

Critically analysing the SMEs in India under the prevalent scope of Competition Act, 2002

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Abstract

SMEs play an important role in responding to economic growth and development in India, contributing to job creation, innovation and poverty reduction. The “Competition Act” was enacted or adopted to promote fair competition and prevent anti-competitive practices have serious implementation for Small and Medium sized enterprises.

This analysis highlights some of the positive as well as negative impacts of the competition laws on Indian SMEs. It examines the relevance of the law, the problem of implementation, the challenges it faces and the benefits of working for SMEs in competitive markets. It also explores the potential impact of competition law on the competitive dynamics of SMEs. While the policy is designed to protect business efforts and boost entrepreneurship, its stringent rules and compliance may impose additional burdens, preventing the capital structure of small and medium sized businesses from competing well. Thus, accessing the need *to be on a par* with the unique challenges against small businesses are important factors to keep legislation effective and up to date.

INTRODUCTION

In the present era of globalization, although small enterprises cannot match the marketing strategy or distribution reach of a large corporation but has proven itself to be the backbone of the monetary framework of all nation and the key source of economic growth, dynamism and flexibility in advanced and developing countries. SMEs have been driving industrial growth by enhancing existing capacities and by delivering cost efficient goods and services. SMEs are basically small and medium enterprises that are independent commercial entities and non- subsidiary business that employ not more than a certain number of workers. The role of SMEs is quite substantial in many countries, especially in emerging and developing countries. SMEs account for a large share of total employment, job creation and GDP in emerging economies. New jobs boost living standards and foster social cohesion in a country and therefore SMEs are the main factors of economic growth and social peace. Without a strong and healthy SME sector this cannot be achieved. As for example, south Korea is associated with giants like Samsung, Hyundai, LG but SMEs in Korea accounts for more than 80% of total employment and about 50% of total value added. SMEs also played a large role in the transformation of Korea into a high-income industrialized country during the last quarter of 20th century putting SMEs always on high agenda of the government there. But we should not conclude that all SMEs are drivers of growth and job creators. SMEs can differ greatly in their role in the economy. A lot depends on the skills of individual entrepreneurs, their attitude and willingness and ability to grow their business. But on the whole SMEs play an

important role in many economies and on average they contribute more to employment in low-income countries than in high income countries.

SME

Small and Medium Enterprises (SME) emerged as an overriding sector in the global economy contributing not only towards economic growth but also generating employment, introducing innovations and imports. It is regarded as a blessing to developing countries like India, as help in rapid growth of economy as well as social.

Making the best use of natural resources, optimum use of time and great use of skilled labour India has already acquired a renowned position for its products in the global market. India being a country of vibrant demography is a home to thousands of Small and Medium Enterprises. SME sector of India is considered as the backbone of economy contributing to 45% of the industrial output, 40% of India's exports, employing 60 million people, create 1.3 million jobs every year and produce more than 8000 quality products for the Indian and international markets¹. Definitions of small and medium enterprises differs from nation to nation, some rely in accordance to number of employees, some turnover, and others on plant and machinery. In India, the Small and Medium Enterprises are classified under the Micro, Small and Medium Enterprises Development Act 2006 (No 27 of 2006). Enterprises as defined under the Act means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or Schedule to the Industries (Development and Regulation) Act, 1951 or engaged in providing or rendering of any service or services². Through notification released by Ministry of Micro, Small and Medium Enterprises on 1st June 2020 the definition of Micro, Small and Medium Enterprise was enhanced. The new definition provides that a small enterprise includes those enterprises where the investment in Plant and Machinery or Equipment does not exceed ten crore rupees and turnover does not exceed fifty crore rupees³. A medium enterprise refers to those enterprises where the investment in Plant and Machinery or Equipment does not exceed fifty crore rupees and turnover does not exceed two hundred and fifty crore rupees⁴.

Globalisation of SMEs can be realised through any range of cross border activities indulging from International Agreements, trades, International Investment, and alliance for distribution, marketing, innovations, research and development, production and so on. This globalisation process of SMEs adds an important value in the development and growth of the enterprises as they acquire a global market. The coming of E-commerce has globalised the market for SME in a broader way. E-commerce eliminates the time and space barriers from the market. Factors like direct and indirect exporting, licensing and franchising acts as a backbone to globalization of SMEs. Here, Intellectual Property Rights plays a significant role, the protection of in the form of patent, trademark, geographical design and so on, encourages the SMEs to enlarge their trading globally.

¹ "Definitions of Indian SMEs", SME Directory, *Europe-India SME Business Council*, accessed on 3:15 pm, 12th August 2022. Available at http://www.eisbc.org/Definition_of_Indian_SMEs.aspx

²Section 2(e) of Industries (Development and Regulation) Act, 1951

³S.O. 1702(E)(ii) Ministry of Micro, Small and Medium Enterprises Notification on 1st June 2020

⁴S.O. 1702(E)(iii) Ministry of Micro, Small and Medium Enterprises Notification on 1st June 2020

Cottage and small-scale industries had flourished the Indian market before the Independence. They were principal sources of income and employment and their products were identified for their excellence and artistic skill but were not paid enough. The concept of SME had not gained attention in British India. After Independence the Government of India realised the socio-economic significance of Small and Medium Industries, introduced several policies and took positive initiative for the growth and development of these industries through Five-Year Plans.

The First Five Year Plan (1951-56) recommended a “Common Production Programme” to ensure that both large and small units both make their contributions to the total requirement of the community. A landmark in the history of the development of small-scale enterprises in India was the visit of the international perspective team in 1953-54, which was jointly sponsored by the Government of India and the Ford Foundation. The team recommended setting up of a regional extension institute to provide services in technical, marketing and financial areas. In accordance with the recommendations made by the team, four regional extension institutes were set up at Bombay, Calcutta, Delhi and Madras, to provide technical assistance to small enterprises. The Second Five-Year Plan (1956-61) gave prominence to heavy and basic industries but did not neglect the small industries or the small enterprises. The Third Five Year Plan (1961-66) aimed at a greater diversification of production in the small sector and a closer integration between the large and small sectors in specified items. Fourth Five Year Plan (1969-74) admired the policy of decentralized growth of industries. In July 1969, 14 major commercial banks of the country were nationalized and this helped to accelerate the flow of funds from the banks to the small sector which accelerated credit aid to the industries at lower rate of interest. Fifth Five Year Plan (1974- 79) added a new chapter by emphasizing removal of poverty by provision of many self-employment schemes through cottage and small scale industries, which received their due share in the plan allocation. The Sixth Five Year Plan provided a wide range of opportunities to artisans to develop and enlarge their work through measures like skill development, industrial education and so on. The Seventh Five-Year Plan (1985-90) period laid emphasis on industrial development strategies based on adequate infrastructure development. The Eighth Five-Year Plan marked the highest growth of industrial development till then. The Ninth Five-Year Plan put emphasis on eradicating poverty. The Tenth-Five Year Plan was aimed to ensure equity and social security.

The Eleventh Five-Year Plan (2007 – 2012) acted as a come back for enterprises. It aimed at raising the rate of growth of the industrial sector to 10 per cent and manufacturing growth to 12 per cent per annum. Continuing commitment to priority lending for MSMEs remains an essential feature of development banking. The 11th plan ensured that the policies are sufficiently flexible to support the development of micro finance. In the 11th plan, the strategy for manufacturing proposed by the National Manufacturing Competitive Council (NMCC).

The Report of the Working Group on Micro, Small & Medium Enterprises (MSMEs) Growth for 12th Five Year Plan (2012-2017) has made some important recommendations to make MSME sector a vital part in the country's growth story. The new ambitious National Manufacturing Policy, aims to make India a manufacturing hub and increase the sectoral share of manufacturing in GDP to 25 per cent in the next decade from the present level of 15-16 per cent, requires substantial support from MSME sector and growth rate of MSME sector from the existing level

of 12-13 per cent per annum. The Ministry of Micro, Small and Medium Enterprises is the administrative Ministry in the Government of India for all matters relating to Micro, Small and Medium Enterprises. It formulates and implements policies and programmes through its field works, organisations committees for promotion and growth of MSME sector. In order to regulate and control the MSME Sector the Government of India had passed The Micro, Small and Medium Enterprises Development Act, 2006 (No 27 of 2006).

In developing countries like India SMEs generally employ the largest percentage of the workforce and are responsible for income generation opportunities. These enterprises can also be described as one of the main drivers for poverty eradication. In manufacturing sector, SMEs act as specialist suppliers of components, parts and sub-assemblies to larger companies because these items can be produced at a cheaper price compared to the price large companies must pay for in-house production of the same components⁵. The Indian SMEs are engaged in ranging from high-tech industries to traditional productions.

The initiation of economic reforms through Liberalization Privatization and Globalization (LPG) Model, 1990s marked the beginning of a new era for industry in India. This model made market entry easier and provided more operational freedom for enterprises. In addition, industries had cheaper and easier access to imported inputs and capital goods. Because of the globalization of markets, technological advances and the changing needs and demands of consumers emerged as a huge footstep towards the nature of competitiveness in the market. These changes have forced enterprises to compete along different dimensions such as designing and developing new products, adopting smart approaches to manufacturing, implementing quick-to-market distribution, purchasing cutting-edge communication and developing appropriate marketing strategies. And with onset of LPG Model the competitiveness nature of SMEs had raised as they are now competing with imported products. The concept of 'Make in India' attracts a huge number of investors and results in rapid growth of SMEs. In India the SMEs are becoming highly competitive with regard to its production, innovation, cost and other various factors.

India's SME holds the second largest position after China. The Competition Act of India is applicable both on large industries and enterprises as well as SMEs, thus both of them are equally liable under the completion law for hampering healthy competition. This practice is not only restricted to India but also prevails in other countries where SMEs are found to be practicing anti-competitive practices.

Following are the four important objectives of the Act of 2002 in India and their effect on the SMEs:

- a) to prohibit all such practices which creates an appreciable adverse effect on competition in India; [When the anti-competitive practices are prevented then the small players of the market get a chance to fairly participate and ultimately exist and develop in the market].
- b) to promote and sustain competition in markets; [With this objective the competition is expected to exist between the large scale industries and also the small ones. Everyone is given a fair chance and the market in India is to promote competition].

⁵ Rajesh Kumar Singh, Suresh K. Garg, "The competitiveness of SMEs in a globalized economy Observations from China and India", 33,1 *Management Research Review* 54 (2009)

c) to safeguard the interests of consumers; [The more the number of market players the greater the level of competition exists. They are not to get adversely affected instead they will get exposed to better product qualities, innovation, quantities, and pricing with a greater degree of competition. And the number of SMEs is obviously higher the big industries in any sector].

d) to fulfill the notion of freedom of trade among various market participants within the territorial circumference of India. [Freedom to practice trade and profession is guaranteed by the Constitution of India in Article 19 and the more the number of SMEs will be there in any sector the higher the competition will be there. And after all the problem of unemployment will be solved].

The Competition Act of India extends its ambit over big enterprises SMEs as well as. And therefore any SME that engages in anti-competitive practices is also found to be guilty. This law is also similar to the laws of different nations where the SMEs were punished for the violation of competition law by engaging themselves in anti-competitive practices.

Bid rigging

Bid-rigging is the process where the bidding takes place before the actual bidding. The expected bidders used to indulge in an agreement before the actual bidding takes place and pre determines the winner of the upcoming bidding. Some forms of bid rigging are as follows:

- **Cover bidding:** One or more bidders other than pre-determined winner submit bids which are higher than 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 bidders other than pre-determined winner agree to either refuse to bid together or withdraw a submitted bid before the final stage of bidding process.
- **Bid rotation:** Bidders come to an understanding to appoint a pre-determined winner for bids on a systematic basis so that each supplier gets a chance to become pre-determined winner on a rotating basis.
- **Market division or market allocation:** Bidders agree to mark boundaries of their operations to operate in a specific 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 specifically in education, railways, which procure goods and services from the non-state enterprises. Bid-rigging thus not only restricts 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 is illegal per se. Generally, the bidders are SMEs and it can be seen that these bidder indulge in anti-competitive agreements including bid-rigging.

For instance, AB, AC, AD, AE and AF are SMEs and suppliers of bricks and cements. Bidding was fixed on 20th August 2022 for the fixation of supplier of bricks and cements. AB, AC, AD, AE and AF were the potential bidders. The potential bidders before 20th August 2022 had come into an agreement that AD was give the

appropriate data and price on the actual bidding and other will give inappropriate bidding and in subsequent bidding AE will win the bid.

In 2013, Competition Commission of India 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 the 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 Fans¹³ and other electrical items, the CCI conducted a qualitative analysis of documentary, oral and forensic evidence. After investigation the CCI passed order to cease the agreement 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. In another case, the Union of India through Secretary, Ministry of Health and Family Welfare¹⁴, 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.

Anti - Competitive Agreements under Competition Act 2002 and its impact on SME

“It takes 20 years to build a reputation and five minutes to ruin it. If you think that, you'll do things differently.”-Waren Buffet.

SME are a major contributor for a balanced economic growth and development of the economy. It is one through their contribution to economic growth, economic generation and poverty reduction. SMEs help in reducing migrations of rural people to urban areas by creating new employment opportunities

Besides, SMEs help in reducing the migration of rural peoples to urban areas by creating employment opportunities in rural areas and proliferating indigenous technologies. The small size of SMEs can be both advantages and a disadvantage.

The MSMED Act of 2006 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 stated as

- a. A micro-enterprise, where the investment in plant and machinery does not exceed twenty-five lakh rupees;
- b. A small enterprise, where the investment in plant and machinery is more than twentyfive lakh rupees but does not exceed five crore rupees; or
- c. A medium enterprise, in which the investment made in plant and machinery exceeds five crore rupees but does not exceed ten crore rupees.”

But our Competition Act of 2002 does not look at the size of the enterprise whether in terms of capital, or turnover or the number of employees as MSME as defined under MSME Act 2006. The effect has to be adverse and against healthy competitive practices. So we do not exclude the SMEs from the scope. And in cases wherein they splurge in anti-competitive practices then the Act extends over them also. As per the ‘Competition Act of India’, ‘anti-competitive agreements’ in India can be of the following types-

- i. Horizontal agreements
- ii. Vertical agreement

HORIZONTAL AGREEMENT [SECTION - 3(3)] – Horizontal Agreements are the agreements amongst those firms that trade in similar kind of business, like two manufacturers, wholesalers, distributors or retailers etc., these agreements are pessimist in nature and have an appreciable adverse effect on competition. Horizontal agreements are of four kinds. They are as follows-

- i. Fixation of price
- ii. Production control/output control
- iii. Market sharing
- iv. Bid Rigging

Illustration

Suppose A Pvt Lt is a SME dealing in handloom industry making muga silk sarees and other SME near it viz., B Pvt Ltd and C Pvt Ltd and D Pvt Ltd doing the same business .Now if A,B,C,D get into an agreement amongst themselves with regard to production control then it will amount to horizontal agreement. But this may take the form of cartel so such agreement should not always be permitted . it can be permitted only if such agreement or such co-operation is for some sort of benefits like training purpose or use of better resources etc.

i. FIXATION OF PRICE

Price fixing refers to an agreement between market participants to collectively raise ,lower, or stabilize prizes to control supply and demand.⁶ Under Canadian and United the practice benefits the individuals States competition laws, price fixing is illegal. This practice is considered as anticompetitive as it benefits only the individuals or firms involved in setting the price and hurts

⁶ CFI Team, ”Price fixing,” corporatefinanceinstitute.com(last assessed 18 Aug 2022)

consumers and firms on the receiving ends. Price fixing provides firms with the ability to deter away from market competition. Price fixing is also illegal for SMEs. It made easier for producer to set a fix prices together rather than competing in the competitive environment.

Price fixing is difficult to prove as such agreements are made in secret. Such discussions

often takes place in a private meeting or phone calls to prevent paper trial.

Illustration

Suppose, P Pvt Lt is a SME dealing in brakery factory manufacturing bread and brakery biscuits and other SME near it viz., Q Pvt Ltd and R Pvt Ltd doing the same business. Now if P, Q, and R get into an agreement amongst themselves with regard to fixation of price then it will amount to horizontal agreement. Such agreements are illegal and are not permitted to do so by Competition Act, 2002.

ii. PRODUCTION CONTROL/OUTPUT CONTROL

Production control/output control refers to an agreement between market participants to collectively control or limits the production, supply, markets, technical developments, investment or provision of services.⁷ such agreements are illegal in nature.

Supply of goods from suppliers through producers to customers using SME's has become an integral and important part of any market place. Production activity control describes the principles and techniques used by management to planning short term and to control and evaluate the production activities of the manufacturing organisation.⁸ However, fewer studies have investigated the operational controls associated with the production of goods and services, or addressed the needs for logistic, operations and production activity control and their associated disciplines within the context of the SME in supply chain. The recognition of the existence of any these activities is central to developing a planning and control process that communicates relevant information to support the operations activity of the enterprise⁹.

Unlike larger organisations that have quaterly and annual production activity plans, the SME is required to focus its plan on a daily or at most monthly at the horizon. by virtue of its size the financial burden of unwanted work in progress and materials waiting longer than necessary within the production process impact to far greater extent on a SME. It can impact on its capacity to be responsive to customer's changing demands.¹⁰

Illustrations

Suppose A Pvt Ltd is a SME dealing in handloom industry making muga silk product and other SMEs near it viz., B Pvt Ltd and C Pvt Ltd and D Pvt Ltd doing the same business. Now if A, B, C, D get into an agreement amongst themselves with regard to production control then it will amount to horizontal agreement. But this may take the form of cartel so such agreement should not always be permitted. It can be permitted

⁷ Section 3(2)(b) of competition Act 2002.

⁸ Browne, J. et al, "production Management Systems- A CIM Perspective", Addison- Wesley, UK, 1988.

⁹ Jordan et al., "Production Activity Control for Small Manufacturing Enterprises", IFIP International Workshop on Knowledge based Reactive Scheduling, Athens, 199, Elsevier Science B.V., p 29-38

¹⁰ Towers Neil, "Production Activity Control for Small and Medium Sized Enterprises, SMEs with less than 500 Employees"

only if such agreement or such co-operation is for some sort of benefits like training purpose or use of better resources etc. production control/output control are illegal in nature.

iii. MARKET SHARING

Any agreements entered between enterprises or associations of enterprises or association of persons or between any person and enterprises or or practice carried on or decision taken by, any association of enterprise or association of persons including cartel, engaged in identical or similar trade of goods or provision of services which 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 way¹¹. Such types of agreements are illegal in nature. With the increase in market share, a company increases its dominance over the industry it operates in. With increase in dominance over the market /industry, company can exercise certain powers such as bargaining power.¹²

A company can also expand its market by increasing lowering its prices which is also known as predatory pricing. Lowering price may attract more customers and thereby helps in widening the customer base and increase the sales, hence increasing the market share of the company. By ensuring high quality standards of the products a company can increase its market share.

Illustration

Suppose, “A Pvt Ltd” is a SME deals with production of cotton and forms an agreement with two other SMEs “X Pvt Ltd” and “Y Pvt Ltd” producing cotton with the intention to produce one similar type of cotton allocated in its geographical area through predatory pricing. Since predatory pricing is illegal in nature so such types of agreements are illegal in nature and CCI may take actions against such form of agreements if found proved. Such types of agreements are prohibited by Competition Act, 2002.

2. VERTICAL AGREEMENTS

Vertical agreement (section 3(4)) is the agreements amongst the firms that deals in different business line, like an agreement between manufacturers and distributors, retailers etc. Sec 3(4)¹³ of the act says that –any agreements amongst enterprises or persons of different stages or levels of production chain in different markets, in respect of production, supply, distribution, storage, sale price of, or trade in goods or provisions of services, including-

- a. Tie- in arrangement
- b. Exclusive supply agreement
- c. Exclusive distribution agreement
- d. Refusal to deal
- e. Resale price maintenance.

¹¹ Section 3(2)(c) of Competition Act 2002

¹² CFI team, “market share”, corporatefinanceinstitute.com (last assessed 18 Aug 2022)

¹³ Sec 3(4) of the Competition Act, 2002.

Anti – competitive practices act as a hostile to the choice of consumers and often lead to rise in prices that ultimately affect the general public, especially the poor and the middle class in particular. And when such cartels are formed with regards to essential goods and services that are required in day to day life for basic necessities their effects are the most harmful in a developing country like India wherein the maximum lot of population consists of poorer or middle class active participation by SMEs in competing with the bigger firms can always be a strong force behind the maintenance of a healthy competition.¹⁴ Thus SMEs help to increase competition in the market and the agreements amongst SMEs may be justified on that basis.

Cartels negatively affect the SMEs by preventing them from entering into the cartelized markets and developing their business. For instance, when the SMEs want to start a new business in the market, the cartelized may collide to prevent the new business from entering or cartelists can increase the rate of inputs which the SMEs take from them for further protections.

ROLE OF THE GOVERNMENT IN PROVIDING SMES A CHANCE TO COMPETE

The Companies Act and other Acts governing the business sectors always try to promote the SMEs in participating in the Indian markets. PM Narendra Modi in the year 2014 made many new campaigns, plans and yojanas for the SMEs. The Make in India is one of the most famous campaigns among them where SMEs is the focal point. Even with the increase in the number of the start-up business in the form of SMEs helps in reducing the problem of unemployment. Some of the major policies implemented by the government of India since 2015-19 are Public Procurement Policy, Pradhan Mantri Mudra Yojana, Make in India, Start up India and Skill India etc. The introduction of GST and policy of digital India are some other important initiatives taken from the side of government to help the SMEs in prospering.

The state governments were also implementing their own policies in promoting the growth and development of SME and also inspiring peoples to begin SMEs in the form of Handlooms, poultry, dairies, fishery etc are being promoted by the respective departments. The state were also trying to get Geographical Indications registered or patents and copyrights registered for SMEs for their better developments. For example- Muga silk of Assam, orthodox tea of Assam, Bengal's Rasgulla, Ponchampalli Ikkat, Odisha's Rasgulla and many more for the better interests of the SMEs and cottage industries. All these initiatives were taken by the government to provide an ample employment opportunity to the youth.

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