

RESPONSE TO THE
PUBLIC CONSULTATION ON “THE
COMPETITION COMMISSION OF INDIA
(DETERMINATION OF TURNOVER AND
INCOME) REGULATIONS, 2023”

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The ESYA Centre is a New Delhi based technology policy think tank. The Centre’s mission is to generate empirical research and inform thought leadership to catalyse new policy constructs for the future. More details can be found at www.esyacentre.org.

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Introduction

The Competition Commission of India (CCI) opened public consultations on the Draft (Determination of Turnover and Income) Regulations, 2023 (“Draft Regulations”) on December 22, 2023. The Esya Centre¹ is pleased to be afforded an opportunity to respond to the Draft Regulations.²

The Draft Regulations clarify how turnover and income are to be determined for calculating penalties for anti-competitive agreements (s.3) and abuse of dominant position (s.4) under s. 27 of the Competition Act, 2002, or contraventions of the Act under s. 48. The response is divided into two parts, with Part I providing a general overview and Part II delving deeper into each submission.

Part 1 – General Overview

The Regulations provide a clear and rational basis for calculating the turnover or income of enterprises when determining penalties under s. 27 or s. 48. By clarifying how turnover and income will be determined, the Regulations mark an important first step in creating an effective enforcement regime against anti-competitive agreements and abuses of dominant position.

However, the objective and proportionate determination of turnover and income for the imposition of penalties will be affected by the following:

- a. **Inclusion of “other operating incoming” as a facet of an enterprise’s turnover** – the Regulations define turnover to include an enterprise’s income, sales, revenue, or receipts and other operating income. However, a review of best practices shows that turnover is typically restricted to revenues arising from an enterprise’s primary or core activities when determining penalties or administrative fines under competition law. As such, including other operating income within the definition of turnover may subject enterprises to disproportionate penalties.

1. The Esya Centre is a New Delhi-based technology policy think-tank. Its mission is to generate empirical research and inform thought leadership to catalyse new policy constructs for the future. It simultaneously aims to build domestic institutional capacities for generating ideas that enjoin the triad of people, innovation and value, consequently helping reimagine the public policy discourse in India. More information can be found at: www.esyacentre.org.

2. The response is prepared by Mohit Chawdhry (Fellow) on behalf of the Esya Centre.

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- b. **Uncertainty over “global turnover”** – the Competition (Amendment) Act, 2023 specifies that while determining penalties under s. 27, the Commission will consider “global turnover,” i.e., the turnover derived from all products and services offered by a person or enterprise, and not just the turnover from the products or services related to the case at hand. While levying penalties on global turnover may be necessary and proportionate in certain cases with pervasive and persistent impacts on competition, its use in all cases may subject enterprises, particularly those operating in multiple product or service markets, to excessive penalties under the Act.

Both submissions are detailed further in the following section.

Part II – Detailed Submissions

1. Exclude other operating income from the definition of turnover

Regulation 3 defines an enterprise’s turnover as including the total value of sales or revenue or receipts and other operating income as per its annual consolidated financial statements. It also clarifies that indirect taxes, trade discounts, and intra-group trades will not be considered when determining an enterprise’s turnover. In line with recommendations of the Competition Law Review Committee, the exclusion of indirect taxes and intra-group trades will help avoid double counting when determining turnover.³

However, the inclusion of ‘other operating income’ as part of turnover raises concerns related to the proportionality and reasonableness of penalties imposed on enterprises. While the term typically refers to revenue derived from operating activities unrelated to an enterprise’s core business activity⁴, neither the Regulations nor the parent act specify what the term ‘other operating income’ can include. **Importantly, the definition of “turnover” under the Competition Act is limited to the value of the sale of goods and services.⁵ Similarly, the CCI’s FAQs on Mergers and Acquisitions clarified that under its merger control regime, turnover would only include income derived from the sale, supply, or distribution of goods or on account of**

3. <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>

4. <https://www.gmtresearch.com/en/accounting-ratio/other-operating-incomeoperating-income/#>

5. S. 2(y), Competition Act, 2002.

services rendered.⁶ As such, it would be reasonable to presume that the term ‘other operating income’ could not go beyond the ambit of the definition in the parent Act. In which case, its inclusion may be unnecessary.

Other jurisdictions, including the EU, UK, Japan, Korea, and Denmark, also limit the definition of turnover to revenue from sales while calculating penalties under their respective competition laws. For instance, the UK’s Determination of Turnover for Penalties Order states that turnover shall be limited to the “amounts derived by the undertaking from the sale of products and the provision of services within the undertaking’s ordinary activities.”⁷ Similarly, the European Union’s Guidance on Fines for Breaking EU Competition Law considers the company’s annual sales of the concerned product or service and not other forms of operating and non-operating income.⁸ Japan and Korea also only consider the proceeds or revenues of sales.⁹

NATION	DEFINITION OF TURNOVER
Denmark ¹⁰	Net turnover derived from the sale of products and the provision of services falling within the undertakings’ ordinary activities after deduction of value added tax and other taxes directly related to sales.
European Union	The value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates
Japan	The amount of sales or purchases of the goods or service in question during the period of infringement
South Korea	Turnover of the offending corporation from the sale of goods and services in specific transaction areas during the period of the violation

6. <https://www.cci.gov.in/faqs#:~:text=Do%20I%20need%20to%20notify,the%20CCI%20for%20prior%20approval.>

7. https://www.legislation.gov.uk/ukxi/2000/309/pdfs/ukxi_20000309_en.pdf

8. https://competition-policy.ec.europa.eu/system/files/2021-01/factsheet_fines_en.pdf

9. <https://www.oecd.org/daf/competition/Australia-Pecuniary-Penalties-OECD-Report-2018.pdf>

10. <https://www.en.kfst.dk/media/1366/executive-order-on-the-calculation-of-turnover-in-the-competition-act.pdf>

NATION	DEFINITION OF TURNOVER
United Kingdom	Amounts derived by the undertaking from the sale of products and the provision of services within the undertaking's ordinary activities

Hence, it would be prudent to remove the term “other operating income” from the Regulations and limit the definition of turnover to revenues generated from sales of products and services in keeping with international best practices.

II. Clarify the use of global turnover as the basis for calculating penalties

The use of global turnover, i.e., the turnover derived from all the products and services sold by a person or an enterprise, to determine penalties under s. 27 is one of the key changes introduced by the Competition (Amendment) Act, 2023.¹¹ Before the amendment, the CCI considered the “relevant turnover” of an enterprise, i.e., the turnover from the goods or services that were relevant to any alleged anti-competitive conduct. The Supreme Court, in *Excel Crop Care Ltd. vs. CCI*, held that relevant turnover must be the basis for determining in keeping with the doctrine of proportionality, which requires that the punishment be proportioned to the penalty.¹² It held that imposing a penalty on the entirety of an entity’s turnover when the contravention relates to one or a few products or services would lead to a penalty disproportionate to the harm in question.¹³

However, in subsequent cases, the limitations of using relevant turnover for certain scenarios became apparent. For instance, in *Matrimony.com vs. Google*, the CCI noted that relevant turnover may not be apt in multi-sided markets where certain services are offered for free.¹⁴ In such cases, considering the turnover of the entire platform may be required. The Competition Law Review Committee (CLRC) also noted that relevant turnover may also be inapplicable in cases involving hub and spoke cartels due to their unique structure. The interplay between different market levels and the indirect nature of collusion make assessing the impact based solely on turnover is

11. [https://prsindia.org/files/bills_acts/acts_parliament/2023/The%20Competition%20\(Amendment\)%20Act,%202023.pdf](https://prsindia.org/files/bills_acts/acts_parliament/2023/The%20Competition%20(Amendment)%20Act,%202023.pdf)

12. https://main.sci.gov.in/supremecourt/2014/3244/3244_2014_Order_08-May-2017.pdf

13. Ibid.

14. <https://www.cci.gov.in/antitrust/orders/details/746/o>

challenging.¹⁵ To provide for such situations, the Competition (Amendment) Act, 2013 clarified that penalties u/s 27 of the Act would be levied on an enterprise's global turnover.

While using global turnover to establish penalties may be necessary in certain cases, it may lead to disproportionate penalties where the products and services in question constitute a small percentage of an enterprise's turnover. Penalties based on global turnover also fail to consider that while businesses are global, their operations in different countries are distinct and typically operate on a standalone basis.¹⁶ If an Indian subsidiary's anti-competitive behavior is confined to the local market, imposing penalties based on global turnover will be disproportionate, especially in cases where its contribution to the firm's total turnover is minimal.¹⁷

Indeed, the CLRC Report states that relevant turnover should be given due consideration while determining penalties, and the CCI should issue guidance clarifying its use of relevant turnover as the starting point for determining penalties.¹⁸ The EU and UK follow a similar approach, wherein the maximum penalty that can be levied is based on an enterprise's global or worldwide turnover. However, the starting point for calculating a penalty is the relevant turnover. The Competition Authority may then consider aggravating or mitigating factors in determining whether the penalty should be limited to the relevant turnover or extended to global turnover.¹⁹

In keeping with the above, the CCI must either amend the Draft Regulations or issue distinct penalty regulations that clarify how it will use global turnover in determining penalties u/s 27. The regulations must provide for the use of relevant turnover as the starting point for determining penalties, with the possibility to levy a penalty on global turnover where extenuating circumstances exist.

15. <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>

16. https://ebrary.net/22380/business_finance/organizational_structure_within_global_corporations

17. <https://www.azbpartners.com/bank/penalties-on-global-turnovers-implications-for-businesses/>

18. Ibid.

19. https://awards.concurrences.com/IMG/pdf/samco_-_cci_penalties_article_-_24_july_2023rev.pdf?120070/55ee838297f9c879e35a5bd7ab12577d80fe7dd201b7fddae-12b9e7ec90533ed

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