td>
<td>add 4</td>
</tr>
<tr>
<td>(C) More than $40,000,000</td>
<td>add 6</td>
</tr>
<tr>
<td>(D) More than $100,000,000</td>
<td>add 8</td>
</tr>
<tr>
<td>(E) More than $250,000,000</td>
<td>add 10</td>
</tr>
<tr>
<td>(F) More than $500,000,000</td>
<td>add 12</td>
</tr>
</tbody>
</table>
(G) More than $1,000,000,000

(H) More than $1,500,000,000

For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.

(c) Special Instruction for Fines

(1) For an individual, the guideline fine range shall be from one to five percent of the volume of commerce, but not less than $20,000.

(d) Special Instructions for Fines - Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce.

(2) When applying §8C2.6 (Minimum and Maximum Multipliers), neither the minimum nor maximum multiplier shall be less than 0.75.

(3) In a bid-rigging case in which the organization submitted one or more complementary bids, use as the organization's volume of commerce the greater of (A) the volume of commerce done by the organization in the goods or services that were affected by the violation, or (B) the largest contract on which the organization submitted a complementary bid in connection with the bid-rigging conspiracy.”

A basic amount, called the ‘base fine’, which is calculated first according to the volume of commerce affected. This base fine is then adjusted for a number of aggravating and mitigating circumstances. The United States has a very forceful deterrence policy and criminal sentences are handed down regularly. The fine imposed by the DOJ or the FTC may be as much as twice the illegal profits accruing to the undertakings and civil actions are very common. These actions enable victims to receive up to triple damages for proven economic losses.

The following steps are involved in calculation of the penalty in accordance with Sentencing guidelines.\(^{15}\)

\(^{15}\) Application of the Federal Sentencing Guidelines In Antitrust cases: A Practical Guide- Kathleen M. Beasley (Haynes and Boone, LLP)
Step 1: Determining the “Guideline Fine Range”

The Guideline Fine Range for corporate anti-trust offenders is determined by using the following formula: The low end of the range is equal to the “Base Fine” times the “minimum multiplier.” The high end of the range is equal to the “Base Fine” times the “maximum multiplier.”

Thus, Guideline Fine Range = [“Base Fine” X minimum multiplier] to [“Base Fine” X maximum multiplier]

Now to use this formula, one must first determine the “Base Fine,” as well as the minimum and maximum multipliers.

Step 2: Determining Base Fine

Chapter 8 of the Guidelines Manual deals with the Sentencing of Organizations. Under §8C 2.4(a), the Base Fine is the greatest of:

(1) The amount from a table provided in that section; (as reproduced below)

(2) The pecuniary gain to the organization from the offense; or

(3) The pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.

This general rule is modified, however, when the applicable offense guideline in Chapter 2 of Fine Guidelines has a special instruction for organizational fines. The Guidelines further provide that, to the extent where the calculation of either pecuniary gain or pecuniary loss would unduly complicate or prolong the sentencing process, that amount shall not be used for the determination of the base fine.

Offense Conduct is organized according to the specific criminal offense involved. In our hypothetical involving an antitrust offense, Chapter 2 does indeed provide a special instruction for organizational fines. Section 2R1.1 relates to Antitrust Offenses (bid rigging, price-fixing and market allocation). This section, in subsection (d), provides Special Instructions for fines of organizations: “In lieu of the pecuniary loss under subsection (a) (3) of §8C2.4 (Base Fine), use 20% of the volume of affected commerce.”

Step 3: Determining Volume of Affected Commerce

The Guidelines and existing case law provide little guidance as to how the volume of affected commerce is to be calculated. **Section 2R1.1 of the Sentencing Guidelines provides that the volume of commerce** attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation.
It also states that when multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.

It is noted that one area of ambiguity is in defining what portion of the commerce was in fact “affected” by the violation. Another complication arises when an alleged conspiracy involves international commerce. In 1999, the Division announced that it normally would use the defendant’s volume of affected U.S. commerce in calculating the defendant’s Guideline range, but that foreign sales could be taken into account if the affected U.S. commerce understated the seriousness of the defendant’s role in the offense and the impact of the defendant’s conduct on U.S. victims.

Since then, the Division has indicated that it will consider only a defendant’s “domestic sales” in calculating the base fine, but has suggested that foreign sales have and may be used as an “aggravating factor” to justify an increased fine.

In a simple case, where the company has clear U.S. sales affected by the violation, the volume of affected commerce would likely be the Company’s total U.S. sales revenues on the relevant product for the full period of infringement.

This method of calculation has been explained with the help of a hypothetical example i.e. if it is assumed that a five-year price-fixing conspiracy on the sale of ‘product-A’ in the United States, the volume of affected commerce would likely be the Company’s total U.S. ‘product A’ sales revenues during the entire five year term of the conspiracy shall be:

So, $40m/year in sales revenue x 5 years = $200 million volume of affected commerce

**Step 4: Calculating Base Fine**

Once the volume of affected commerce is determined; the next step is to use that to calculate the base fine. Under §2R1.1 (d), for an organization charged with an antitrust offense, “pecuniary loss” (“PL”) is assumed to be 20% of the volume of affected commerce. Although the final fine level can range between 20 per cent and 40 per cent even if there are neither aggravating nor mitigating factors to take into account. This is the result of case law and sentencing guidelines by the Federal Court.

Therefore, continuing our example of the company selling ‘product-A’ turnover of $40 million per year in U.S. sales over a five year conspiracy, the proxy for pecuniary loss is calculated as:

\[ PL = \$200 \text{ million} \times 20\% \text{ PL} = \$40 \text{ million} \]

Referring back to §8C2.4 (a), the Base Fine is greatest of:

1. The amount from a table provided in that section; (given below)
(2) The pecuniary gain to the organization from the offense; or

(3) The pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly;

And applying the §2R1.1 (d) special instruction regarding pecuniary loss, the Base Fine for our hypothetical widget seller is $40 million. (Unless, hypothetically, the amounts derived under §8C2.4(a)(1) or (2) provide a higher number.)

Table: As discussed above to determine the minimum and maximum multiplier following table has been provided u/s.8C2.4(d) :

<table>
<thead>
<tr>
<th>OFFENSE LEVEL</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>6 or less</td>
<td>$5,000</td>
</tr>
<tr>
<td>7</td>
<td>$7,500</td>
</tr>
<tr>
<td>8</td>
<td>$10,000</td>
</tr>
<tr>
<td>9</td>
<td>$15,000</td>
</tr>
<tr>
<td>10</td>
<td>$20,000</td>
</tr>
<tr>
<td>11</td>
<td>$30,000</td>
</tr>
<tr>
<td>12</td>
<td>$40,000</td>
</tr>
<tr>
<td>13</td>
<td>$60,000</td>
</tr>
<tr>
<td>14</td>
<td>$85,000</td>
</tr>
<tr>
<td>15</td>
<td>$125,000</td>
</tr>
<tr>
<td>16</td>
<td>$17,000</td>
</tr>
<tr>
<td>17</td>
<td>$350,000</td>
</tr>
<tr>
<td>18</td>
<td>$500,000</td>
</tr>
<tr>
<td>19</td>
<td>$650,000</td>
</tr>
<tr>
<td>20</td>
<td>$910,000</td>
</tr>
<tr>
<td>21</td>
<td>$1,200,000</td>
</tr>
<tr>
<td>22</td>
<td>$1,600,000</td>
</tr>
<tr>
<td>23</td>
<td>$2,100,000</td>
</tr>
<tr>
<td>24</td>
<td>$2,100,000</td>
</tr>
<tr>
<td>25</td>
<td>$2,800,000</td>
</tr>
<tr>
<td>26</td>
<td>$3,700,000</td>
</tr>
<tr>
<td>27</td>
<td>$4,800,000</td>
</tr>
<tr>
<td>28</td>
<td>$6,300,000</td>
</tr>
</tbody>
</table>

16. 2011 FEDERAL SENTENCING GUIDELINES MANUAL
Then following adjustments can be made to the above base fine so calculated:

**Application of CHAPTER THREE – ADJUSTMENTS**

**PART B - ROLE IN THE OFFENSE**

§3B1.1. **Aggravating Role**

Based on the defendant's role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
- (b) If the defendant was a manager or supervisor (but not an organizer or leader), and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
- (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

§3B1.2. **Mitigating Role:**

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

**Step 5: Determining Multipliers**

After calculating the base fine, as noted above, it needs to be multiplied by minimum and maximum multipliers to determine the applicable Guideline Fine Range. Calculation of the multipliers can be a very complex exercise, but the basic framework is as follows.
Under one of the special instructions in §2R1.1 (d), the minimum multiplier must be at least 0.75, so the bottom of the Guidelines Range will be at least 15% of the affected volume of commerce.

The Commission felt that because “the Department of Justice has a well-established amnesty program for organizations that self-report antitrust offenses, no lower minimum multiplier is needed as an incentive for self-reporting. A minimum multiplier of at least 0.75 ensures that fines imposed in antitrust cases will exceed the average monopoly overcharge.”

In most cases, however, the minimum multiplier will certainly be higher. Section 8C2.6 addresses the Minimum and Maximum Multipliers. They are derived from a table in the Guidelines Manual, by reference to the organization’s “Culpability Score.” To find the organization’s Culpability Score, §8C2.5 instructs that you start with 5, and then add or subtract points based on the applicability of factors set forth in that section.

The table so provided under section 8C2.6 is as follows:

**§8C2.6. Minimum and Maximum Multipliers**

Using the culpability score from §8C2.5 (Culpability Score) and applying any applicable special instruction for fines in Chapter Two, determine the applicable minimum and maximum fine multipliers from the table below.

<table>
<thead>
<tr>
<th>Culpability Score</th>
<th>Minimum Multiplier</th>
<th>Maximum Multiplier</th>
</tr>
</thead>
<tbody>
<tr>
<td>10 or more</td>
<td>2.00</td>
<td>4.00</td>
</tr>
<tr>
<td>9</td>
<td>1.80</td>
<td>3.60</td>
</tr>
<tr>
<td>8</td>
<td>1.60</td>
<td>3.20</td>
</tr>
<tr>
<td>7</td>
<td>1.40</td>
<td>2.80</td>
</tr>
<tr>
<td>6</td>
<td>1.20</td>
<td>2.40</td>
</tr>
<tr>
<td>5</td>
<td>1.00</td>
<td>2.00</td>
</tr>
</tbody>
</table>
§8C2.5. **Culpability Score:**

It provides that Start with 5 points and apply subsections (b) through (g) thus adding or subtracting according to the following factors:

- High level involvement or tolerance of the conduct (scaled according to the number of employees in the involved organization or unit) = 5;
- Prior criminal history;
- Violation of an Order or injunction;
- Any obstruction of justice;
- Cooperation and acceptance of responsibility.

Section 8C2.5 (f) also identifies an effective compliance and ethics program as a factor which could theoretically result in a three point reduction in the culpability score. However, the Antitrust Division has consistently refused to apply this provision in its fine calculations for plea agreements, apparently reasoning that a compliance program that has failed to prevent the violation and failed to detect it in time for the organization to obtain the benefits of the Corporate Leniency Policy has been, necessarily, “ineffective.”

Returning to our hypothetical product A seller, if the culpability score calculation starts with 5, but there was an addition of (5) five points for involvement or tolerance of the conduct at high levels of an organization of 5000 or more employees (§8C2.5 (b) (1) (A) (i)), and a subtraction of (2) two points for full cooperation and acceptance of responsibility (§8C2.5(g)(2)), and no other factors apply, the hypothetical Culpability Score is 8. On the table provided in §8C2.6, a Culpability Score of 8 yields a minimum multiplier of 1.6 and a maximum multiplier of 3.2. Therefore, because:

Guideline Fine Range = [“Base Fine” X minimum multiplier] to [“Base Fine” X maximum multiplier]
Range = [$40M X 1.6] to [$40M X 3.2] Range = $64M minimum fine to $128M maximum fine

The Guideline range for the fine of our hypothetical product A seller is therefore $64 million – $128 million.

Step 6: Potential Cooperation Discount:

Upon determination of fine as calculated above after adjusting with the minimum and maximum multiplier, in pursuant to §8C4.1, the government can request a downward departure from the Guidelines for a defendant that has provided substantial assistance in the investigation or prosecution of an other organization that has committed an offense. The Antitrust Division has indicated these “cooperation discounts” average in the range of 30% to 35% off the bottom of the Guidelines range for “second-in” companies, assuming the company did not have a significant leadership role in the conspiracy.

If our hypothetical product A seller was the first organization to cooperate with the Antitrust Division, after the amnesty applicant (i.e., was “second-in”), and provided substantial assistance, its projected fine might be reduced as follows:

Bottom of Range = $64 million $64M – 30% discount = projected fine of $44.8 million

Guidelines applied to individual antitrust offenders:

It is important to note that the antitrust guidelines are also applicable to individual offenders as well and that includes two components: (i) imprisonment, and (ii) fines. Although there was a time in the past when the Division would accept a guilty plea from foreign defendants without seeking a jail term, which is no longer the case now. Division practice today is to insist on jail sentences for all individual defendants, domestic and foreign.

Fines for Individuals:

According to §2R1.1(c) (1): “For an individual, the guideline fine range shall be from 1% to 5% of the volume of commerce, but not less than $20,000.” In setting the fine for individuals, the court should consider the extent of the defendant’s participation in the offense, the defendant’s role, and the degree to which the defendant personally profited from the offense (including salary, bonuses, and career enhancement). If the court concludes that the defendant lacks the ability to pay the guideline fine, it should impose community service in lieu of a portion of the fine. The community service should be equally as burdensome as a fine.
Criminal Prosecution:

Once the base offense level is calculated, as suggested above, then the defendant’s criminal history category should be determined before identifying the appropriate sentencing range. Chapter IV deals with the case, if the antitrust offenders have no prior criminal history, and will be designated with a Criminal History, category of I. Application Note 7 to §2R1.1 provides that in the case of a defendant with previous antitrust convictions, a sentence at the maximum of the applicable guideline range, or an upward departure, may be warranted. The court will have the discretion to impose considerably longer sentences in bid-rigging cases within the guideline ranges.

§4A1.1. Criminal History Category

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of 3 points for this subsection.

Then, adjustments may be given from Chapter Three, Part E (Acceptance of Responsibility) and, in rare instances, Chapter Three, Part B (Role in the Offense), may decrease these minimum sentences; nonetheless, in very few cases will the guidelines not require that some confinement be imposed. However these adjustments will not affect the level of fines.

Chapter 5, Part-A of the Sentencing Guidelines Manual contains the Sentencing Table. The applicable row is based upon the offense level resulting from the calculations set forth above, and the applicable column is determined by the criminal history category. For example, if the offense level is 20 and the criminal history category is 1, the resulting guideline range is 33-41 months of imprisonment. The Application Notes to Chapter 2 specifically provides that: “It is
the intent of the Commission that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.”

Under the Sherman Act (and the 2004 ACPERA amendments), the statutory maximum term of imprisonment is ten years.

In 2005, the Antitrust Division said the following:

The only change to our charging practice will occur in cases in which we are seeking a fine above the Sherman Act statutory maximum, pursuant to 18 U.S.C. § 3571(d). In that case, we will allege the amount of gain or loss in indictments. If necessary to obtain an appropriate fine, the Division will allege the gain or loss attributable to the entire cartel, not just the defendant.

3571(d) provides for a fine of twice the gross gain derived from the crime or twice the gross loss of the victims of the crime, i.e. twice the gain derived by, or twice the loss caused by, the cartel rather than the defendant.

It is not clear the extent to which the Division will be able to successfully pursue this theory, but they have, since 2005, entered into a number of plea agreements in which the agreed fine exceeded the statutory maximum.

Prior to 1987, the sentence imposed on a federal criminal defendant in the United States was left largely to the discretion of the sentencing judge, subject to offense-specific statutory minimum and maximum sentences. In 1984, Congress passed the Sentencing Reform Act, delegating broad authority to the United States Sentencing Commission (the “Commission”) and then with the introduction of the Federal Sentencing Guidelines Manual (the “Guidelines”) in November 1987, judges were required to impose sentences in accordance with the Guidelines. In 2005\(^\text{17}\), the mandatory sentencing under the Guidelines changed as a result of the United States Supreme Court decision in United States v. Booker, 125 S. Ct. 738 (2005) wherein it was held federal judges must consider, but are not bound by, the Sentencing Guidelines in rendering a criminal sentence. The Booker decision made the guidelines less binding and gave judges more autonomy.

Thus, fines / penalties provisions on large corporations have been publicly touted by the DOJ-Antitrust Division as a measure of success. Also, the criminal fines and prosecution provides a very strong deterrent.

\(^{17}\) http://ftpcontent.worldnow.com/wbrc/docs/blountsentencingmemorandum.pdf
In Short the US antitrust laws provides that,

In case of violation by companies, the US Competition Laws have very stringent fines which are to be calculated as per the above set procedure but these fines are subject to maximum limit of US$ 100 million or say Rs. 550 Crore. However, the sentencing guidelines also provide for alternative fine method which is twice the gain or loss There has been a levy of criminal fine of RS$ 500 million or approximately Rs. 2750 Crore in case of Hoffmann La Roche Limited (Vitamin case-1999).

In case of individual offenders, there is provision of imprisonment and fine both, and fine guidelines ranges from 1% to 5% with minimum find of US$ 20,000, whereas in case of Cartel, the penalty so determined shall be increase keeping in account of aggravating factor which ranges from 2 to 5 and further discount will be allowed for mitigating factor and that also ranges from 2 to 4.

As stated earlier that the EU Competition Laws are more or less in line with the EU Competition Laws in terms of its objective and penalty provisions. To understand this better, the summary of EU competition law is mentioned hereinafter.
4.2 EU COMPETITION LAW:

Competition law gained new recognition in Europe in the inter-war years, with Germany enacting its first anti-cartel law in 1923, Sweden and Norway adopting similar laws in 1925 and 1926 respectively. However, with the Great Depression of 1929, the competition law disappeared from Europe and was revived following the 2\textsuperscript{nd} world war, with the pressure from USA, ‘United Kingdom’ and ‘Germany’ became the first European countries to adopt full-fledged Competition Laws. The Europe came up with novel idea of European Union by which different European countries joined hands to strengthen the Europe economy and introduced single currency for all member nation of the European Union which is now known as ‘Euro’.

The old Rome Treaty of 1957, which is now known as ‘Treaty on European Union’ (previously known as European Community), by the Treaty of Lisbon, which was signed on 13 December 2007, in Lisbon, and came into force on 1 December 2009. The Competition Laws of EU prohibits anti-competitive agreements in Article 101(1), including price fixing. According to Article 101(2) any such agreements are automatically void. Article 101(3) establishes exemptions, if the collusion is for distributional or technological innovation, gives consumers a "fair share" of the benefit and does not include unreasonable restraints that risk eliminating competition anywhere. Article 102 prohibits the abuse of dominant position, such as price discrimination and exclusive dealing. Article 102 allows the European Council regulations to govern mergers between firms.

It is important to note that Article 3(3) of the EU Treaty provides that the Union shall establish an internal market. It shall work for the sustainable development of Europe based on ‘balanced economic growth and price stability’, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

This aim as mentioned above can be attained only when there is an existence of a free market which is sine qua non of free competition in the market. So, to ensure the objective of the competition laws by which anti-competitive agreements have been prohibited and such prohibited acts have been provided in article 101 and 102 which are analogous to those provided u/s 3 and 4 of Indian Competition Laws and section 1 and 2 of US Sherman Act.
4.2.1 Application of Articles 101 and 102 Treaty of Functioning of European Union (known as ‘TFEU’)

(Formerly Articles 81 and 82 of the EC Treaty)

These articles are provided under chapter 1 (i.e. Rules on Competition) of Title VII of TFEU. These articles enlist the acts which are prohibited as being anti-competitive.

Article 101

(Earlier Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) Directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) Limit or control production, markets, technical development, or investment;
(c) Share markets or sources of supply;
(d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void. 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: — any agreement or category of agreements between undertakings, — any decision or category of decisions by associations of undertakings, EN — any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
Article 102

(Earlier Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) Limiting production, markets or technical development to the prejudice of consumers;

(c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 103 (Earlier Article 83 TEC) provides: That the appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

In other words, these regulations or directives shall be designed in such a manner as to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments.

Also detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision and simplified administration to the greatest possible extent be laid and also define the scope of articles 101 and 102 and respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down herein. It also provides for determining the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

4.2.2 Development of Commission Fining Policy on Method of Setting Fines

I. Commission Fining Policy Prior to 1998

Before taking into consideration the existing penalty and fine policy of European Union under Competition Laws, it would be better to understand its position prior to 1998, the Commission’s
freedom of maneuver when setting fines was couched in the loose parameters of Article 15 (2) of Regulation 17/62, which lays down that the Commission may by decision impose on undertakings or associations of undertakings fines of from 1000 to 1,000,000 units of account, or a sum in excess thereof, but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the ‘infringement’, where, either intentionally or negligently, they violate Article 81(1) or Article 82 EC.

In fixing the amount of the fine, Regulation 17/62 further provides that regard shall be had to both the gravity and the duration of the infringement. The flexible fining parameters within which the Commission worked were (and still are), however, circumscribed by the fundamental principles of Community law, such as the rule of proportionality, the principle of non-discrimination and the principle of ne bis in idem. With regard to the principle of ne bis in idem, the European Court of Justice (ECJ) stated in *Walt Wilhelm* that equity necessitates that an earlier sanction must be taken into account in determining the level of any subsequent sanctions to be imposed.

It would be interesting to note that the Commission’s fining policy at the end of the 1960s and throughout the 1970s was characterized by a light-handed approach towards anti-competitive conduct, which was changed for far more severe fining policy with one of the parties receiving a fine of 4,350,000 units of account in case of Pioneer decision. The latter stages of the period before the introduction of the 1998 Guidelines bore testimony to the fact that the Commission’s enforcement was more rigorous and sanctions increasingly draconian (extremely harsh).

**Method Employed by the European Commission for determination of fines:**

Period preceding the adoption of the 1998 Guidelines was epitomized by a reliance on a percentage of turnover in the relevant market, and to a much lesser extent on the illegal gains achieved by a company, for the determination of fines. Invariably a figure of between 2% and 4% of EC turnover in the product in question was taken into account as the starting point. The Commission’s method of calculation was as follows:

i. Relevant turnover x percentage in respect of the gravity of the infringement x percentage in respect of duration = total (basic amount);

ii. Basic amount – reduction in the event of co-operation = amount of the fine.

Prior to the promulgation of the 1998 Guidelines on the method of setting fines, earlier method was vague and arbitrary. A mathematical formula for the computation of fines did not exist in contrast to, for example, the US. In addition to that for reasons of business secrecy the Commission did not clarify what percentage of turnover it applied in a given decision and the percentage was often impossible to deduce. The courts themselves had lamented the lack of
transparency inherent to the method used by the Commission at arriving at its final figure. In 1995, the CFI held that:

“it is desirable for undertakings – in order to be able to define their position in full knowledge of the facts – to be able to determine in detail, in accordance with any system which the Commission might consider appropriate, the method of calculation of the fine imposed on them, without being obliged, in order to do so, to bring court proceedings against the Commission decision - which would be contrary to the principle of good administration”.

This persuaded the commission to make more methodical guidelines to impose penalties.

II. Commission Fining Policy Post 1998 – How to implement Competition Laws in European Union:

In response to these criticisms the Commission published the 1998 Guidelines on the method of setting fines, which embodies a sea change in the Commission’s methodology for setting fines and a doctrinal shift of massive proportions”. The preamble to the 1998 Guidelines expressly states that the principles incorporated in these Guidelines should ensure transparency and impartiality of the Commission’s decisions while maintaining the discretion bestowed upon the Commission through Regulation 17/62. The basis of present guidelines for imposing penalty and fines is influenced while drafting the guidelines in 2003 known as Regulation No. 1/2003 which have been amended subsequently.

Criticism of the 1998 Guidelines

The Commission’s 1998 Guidelines can, nonetheless, be criticized on a number of points, being linguistically vague, which both leaves undertakings unable to ascertain where their behavior falls in the 1998 Guidelines and arouses the suspicion that the Commission is attempting to maintain its discretion. Examples of vagueness abound with phrases such as “generally speaking”, “might be” and “likely fines” dotted throughout the 1998 Guidelines. Further, the word “other” (aggravating or mitigating circumstances) is found in sections 2 and 3 of the 1998 Guidelines, highlighting the discretion which the Commission has bestowed upon itself.

To overcome with these criticisms, the Council Regulations for Fining Policy are as given herein below.\textsuperscript{19}


The new arrangements for applying the anti-trust procedures, which were introduced by Council Regulation (EC) No 1/2003, are designed to ensure more effective enforcement of the

\textsuperscript{19}The EC fining policy for violations of competition law: An empirical review of the Commission decisional practice and the Community courts’ judgments
PENALTIES FOR INFRINGEMENT OF COMPETITION LAW

European Union (EU) competition rules in the interest of consumers and businesses, while easing the administrative burden of firms doing business in Europe. Also, there was an amendment in 2006 of the Penalty Guidelines, which came into force in September 2006.

With a view to simplifying administrative formalities for firms and enabling the Commission to take more effective action against serious infringements of the rules on competition, the Commission launched, with the publication of its 1999 White Paper, a long process of reform which resulted in the public action of this regulation. This reform brings about the transition from a system of centralized authorization by the Commission to the decentralized application of EU competition rules and a strengthening of *a posteriori* control, lightens the Commission's workload and increases the role of national competition authorities and courts in implementing EU competition law, while guaranteeing that it is effectively and uniformly applied.

This regulation was adopted by the Council on 16 December 2002 and implementing the rules on competition laid down by Articles 101 and 102 of the TFEU (formerly Articles 81 and 82 of the Treaty establishing the European Community (EC Treaty)), replaced Regulation (EEC) No 17/62 from 1 May 2004.

**Scope and administration of information:**

In order to achieve the objective of competition laws in EU, this regulation lays down rules implementing the provisions of the TFEU relating to agreements, decisions by associations of undertakings and concerted practices which may restrict competition (Article 101 TFEU) and abuses of a dominant position (Article 102 TFEU). The administration of Competition Law in EU needs better exchange of information and cooperation between the Competition Commission and EU Countries for which a proper mechanism have been provided which is evident from the following:

**Cooperation between the Commission and EU countries competition authorities and courts**

The direct effect of the legal exception system established by this regulation is to increase the responsibility of undertakings since, given that they are no longer subject to a prior-notification requirement, they will have to ensure in good faith that agreements do not affect free competition and do not infringe EU rules in this area. However, in order to avoid any abuse, the competition authorities in Europe - including the Commission - and the national courts will themselves assume greater responsibility in ensuring that the EU competition rules are complied with, while coordinating their respective activities. To that end, efforts are required to encourage an exchange of information between the various institutions.

To facilitate the exchange of information among competition authorities in Europe, the regulation provides for the creation of a European competition network which consists of the national competition authorities and the Commission.
To avoid any overlap and ensure a uniform and coherent application of European competition law, the regulation maintains the rule that *national competition authorities are automatically relieved of their competence if the Commission initiates its own proceedings.*

Before taking a decision to order an infringement to be brought to an end, to make binding the commitments offered by undertakings, to find Article 101(1) TFEU inapplicable or to impose a fine or periodic penalty payment on undertakings, the Commission will consult the Advisory Committee on Restrictive Practices and Dominant Positions at one of its meetings or by written procedure. This Committee, made up of representatives of national competition authorities, serves as a forum for discussing cases that are being handled by the various competition authorities in Europe.

Finally, regarding the cooperation which must exist between the Commission and national courts, the regulation lays down that the National Courts may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of EU competition rules. In addition, EU countries undertake to forward to the Commission a copy of any written judgment of national courts relating to the application of Article 101 or 102 TFEU. This regulation also makes provision for the Commission and national competition authorities to submit written or oral observations to the national courts on issues relating to the application of Articles 101 or 102 TFEU.

### 4.2.3 Guidelines on method of setting fines (pursuant to article 23(2)(a) of regulation no. 1/2003)

The commission(EU) may impose fines on undertakings or association of undertaking where they infringe article 101 or 102, either intentionally or negligently, in pursuant to article 23(2)(a) of regulation No. 1/2003 (as amended in 2006).

Whenever the Commission finds that there is an infringement of Article 101 of the Treaty it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation (EC) No 1/2003.

Given the secrecy in which the cartel arrangements were carried out, it is not possible to determine with absolute certainty that the infringement has ceased. It is, therefore, necessary for the Commission to require the undertakings to which this Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision of an association which might have the same or a similar object or effect.

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20 Cases and Material on EC Competition Law-Valentine Korah (Third edition-2006)
The task conferred on Commission is thereby to create a necessary deterrent effect by its action. The Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in the Regulation.

**Methodology for setting the amount of fine has been provided as follows:**\(^{21}\)

According to the 2006 Guidelines on fines, the basic amount of the fine for each party result from the addition of a variable amount and an additional amount.

The additional amount is calculated as a proportion of the *value of sales of goods or services to which the infringement relates in a given year* (normally, the last year of the infringement).

The variable amount results from a proportion of the value of sales multiplied by the number of years of the company's participation in the infringement.

The resulting basic amount can then be increased or reduced for each company if either aggravating or mitigating circumstances are present. The *fine may not exceed 10% of the worldwide turnover of an undertaking concerned* pursuant to Article 23 of Regulation (EC) No 1/2003. The fine may be reduced in application of the Leniency Notice, where applicable.

This method of fine is now supported with the following case law:

In order to understand the penalty provisions with clarity, I have taken the facts and remedies imposed in a recent case i.e. ‘Consumer detergents cartel case’.\(^{22}\) However, the figures so taken for understanding are hypothetical. The facts of this case herein are provided in brief are as follows:

This case relates to a single and continuous infringement of Article 101 of the TFEU, and Article 53 of the EEA Agreement. The single and continuous infringement, in which the addressees of this Decision participated, concerns heavy duty laundry detergent powders intended for machine washing and sold to consumers (“HDD low suds powder”) and covered Belgium, France, Germany, Greece, Italy, Portugal, Spain and The Netherlands. It was aimed at the stabilization of market positions and price coordination and lasted from 7\(^{th}\) January 2002 until 8\(^{th}\) March 2005.

On 13 April 2011, the Commission adopted a cartel settlement decision prohibition decision against three major detergent manufacturers: Henkel, Unilever and Procter & Gamble (P&G). The Decision finds that they had operated a single and continuous cartel on washing powder.

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22 http://ec.europa.eu/competition/antitrust/cases/dec_docs/39579/39579_2633_5.pdf
The Commission imposed fines of EUR 315,2 million for infringing Article 101 of the TFEU and Article 53 of the EEA Agreement. This was the third cartel case in which the Commission applied the settlement procedure as introduced in 2008 and has so far been applied in five Commission cartel decisions. The first were in the DRAMS case (19 May 2010) and the Animal Feed case (20 July 2010).

EC's first settlement in price-fixing case with DRAM makers

In May 2010, the EC announced a settlement with 10 dynamic random access memory chip (DRAM) manufacturers. This settlement is the first of its kind to follow the EC's simplified settlement procedure established in June 2008.

Under the new settlement framework, companies accused of involvement in a cartel may acknowledge liability for their involvement in the cartel after reviewing the evidence in the Commission's file and submitting a 'common understanding' as to the scope of the EC's potential objections. Companies agreeing to participate in this settlement procedure receive a 10 per cent reduction in fines. Infineon Technologies, Samsung Electronics and Hynix Semiconductor Inc are among 10 DRAM manufacturers that participated in this landmark settlement with the EC. They agreed to pay over €331 million, after taking into account the 10 per cent reduction granted to each party.

EC's first 'hybrid' cartel settlement

In July, the EC announced its first 'hybrid' cartel settlement, in which some companies admit to taking part in the cartel while others opt not to settle and face the regular enforcement procedure. Here, the EC issued a streamlined settlement decision against 12 producers of animal feed phosphates and a standard decision against Timab Industries, a phosphate producer that chose not to settle. For settling with the EC and admitting their participation in a cartel that lasted over 30 years, the fines for the 12 phosphate producers were reduced by 10 per cent (totaling €115 million).

Step 1: Determination of Basic amount of fine:

The basic amount of fine will be set by reference to value of sales and applying the following methodology.

A. The value of sales:

The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of sales, that is, the value of the undertakings sales of goods or services.

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to which the infringement directly or indirectly related in the relevant geographic area in the EEA.

The value of sales has to be determined before VAT and other taxes directly related to the sales.

In the case taken as example, the relevant value of sales is the undertaking's retail sales of HDD low suds powder generated in the eight Member States covered by the infringement: Belgium, France, Germany, Greece, Italy, Portugal, Spain and The Netherlands.

On the basis of the information provided by the parties, the undertakings' sales made in 2004 are used to calculate the basic amount. As P&G's financial year is not identical to the calendar year, for P&G the last full business year during which the infringement took place is the financial year July 2003 - June 2004. Each party has confirmed the relevant value of sales for the calculation of the fines in their settlement submission.

Accordingly, the value of sales for each undertaking concerned is as set out in following Table(hypothetical figures):

<table>
<thead>
<tr>
<th>Undertaking</th>
<th>Combined value of sales in € in the relevant eight Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Henkel</td>
<td>[500,000,000 – 550,000,000]</td>
</tr>
<tr>
<td>P&amp;G</td>
<td>[660,000,000– 730,000,000]</td>
</tr>
<tr>
<td>Unilever</td>
<td>[225,000,000 – 250,000,000]</td>
</tr>
</tbody>
</table>

B. Determination of the basic amount of the fine

The basic amount consists of an amount of up to 30% of a company's relevant sales, depending on the degree of gravity of the infringement and duration of the infringement, and an additional amount of between 15% and 25% of the value of a company's sales, irrespective of duration.

Gravity: In order to decide that whether the proportion of value of sales to be considered in a given case should be at the lower end or higher end of scale reliance has to be made on gravity.

In order to determine the specific percentage of the basic amount of the fine, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.
So, as a matter of policy, in case of Horizontal price-fixing, market-sharing and output-limitation agreements which are usually secret, are, by their very nature, among the most harmful restrictions of competition and therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale so as to impose heavy penalties.

The relevant elements in the case so taken were assessed as follows:

(i) **Nature of infringement:**

The nature of infringement in this decision is termed as a single and continuous infringement of Article 101 of the TFEU and Article 53 of the EEA Agreement, the aim of which was to achieve market stabilization as well as to coordinate prices, as described in Section 4.

That type of anticompetitive behavior is by its very nature a very serious violation of Article 101 of the TFEU and Article 53 of the EEA Agreement.

(ii) **Combined market share:**

The undertakings participating in the infringement had a high combined market share in the majority of the Member States concerned by the infringement.

(iii) **Conclusion on gravity:**

Given the specific circumstances of this case, taking into account the nature of the infringement and the combined market share of the parties, the proportion of the value of sales to be taken into account should be 16%.

((C) **Duration:**

In order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales, which will be multiplied by the number of years of participation in the infringement. The period of less than six months will be counted as half year; periods longer than six months but shorter than one year will be counted as a full year.

In the given case, the actual duration of participation in the infringement of the undertakings concerned is taken into account, rounded down to the month. The duration of the infringement in this case is consequently 3 years and 2 months. Accordingly, the basic amount of the fine is multiplied by 3.16 (2m/12m).
(D) Additional Amount:

In addition, irrespective of the duration of the undertakings participation in the infringement, the Commission includes in the basic amount a sum of between 15% to 25% of the value of sales in order to deter undertakings from even entering into horizontal price-fixing and market-sharing agreements.

Taking into account the factors indicated above in the case relating to the nature of the infringement and the combined market share of the parties, the percentage to be applied for the purposes of calculating this additional amount is 16%.

Calculation and conclusion on basic amounts:

Based on these criteria, the basic amounts of the fines to be imposed on each undertaking in present case based example should therefore be as follows:

Base fine = Variable amount + Additional amount

- Variable amount = amount = up to 30% of Company relevant sales depending on gravity x Duration of infringement

- Additional amount = An amount between 15% to 25% of value of relevant sales, irrespective of duration.

<table>
<thead>
<tr>
<th>Undertaking</th>
<th>Sales in €</th>
<th>Duration</th>
<th>Basic Amount in €</th>
</tr>
</thead>
<tbody>
<tr>
<td>Henkel</td>
<td>[500,000,000 – 550,000,000]</td>
<td>3 y 2 m (3.16)</td>
<td>[310,000,000 – 360,000,000]</td>
</tr>
<tr>
<td>Unilever</td>
<td>[225,000,000 – 250,000,000]</td>
<td>3 y 2 m (3.16)</td>
<td>[150,000,000 – 170,000,000]</td>
</tr>
<tr>
<td>P&amp;G</td>
<td>[660,000,000 – 730,000,000]</td>
<td>3 y 2 m (3.16)</td>
<td>[440000,000 – 490,000,000]</td>
</tr>
</tbody>
</table>

Step 2: Adjustments to the basic amounts of the fine:

In setting the fine, the Commission may take into account circumstances that result in an increase or decrease in the basic amount as determined in Section 1 above. It will do so on the basis of an overall assessment which takes account of all the relevant circumstances.
A. **Aggravating circumstances:**  

The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as:

- where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 101 or 102 the basic amount will *be increased by up to 100 % for each such infringement established*;

- Refusal to cooperate with or obstruction of the Commission in carrying out its investigations;

- role of leader in, or instigator of, the infringement; the Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement.

B. **Mitigating circumstances:**

The basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as:

- Where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened: this will not apply to secret agreements or practices (in particular, cartels);

- Where the undertaking provides evidence that the infringement has been committed as a result of negligence;

- Where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;

- Where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so;

- Where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation.

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25 EC Competition Law - Alison Jones and Brenda Sufrin (Third edition)
In the present case it was found that there were no circumstances to apply the Aggravating or Mitigating circumstances have been found.

C. Specific increase for deterrence:

The Commission requires paying particular attention to the need to ensure that fines have a sufficiently deterrent effect and therefore it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates. The Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount.

In this case, in order to ensure deterrence in accordance with point 30 of the Guidelines on fines, it is appropriate to apply a multiplier factor to the fines imposed based on the size of the undertakings concerned. On that basis, the fine to be imposed on P&G (which has a world-wide turnover of EUR 56 400 million) is multiplied by 1.1.

D. Legal maximum:

As prescribed under the guidelines, that the final amount of the fine shall not, in any event, exceed 10 % of the ‘worldwide’ turnover in the preceding business year of the undertaking or association of undertakings, participating in the infringement, as laid down in Article 23(2) of Regulation No 1/2003.

Where an infringement by an association of undertakings relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by that infringement.

In the given case, the adjusted basic amounts do not exceed 10% of the total turnover of any of the undertakings concerned. Therefore, it is not necessary to adjust the amounts in the light of the undertakings' turnover.

E. Leniency Notice:

The Commission will apply the leniency rules in line with the conditions set out in the applicable notice to decrease the penalty level as a benefit to the whistle-blower.

In the present case taken as example:

Henkel submitted an immunity application on under the Leniency Notice. Henkel was the first undertaking to inform the Commission about the present cartel concerning HDD low suds powder. Henkel was granted conditional immunity from fines on 12 June 2008. Henkel's
cooperation fulfilled the requirements in the Leniency Notice. Henkel is therefore granted immunity from fines in this case.

In this case, every submission has significantly strengthened the Commission's ability to prove the existence of the infringement as well as its specific nature and its scope. It is only due to each and every submission from the leniency applicants that the Commission is able to demonstrate the existence of the cartel aiming at the stabilization of market positions and price coordination, as well as each participant's involvement in the cartel.

However, the timing of the cooperation is also an important factor which needs to be taken into account under points 23 to 26 of the Leniency Notice to determine the amount of the reduction.

As regards P&G, considering both the quality of its application and its timely cooperation from the beginning of the investigation, it should benefit from the maximum reduction foreseen for the first undertaking to provide significant added value, which is a reduction of 50%. As regards Unilever, considering the delay in its cooperation, in particular the fact that it made its first submission only in 2009, which is more than one year after the start of the investigation, it is not justified to grant it the maximum percentage of reduction foreseen for the second undertaking to provide significant added value. In view of the quality and the timing of its application, a reduction of 25% is therefore granted to Unilever.

In the light of the above, P&G is granted a 50% reduction of the fine and Unilever is granted a 25% reduction of the fine.

F. Ability to pay:

In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

Step 3: FINAL CONSIDERATIONS:

The Commission may, in certain cases, impose a symbolic fine. The justification for imposing such a fine should be given in its decision.

Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified.
These Guidelines will be applied in all cases where a statement of objections is notified after their date of publication in the Official Journal, regardless of whether the fine is imposed pursuant to Article 23(2) of Regulation No 1/2003 or Article 15(2) of Regulation 17/62.

The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 in the present case are set out in Table 3:

<table>
<thead>
<tr>
<th>Undertaking</th>
<th>Fines</th>
</tr>
</thead>
<tbody>
<tr>
<td>Henkel</td>
<td>EUR 0</td>
</tr>
<tr>
<td>P&amp;G</td>
<td>EUR 211,200,000</td>
</tr>
<tr>
<td>Unilever</td>
<td>EUR 104,000,000</td>
</tr>
</tbody>
</table>

**CONCLUSION OF CASE**

In short, the Henkel, P&G and Unilever undertaking found to infringed the competition laws Article 101 of TFEU and Article 53 of the EEA for a period of 3 year 16 days, and on account of informant, the Henkel under leniency factor saved from penalties, whereas P&G fined for Euro 21,12,00,000 (after 50% leniency) and Unilever in absence of proper cooperation was fined for Euro 10,40,00,000 (after 25% leniency) for its infringement’s.

This process has been followed in the following cases as well in same manner as given above:

a) **Exotic Fruit (Bananas)-(COMP/39482)**\(^{26}\): This case was decided by the commission on 12.10.2012 wherein penalties were imposed by following the above 3 step approach and fines were imposed as follows:

   i) Chiquita Brands International, Inc., Chiquita Banana Company BV, Chiquita Italia SpA, jointly and severally: EUR 0 (full immunity via leniency policy).

   ii) FSL Holdings NV, Firma Leon Van Parys NV, Pacific Fruit Company Italy SpA, jointly and severally: EUR 8 919 000.

These undertakings were infringed in violation of Article 101 of the Treaty from 28 July 2004 until 8 April 2005 by participating in a single and continuous agreement and/or concerted practice regarding the supply of bananas in Italy, Greece and Portugal.

b) **CRT Glass case (COMP/30605)**\(^{27}\): This case was decided by the commission on 19.10.2011 wherein penalties were imposed as follows:

\(^{26}\) [http://ec.europa.eu/competition/antitrust/cases/dec_docs/39482/39482_3130_4.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39482/39482_3130_4.pdf)

\(^{27}\) [http://ec.europa.eu/competition/antitrust/cases/dec_docs/39605/39605_2700_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39605/39605_2700_3.pdf)
i) On Samsung Corning Precision Materials Co. Ltd.-EUR 0

ii) On Nippon Electric Glass Co. Ltd.-EUR 43,200,000

iii) On Schott AG-EUR 40,401,000

iv) On Asahi Glass Co. Ltd.-EUR 45,135,000

These undertakings were infringed in violation of Article 101 of the Treaty and article 53 of EEA Agreement by participating in anti-competitive practices with view to restrict price competition within EEA in CRT Glass market.

Similar has been the position in case of Liquid Crystal Display (LCD) case as decided on 08.12.2010.

4.2.3 Powers of the European Commission and to levy fines for non-compliance of orders and directions under EU Competition Laws:

In order to ensure that the rules on competition concerning agreements, decisions of associations of undertakings and restrictive practices (Article 101) and abuses of a dominant position (Article 102), which are liable to be anticompetitive, are applied, the Commission has a number of powers to take decisions, to conduct investigations and to impose penalties. It exercises these powers when, following a complaint or on its own initiative, it considers in a given case that there has been a violation of Article 101 or 102 TFEU. Some of its powers which interalia includes:

i. decision finding and terminating an infringement:

ii. A decision ordering interim measures

iii. A decision making commitments binding:

iv. A decision finding that Articles 101 and 102 TFEU are inapplicable

v. Conduct sector inquiries

vi. Request for information

vii. Take statements

viii. Conduct inspections

The Commission also has the power to impose the following penalties / fines on undertakings and associations of undertakings for non-compliance of its orders / directions:
Fines under article 23:

(For supply of incorrect and misleading information – offence analogues to section 42-46 of Indian Competition Act, 2002):

The Commission may impose on undertakings and associations of undertakings fines not exceeding 1% of the total turnover in the preceding business year where, intentionally or negligently, supply incorrect, incomplete or misleading information in response to a request or do not supply information within the required time-limit or they produce the required books or other records related to the business in incomplete form during inspections or refuse to submit to inspections which have been ordered or refuse to reply to a question during an inspection or reply in an inaccurate, incomplete or misleading manner or seals affixed by officials authorised by the Commission have been broken.

Periodic penalty payments (article 24): For Continuance of infringement of Competition Laws – offence analogues to section 42 of Indian Competition Act, 2002:

The Commission may also impose on undertakings and associations of undertakings periodic penalty payments not exceeding 5% of their average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them to put an end to an infringement; comply with a decision ordering interim measures; comply with a commitment made binding; supply complete and correct information which it has requested and/or submit to an inspection which it has ordered.

Thus, the close reading would show the EU Competition empowers the authority to impose basic fine up to 30% of the turnover of the infringed product which is further multiplied up to 100% for aggravating circumstances (where repetition and continuance is the highest facts amongst others) and discount is allowed on account of leniency for mitigating factors up to 100%. The basic fine so computed is subject to levy of Additional amount which varies from 15% and 25% of irrespective of duration of infringement. However, these fines are subject to 10% of the total turnover of the company / enterprise or each of the enterprise / company which is member of such infringement.

Now, let us understand the penalty provision of UK Competition Laws in comparison to USA and EU Competition Laws:
4.3 **UK COMPETITION LAW:**–

The doctrine of restraint of trade is of early vintage in English law, with Dyer’s Case (1414) often identified as a founding precedent. It has provided the base for an attempt by courts to reconcile the freedom to trade with the freedom to contract and restricts restraint of trade as being void.

Modern statutory competition policy first emerged in the aftermath of the Second World War, but did not prove to be very effective. Indeed, it was only in 2000 with the coming into force of the Competition Act 1998 (hereinafter referred to as ‘CA, 1998’), and 2002 with the passage of the Enterprise Act that the United Kingdom saw the completion of a rounded scheme of law that promotes competition and economic efficiency, by repealing the then Restrictive Trade Prices Act 1976, the Resale Prices Act 1973.

The principal domestic law relating to competition in the UK is the ‘Competition Act, 1998’. The ‘Enterprises Act, 2002’, is complementary to their Competition Act and **furthers the deterrence effect by introducing criminal penalties**.

The two sets of competition rules apply in parallel. Anti-competitive behavior which may affect trade within the UK is specifically prohibited by Chapters I and II of the CA,1998 and the Enterprise Act 2002. Where the effect of anti-competitive behavior extends beyond the UK to other EU-member states, it is prohibited by Articles 101 and 102 of the TFEU.

It would be interesting to note that these articles are same as set out in Article 101 (EU), as according to section 60 of the CA,1998, the domestic law in the UK relating to the Competition should be consistent with the corresponding questions arising in the competition law within the Community. Any issue relating to effect on competition with a Community Dimension is provided to be dealt with in accordance with the European Community law, viz. Articles 101 and 102 of the EU Treaty.

4.3.1 **Enforcement of competition law**

UK competition authorities and courts are empowered to apply and enforce the entirety of Articles 101 and 102 of the TFEU, in addition to their existing powers to enforce the Competition Act 1998. These competition authorities have significant powers to investigate suspected anti-competitive behavior (including entering and searching business and private premises with a warrant) and to impose significant fines on businesses found to have infringed competition law. Criminal sanctions are also possible for the most serious breaches of competition law.
The Office of Fair Trading (OFT) is the principal competition law enforcement authority in the UK, though there are a number of sectorial regulatory authorities with similar powers to enforce competition laws in their respective sectors (for example, OFGEM for the electricity sector and OFWAT for the water sector).

The Enterprise Act, 2002 provided the OFT with certain new powers for investigation into cartel offenses and those who hinder the investigation will be themselves liable for imprisonment or fine or both.

Competition Commission (CC) has a role of making investigations which has also been given in Part 4 of The Enterprise Act, 2002. The CC replaced the Monopolies and Mergers Commission in 1999, following the commencement of the CA, 1998. The Enterprise Act introduced a new regime for the assessment of mergers and markets in the UK. The CC’s role in such cases is now clearly focused on identifying and remedying competition issues, replacing a wider public interest test in the previous regime. It also continues to act as an appellate body in relation to regulatory—particularly price control—decisions taken by economic regulators.

In the old regime, decisions made by the CC were merely recommendations to the Secretary of State, but in new regime put into place by the Enterprise Act, its decisions, both in the identification of adverse effects arising from a substantial lessening of competition and in the remedies designed to deal with these effect will be determinative. However, they may be judicially reviewed at the CAT.

The CC does not initiate inquiries independently. All its activities are undertaken following a reference to it by another authority. Mergers and Market investigations are referred for investigation by the Office of Fair Trading (OFT) or, sometimes, the Secretary of State.

The Enterprise Act enables the OFT (and the sector regulators) to investigate markets and, if they are concerned that there may be competition problems, to refer those markets to the CC for in-depth investigation. So, this system has what is basically a two tier structure. At the first tier are the OFT (in the area of merger and monopoly control) and the various sector specific regulators (in their particular sectors). The second tier consists of the CC and the CAT. The CC is an expert body with the resources and expertise to conduct detailed investigations into highly complex issues, and to design remedies whenever adverse effects are found.

The CC is required by the Enterprise Act to decide whether any feature or combination of features in a market prevents, restricts or distorts competition, thus constituting an adverse effect on competition (AEC). Market investigations enable the CC to undertake a broad, in-depth assessment of the complexities of a market and focus on the functioning of a market as a whole rather than on a single aspect of it or on the conduct of an individual firm within it.

If the CC finds that features of a market are harming competition, it must seek to remedy the harm either by introducing remedies itself or recommending action by others.
The competition authorities (such as the CC and the OFT) can impose not only fines and penalties, but can also order damages (compensation) to be paid and injunctions through UK civil courts. The maximum period for the CC's investigation is two years.

The Secretary of State (SoS) may intervene in cases involving specified public interest considerations (currently only national security) by giving an intervention notice. Where an intervention notice has been served, the CC will decide whether there has been an adverse effect on competition in the market and what remedies would be appropriate, and will report to the SoS. If the SoS decides that a public interest consideration is relevant to the proposed remedies, the SoS will take action, taking into account that consideration. If the SoS decides that no public interest consideration is relevant, the matter will revert to the CC to take action.

4.3.2 Legislations

Since the UK follows both, domestic competition laws and EU Competition Laws, it would be better that how these laws are dealt with in order to levy penalty if the enterprise of undertaking found infringing the provisions of competition laws.

**Competition Act, 1998:**

This Act is broadly based on the European competition law regime with prohibitions on anti-competitive agreements and the abuse of a dominant position (Chapter I and Chapter II of the 1998 Act, respectively). As stated above, these provisions will come into force on 1st March, 2000. The 1998 Act replaces the Restrictive Trade Prices Act 1976 and the Resale Prices Act 1973.

**Chapter I:** It prohibits agreements that prevents, restricts or distort competition. Section 2 of chapter I of the UK Competition Act, deals with anti-competitive agreements.

**Chapter II:** prohibits abuse of dominant position. Section 18 provides that any conduct of undertaking which amounts to abuse of its dominant position are prohibited if it affects the market within UK.

**Articles 101 and 102** of the TFEU are the EU law equivalents of these UK prohibitions and apply where the anti-competitive agreement or conduct may have an effect on trade between EU Member States. Since 1 May 2004 the OFT has the power to apply and enforce Articles 101 and 102 of the TFEU (formerly known as Articles 81 and 82 of the EC Treaty) in the UK. When doing this, it is imperative to follow the case law of the European Courts. When applying the
PENALTIES FOR INFRINGEMENT OF COMPETITION LAW

Competition Act 1998, section 60 of the Competition Act 1998 (i.e. Principles to be applied in determining questions) requires to ensure that they act consistently with EU law.

The OFT is empowered to levy penalty u/s Section 36 of the Competition Act, which has intentionally or negligently committed an infringement of Article 81, Article 82, the Chapter I and/or Chapter II prohibition.

Where anti-competitive agreements or behavior have an effect on trade across EU Member States, it is likely that the European Commission would be best placed to address take any necessary action under the TFEU. On these occasions it may be necessary to share information with the Directorate General of Competition at the European Commission as well as with other national competition authorities

The Enterprise Act, 2002

The Enterprise Act, 2002 commenced in two stages. It received Royal Assent in November 2002 and its provisions came into force on 1st April and 20th June 2003. The Act has made a number of significant reforms to competition and consumer law enforcement in the UK.

The provisions of the Enterprise Act are largely complementary to those of the Competition Act, which remains in force and largely replacing Fair Trading Act, 1973. As a result, the substantive Chapter I and Chapter II prohibitions remain in place and the general CA, 1998 procedures for investigation and enforcement continue to apply.

Some of the following amendments have been made by the Enterprise Act, 2002:

Establishment of OFT: OFT has been established as a legal body, replacing the former statutory office of the Director General of Fair Trading. The OFT is empowered to apply and enforce the new competition and consumer measures alongside the Competition Commission, the sectorial regulators, the Competition Appeal Tribunal, Trading Standards Departments and others. Under the old law, OFT did not exist as a legal entity for Competition Laws but was merely acted as administrative support for DG of fair Trading.

Criminalization of Cartel Offence: The substantive penalties applied to undertakings for a breach of the CA, 1998 continue to apply. Alongside the CA, 1998 regime, which applies to undertakings, the Enterprise Act introduces a criminal offence for individuals who dishonestly engage in certain types of cartel agreements. So, Under the Enterprise Act there will be no change to the penalties applied to undertakings for infringing the Chapter I or Chapter II prohibitions.

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28 OFT guideline 441-How did Enterprise Act, 2002 changed the Competition Act, 1998 regime
Section 188 provides that an individual will be liable to criminal prosecution if he dishonestly agrees with one or other person that two or more undertakings will engage in one of the prohibited activities, these specific prohibited cartel activities have been provided under sub-section(2) as-price-fixing, limitation of production or supply, the sharing of markets and bid-rigging.

Section 190 provides for penalty and prosecution in case of cartel offense u/s 188, i.e. imprisonment up to 5 years or fine or both. However, no proceedings may be brought for an offense u/s 188 in respect of an agreement outside the UK unless it is implemented in whole or in part in UK.

The Enterprise Act allows the OFT to issue notices known as no-action letters giving individuals immunity from prosecution in England, Wales and Northern Ireland.

Disqualification of directors: The Act also amends the Company Directors Disqualification Act 1986 to provide the OFT with power to apply to the court for orders disqualifying directors of companies which have committed a breach of competition law. These orders are called Competition Disqualification Orders (CDOs). The maximum period of disqualification under a CDO is 15 years. During the period in which a person is subject to a CDO, it is a criminal offence for that person to be a director of a company or take on certain other roles relating to company management.29

Establishment of CAT (Competition Appeal Tribunal): The Enterprise Act establishes the CAT as a specialist independent body for appeals on matters relating to competition law. This replaces the Competition Commission Appeal Tribunals (CCAT) that was established as part of the Competition Commission by the CA, 1998.

Third party appeals: Previously third parties could only appeal a decision of the Director General of Fair Trading, other than a decision concerning the imposition of any penalty or the withdrawing or varying of a decision following a third party appeal, after first applying to the Director General requesting the Director General to withdraw or vary the decision. The third party’s right of appeal to the CCAT was then against the Director General’s refusal to do so. Under the Enterprise Act this procedure is abolished and any third parties with sufficient interest in the decision will have a right of appeal directly to the CAT.

Market investigation references: The Enterprise Act replaces the Director General’s monopoly reference powers with a new power for the OFT to make market investigation references to the Competition Commission. The OFT will, as a matter of policy, consider whether a matter which needs investigation involves an infringement of the Chapter I or Chapter II prohibitions, before

29 Company directors and competition law -OFT Guidance 1340(June 2011)
it considers whether to initiate a market study or make a reference to the Competition Commission under the Enterprise Act’s market investigation provisions.

The Enterprise Act also introduces the opportunity for consumer bodies, designated by the Secretary of State, to make super-complaints to the OFT and to the Regulators when they believe that features of a market are significantly harming the interests of consumers. It also repeals the Competition Act provisions relating to the disclosure of information and replaces them with more detailed provisions for the handling and disclosure of information received by the OFT and other public bodies and Repeals the exclusion for professional rules. The Enterprise Act repeals Schedule 4 of the Competition Act which excluded designated professional rules from the Chapter I prohibition.

Thus the UK competition law prohibits Anti-Competitive Agreements and Cartels and abuse of dominant position by an individual or enterprise or by an undertaking, which are similar to EU, USA and India.

4.3.3 Penalties under UK Law:

In UK the penalty for infringement of competition law is levied by the office of OFT and in some cases by CC and the Competition Act, 1998 (Determination of Turnover for Penalties) Order, 2000 provides the guidelines to OFT as how to determine the appropriate amount of penalty.

The OFT (not including the Regulators) has issued the following revised guidance as to the appropriate amount of a penalty to reflect changes arising out of EC Regulation 1/2003 (the Modernization Regulation) and the entry into force of the Enterprise Act 2002. In addition, the guidance has been revised in the light of judgments of the CAT and the OFT’s experience in applying the guidance since the CA, 1998 came into force. This revised guidance replaces the DGFT's guidance as to the Appropriate Amount of a Penalty which was approved by the SoS under section 38(4) of the CA, 1998 on 29 January 2000.

It is to be noted that under the CA, 1998, section 36 provides for financial penalties and sections 38(1) and 38(1A) of the Act require the OFT to prepare and publish guidance as to the appropriate amount of a penalty, including guidance as to the circumstances in which, in determining a penalty, the OFT may take into account the effects of an infringement in another Member State. Section 38(2) of the Act provides that the OFT may alter the guidance on penalties at any time. Section 38(3) of the Act provides that, if altered, the OFT must publish the guidance as altered. Under section 38(4) the SoS must approve any guidance on penalties before it can be published. Whenever preparing or altering any guidance or penalties, sections 38(6) and (7) require the OFT to consult such persons as it considers appropriate. These particular provisions apply to the OFT alone and not also to the Regulators. By virtue of section

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30 Section 36(8) of the Act and the 2000 Order, as amended by the 2004 Order.
38(8) of the Act, the OFT must have regard to the guidance for the time being in force when setting the amount of any financial penalty to be imposed.

This revised guidance was approved by the SoS as required under section 38(4) of the Act for publication on 21 December 2004.

4.3.4 Method of Calculation of Penalty:

A financial penalty imposed by the OFT under section 36 of the Act will be calculated following five step approach 31:

These steps has been explained with the help of a recent case law i.e. Reckitt Benckiser Healthcare (hereinafter referred to as “RB’s”), 2011. 32

The brief facts of the case is that on investigation, OFT found that it had abused its dominant position in the market for the NHS supply of alginate and antacid heartburn medicines. The OFT found that RB’s abused its dominant position by withdrawing and de-listing Gaviscon Original Liquid from the NHS (National Health services) prescription channel in 2005. The facts of the case are that OFT found that RB’s withdrew Gaviscon Original Liquid with the intention of limiting pharmacy choice and hindering competition from suppliers of generic medicines. Where a branded medicine's patent has expired and a 'generic name' has been assigned to it, GPs (General Practitioner) can use their prescribing software to search for the brand and then provide patients with an 'open' prescription that refers to its generic name. Pharmacies that receive these prescriptions can choose whether to dispense the relevant brand or equivalent generic medicines. This choice provides for strong price competition between pharmaceutical suppliers and can result in considerable savings to the NHS. The OFT further found that RB’s withdrew NHS packs of its profitable Gaviscon Original Liquid from the NHS prescription channel after the product's patent had expired but before the publication of the generic name for it, so that more prescriptions would be issued for its alternative product, Gaviscon Advance Liquid. Pharmacies that receive prescriptions for Gaviscon Advance Liquid must dispense it, as it is patent protected and there are no generic equivalent medicines. The penalty so imposed in April 2011, was on the basis of agreement with the defendant for abuse of dominant position the penalty was £10.2 million.

**Step 1:** Calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking

The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regarded to:

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31 OFT’s guidance 423 as to the appropriate amount of a penalty
32 Decision no.CA98/02/2011,Case:-CE/8931/08 (12th April 2011)
• Seriousness of the infringement, and;

• **Relevant turnover** of the undertaking.

The more serious and widespread the infringement, the higher the starting point is likely to be.

*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 business year. Relevant turnover will be calculated after deduction of sales rebates, value added tax and other taxes directly related to turnover. The starting point may not in any event exceed 10 per cent of the relevant turnover of the undertaking.

Where an infringement involves several undertakings, an assessment of the appropriate starting point will be carried out for each of the undertakings concerned, in order to take account of the real impact of the infringing activity of each undertaking on competition.

Now as per the first step, the OFT finds that the relevant product market in this case is no wider than the supply of alginates and antacids by prescription and the relevant geographic market is no wider than the UK.

The actual percentage which is applied to the relevant turnover at Step 1 of the penalty calculation depends upon the nature of the infringement. The more serious and widespread the infringement, the higher the starting point is likely to be. When making this assessment, the OFT considers a number of factors, including the nature of the product/services, the structure of the market, the market share of the undertaking involved in the infringement, the effect on competitors and third parties and direct or indirect damage caused to consumers.

The OFT considers that the Withdrawal represents a serious infringement and OFT finds that RB has held a market share (by value) of over 80 per cent for a number of years. Existing competitors to RB face significant barriers to expansion, and new entrants to the market face significant barriers to entry and expansion.

• The OFT finds that the objective of the Infringement was to hinder competition by Withdrawal to hinder development of competition in relevant market instead of meeting the threat of full generic competition by offering more favourable prices to its customers.

• At the time of the Withdrawal, it was reasonable to expect that it would (i) hinder the development of the increased price competition that is typically associated with full generic competition; and (ii) result in Pinewood and potential entrants to the market having to incur higher detailing and/or marketing costs to win market share than would have otherwise been the case.
• It was reasonable to expect that the Withdrawal would not generate any material benefits to consumers or to the NHS in advance of its restrictive effects.

The OFT also notes that conduct of this type in the pharmaceutical sector has the potential to hinder the development of full generic competition, and that the effects of doing so can last for a considerable period and prevent significant price decreases. These factors reinforce the assessment that the Infringement was serious in nature.

Taking into account the above factors, the OFT concludes that a starting point of 7 per cent of RB's relevant turnover is appropriate for determining its penalty at Step 1.

**Step 2: Adjustment for duration**

The starting point may be increased or, in exceptional circumstances, decreased to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement. Part years may be treated as full years for the purpose of calculating the number of years of the infringement.

Now in the present case taken as example, the OFT finds that the infringement took place in June 2005 such that the action of the withdrawal had a duration of less than a year. Part years may be treated as full years for the purpose of calculating the number of years of the infringement. The OFT has therefore made no increase or decrease for duration at Step 2 of the penalty calculation.

**Step 3: Adjustment for other factors**

In considering whether any adjustment to the penalty is required for the purposes of deterrence, the OFT considers both the need specifically to deter the infringing undertaking from engaging in such behaviour in future ('specific deterrence') and also the need more generally to ensure that other undertakings are deterred from engaging in similar behaviour ('general deterrence').

So in considering whether the financial penalty calculated at the end of Step 2 is sufficient, the OFT may have regard to a range of considerations. These may include the undertaking's size and financial position (by reference to indicators such as total turnover profits, dividends and margins) and the OFT's estimate of any potential economic or financial benefits made by the infringing undertaking(s) from the infringements.

The assessment of the need to adjust the penalty will be made on a case by case basis for each individual infringing undertaking. This step may result in either an increase or reduction of the financial penalty calculated at the earlier step.
In exceptional circumstances, where the relevant turnover of an undertaking is zero (for example, in the case of buying cartels) and the penalty figure reached after the calculation in Steps 1 and 2 is therefore zero, the OFT may adjust the amount of this penalty at this step.

Now in the present problem,

RB's penalty after Step 2 has to be considered in the context of Reckitt Benckiser Group plc's total worldwide turnover of £7,753 million and Reckitt Benckiser (UK) Limited's turnover of £601 million in the year ending December 2009. RB's penalty figures after Step 2 represent an extremely small proportion of the respective turnover of RB worldwide and in the UK given the nature of the infringement. Also according to the worldwide and UK profits, the figure attained at Step 2 represent a very small portion.

Having regard to those figures and given the nature of the infringement, the OFT considers that the financial penalty reached after step 2 would not provide a sufficient deterrent and the penalty calculation must also recognise the significant financial gains that dominant companies such as RB can potentially realise by engaging in such conduct, in particular this type of conduct will often be capable of restrictive effects that last for some time wherein such dominant firms are able to generate financial gains over a considerable period. In this case the OFT has found that it was reasonable to expect the Withdrawal's restrictive effects to last for a period of at least seven years. Thus, the OFT considers that the expected gain is a relevant factor when determining the appropriate penalty and in present case feels that it is necessary to increase RB's penalty significantly at Step 3.

In determining the appropriate increase at Step 3 in this case, the OFT has also had regard to the fact that this specific form of abuse (the withdrawal and de-listing of a product) had not previously been found to be an infringement of the Chapter II prohibition or Article 102 TFEU at the time of the Infringement. Given the complex nature of the analysis that has been necessary in this case, the OFT considers the absence of guiding case law at the time of the Infringement is, in the circumstances of this case, a relevant factor in determining the appropriate level of penalty. Thus, in the specific circumstances of this case, and having assessed the above factors in the round, the OFT considers that it is proportionate to increase RB’s penalty. Whilst such figures remain comparatively small the OFT considers that they will act as a sufficient deterrent to RB and others, and the adjusted penalty would amount to a substantial part of the relevant turnover identified in Step 1. The OFT also notes that the adjusted penalty would mean that the Step 1 figure would have been subject to a multiplier of slightly over [10 – 15]. Given the circumstances and matters already referred to, the OFT considers that such a multiplier is proportionate.
PENALTIES FOR INFRINGEMENT OF COMPETITION LAW

Step 4: Adjustment for further aggravating or mitigating factors

The basic amount of the financial penalty, adjusted as appropriate at steps 2 and 3, may be increased where there are other aggravating factors, or decreased where there are mitigating factors.

Aggravating factors includes such as role of the undertaking as a leader in, or an instigator of the infringement, involvement of directors or senior management, retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement, continuing the infringement after the start of the OFT’s investigation, repeated infringements by the same undertaking or other undertakings in the same group, infringements which are committed intentionally rather than negligently, and retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.

Mitigating factors includes such as role of the undertaking, for example, where the undertaking is acting under severe duress or pressure, genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement, adequate steps having been taken with a view to ensuring compliance with Articles 81 and 82 and the Chapter I and Chapter II prohibitions, determination of the infringement as soon as the OFT intervenes, and cooperation which enables the enforcement process to be concluded more effectively and/or speedily.

Provided that in cases of cartel activity an undertaking which co-operates fully with the investigation may benefit from total immunity from, or a significant reduction in the level of, a financial penalty, if it satisfies the requirements for lenient treatment set out in part 3 of this guidance.

In the present problem, the OFT has decided to make no increase in penalty for aggravating factors.

The OFT is satisfied that RB has demonstrated that it has taken adequate steps to ensure compliance, in particular, by investing significant resources into developing a comprehensive and effective competition law compliance policy and thus OFT has recognised this as a mitigating factor and decreased RB's penalty by five per cent at Step 4 of the penalty calculation.

Step 5: Maximum Legal Penalty and avoidance of double jeopardy

The final amount of the penalty calculated according to the method set out above may not in any event exceed 10 per cent of the worldwide turnover of the undertaking in its last business year calculated in accordance with the provisions of the 2000 Order, as amended by the 2004
Order. This turnover is not restricted to an undertaking’s turnover in the relevant product market and relevant geographic market.

The business year on the basis of which ‘worldwide turnover’ is determined will be the one preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it. The penalty will be adjusted if necessary to ensure that it does not exceed this maximum.

Where any infringement by an association of undertakings (e.g. a trade association) relates to the activities of its members, the penalty shall not exceed 10 per cent of the sum of the worldwide turnover of each member of the association of undertakings active on the market affected by the infringement.

If a penalty or fine has been imposed by the European Commission, or by a court or other body in another Member State in respect of an agreement or conduct, the OFT must take that penalty or fine into account when setting the amount of a penalty in relation to that agreement or conduct as per section 38(9) of the Competition Act. This is to ensure that double jeopardy is not caused.

In the present problem taken as example, the OFT has assessed RB's penalty against the test set out in this step and is satisfied that no reduction to RB's penalty at Step 5 of the penalty calculation is necessary in this case.

Also, the OFT must, when setting the amount of a penalty for a particular course of conduct, take into account any penalty or fine that has been imposed by the Commission or by a court or other body in another Member State in respect of the same course of conduct. As there is no such applicable penalty or fine in respect of RB's conduct, no adjustments are necessary in this case.

RB had concluded an Early Resolution agreement (ERA) with the OFT. The Early Resolution agreement anticipated a decrease in the penalty of up to 15 per cent if RB co-operated fully throughout the investigation and until the conclusion of any resulting action by the OFT as set out in the agreement. The OFT is satisfied that RB has fully co-operated with the terms of its Early Resolution agreement and has therefore decreased RB's penalty by 15 per cent after Step 5 of the penalty calculation.

On entering into the ERA it was necessary for the OFT to stipulate the penalty that it would impose upon RB. Under the terms of the ERA, the OFT stated that it would impose a penalty of £10,175,000 after a reduction for early resolution.

In particular, given the small difference between the two penalty figures, the OFT considers that both the penalty agreed in RB's ERA and the penalty calculated by reference to RB's
relevant turnover in the last business year preceding the date on which the Infringement ended are sufficient to meet the twin objectives of the OFT's penalties policy, and are proportionate, having regard to RB's size and financial position and therefore OFT imposes a penalty of £10,175,000.

**Leniency provisions**

Immunity or reduction may be granted in financial penalty in case where undertakings participating in cartel activities wish to terminate their involvement and inform the OFT of the existence of the cartel rather than being deterred from risk of incurring huge penalties. However, such grant of reduction by OFT is discretionary and in exercising this discretion it must be satisfied that the undertaking should benefit from a reduction.

The OFT considers that it is in the interest of the economy of the United Kingdom, and the European Community more generally, to have a policy of granting lenient treatment to undertakings which inform it of cartel activities and which then co-operate with it as cartel activities they are often of secret nature which justifies such a policy. So, it acts as a deterrent in an indirect way.

**4.3.5: Conclusion**

The provision of Competition Laws in UK appears to be more deterrent upon inclusion of provision of criminal sentencing. The UK, being part of Europe also deals with EU Competition Law for which a proper mechanism is in place. The penalty provisions are determined by taking into consideration the relevant turnover (turnover of the product infringed in relation to geographical market) coupled with the serious of infringement, then this relevant turnover is to be adjusted with time duration (where the part of the year may be considered as full year), and after providing the other factor adjustment, as stated above, the same shall be adjusted with the aggravating and mitigating factors, as per OFT guidelines, the penalty so derived shall be limited to 10% of the worldwide turnover of the undertaking and in case of offence is by a Cartel, then each of the member of that cartel shall be levied the penalty for infringement, subject to maximum of 10% of worldwide turnover of that member of a Cartel.

In addition to that there is a provision for disqualification of directors up to 15 years participating in such infringement and thus shows that the penalty provisions are deterrent enough.
CHAPTER-5

COMPARITIVE STUDY OF INDIA WITH USA, EU AND UK COMPETITION LAW PENALTY REGIMES:

In today’s global era, the Competition Law of India cannot be viewed in isolation and in order to ascertain the adequacy or inadequacy of it, it would be better that it is now compared with Competition laws and rules applicable in US, EU and UK.

Infringements of competition law, such as cartel agreements and abuse of dominant positions, are highly damaging to consumer welfare and consequently to the financial economy of a country. Thus, in order to create deterrence amongst companies and enterprises from committing such infringements of competition laws, and detecting those organizations and individuals that continue to undertake anti-competitive activity is one of the most important tasks for competition authorities internationally, and such deterrence can be created by way of hefty penalties.

The comparison has been made as follows:

5.1 FINE LEVELS:

The UK approach of determining penalties is similar to that of the US and EU regimes. In the first stage, a base level is set that reflects the overall gravity of the offence. It is calculated as a percentage of the turnover achieved in the market affected over the duration of the infringement.

In India the approach is somehow on same lines but some variations. They are as following:

i. The legal maximum limit is 10% of average turnover for the last three preceding financial years of the person or enterprise.

ii. However, EC fines are capped at 10 per cent of the undertaking’s worldwide turnover, as the level of fines exists in the UK, and other EU jurisdictions. There is no fixed upper limit on fines set in the US under the ‘Alternative Fine Provisions’ but has been fixed to $100 million in the Sherman Act.

iii. In India only the word ‘turnover’ has been used and not ‘global / worldwide turnover’ as used in case of UK and EU. However, the term ‘relevant turnover’ has been defined in the other jurisdictions compared herein, which provides for a global turnover of the undertaking.
iv. No specific minimum cap / base level fine has been given in case of India. Whereas the OFT regime has a relatively low base level, capped at 10% of relevant turnover. The US starts at 20% and the European Commission's (EC) starting point is closer to 30% for the most serious types of infringement.

v. While calculating the penalty, the ‘turnover’ in case of India, it is to be noted that it has been defined u/s 2(y) of the Competition Act, which reads – ‘turnover’ includes value of sale of goods or services’, and this being an unqualified definition, it is taken as total turnover of the enterprise / undertaking based on the decisions taken by CCI till now, while in other three jurisdictions it is of the turnover of the relevant product in affected market.

5.2 INDIVIDUAL SANCTIONS:

Fundamental differences exist in the area of penalties for individuals.

Administrative fines on individuals are possible in United Kingdom, where a company has infringed competition law; its directors can face Competition Disqualification Orders, barring them from acting as a company director or shadow director for up to 15 years.

In contrast, the US does not have separate administrative and criminal penalties. All antitrust penalties are criminal.

Even Criminal sanctions, including imprisonment, are available in the UK. On Commission of the cartel offence may attract, among other things, up to five years imprisonment as per section 188 and 189 of Enterprise Act, 2002.

In the US, the use of imprisonment is extensive, and overtime both the number and duration of prison sentences imposed are increasing. Imprisonment is widely regarded as a very strong means of deterring anti-trust infringements and even a relatively low probability of facing a jail term may prove significantly deterrent relative to jurisdictions where this possibility is altogether absent.

No criminal sanctions can be imposed by the European Commission, nor are such criminal sanctions are currently available in India for infringement of competition laws.

In India, criminal sanctions for individuals are provided only u/s 48 of the Competition Act, i.e. in case of contravention of commissions order by companies wherein every person who at time of contravention was in charge/responsible for company's conduct would be guilty and punishable.
While not exonerating the undertaking of its liability in any way, it may seem unfair to find the undertaking alone liable for the isolated and autonomous acts of one of its employees. Imposing a fine on an undertaking punishes the shareholders and customers, since the latter will pay higher prices to cover the fines if the pressure of competition is not too strong and the undertaking is able to raise its prices, for the acts committed by persons who, in some cases, may have left the undertaking in the meantime. Thus, various personal sanctions should be developed in order to deter the persons so responsible for the anti-competitive act and such sanctions are not even transferable.

5.3 LENIENCY

The UK and the US offer relatively strong protection to the offenders under leniency rules, which is adjudged from the conduct and behavior of the offending undertaking / enterprise. In the UK, it is possible for individuals to benefit from leniency and to receive full immunity from criminal prosecution, as just we saw in case of Tobacco Manufacturers where the Sainsbury’s was exempted from fines. For the first individual applying for leniency in a personal capacity, the OFT can also issue a 'no-action' letter basically to encourage them to come forward.

In the US, not only can individuals benefit from immunity from criminal prosecution, but a company that is granted immunity by the US Department of Justice who co-operates with claimants in private actions will cease to be exposed to treble damages and instead be liable only for actual damages. In addition cooperating firms may cease to be subject to joint and several liabilities for the harm caused by other cartelists. The US can also offer immunity to a cartel member who discloses previously undetected antitrust offences involving a cartel different from the one that first brought that cartelist to the prosecutors' attention.

Leniency in the EU is also available which is adjudged from the conduct and cooperation during the course of investigation where EC can provide full immunity against penalties, as referred above in cited case of Henkel in detergent case.

In India, section 46 of the Act provides to Commission the power to impose a lesser penalty, if it is satisfied that any producer, seller, distributor, trader or service provider who was alleged to be included in any cartel activity or alleged to have violated section 3, has made a full and true disclosure in respect of alleged violations and it is vital for the commission in its investigation process provided such disclosure should have been made before commissions report u/s 26 is received.
5.4 SETTLEMENT

A settlement programme is another key feature of an effective penalty regime. Settlement refers to the practice whereby an infringer agrees the level of the penalty before a formal decision is made. It helps to reduce the cost of enforcement by allowing a speedier resolution of enforcement procedures in exchange for a (potentially) lower fine. A priori, settlement is thus more attractive for firms in jurisdictions where the outcome of formal proceedings is more uncertain (for example, Australia).

Settlement programmes are present in the UK penalty regime. They are very common in the US, where an estimated 90 per cent of cases are settled.\(^3\)

In EU a formal settlement procedure is followed. Policy laid out in the Commission Notice on the Conduct of Settlement Procedures (2008). Companies that acknowledge their liability can be rewarded with lower fines for reducing the burden on the EC's resources. The EC retains full discretion about which companies can benefit from settlement and the terms of the settlement.

However, in India there is no such settlement procedure.

5.5 COMPARISON OF FINING PRACTICES ACROSS JURISDICTIONS:

In this an effort has been made to analyze the process of fine determination in these four jurisdictions. It illustrates the stages of fine determination in these jurisdictions.

The UK (OFT), US (DOJ), EU (EC), all have similar approaches to determining penalties. In a first stage, a base level is set that reflects the overall gravity of the offence. It is calculated as a percentage of the turnover achieved in the market affected over the duration of the infringement.

The OFT regime has a relatively low base level, capped at 10 per cent of relevant turnover. The US starts at 20 per cent and the EC starting point is closer to 30 per cent for the most serious types of infringement. In addition to the determination of the starting point, the European Commission levies an additional fine or 'entry fee' for hard-core cartels.

In a subsequent stage, the base level is adjusted to take account of the size of the undertakings involved and to increase deterrence of particularly harmful behavior (for example, instigating the formation of a cartel, repeat offences, and coercion). Downward adjustments reflect non-

intentional infringement and assistance to the anti-trust authorities' investigation. The treatment of these factors varies significantly across jurisdictions.

Very marginal differences also exist in the way rules in different countries account for the duration of an infringement in setting the fine. In the UK, as is also the case for the EC, the base fine is based on one year of turnover (the last business year for which figures are available) and duration is accounted for by multiplying the base fine by the length of the period of infringement. In US duration enters in the base fine because the affected commerce is taken as the turnover of the company over the period of the infringement. The former approach leads to heavier fines for companies whose turnover increased over the duration of the infringement.

However, in India the fine-determination procedures are left to the Commission and no indication of a similar step-by-step procedure is found.

Thus, the generic process of final fine determination appears to be as follows:

| Base fine | Set with reference to relevant turnover |
| Adjustments | Set with reference to base fine; includes aggravating & mitigating circumstances |
| Fine cap | Binding statutory limit set with reference to global turnover |
| Leniency | Full immunity for decisive evidence, various reductions otherwise |

However, India does not appear to be fit in this structure as there is no indication of the authorities starting with the base fine.

The close look of the formation of Competition Act, 2002 would show that this Competition Act has been drafted after taking into consideration the circumstances and market behavior and problem faced by these western countries as the objective of this Act and the penalty provisions contained therein are more or less similar, and it appears that the difference in those competition laws and competition law of India is the result of due consideration of host of variable factors which are influenced from the history of the Country, education level of
population, awareness of competition laws, non-exposure of world market to maximum number of business ventures in India are some of the main reasons amongst others.

The penalty provision contained u/s 27(b) of the Competition Act, 2002 specifies the penalty up to 10% of the average turnover of preceding three years in case of infringement of competition laws by a company or enterprise or person, whereas in case of a Cartel, the penalty provisions specifies penalty up to three times of its profit of each year of continuance of such agreement for infringement or 10% of the turnover of the each year of continuance of infringement, whichever is higher.

From the above cited cases in Indian Scenario it would be clear that the Commission has taken into consideration the turnover of the enterprise as a whole and not the turnover of the infringed product or say turnover of the affected commerce as adopted by US, EU and UK Competition Laws.
CHAPTER- 6

FINDINGS, CONCLUSION & RECOMMENDATIONS:

6.1 FINDINGS

On the above study, it may be concluded that penalty provisions in USA, EU and UK are harsher and therefore acts as most effective deterrent, as USA has both financial and criminal penalties, EU and UK has penalty provisions which may be subject to maximum of 10% of the worldwide turnover of the enterprise. Between USA, EU and UK, one common factor exists while determining the penalty and fines are calculated as they adjust the basic fine with the aggravating and mitigating factors and allow the discount for leniency on account of cooperation and behavior of the undertaking / enterprise during the course of investigation. However, under US antitrust laws, the penalties are 20% of the affected commerce with criminal fines up to 8 times of the profits and profits are estimated @ 10%, thus, in other words, it becomes 100% of Turnover (20%+80%, subject to maximum of US$ 100 million in terms of provisions of Sherman Act.

Whereas, the Competition Law of India provides leverage with the Commission to levy fines up to 10% of the turnover of the company which means that the commission can exercise its right to choose the percentage after taking into consideration the aggravating and mitigating factors. As regards to the discounts, Section 46 of the Competition Act, 2002 provides leniency, which is in line with the EU and UK Laws. However, since there is no method has been prescribed to levy penalty under the Competition Act, 2002, it may be treated that the option to choose % of penalty to be levied, may be treated as arbitrary, whereas in case of USA, EU and UK there is a well-defined method to calculate penalty and then limit those penalty to 10% of the worldwide turnover or US$ 100 million, as the case may be, in case of EU, UK and USA respectively.

As regards to adequacy of inadequacy of the penalty provisions in Competition Laws of India, if we consider the Indian Economic Scenario in the light of the Competition Laws, we will find that the penalty provisions contained in the Indian Competition Laws in terms of conditions prevails in our country are adequate. We must not forget that the competition laws of the developed country cannot be ipso-facto be applied due to host of variable factors and some of them amongst others are as under:

a. India does not have such kind of Multi-National Corporations as they exist in Europe and USA, where the product of a company is marketed across continents and thereby increasing the product turnover which is taken into consideration while determining the
penalties whereas in India it does not exist because the retail is unorganized and hardly any MNC'S exist.

b. The levy of penalty on the infringed product may not be a popular method as most the companies in India are single product companies except FMCG product companies, which are limited in numbers.

c. The education level and awareness of the competition laws in India is still negligible when it is compared with the USA, EU or UK. A survey conducted by OFT on business awareness of Competition Laws in year 2011 shows that 65% of larger businesses were aware of OFT enforcement regimes. So due to this reason it takes a lot of time before a case is bought before CCI.

Even a successful program cannot operate efficiently without serious and credible threat of severe sanctions. Undertakings and individuals are not deterred from participating in cartel activities unless the potential penalties for engaging in cartels outweigh the potential awards. Thus, in term of 'carrot and stick' approach, the possible sanctions works as the 'stick' while the opportunity to avoid the sanction by co-operating means the 'carrot'.

As regards to that the Commission in India levy the penalty on total turnover of the enterprise @ 10% whereas the base penalties are determined from the value of product infringed in case of US, EU and UK, it appears that there is nothing wrong in taking up to 10% of total turnover, as it matches with the 10% of total worldwide turnover terms used in EU and UK. Since 10% is the highest penalty, the consideration of lower % of penalty includes such consideration and it matches with the turnover of the product infringed.

This fact can be understood from an example cited below:

**Example:**

A company ABC Ltd. acquired another company XYZ Ltd in February, 2010 by which it market share of this Company became 72%, and by abusing its dominant position, it was able to increase its turnover and profits as described above.

It is assumed that Company A has two products and the turnover from the product G and H is determined as under:
PENALTIES FOR INFRINGEMENT OF COMPETITION LAW

Amount in INR and Crore

<table>
<thead>
<tr>
<th>Year</th>
<th>Turnover</th>
<th>Profit</th>
<th>% of profit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prod G</td>
<td>Prod H</td>
<td>Total</td>
<td>Rs. 12 Crore</td>
</tr>
<tr>
<td>2011</td>
<td>50</td>
<td>50</td>
<td>100</td>
</tr>
<tr>
<td>2010</td>
<td>45</td>
<td>25</td>
<td>70</td>
</tr>
<tr>
<td>2009</td>
<td>40</td>
<td>26</td>
<td>66</td>
</tr>
</tbody>
</table>

From the above table it is assumed that the turnover of the product H after acquisition of company X has increased from Rs. 25 Cr to Rs. 50 Cr and profits have been increased to Rs. 12 Cr. It is presumed that, on acquisition of company X, dominant position was attained and by abusing its dominant position double increase has occurred in turnover of product H.

The normal profit as per the % of 2010 on the total sale of 2011 should have been at Rs. 7 Cr (7% of Rs. 100 Cr) and thus, earned an extra profit of Rs. 5 Cr (12-8) on additional sale of Rs. 25 Cr (50-25) of product H, amounting to 20% (5/25) of additional sale of product H.

Now, if we consider that the penalty should be levied @ 10% of the product infringed, then it would be only Rs. 5 Cr (10% of Rs. 50 Cr), as against Rs.10 Cr [10% of Rs. 100 Cr] and if this is the case, then the enterprise A would be only paying the additional profits earned by abusing its dominant position and the recovery of extra earning from the enterprise is not the objective of the Competition Act, 2002 and this position would not be a deterrent for observing the provisions of competition law.

Also as we do not have criminal sanction yet, so to make the provisions deterrent enough a substantial financial penalty should be included..

*Whether levy of penalty on the basis of turnover of the product infringed would be a justifiable proposition u/s 27(b) of the Competition Act?*

The Answer is No, because neither the most of the Indian Companies are multi-product companies, as stated above, nor they have their presence in the organized retail market across the globe.
The following two diagrams shows the effect of high and low penalties:

- **High penalties have a deterrent effect**
- **High penalties are imposed on the members of cartels other than whistleblower**
- **Blowing the whistle leads to the discovery of cartels**
- **High penalties create an incentive to blow the whistle**

High penalties have a deterrent effect. High penalties create an incentive to blow the whistle. Blowing the whistle leads to the discovery of cartels. High penalties are imposed on the members of cartels other than whistleblower.
6.2 RECOMMENDATIONS:

Considering the above cited example, it may be inferred that the provisions of section 27(b) of Competition Act, 2002 are good to create deterrent but to make this act as an acceptable proposition amongst the general public and business community, there is a need to align it with the international standards. So, in order to create a more effective enforcement regime the following should be considered:

a. Consider disqualification to be appointed as Director by amending our Competition Act and section 283 of the Companies Act, 1956 which provides for various grounds for disqualification of a director and section284 talks about the procedure for removal. So, in addition to the grounds already provided, a new ground should be added in pursuance of Competition Act, 2002.The procedure should be that if CCI finds that a person should be disqualified as a director then the Hon’ble Commission should inform
the ROC (Registrar of Companies) by providing the DIN (Director Identification Number) of such person.

b. Proper penalty imposition guidelines should be made in line with OFT Guidelines or EU Guidelines, where a basis of calculation of base fine with predetermined factors to multiply with the aggravating and mitigating factors, include discount for conduct and behavior of respondent organization during investigation etc.

These guidelines would ensure that calculation of penalty is not arbitrary and would precisely define every step so taken in its calculation to the parties.

c. A provision should be made for “worldwide/global” turnover of the relevant product by amending the definition of turnover to give a more deterrent effect. This would provide more deterrence in case of MNC’s, while the position for Domestic companies would remain same as it exist today.

d. A minimum base fine should be set and then calculation should be made by taking into consideration various factors but with a maximum limit of 10% that has already been provided in section 27(b) and is in consonance with the provisions in EU and UK.

There may be two ways for calculation of minimum base fine:
   (a) Either by fixing a rate lower than the maximum 10% so provided in the Act and then adjust it according to the various aggravating and mitigating factors (including leniency), or

   (b) By fixing a lower rate and then multiplying it with the number of years of infringement and thereafter making other adjustments.

This will ensure that all relevant factors are considered, thus making the calculation very acute. Also a list of various aggravating factors and mitigating factors should be made, which can be modified on case to case basis.

Such factors which are considered in other countries while determining the penalty may be narrated in the form a table herein below.
### PENALTIES FOR INFRINGEMENT OF COMPETITION LAW

#### 1. Aggravating factors

<table>
<thead>
<tr>
<th>Factor</th>
<th>EU</th>
<th>UK</th>
<th>US</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coercive measures to ensure continuation of the infringement</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Continuation of the infringement after start of investigation</td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Infringement committed intentionally</td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Involvement of senior management</td>
<td></td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Leading role in the infringement</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Obstruction of the investigation</td>
<td></td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Pervasive tolerance of the offence by substantial authority personnel</td>
<td></td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Recidivism</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Retaliatory measures against leniency applicants</td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Size of firm</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Violation of an injunction/condition of probation</td>
<td></td>
<td></td>
<td>✓</td>
</tr>
</tbody>
</table>

#### 2. Mitigating factors

<table>
<thead>
<tr>
<th>Factor</th>
<th>EU</th>
<th>UK</th>
<th>US</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acceptance of responsibility</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Compensation of injured parties</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cooperation with the investigation</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Effective compliance programme</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Infringement authorized /encouraged by legislation/public authorities</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minor role in the infringement</td>
<td></td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Non-implementation</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
e. It is a matter of record that business awareness has raised to 25% in UK which is double the awareness that business houses had in UK in 2006. Thus, penalty’s for infringement of competition should be communicated to the entrepreneur and employees of the adequate size organizations by arranging Seminars and Conferences.

This will help in India as it necessitates “Enterprises” to take the law and the Commission seriously as violations / non-compliance can have devastating consequences in terms of enormous costs, hefty fines, demoralized workforce and a serious dent to hard earned reputation which is often irreversible.

Also to encourage enterprises to launch Competition Compliance Programme on perennial basis and on sound lines, the Commission should initiate to publish “Manuals” on achieving Compliance in terms of Act on the lines published by Office of Fair Trading (OFT) in UK and the Department of Justice (DOJ) in US. Though under the advocacy section i.e. section 49, there is a suggested framework provided for compliance of Competition Act by Enterprises but a proper implementation of it is required.

f. Provisions for Criminal Sanctions and Individual sanctions against the person(s) concerned in such infringements should be incorporated by making a recommendation to the Government to amend it accordingly.

The procedure that can be followed thereafter is that, the Commission shall forward the fact finding report showing contravention of Act and being satisfied that criminal penalty should be imposed to the Court and then the State will take up this matter in the court. Thus, CCI will act as a complainant;
6.3 CONCLUSIONS

The adoption of guidelines by the Competition Authority for calculating fines would clarify enforcement and the method for calculating penalties, thus providing greater legal certainty for offenders. However, while imposing penalties, the principle of proportionality should not be avoided as a whole and some regard should be given to it in order to ensure that over-deterrence is not caused as it would discourage the potential investors and may also lead to the closure of the enterprise.

In today's globalized economy, violations of competition law are often performed internationally and therefore enforcement of competition law is also growing evermore international. There is a great emphasis on international cooperation with foreign authorities.

Thus, in a developing economy like ours though the legislators have done their best to frame laws which would provide suitable conditions for a fair and perfect competition but still the present act requires some alterations to make it more effective on an international level. It is believed that by making the required changes in imposition of penalty under the Competition Act, 2002, in line with the other international competition law forums, it would not act as more deterrent and ultimately achieve its objective.

Lastly much can be borrowed from the Sherman act and Clayton act and other acts of European nations and UK as they have very perfect piece of legislations on the competition laws.
BIBLIOGRAPHY

BOOKS

1. Richard Whish, Competition Law (Fifth edition)- Oxford University Press

2. Martin Smith Competition Law Enforcement and Procedure- Butterworths


5. Joanna Goyler’s EC Competition Law (fifth edition)

6. Meher M. Dabah- EC and UK Competition Law

7. Eleonor M. Fox US Antitrust in Global context (Thomson-West)

WEBSITES


