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Do MSMEs Engage in Cartels? A Brief Anti-trust Perspective from India*

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ABSTRACT

One of the primary objectives of a competition agency is to prohibit cartels since they injure customers by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others. Section 3(3) of the Indian Competition Act prohibits agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an Appreciable Adverse Effect on Competition (AAEC) within India. However, co-operation agreements among the SME are often considered a means of ensuring survival and offsetting structural disadvantages. Forms of co-operation whose sole purpose and intent is the restriction of competition are not exempt from a general ban on cartels. Given the above, the paper considers the recent anti-trust cases in India which involved SMEs and looks at the forms of cooperation between them and the specific need for advocacy on competition issues for the SME sector.

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1. INTRODUCTION

Competition Act, 2002 lists down four overarching objectives that it strives to achieve i.e. "*to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets*". Chapter II of the Act lists down prohibitions/regulations put in place by the Act to achieve the above objectives. Under Chapter II, section 3 deals with prohibition of anti-competitive agreements, section 4 deals with prohibition of abuse of dominant position and section 5 and 6 concern regulation of combination. An important feature of India's competition law is that it is size and type neutral i.e. there are no explicit provisions for safeguarding enterprises based on their size and type of business. All enterprises, irrespective of their size, are equal in the eyes of the law unlike some other jurisdictions where SMEs or some type of businesses receive explicit (though not absolute) protection under the respective competition laws. Countries like Australia, Germany, Japan, and South Korea have special provisions relating to collective bargaining contracts of SMEs or provide immunity to SME cooperatives. Under Competition and Consumer Act 2010 (CCA) of Australia, SMEs can apply for immunity from legal action on their collective bargaining arrangement by notifying the Australia Competition and Consumer Commission (ACCC). Unlike in Australia, SME cartels need not seek prior approval from the GCA as efficiency of such cartels is presumed, which is why they are categorized as 'unopposed' cartels (OECD, 2004). The arrangement in Japan is similar to the one in Germany where SME cartels are presumed to be legal and are called unopposed cartels. (Takahashi, 2003).

The MSMEs contribute 35-40% of India's GDP. They are a major contributor to balanced economic growth and development of the economy through their contribution to growth, employment generation and poverty reduction. Moreover, MSMEs reduce rural urban migration by providing employment opportunities in rural areas and promoting indigenous technologies. The small size of MSMEs can be both an advantage and a disadvantage. While the small size helps the MSMEs in terms of faster decision making and quicker adaptability to market conditions, it also makes it difficult for them to access capital markets or compete with larger rivals. They are hence more susceptible to cyclical and structural downturns and fluctuations

in business activity. MSMEs are vulnerable to anti- competitive acts of bigger corporations, including abuse of monopoly power which have the potential to inhibit their growth and thereby affect their functioning. Therefore, at times cooperation agreements among MSMEs tend to be necessitated for the survival of the firms. Agreements amongst SMEs help to counteract some or all the economies of scale that a large firm may enjoy. There are two schools of thought regarding these cooperation agreements among SMEs. One view holds that by increasing the SME's efficiency, these agreements are of great importance to economic and competition policy. It has been argued that they can contribute in improving competitive structures and in that case, are even considered desirable from a competition policy perspective. Many a times, this very co-operation agreement enables SME to compete with large firms. Thus, the SMEs help to increase competition in the market and the agreements amongst SMEs may be justified on that basis. The opposite view is that cooperation stifles competition. Efficiencies are more likely to be promoted by competition. It is argued that the incentive to seek efficiency is greater in markets where there is competition (Hay & Liu, 1997). Co-operation among individual firms, including SME, restricts the scope for initiative. Thus, the limit to co-operation among SMEs must be set where substantial anticompetitive effects are felt in the relevant market.

Trade associations formed by SMEs became an essential body to ensure cooperation and survival. Some Indian cases discussed below illustrate how certain business practices which were considered normal and attracted no legal scrutiny earlier were deemed illegal under Competition Act 2002. On the other hand, the Competition Act 2002 also provides recourse to the SMEs if they are victims of any anti-competitive practice by other market players especially larger enterprises. Given the importance of MSMEs in the economy, it is critical that their interests be protected and they are made aware of the legal and institutional mechanisms that are available to protect their interests. This paper looks at cases under section 3(3) where MSMEs have been involved and assesses the need for advocacy.

Anti-competitive effect of cooperation amongst firms in the market depends upon the quality, nature and intensity of cooperation. It is difficult to determine whether and to what extent competition has increased or decreased because of a SME co-operation agreement. An initial evaluation may be based on the combined market share of the parties. The paper looks at a few Indian cases under Section 3(3) of the Act and discusses the impact that the trade associations of SMEs have had on the market.

2. DATA and METHODOLOGY

The methodology for the study consisted of a review of existing literature, the study of the relevant rules, regulations, legislation, cases and policy documents of the Competition Commission of India ("CCI") and Government of India covering MSMEs, as well as a review of the international experience of special provisions for MSMEs in International jurisdictions. Interviews with SME associations were conducted to understand the ground realities of the sector.

3. MSME- DEFINITION AND ANTI-TRUST PERSPECTIVE

Though according to MSMED Act 2006 MSMEs are identifiable as per laid down statutory definitions, SME are not easily identifiable by clear-cut criteria in orders of the CCI. MSMEs can be classified into Registered Sector, Unregistered Sectors and SSI. SMEs are active in nearly all markets and nearly all sectors of the economy. The forms of SME are therefore equally diverse, ranging from single proprietorship to a firm with several hundred employees or an internationally known successful and leading specialty supplier filling a market niche. Many SMEs in India are in the retail trade sector, basic machinery, leather and textile industry where they coexist with large enterprises.

As the term suggests, SMEs are distinguished from other business units mainly by size criteria. In India, the MSMEs are defined based on investment in plant and machinery separately for manufacturing and services sector, generally without regard to the nature or type of industry where they operate, Chapter III of the MSMED Act, 2006. The MSMED Act defines an MSME as follows:

In the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951, an enterprise is defined as-

i. *A micro enterprise, where the investment in plant and machinery does not exceed twenty-five lakh rupees;*
ii. *A small enterprise, where the investment in plant and machinery is more than twenty-five lakh rupees but does not exceed five crore rupees; or*
iii. *A medium enterprise, where the investment in plant and machinery is more than five crore rupees but does not exceed ten crore rupees;*

In case of the above enterprises, investment in plant and machinery is the original cost excluding land and building and the items specified by the Ministry of Small Scale Industries vide its notification No. S.O. 1722(E) dated October 5, 2006

In case of enterprises engaged in providing or rendering of services, is defined as-

i. *A micro enterprise, where the investment in equipment does not exceed ten lakh rupees;*
ii. *A small enterprise, where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees; or*
iii. *A medium enterprise, where the investment in equipment is more than two crore rupees but does not exceed five crore rupees.*

The Parliamentary Standing Committee on Industry has suggested that the definition of MSME should be amended to make it more flexible. The Report of the Working Group also points out that every enterprise in its infant years is an SME which should cover all start-ups. Moreover, the criterion of investment in plant and machinery stipulates self-declaration which in turn entails verification, if deemed necessary, and leads to transaction costs. In Feb 2018, the Union Cabinet chaired by the Prime Minister approved change in the basis of classifying Micro, Small and Medium enterprises **from 'investment in plant & machinery/equipment' to 'annual turnover'**. Section 7 of the Micro, Small and Medium Enterprises Development (MSMED) Act, 2006 will accordingly be amended to define units producing goods and rendering services in terms of annual turnover as follows:

- *A micro enterprise will be defined as a unit where the annual turnover does not exceed five crore rupees;*
- *A small enterprise will be defined as a unit where the annual turnover is more than five crore rupees but does not exceed Rs 75 crore;*
- *A medium enterprise will be defined as a unit where the annual turnover is more than seventy five crore rupees but does not exceed Rs 250 crore.*

Additionally, the Central Government may, by notification, vary turnover limits, which shall not exceed thrice the limits specified in Section 7 of the MSMED Act. The proposed change is pending for approval in Lok Sabha.

Countries across the world define MSMEs based on various parameters *viz*. number of employees, assets, turnover and capital and investment; and these variables can be differentiated by industry in some cases. It is pertinent to note that India has traditionally been using the investment in plant and machinery as the metric to define the MSME sector as investment in assets can be verified and measured. However, it must be appreciated that each sector has its own unique capital requirement and standard revenue and growth rates. Hence, in today's complex business environment, turnover and number of employees are becoming more relevant matrices for consideration of coverage. Almost the entire European Union and the Americas, including the US, base their categorisation of firms for this sector only based on the number of people employed and their turnover. In fact, the US Trade Commission defines SMEs only based on number of people employed. In Germany, the accepted definition of SMEs is businesses with an annual turnover of less than €50 million and with fewer than 500 employees. In a European context, an SME has been defined by the European Commission as being a company with fewer than 250 employees and an annual turnover of less than €50 million (or total assets of less than €43 million).

Further, the emerging economies have taken a step further to constantly revise and raise the turnover and headcount caps to match the global standards. Brazil categorises its MSME sector as individual entrepreneur, micro and small businesses. Similarly, South Africa tags its MSME sector into micro, very small, small and medium businesses thereby encompassing all the small businesses in its purview. South Africa and Argentina have extensively defined their MSME sector based on industries (agriculture, trade, services, industrial, etc.) and the corresponding revenues and headcount to maintain unique characteristics of each industry and best channelise the resources to support their development requirements.

As discussed above, the Competition Act, 2002 is size neutral. SME are not classified according to absolute size criteria but in relation to the remaining firms in the relevant market for the purposes of competition law enforcement. This implies that despite a substantial turnover, a firm may be classified as SME, because it is active in a market in which several other competitors record significantly higher turnovers. In a different market a firm with the same turnover might be considered a large firm in comparison with competitors in that market. Therefore, market structure is a decisive factor.

4. PROHIBITION OF ANTI_COMPETITIVE AGREEMENTS

Section 3 of the Act prohibits all anticompetitive agreements, both horizontal and vertical. Section 3(1) states "*No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India*." Section 3(3) deals specifically with horizontal agreements. It states: *"any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods of provision of services, which –*

(a) directly or indirectly determines purchase of sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition."

After it is established that there is an agreement of any kind under Section 3(3), the agreement is presumed to have an appreciable adverse effect on competition (AAEC) and the burden of proof is on the alleged contraveners to demonstrate that such agreement did not lead to any AAEC.

Section 2(c) of the Act defines 'cartel' to include an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services. Section 19(1) provides for the various sources of information which can form the basis for initiating an inquiry– *suo motu*, upon receipt of information through an informant, or through a reference from Government or statutory authority. Section 19(3) provides a list of factors that the CCI shall consider during an inquiry into alleged anti-competitive agreements including cartels. Section 26 lays down the procedure for such an inquiry.

Figure 1 discusses the procedure for inquiry into cartels. If the CCI, on receipt of information believes that there is no *prima facie* case of contravention, it can dismiss the allegations under Section 26(2) without further investigation. If, however, there is a *prima facie* case of contravention, it can direct the Director General (DG) to cause an investigation into the matter under Section 26(1). Once the investigation has occurred, upon the receipt and analysis of information uncovered during the investigation, the CCI can dismiss the allegations under Section 26(6) if it believes that no infringement has taken place. If, however, it concludes that an infringement has taken place, then it can pass an order under Section 27, prescribing remedies and / or monetary penalties.

While the CCI initiated several cartel investigations upon the notification of the horizontal agreements provisions in 2009, most of these investigations reached fruition only in 2011. As of July 31, 2017 final orders/ decisions issued by CCI were 669; it has passed 136 orders that have contained substantive discussions on cartelisation under Section 3(3) of the Act[2]. A total of 55 orders were passed under Section 27 of the Act, where infringements were found after a detailed investigation, usually resulted in financial penalties and/or behavioural remedies. Another 26 orders were passed under Section 26(6) of the Act, where a detailed investigation was initiated by the investigative arm of the CCI due to *prima facie* concerns, but no infringement was found. In addition, there were 55 orders passed under Section 26(2) of the Act, where allegations were set aside by the CCI at the prima facie stage itself. In most of these prima facie non-infringement cases, abuse of dominance was the main allegation and cartelisation was used as a secondary, alternate line of attack[3]. Since then, the CCI has maintained a consistent pace in disposing of cases relating to cartelisation. The paper analyses the cases under section 3(3) with a 'limited focus[4]' where MSMEs were involved.

As per CCI, the highest number of infringement decisions (15) took place in the entertainment sector, which is not usually regarded as being prone to cartelisation. Another unconventional sector is pharmaceuticals distribution, with thirteen (13) cases and eleven (11) infringements. Public procurement through online tendering saw fifteen (15) cases with eight (8)

[2] CCI (2018), Report of the Special Project on 'Cartel enforcement and competition' for the 2018 ICN Annual Conference in New Delhi, India
[3] Op cit
[4] The paper does not look into various other legal aspects such as evidences in some cartel investigations, appeals, quantum of fines, etc.

infringement findings, and transport (excluding railways) saw fourteen (14) cases with seven (7) infringements findings[5]. In this paper, MSMEs involvement in two sectors, namely, entertainment (film production and distribution) and pharmaceuticals had been examined.

As per CCI, of the 55 infringement orders, a monetary penalty was imposed in 41 cases. The total quantum of monetary penalties imposed by the CCI in these orders was INR 17,160.67 crores. However, the penalties were not evenly distributed between cases. Twelve orders imposed low penalties, with penalties on all opposite parties totalling less than INR 10 lakh. These orders ***relate mostly to trade associations of small service providers*** in informal sectors being held guilty of collusion. On the other side of the spectrum, there were 9 orders where penalties of over INR 100 crore were imposed[6].

There are various ways or typologies of forming a cartel by enterprises but the sole objective of every cartel is to make supra natural profits by charging high prices. In case of SMEs, apart from making unreasonable profit, one of the prominent factors which compel SMEs to form a cartel is the competition faced by them from the big players possessing vast resources in the relevant market. To tackle the competition posed by the big players, the SMEs collude by virtually growing their size and power over the market which makes them equipped to compete with the big players.

However, this arrangement also provides them the opportunity to behave unreasonably by charging high prices or limiting supply.

Very often association of enterprises involved in same trade or business provides an effective and reliable platform for enterprises to interact with each other and enforce cartel rules. Hence, it is important to understand that though the membership of industrial association is not *per se* illegal, enterprises can be held guilty if association is used to enforce cartel rules among its members. Despite having various pro-competitive effects, the trade associations due to its very nature are vulnerable to anti-competitive behaviour. The Competition Act, 2002 does not deal with the trade associations differently, and it takes every anti-competitive act in to its account as in case of enterprises.

Associations specially having members from the same market level are more likely to commit anti-trust violation. As associations provide umpteen opportunities for the members to

[5] CCI (2018)
[6] CCI (2018)

meet and discuss the concerns of common interest and during such meetings casual discussions relating to business conditions and prices lead to price setting and limiting supply. Associations sometimes also intentionally abuse their position and compel their members to take part in Cartels.

The CCI's decisional practices against trade associations across sectors shows its reliance on direct and circumstantial evidence, such as circulars issued to members, minutes of trade association meetings, depositions of stakeholders and resolutions passed under the charter documents of the trade association in question. In many cases, the charter documents of these trade associations themselves enforced anti-competitive practices. In certain cases, even when the charter documents of the association revealed no such restrictions, circumstantial evidence revealed that the members were engaging in acts of market restriction and boycott. A trend assessment shows that the practice of the CCI, in terms of standard of evidence, has remained largely consistent over the years.

5. CARTELS FACILITATED BY ASSOCIATIONS IN INDIA

Many sectors such as film production and distribution, drugs distribution, etc have been frequently reported to have been affected by cartel activity in India. The film and television sector is characterized by the presence of trade associations for all stakeholders, be they artists, distributors, exhibitors, and sometimes the industry as a whole. Most of these associations have strict rules for members not being allowed to deal with non-members. In all these cases, the CCI has passed similar orders – finding the association guilty of restrictive practices under Section 3(3) of the Act and imposing penalties accordingly.

The film and television sector has been a case in point here. The CCI has initiated and/or acted against enterprises active in this sector on twenty (20) occasions[7]. This sector has also seen one of the first substantive decisions on merits by the Supreme Court of India in *Competition Commission of India vs. Coordination Committee of Artists and Technicians of West Bengal Film and Television & Ors.*[8] (Bengal Artists Case). The defining characteristic of this sector is the control exercised by trade associations. Most aspects of this industry are unionised,

[7] CCI (2018)
[8] Ref. Case No. 01 of 2013

and these associations and unions exercise significant influence on the way in which their constituent members do business. By far, the largest chunk of cases under the Act have been because concerted action by trade associations.

In the case of *Kerala Cine Exhibitor's Association (Informant) vs. Kerala Film Exhibitors Federation and Others*[9], the informant was an association of 171 cinema theatre owners in Kerala with its members engaged in running theatres and exhibition of cinema under licenses. The member theatres of the informant, were not getting fresh releases due to anti-competitive practices adopted by Kerala Film Exhibitors Federation, Film Distributors Association (Kerala) and Kerala Film Producers Association. The three formed a cartel and were denying members of the Kerala cine exhibitor's release of new films in their theatres. This conduct also deprived the viewers in far flung areas, where only the members of the Informant have theatres, of new films. It was held by the commission that the associations had transgressed their legal contours and indulged in collective decision making to limit and control the exhibition of films in the theatres other than the ones owned by the members of OP 1 and that there is no rational justification for the same.

Similarly, in the case of Kannada Grahakara Koota (Informant) and Ors. Vs. Karnataka Film Chamber of Commerce (OP) and Ors, it was found that Kannada Film Producers Association), are involved in the practice of preventing the release and telecast of dubbed TV serials and films in Karnataka. The issue of restriction imposed by associations on the dubbed version of TV serials has been declared anti-competitive by the commission in many other cases as well. In the present case, the DG found out that in Karnataka, no TV serial or film that has been dubbed in Kannada has been released in the past 40-50 years. It can be concluded from the above decisions and from the evidence gathered in the present case that these lead to anti-competitive outcomes as it prevents the competing parties in pursuing their commercial activities. Also, all the opposite parties were associations of enterprise engaged in the production and exhibition of films and TV programs, to be engaged in similar or identical trade, and observed that any agreement between them would fall within the purview of section 3(3) of the Act. It was thus opined that any agreement or joint action taken by the OPs would attract the provisions of section 3(3) of the Act being a horizontal agreement and thus the commission ordered the OPs to stop indulging in such practices and OP 1, 2 and 4 are liable to pay a penalty.

[9] Case No. 45 of 2012

This case highlights that sometimes SMEs form cartels. A common claim is that SME cartels are indispensable and help them to compete with larger enterprises. This has also been found by CCI in its 2018 study. CCI found that "*majority of the infringement findings of the CCI reveal certain striking characteristics that may be common across transitional economies: (i) an extremely strong trade association forms the fulcrum of the cartel; (ii) the participants of these association are often small or micro enterprises or individuals with a low business turnover; and (iii) these participants operate in the informal sector, with a high degree of self-regulation. The association culture in large number of cases may be an attempt at increasing bargaining power and creating a collective insurance policy by small, unsophisticated service providers*[10]". Some jurisdictions, allow SMEs to cartelize and compete with larger enterprises but this case shows that the authorities have been very cautious before allowing any SME cartel. It must be ensured that the cartel does not harm consumer interest which happened in the present case as the cartel members indulged in market allocation and did not pass on the benefit they have received by forming a cartel to the ultimate consumers.

MSMEs are also compelled by the associations to become the part of cartel, failing which they would be unable to avail the services of the association. In the pharma sector in India most of the interventions of the CCI have been directed at the pharmaceutical distribution chain and in particular at the All India Organization of Chemists and Druggists (AIOCD) and various other state-level associations of chemists and druggists. In the case of *P.K. Krishna (Informant) vs. Paul Madhavana and Ors*[11], the informant was engaged in distribution of medicines manufactured by pharmaceutical companies in Kerala and has a valid drug license. Alkem Labs Ltd. (OP 2) was a pharmaceutical company engaged in manufacturing and marketing of branded and generic drugs and has a huge presence across several therapeutic segments with OP as its Divisional Sales Manager. All Kerala Chemists and Druggists Association (OP 3) is a society registered under the Travancore Cochin/Literary, Scientific & Charitable Societies Registration Act, 1955 formed to maintain fellowship and harmony among chemists. Informant alleged that OP 2 had denied his application to become a stockist as he did not receive a NOC from OP 3 and that OP had initially offered stockist-ship of OP 2. Subsequently, OP 2 stopped supplying drugs to informant without stating any reason. Upon careful observation of evidence, it was observed by the Commission that, appointment of stockists were being

[10] CCI (2018)
[11] CCI order in Case No. 28 of 2014

made with the approval of state/district units of the OP 3. Also, it is very clear from the evidence that was earlier submitted by Merck Ltd., which is a third party that, OP 3 unanimously decided to boycott Merck Ltd. by requesting stockists to stop the supply and 95% of the stockists complied with its request too. This clearly shows that the OP has been exercising influence and controlling the supply of medicines. This results in restricting provisioning of goods in the market and thus, in contravention of certain provisions of the act. Accordingly, OP 2 and OP 3 are thus held liable for a penalty.

In the case of *Bengal Chemist and Druggist Association*[12], the CCI imposed a penalty of Rs. 18.38 crores on Bengal Chemist and Druggist Association (BCDA) for their anti-competitive conduct. This was a *suo motu* case by the CCI. In this case, the BCDA an association of wholesalers and retailers was engaged in fixing the price of the drugs in a concerted manner. BCDA directed the retailers to sell the drugs only at MRP determined by it because agreement entered amongst the members of the BCDA. Further, it also carried out vigilance operation to identify the retailers defying the directions given by it and forced the defiant members to close the shop as the punishment for not complying with the directions of the association. The CCI in this case not only penalized the association for its anti-competitive conduct but also additionally held 78 of its senior office bearers to be personally liable for taking part in such anti-competitive conduct of the association. A large number of SMEs were involved in this case and they made use of the association to for a cartel. An association can help run a cartel effectively among hundreds of enterprises as it provides a cost-effective and robust platform to monitor defection and bring together non-defecting enterprises to penalize the defecting enterprise(s). Without association, though not impossible, it would have been very costly for enterprises to monitor behaviour of other enterprises taking part in a cartel.

6. BID-RIGGING

Bid-rigging implies that enterprises collude and decide which enterprise(s) will win the bid. Usually the schemes are used in combination to make it look like a competitive process and ensure that competition is suppressed. Some forms of bid rigging are as follows:

[12] CCI order in Case No 01

- *Cover bidding***:** One or more suppliers other than designated winner deliberately submit bids which are higher than designated winner, are too high to be accepted by purchaser or have terms and conditions which are unacceptable to purchaser.
- *Bid suppression or bid withdrawal***:** One or more suppliers other than designated winner agree to either abstain from bidding altogether or withdraw a submitted bid before the final stage of bidding process.
- *Bid rotation***:** Suppliers come to an understanding to appoint a designated winner for bids on a systematic basis so that each supplier gets a chance to become designated winner on a rotating basis.
- *Market division or market allocation***:** Suppliers agree to mark boundaries of their operations to cater to a geographic area or a customer group. They agree to refrain from catering to other geographic areas or customer groups usually by submitting cover bids.

Bid-rigging is prohibited under the Competition Act 2002. Bid-rigging is a main concern for government departments which procure goods and services from the non-state enterprises. Bid-rigging thus not only distorts the competitive outcome of the bids but also amounts to loss of tax payer's money. Bid-rigging is treated seriously under the Competition Act 2002 and it can be said that it is illegal per se for there cannot be any efficiency justifications for bid-rigging. In 2013, CCI decided a bid-rigging case that involved 13 suppliers of CN containers which was used to manufacture 81 mm bomb by Ordnance factories for Defense Sector. As per the Order, the 13 suppliers many of whom were SMEs came together and agreed to have collusive bidding for the supply of CN containers in response to the bid floated by three Ordnance factories based in the State of Maharashtra. All the 13 suppliers quoted same bid prices despite difference in cost of their raw material. Ten out of 13 suppliers had members of the same family in decision making positions and had common directors. Further, several suppliers had submitted their bids from same fax number. A combined penalty of Rs 3, 02, 78,300 (three crores two lakh seventy eight thousand and three hundred) was imposed on 13 colluding suppliers.

In *Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans*[13] and other electrical items, the CCI conducted a qualitative analysis of documentary (bid documents), oral (recorded statements) and forensic (call data records and e-mails) evidence. For instance, it compared prices shared through e-mail and prices quoted in

[13] CCI order in Suo Moto Case No.03 of 2014

the bid documents and corroborated the recorded statements with the call data records. The CCI passed a cease and desist order along with different monetary penalties for different parties. The CCI noted that Pyramid Electronics (Pyramid) was the first one to make a disclosure in the case by extending co-operation and made value addition in establishing the existence of cartel. Therefore, Pyramid's penalty was reduced by 75 per cent under the leniency regime and was fined only INR 1.6 million instead of INR 6.2 million.

In another case, the *Union of India through Secretary, Ministry of Health and Family Welfare*[14], invited bids for supply of pre-fabricated Modular Operation Theatre (MOT) to which 6 parties submitted. One of them, PES Installation's bid was favoured by the committee even though it had technical deficiency. It is reported that the 3 bidders i.e. MPS, MDD and Unniss did not have the exclusive authorisation for integration of MOT. This fact was well known to both MDD and MPS but they still applied to help PES win the bid. Therefore, the acts and conduct of the 3 firms were found to be a part of overall agreement under which they had agreed to bid in a manner that they rotate bids among themselves in different hospitals. Since the Commission has already imposed penalty on the 3 parties in similar case (Case no. 43 of 2010) it did not feel the need to impose any further penalty[15].

7. CONCLUSION

The manifest capacity of Micro, Small and Medium Enterprises (MSMEs) around the world for driving economic growth and development at regional, national and global levels cannot be overemphasized. As India gears up to retrace the high growth path, the MSME sector assumes a pivotal role in driving the growth engine. There is a thrust on 'Make in India' campaign across the nation for making India as a manufacturing hub. This thrust would be incomplete without building an enabling environment for MSMEs. Many small firms which choose to manufacture goods that can be mass-produced suffer from the existential crisis. Large businesses with large-scale operations can manufacture such products more efficiently. MSMEs are often at a disadvantage compared to large firms in situations where size is associated with regular advantages in purchasing, production, marketing and distribution. Often SMEs are suppliers to large enterprises like the ancillary auto products etc. MSMEs are also dependent on large enterprises for their inputs or raw materials and anti-competitive practices in the supply chain impact them adversely and makes them vulnerable to abuse by the large firms. Added

[14] CCI order in Case No. 43 of 2010
[15] CCI Order in Case no. 40 of 2010.

to this is the fact that MSME sector grapples with the high cost of credit, difficulty in hiring skilled manpower, and complex regulatory procedures. It seems to be a matter of concern that a sector with an overwhelming presence in the economy in terms of number of enterprises and employment has been unable to increase its contribution towards total GDP of the economy over the years. This sector is largely unorganised and vulnerable to the dynamic external business environment, and, therefore in the wake of rising competition, it is essential to provide the sector with a level playing field to be able to sustain and thrive in the economy. The Competition policy dispensation provides for recourse measures against many of such practices.

Generally, a cartel is found to be run by the big firms and small firms are compelled to be the part of a cartel having no option other than agreeing to the terms of the big firms. In case of not complying with the big firms there exists a huge likeliness of losing business. But contrary to this, it has also been seen that the MSMEs have themselves taken the first step and acted as the focal point of the cartel. The possibility of MSMEs acting as a kingpin of the cartel cannot be ignored by the commission simply because of the reason that every firm irrespective of the size wants to make as much profit as they can. Also, to cartelize, size of the firms does not act as an impediment. It is the favourable circumstances which play a major role in promoting cartelization and these circumstances do exist in case of MSMEs too.

All the cases discussed above have had a common characteristic, i.e. an extremely strong trade association that forms the fulcrum of the cartel. These associations are often viewed as an attempt at increasing bargaining power and creating a collective insurance policy by small, unsophisticated service providers.

MSMEs participants of the cartel operate in the informal sector with high degree of self-regulation and ineffective government regulation with low turnover. It may be pertinent to note that these MSMEs and associations are often cash strapped. The interaction with SMEs highlighted that the issues can be summarised as follows:

a) Awareness- A large number of SMEs are still unaware about the Act and there is a lack of technical know-how to ensure compliance of their internal rules and operating procedures with all the relevant laws. Therefore, there is great need of advocacy programmes for both trade associations as well as individual MSMEs in India.

b) Access: SMEs generally do not have skilled manpower and cannot afford to engage competition lawyers or advisors, who are very expensive. To leverage MSMEs participation in competition law proceedings in India, ease and guidance in reporting various anti-competitive matters to CCI is also needed.

This paper analysed the recent cases of CCI under section 3(3) where MSMEs have been involved to understand and assess how the trade associations of MSMEs in India have acted as a focal point and facilitated cartelisation. The anti-trust regime in India is relatively young and hence most trade associations and SMEs are unaware that the legacy practices which had become of a way of business of them are illegal. Going forward, the developing jurisprudence, coupled with the CCI's increased focus on outreach programmes will help to change attitudes among associations and increase compliance.

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Figure 1: Procedure for Enquiry into Cartels