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UNDERSTANDING THE CONCEPT OF TURNOVER UNDER COMPETITION LAW IN INDIA

(A Comparative Analysis from Across Various Jurisdictions)

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Abstract

The Competition Commission of India (hereinafter referred as "CCI") has been established as a statutory body under the Competition Act, 2002 and numerous functions including supervisory, regulatory, investigative, quasi-judicial to ensure free and fair competition in the market within India. The CCI has been empowered to inquire and impose penalties on the violators. The Commission has the authority to order imposition of penalties including penalty under Section 27(b) of the Act on each person or enterprise which are a party to violation of Act, to the extent of 10% of the average of last 3 Financial Year turnovers. The term "turnover" has not been defined under the Act and as such has led to a huge debate, which has been settled in the case of Excel Crop Care v. Competition Commission of India [(2017) 8 SCC 47] by the Supreme Court of India. Even though the court ruled that turnover referred under the Act is relevant turnover and not total turnover, there are arguments in favour of total turnover considering the practices of other states.

The present article deals with the concept of turnover with due regard to the judgement in the Excel Crop case and also considering the practices followed in other states such as EU and UK.

Keywords: Turnover, Relevant turnover, Penalties/ penalty, Total turnover, Comparative analysis, Competition law.

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Introduction

The Competition Commission of India ("CCI") established by the Competition Act, 2002[1] is a body carrying out various functions pertaining to competition in market within India and also looking after the welfare of the consumers. The Competition Act aims at promoting freedom of trade and fair competition amongst producers in the market, as well as provide for robust and sustainable competition through CCI.[2] The CCI, being a quasi-judicial body, is empowered to inquire into and impose penalties under Section 27(b)[3] of the Act upon enterprises or persons found to be in contravention/ violation of Section 3 or 4, i.e. in case of anti-competitive agreements, or abuse of dominant position.

The Act provides for prohibition of anti-competitive agreements and the same has been provided under Section 3[4] of the Act. Section 3 prohibits entering into agreements likely to cause adverse effects on market, which may be regarded as anti-competitive, and any such agreement falling in the purview of Section 3 shall be void. In order to decide whether an agreement is likely to cause adverse effect, as per Section 3, determination has to be made with reference to relevant market as well as relevant geographical market.[5] The term "relevant market" has been defined under Section 2(t)[6] of the Act to mean products or services that are substitutable or interchangeable, whereas
the term "relevant geographical market" has been defined under Section 2(s)[7] of the Act to mean an area having distinct homogenous market for both demand or supply of products or services.

Section 4 of the Act prohibits abuse of dominant position by market players. Abuse of dominant position may be understood in a sense to mean the use of dominant position in a manner for exploitation and exclusion of players in the relevant market, relevant geographical market. Dominance is usually defined in terms of market share of product or services of an

enterprise and the position of strength that is enjoyed by such an enterprise in the relevant market within India for the purposes of the Act, and the Act has limited the scope of abuse of dominance through the means of an exhaustive list.[8]

The CCI is duly empowered to take cognisance of such a situation and inquire into the elements of abuse of dominance or of anti-competitive agreement under the provisions of Section 19[9] of the Act. The CCI is duty bound to ensure fair competition, promote sustainable competition, and also ensure the interests of consumers.[10] As such, the CCI may initiate an inquiry in accordance with the procedure enshrined under Section 19 of the Act, which provides that the Commission may inquire either at its own, or receipt of any information, or on reference by Centre or state government or statutory authority. Section 19(3) to 19(7) limits or restricts the scope of inquiry conducted by CCI and lays down certain criterion for the conduction of said inquiry, i.e. factors that have to be considered by CCI while examining a contravention.

Section 27[11] of the Act further provides for the various powers of CCI after conducting a due inquiry of the contravention under Section 3 or 4. It provides for the orders that can be made by CCI if it finds an enterprise or person in violation of Section 3 or 4, i.e. anti-competitive agreements and abuse of dominant position, respectively. The powers under Section 27 are quite wide in nature and include scope of, but not limited to, direction to and penalties upon the contravening enterprise. The present article focusses on the scope of powers of CCI to impose penalty under Section 27(b), *i.e*. the interpretation of "turnover" for the purpose of imposition of penalty under the sub-section. The paper also takes into consideration the judgement of Hon'ble Supreme Court of India in the matter of *Excel Crop Care* v. *Competition Commission of India & Anr.* [12] The present article/ paper also brings to fore a comparative analysis of the practices pertaining to turnover for the purpose of penalty under Competition law across various jurisdictions.

Relevant Turnover V. Total Turnover – Present Trend in India

Section 27(b) of the Act provides for the imposition of penalty by the CCI upon an enterprise in contravention of Section 3 or 4 after due inquiry, but not more than 10% of the average of turnover for the preceding 3 years upon each of the enterprise which is found to be a party to the said violation. The term "turnover" has nowhere been defined under the Act, except for an inclusive definition under Section 2(y)[13] of the Act which, and as such the courts were left with no other option but to interpret the same using principles enshrined under law, and judicial discretion. Until recently, there was no settled law as to whether the turnover for the purpose of imposing penalty is total turnover or relevant turnover. It was only in 2017 that the Supreme Court finally put this confusion, regarding interpretation of term "turnover", to rest while observing that for the purposes of penalty, we must look into doctrine of proportionality as well as the legislative intent. As such, the court held that for the purposes of penalty under Section 27(b), turnover refers to relevant turnover and not total turnover. Earlier to the judgement, there was an unrest with regard to the interpretation of the term "turnover" as the debate/ confusion on "relevant turnover v. total turnover" gave a lot of discretion upon the commission in the absence of any precedent.

The Commission awarded penalties to the extent of 9% of the company's total turnover under Section 27(b) as it was found to be in contravention of Section 3 of the Act along with 2 other companies. The CCI found the company to have formed a cartel by which in turn had raised the bid prices thereby forming an anti-competitive agreement, after inquiry was conducted by the Director-General, CCI. The company was found to be in violation of Section 3(3) of the Act. As such, the company appealed against the said order before the Competition Appellate Tribunal (COMPAT) arguing that no such anti-competitive agreement was entered into, and moreover, there was the imposition of excessive penalty claiming that only relevant turnover should have been considered for the purpose of calculation of the penalty. [14] This argument of the company was based on doctrine of proportionality and the rule of interpretation considering the legislative intent. The COMPAT dismissed the case on merits, however, it revised the order and calculated the penalty on the basis of relevant turnover. It defined relevant turnover to the turnover of the entity which pertains the products or services of an entity in contravention under Section 3 or 4. Aggrieved by the said order, the appellant approached the Supreme court seeking setting aside of the penalty and to declare the findings as wrong and unsustainable, on the basis of same arguments.

The Supreme Court bench comprising of Hon'ble Justices Mr. A.K. Sikri, and Mr. N.V. Ramana did not change the order of the COMPAT and even upheld the penalty imposed by COMPAT on the basis of the concept of "*relevant turnover*". Apart from this, the court also looked into the anti-competitive conduct of the enterprise, as also the jurisdiction of the Commission (CCI) to conduct inquiry into such conduct in light of Section 26(1)[15] of the Act. After affirming the decision of COMPAT on all other issues, including jurisdiction, anti-competitive conduct, etc. the Supreme Court took note of the penalty imposed by CCI upon the enterprise under Section 27(b) on account of contravention under Section 3. It noted that the company had entered into anti-competitive agreement as was evident from collusive bidding by group of companies. The Apex court upheld the decision of imposing penalty on relevant turnover rather than total turnover. This

decision of the Supreme Court will serve as a precedent for similar upcoming decisions and has also presented the various factors to be taken into consideration while determining the penalty.[16]

The percentage of penalty imposed by CCI was not revised by the Court keeping in view the serious nature of breach committed by the company along with others. However, it took note of the interpretation of turnover as total turnover by CCI for imposing the penalty. The court had regard to the enterprises having several products and observed that if in case that enterprise in found to be in contravention with Section 3 or 4 of the Act with respect to a particular product, then the imposition of penalty on the total of the turnover of all the products will result in inequitable consequences. Therefore, the turnover for the purposes of imposing penalty must be relevant turnover, i.e. turnover of the product which is in contravention. As the term turnover has not been defined under the Act, the court took to the interpretation of the term based on the legislative intent, and principles of interpretation. It also discussed into doctrine of proportionality while looking into the aspect of scope of penalty.

The bench observed that the penalty imposed must be in consonance with the seriousness of the act of contravention, but at the same time, the penalty must be in terms with the legislative intent of the Act, so that the infringer does not suffer inequitably/ disproportionately. The court, considering various considerations, was of the opinion that the term "turnover" under Section 27(b) must be construed as "relevant turnover" for the purpose of imposing penalty as the same would be in tune with the spirit and intent of the Act, as well as in accordance with equity and principles enunciated under law. The Supreme court also linked the legislative intent behind the penalty to the profits that accrue from such contravention, i.e. affected turnover, keeping in view the terminology used under Section 59, and it observed that legitimate interests and rights of the violator have to be considered. Even now, some may argue that the purpose of the Act being the prohibition of anti-competitive practices and abuse of dominant position, the penalty to be imposed in case of violation must be on total turnover, and the same is also clearly established from the fact that the legislature did not choose to use the term "relevant turnover" and as such the same must be construed in a sense to cause strict deterrence.[17] Such an interpretation would mean adding words to a statute, because the statute has a plain language leaving no room for confusion. However, the author also believes that even if total turnover is used for the purpose of imposing penalty, the entrepreneurs may resort to a practice of creating separate companies for each product. There is a need for a legislative amendment in the Competition Act clarifying the scope of interpretation of the term "turnover". There is also a need for clarifying the position where the company has business outside India, i.e. where global transactions are involved. There are various instances where a foreign company is either a parent company or subsidiary.

Issues Under Present Competition Law

There are various issues under the present regime of Competition law which is currently governed by the Competition Act, 2002 (amended by Competition (Amendment) Act, 2007). These issues came to the fore and have been highlighted through various market studies carried out by the competition authorities. As such, a report of the Competition Law Review Committee (CLRC) was prepared which highlighted these issues, including the absence of provisions relating to certain aspects, and also made certain recommendations for solving these problems and making the competition act more robust and ensuring its smooth functioning. Even the present topic at hand relating to interpretation of turnover for the purpose of imposing penalty under Section 27(b) is not clear under the Act. The Committee report takes note of the said issue and discusses the aspect of "relevant turnover". It also discusses various exclusions from the computation of turnover, such as intra group sales, indirect tax, revenue generated outside India, trade discounts.[18] It has further been provided that export-related turnover is also to be included in the calculation of turnover for the purpose of imposing the penalty.[19]

These issues pertaining to turnover for the purpose of imposing penalty under Section 27(b) were discussed in the Report of Competition Law Review Committee of July, 2019 published by Ministry of Corporate Affairs. The Committee made several recommendations for the drawbacks existing in the Act and also issued certain explanations, clarifications. The Committee recommended that the concept of "relevant turnover" must be had regard to while computing turnover under Section 27(b) of the Act, and as such regarded the decision of Supreme court in *Excel Crop*[20] as more in tune with spirit and character of the Act, and the doctrine of proportionality. However, the committee clarified that using the terminology in the said section was not feasible on account of the practical difficulties, such as the hub of a cartel, and it further recommended the inclusion of the term "income" in the Act under Section 27(b) for calculating penalty for individuals and proprietorships.[21] It further proposed issuance of certain penalty guidelines as is the case under EC[22] and UK[23], which have been discussed in this article/ paper.

There is another issue related to turnover in the arena of enterprises involved in digital services, as the same may lead to very difficult. The calculation of turnover of each of digital services becomes more difficult when the same enterprise offers multiple digital services at the same platform. The application of our present competition law, in my opinion, is difficult when it comes to digital platform, because there can be

unrelated arrangements that do not prima facie constitute violation. There also exist several gaps in the present law which have been highlighted in the CLRC report of 2018, and as such it is desirable that new provisions be brought after due market study. The present markets have grown at a fast pace, and as such the markets are no more traditional markets on account of varied business structures, and the consumers are also diverse, which has not been considered by the present act. Moreover, at present, the CCI does not have regional presence which would be a welcome initiative. There are also issues pertaining to the time required for regulatory approvals for M&As. The digital market has grown by leaps and bounds over the years and it is foreseeable that there is still room to grow, and as such, it is desirable that these markets be studied and taken into account while drafting new provisions due to new issues that may arise The Competition Bill, 2020 is based on the report of CLRC, however the same has not been passed yet on account of Covid-19 pandemic till date. The recommendation of the CLRC have formed the basis of the Competition Amendment Bill, 2020 and it aims at overhauling the competition act so as to ensure smooth functioning and promote sustainable competitive environment in the market.

Approach Across Various Jurisdictions – A Comparative Analysis

In the EC arena, the penalty in case of violation of competition law is to be judged at a rate of 30% of the value of the sale of goods, and the value of the sale of goods is to be calculated for the goods which directly or indirectly related to the infringement in relevant geographical area.[24] This can be equated with the concept of relevant turnover devised by the Supreme court under Indian context, however, the penalty imposed in the EU is much greater at 30% as compared to 10% in India. There are a no. of factors that need to be taken into consideration while calculating the penalty to be imposed upon a violator.[25] Also, in EU competition law, the competition authority has the power to impose a penalty on 10% of the worldwide aggregate turnover, and the same is the case with the UK.[26] Apart from the imposition of penalty, it is a criminal offense in the UK to form anti-competitive agreements between competitors, and the same is referred to as "cartel offense". The individuals involved in such cartel activities may be prosecuted and sentenced to prison up to 5 years with the imposition of fines, and directors of a company may be barred from being a director for 15 years.[27] The penalty imposition in the UK is also governed by the UK Competition Act[28] and CMA's guidance as to the appropriate amount of penalty which beings to light the concept of relevant turnover.[29] The individual may also be liable for confiscation of assets under the Proceeds of Crime Act, 2002.[30]

The US competition law is governed by the FTC Act, Sherman Act, and Clayton Act. Section 1[31] and 2[32] of the Sherman Act relates to the prohibition of anti-competitive agreements and abuse of dominant position. Section 2 states that such prohibitive practices, if entered into, are considered as guilty of felony, and as such liable for $100 million in case of corporation, $1 million in case of individual, punishment up to 10 years, any or both of them. The fines and penalties imposed in the US are also very stringent keeping in view the quantum of fine and punishment imposed on each violation. The quantum of punishment is left to the discretion of the Department of Justice (DOJ) considering various factors. The punishment under US competition law is based on each violation and as such, every act of violation will amount a fresh penalty and punishment, every time such violation occurs.

In Australia, the competition law is governed by the Competition and Consumer Act, 2010[33], and as per the said Act, the penalties are imposed to the extent of 10% of the annual turnover, and this turnover is not the relevant turnover, but the entire/ total turnover of the said enterprise which is in violation/ contravention, or $10,000,000 or 3 times the total value of benefits. As such, it can be said that the practice in Australia is similar to the other jurisdictions, as also in India. It also includes criminal punishment of up to 10 years imprisonment for those involved in cartelisation, along with other orders as deemed fit.[34] The concept of relevant turnover has not been recognised in the Australian competition law.

Keeping in view the aforesaid discussion of penalties under UK, US, AU, and EU competition laws, it can be concluded that the laws for anti-competitive behaviour are quite stringent and in no way tend to be proportional or equitable as was the decision of Supreme court in *Excel Crop* judgement. Both the EU and UK competition laws have the power to impose penalties up to 10% of the aggregate worldwide turnover. Moreover, the law is even more stringent in the UK where it is a criminal offense and the individual involved in anti-competitive activities will also be liable for imprisonment and confiscation of assets.[35] One may argue that the decision of Supreme court is not a good decision on the averment that Indian Competition law jurisprudence is based Competition law in EU, UK and US. There is a growing need for guidelines to be issued in order to exercise the power of imposing penalties. There are specific guidelines in the other jurisdictions of competition law which specifically detail about the calculation of penalties.

As is evident from the aforementioned discussion, the approach of the Supreme court of India in equitable and proportional penalty does not seem to be the right one. The jurisprudence of competition law of India, though based on the competition laws of AU, UK, US, and EU, this decision stating penalty to be

restricted only to relevant turnover does not seem to be in line/ consonance with the competition laws of other jurisdictions. Competition laws that seek to provide sustainable and robust competition in the market and also prohibit anti-competitive agreements and abuse of dominant position, must be given an interpretation that punishes the violators severely and gravely. The approach across various jurisdictions, i.e. AU, US, UK, and EU is to punish the violators by imposing steep and hefty fines in order to prohibit and discourage any anti-competitive activities or abuse of dominant position in terms with the aim of their respective competition law to promote fair competition in the market and also to look after the interest of consumers for those markets.

The CLRC in its report of July, 2018 which led to Competition Bill, 2020 also discussed various exclusions from the computation of turnover for the purpose of imposing penalty. One such exclusion is revenue generated outside India, and as such the penalty cannot be imposed on the turnover which has been calculated considering revenue generated outside India. In the other jurisdictions, such as UK and EU, the competition authorities have the power to impose penalties on up to 10% of the aggregate worldwide turnover. However, for the purpose of calculating turnover, the practice under UK and EU is that turnover is calculated for the revenue based on where the customer is located.[36] Further, going by the decision of the Apex court, if we take only the relevant turnover, and not entire/ total turnover, then the penalty would be substantially reduced and such penalty may not cause deterrence, thereby not discouraging anti-competitive agreements and abuse of dominant position.

Conclusion

The present article critically analysis the concept of relevant turnover as highlighted by the Supreme court, which has to be regarded while calculating turnover for the purpose of imposing penalty. This paper/ article also brings forth the practices followed by other jurisdictions while calculating turnover for the purpose of imposing penalty in case of contravention of competition law. The competition law jurisprudence in India is relatively new and heavily borrowed and based upon jurisdictions of UK, US, and EC, and as such it is desirable that the practices followed in these jurisdictions be discussed, considered, and relied upon. Although the concept of relevant turnover is used in other jurisdictions as well, the quantum of permissible penalty is higher in those jurisdictions. As such, it may well be argued that the term "turnover" under Section 27(b) of the Act refers to the entire/ total turnover because the purpose of such penalty is not to be proportionate and just, but rather to work as a deterrent aimed at prohibiting and discouraging anti-competitive practices.

The annual reports of the CCI show that the realisation of the imposed penalty by the CCI is quite low and does not work as a deterrent, which is the aim of CCI, i.e. discourage and prohibit anti-competitive agreements, and abuse of dominant position.[37] The Committee deliberated on the issue that the penalties must serve as a deterrent as per the aims of the CCI, and at the same time, must be proportionate and not excessive, which is in consonance with the decision and approach of the Supreme court in *Excel Crop*. The committee discussed the need for digital market study, and also the need for regulation of competition in digital market. The digital market is a wide market and open to growth, which in turn provides new opportunities and also the new threats/ issues posed by such market. There are difficulties on account of various factors such as: ascertainment of turnover, inter-operability, determining the relevant turnover/ value of goods and services, unlinked anti-competitive agreements which cannot be traced by the present law. Thus, the Committee highlighted the need for a guide for calculation of penalty and determination of penalty thereof, as is also available in other jurisdictions.

The author thinks that the decision of Supreme court in *Excel Crop* is not a good decision as the same is not supported with good reasoning. The Commission has been empowered to impose penalties under Section 27(b) of the Act up to 10% of turnover, and this power should be construed in a sense which facilitates the objectives and aims of the competition law, i.e. to provide for a robust and sustainable competitive market, and prohibit anti-competitive practices by the imposition of penalties, which serve as a deterrent or discourage such activities. The concept of "relevant turnover" is not relatively new and has been used in other jurisdictions, but the quantum of the penalty with respect to relevant turnover is far greater as compared to the 10% provided under the Act. Those regulations further provide for penalty up to 10% of the aggregate total turnover of the contravening enterprise. In light of the aforementioned discussion, it can be argued that the term "turnover" under the Act must be read in a plain and strict sense to mean entire/ total turnover. If the quantum of penalty is minimised using the principles of proportionality and equity, the sole purpose of competition law, which is to provide for a robust and sustainable competitive environment, will be defeated as the penalty would no longer serve as a deterrent.

There is a need for clarifying the true legislative intent by way of an amendment or a notification, however it is pointed out that the CLRC in its report has stated that such an amendment is not possible or feasible on account of practical difficulties. It is further added that a guide for calculation of turnover and determination of penalty thereof would be much appreciated and the same would facilitate a smooth and similar approach, leaving no or little discretion to the Commission. Both EU/EC as well as UK have a guidance for such calculation of turnover, and

determination of penalty which aids in having a similar approach considering various factors involved, depending on a case to case basis. The competition laws in EU/EC, UK, US are quite stringent and provide for the imposition of high penalties, and as India's competition law jurisprudence is based on laws of these jurisdictions, the quantum of penalties must be high in India as well in consonance with the aims and objectives of the competition law prevailing for the time being.

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End Note

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[1] See Competition Act, 2002, (as amended by Competition (Amendment) Act, 2007) available at <https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf> Accessed 12 November, 2021

[2] See Competition Commission of India, About CCI, available at <https://www.cci.gov.in/about-cci#> Accessed 12 November, 2020

[3] See Section 27(b), Competition Act, 2002.

[4] Id., Section 3.

[5] Sethi, Rajat and Dhir, Ranjan "Anti-Competitive Agreements under Competition Act, 2002" published by S&R Associates on Manupatra, available at <http://docs.manupatra.in/newsline/articles/Upload/7182BCB8-7FFD-4D9A-8F53-8606AE3BEBD7.pdf> Accessed 12 November, 2021

[6] See Section 2(t), Competition Act, 2002.

[7] See Section 2(s), Competition Act, 2002.

[8] See Advocacy Series 4, Provisions relating to Abuse of Dominance, Competition Commission of India, available at <https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/AOD.pdf> Accessed 12 November, 2021

[9] See Section 19, Competition Act, 2002.

[10] Id., Section 18.

[11] Id., Section 27.

[12] (2017) 8 SCC 47.

[13] See Section 2(y), Competition Act, 2002.

[14] Thomas, James. PSA, "The Excel Crop Case: Turnover v. Relevant Turnover" 9th August 2017, Mondaq, available at <https://www.mondaq.com/india/antitrust-eu-competition-/618112/the-excel-crop-case-turnover-vs-relevant-turnover> Accessed 13 November, 2021

[15] See Section 26(1), Competition Act, 2002.

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[18] Ministry of Corporate Affairs, Government of India "Report of Competition Law Review Committee" July, 2018, pp. 53, available at <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> Accessed 15 November, 2021

[19] See CCI, FAQs, available at <https://www.cci.gov.in/node/2847> Accessed 15 November, 2021

[20] See Section 27, Competition Act, 2002.

[21] Supra note 17.

[22] Latest/ Present guidelines on method of setting of fines were published in September, 2006 – See Official Journal C 210. Earlier guidelines were published in 1998 – See Official Journal C 9.

[23] Published in April, 2018 by Competition and Markets Authority.

[24] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 *OJ C 210, 1.9.2006, p. C210/ 2–5,* available at < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN> Accessed 15 November, 2021

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[28] See UK Competition Act, 1998, available at <https://www.legislation.gov.uk/ukpga/1998/41/contents> Accessed 16 November, 2021

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[30] See Proceeds of Crime Act, 2002, available at <https://www.legislation.gov.uk/ukpga/2002/29/contents> Accessed 16 November, 2021

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[33] See Competition and Consumer Act, 2010, as amended up to date, available at <https://www.legislation.gov.au/Details/C2019C00149> Accessed 17 November, 2021

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[37] See CCI, Annual Turnover 2017-18, at pp. 17, 21, available at <https://www.cci.gov.in/sites/default/files/annual%20reports/CCI_AR-2016-17_English.pdf> Accessed 17 November, 2021