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MSMEs AND COMPETITION LAW IN INDIA: VICTIMS OR PERPETRATORS

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Abstract

SMEs contribute around 35-40% of the GDP of India and are key to employment generation, sustainable development and poverty reduction. This sector is largely unorganised and vulnerable to the dynamic external business environment. On one hand, small size of the SMEs makes them vulnerable to anti-competitive acts of bigger enterprises including abuse of dominant position and on the other hand, cooperation agreements amongst SMEs assist them to compete with large enterprises. Competition Act, 2002 deals with anti-competitive agreements and abuse of dominant position, amongst other things. The Competition Act of India is size and type neutral. This paper thus, looks at whether SMEs are perpetrators or victims of anti-competitive conduct. This study analyses the recent anti-trust cases in India which involved SMEs and develops a typology of anti-competitive conduct and abuse of dominance activities employed by large corporations against SMEs and also anti-competitive conduct that SMEs may engage in.

Keywords: *SMEs, Competition Law, anti-competitive, large corporations*

JEL Classification: *K21, D22, D40*

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1. Introduction

Micro, Small and Medium Enterprises (MSMEs) are a considerable segment of the Indian economy and contribute about about 35-40 per cent of India's GDP. They enable balanced, inclusive and equitable economic growth and development by generating employment and assist in poverty reduction (OECD,2004). MSMEs help reduce rural-urban migration by providing employment opportunities in rural areas and promoting indigenous technologies . They are nursery of entrepreneurship and play a pivotal role in the economic and social development of the country by facilitating occupational mobility and by industrialisation of rural and remote areas thus reducing regional imbalances and promoting more egalitarian distribution of income. Further, MSMEs are complement the large industries as ancillary units and thus their importance in socioeconomic development of the country cannot be overemphasised (KPMG).

The MSME sector in India is highly heterogeneous with regard to the size of the enterprises, variety of products and services, and the levels of technology. A significant proportion of of SMEs in India are in the retail trade sector, basic machinery, leather and textile industry where they coexist with large enterprises. However, many small enterprise which choose to manufacture goods that can be mass-produced suffer from the existential crisis as businesses with large-scale operations can manufacture such products more efficiently by leveraging the economies of scale. MSMEs are thus at a disadvantage compared to large firms in situations where size is associated with regular advantages in purchasing, production, marketing and distribution.

The relationship between SMEs and large corporations can be on either side of the supply chain. On the one hand, SMEs are suppliers to large enterprises like the ancillary auto products etc. and on the other hand, they are dependent on large enterprises for their inputs or raw materials. Often SMEs reason that as a supplier they are abused by large corporations who delay payment for supply beyond the contract terms. Since SMEs are dependent on these large corporations for existence, they end up accepting the unfair terms. As a buyer of products of the large enterprise, these small firms face are high cost due to their weak negotiating/ bargaining power. Thus, these small enterprise claim disadvantage due to size.

Additionally, MSME sector faces a high credit cost, 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 potential to generate employment has not been able to grow in the country. This sector is mainly unorganised and vulnerable to dynamic external business environment. In the wake of rising competition from the new fourth industrial generations enterprises (digital/ Internet firms), it is vital to provide this sector with a level playing field to be able to sustain and thrive in the economy. Given the potential of MSMEs in contributing to equitable growth in the economy it is critical that their interests are protected and they are made aware of the legal and institutional mechanisms that are available in order to protect their interests.

This paper looks at whether the claim of the SMEs regarding anti-competitive practices of large corporations against them holds merit in the light of the Competition Act 2002. The paper is organised as follows, section 2 discusses the data and methodology, section 3 discusses the definition, organisation, structure, role of MSMEs in India and

examines/analyses different kinds of anti-competitive conduct and abuse of dominance activities, as per the Competition Act, that are employed by large corporations against MSMEs. It will also examine in detail the different kinds of anti-competitive conduct that SMEs engage in based on the cases and orders of Competition Commission of India (CCI).

2. Data and Methodology

The methodology for the study consists of review of existing literature, cases and orders of CCI and Competition Appellate Tribunal (COMPAT)[1] to understand the kinds of anti-competitive conduct that the SMEs are facing or indulging in.

3. Definition, Organisation, Structure, Role of MSMEs In India.

3.1 Definition

Chapter III of the Micro, Small and Medium Enterprises Development (MSMED) Act defines MSME in India on the basis of investment in plant and machinery separately for manufacturing and services sector.

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 INR 25 lakh;
ii. A small enterprise, where the investment in plant and machinery is more than INR 25 lakh but does not exceed INR five crore; or
iii. A medium enterprise, where the investment in plant and machinery is more than INR five crore but does not exceed INR ten crore;

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[2]

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 INR ten lakh
ii. A small enterprise, where the investment in equipment is more than INR ten lakh but does not exceed INR two crore; or
iii. A medium enterprise, where the investment in equipment is more than INR two crore but does not exceed INR five crore rupees.[3]

[1] *The Competition Appellate Tribunal (COMPAT) has ceased to exist effective 26 May 2017. The appellate function under the Competition Act, 2002 (Competition Act) would now confer to the National Company Law Appellate Tribunal (NCLAT). These amendments were brought about under the provisions of Part XIV of Chapter VI of the Finance Act, 2017. Accordingly, Sections 2(ba) and 53A of the Competition Act and Section 410 of the Companies Act, 2013 (CA 2013) have been appropriately amended and various other provisions of the Competition Act dealing with the COMPAT have been omitted.*
[2] Central Bank of India: Micro, Small and Medium Enterprises, page3
[3] Micro, Small and Medium Enterprises Development Act, 2006

These will include small road and water transport operators, small business, retail trade, professional & self-employed persons and other service enterprises. Table 1 summarises the definition of MSME in Manufacturing and Services sector based on the MSMED Act 2006.

Table 1: Definition of MSMEs in as per MSMED Act, 2006

Enterprise Description	Manufacturing Enterprise Investment	Service Enterprises – Investment in Equipment
Micro Enterprise	Up to INR 25 lakhs	Up to INR 10 lakhs
Small Enterprise	Above INR 25 Lakh and up to INR 5 Crore	Above INR 10 Lakh and up to INR 2 Crore
Medium Enterprise	Above INR 5 Crore and up to INR 10 Crore	Above INR 2 Crore and up to INR 5 Crore

Source: MSME Act 2006

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

It is pertinent to note that though within the meaning of 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. 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, for the Competition agency in India it is the market structure that is a decisive factor rather than the size of the firm.

4. Competition Act 2002

Competition Act 2002 lists down four overarching objectives it strives to achieve that is "*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*"[4]. Chapter II of the Act lists down prohibitions 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.

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

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

[4] Competition Act 2002, page 1.

inquiry into alleged anti-competitive agreements including cartels. Section 26 lays down the procedure for such an inquiry.

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 their very nature are susceptible 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 antitrust violation. As associations provide umpteen opportunities for the members to 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. Sometimes associations may intentionally abuse their position and compel their members to take part in cartels.

The CCI stand 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 CCI, in terms of standard of evidence, has remained largely consistent over the years.

Section 4 of the Act prohibits abuse of dominant position but having a dominant position in the market is not prohibited. Abuse of dominance takes several forms like price discrimination, margin squeezing and predatory pricing. However, before establishing abuse it is necessary to establish dominance. Enterprises practicing the said conducts but not having a dominant position in the market do not face the competition scrutiny. It is very rare to come across instances where a SME would be a dominant player in the relevant market and hence it is very unlikely that SMEs would be found guilty of abusing their dominant position. Nevertheless, it may be possible that select SMEs may get together and collectively dominant and subsequently abuse their dominant position.

An important feature of India's competition law is that it is size and type neutral that is there are no explicit provisions for safeguarding enterprises on the basis of their size and type of business they are into. All enterprises 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.

Therefore in the remaining section we look at the recent cases and orders of CCI to understand whether SMEs are victims or perpetrators under the Competition policy dispensation.

4.1 SMEs as Victims

It is an established fact that MSMEs facilitate more equitable economic growth and development of the nation (OECD, 2004). In a competitive market small players compete with all kinds of players, from big size players to players of their size. MSMEs face stiff competition from the hands of big players due to which margin for error in their business activity becomes minimum. Survival of MSMEs becomes is critical when big players start abusing their prevalent position.

In the Auto Parts case[5] the CCI held 14 car companies liable for abusing their dominant position in the relevant market of supply of spare parts and imposed a hefty amount of penalty amounting to INR 2544.65 Crores. Companies were found to be indulging in restrictive trade practices by not providing their original spare parts in the open market and also did not furnish other relevant information related to tools and technology required for carrying out repair. Therefore, it led to the denial of market access to the independent repairers, who are operating in the open market of servicing and spare parts.

In *Faridabad Industries Association (FIA) v. M/s Adani Gas Limited*[6], informant was 90 members of association consuming natural gas supplied by the Adani Gas Limited. Due to government policies Adani Gas Limited had obtained monopoly in the supply of natural gas in the relevant geographic area. An agreement was executed between members of Faridabad Industries Association and Adani Gas Limited to supply natural gas. Since, Adani was the only supplier of natural gas in the relevant geographic area, it compelled buyers to enter into one sided agreement. The CCI found that the conditions stipulated in the agreement such as penalty, rate of interest, delay in payment and non-performance was unilateral and heavily tilted in the favour of Adani Gas Limited. Hence, it was held to be the abuse of dominant position by Adani Gas Limited.

Sometimes dominant player in upstream market may compels the downstream market players to follow their recommended resale price and to ensure compliance by the small player, the dominant player may imposes certain punitive measures. Wuliangye, a Chinese Liquor Company signed agreements with more than 3,200 independent distributors to restrict the minimum resale price of its liquor. For those who did not implement the minimum price, Wuliangye adopted various punitive measures such as limiting their business, reducing supply, confiscating deposit money and imposing fines. Wuliangye even stopped supply to one supermarket chain in order to force the latter to comply with the RPM agreement. These agreements were found to be anti-competitive and penalty of RMB 202 million (about USD 32.6 million) was imposed upon Liquor Company.[7]

The case of *FIA v. M/s Adani Gas Limited*[8]shows that small firms are sometimes served with unconscionable terms and their position compels them to accept the adversarial offers as they don't have option other than dealing with the dominant player. Moreover, in case of non-performance MSMEs are often subject to various unreasonable penalty clauses but the same high penalty clauses do not apply to the dominant player. In vertical

[5] Case No. 03/2011 Competition Commission of India
[6] Case No. 71 of 2012. Competition Commission of India
[7] Competition law: Regulation and SME in Asia Pacific by Michael T. Schaper and Cassey Lee
[8] Case No. 71 of 2012. Competition Commission of India

agreements dominant player in the upstream market often compels players of the downstream market to undergo the unreasonable terms of the contract like the case of Auto parts case quoted earlier. Due to lack of bargaining power MSMEs in the downstream market left with no alternative other than accepting one sided terms of the contract viz unreasonably high prices, tie-in, bundling and to maintain minimum retail price.

4.2 SMEs as Perpetrators

Generally, MSMEs may not be able to abuse its position due its small size. However, there are instances whereby large number of MSMEs collectively created a dominant position and after attaining dominance they exploited their customers. 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. We survey select Indian cases under Section 3(3) of the Act and discusses the impact that the trade associations of SMEs have had on the market.

In the case, *M/s Shivam Enterprises v. Kiratpur Sahib Truck Operators, Co-operative Transport Society Limited and Members of Kiratpur Sahib Truck Operators, Co-operative Transport Society Limited* it was observed that the opposite party gained the position of dominance and did not allow any except its members to provide freight transport services within the region. Furthermore, the rates imposed were inflexible and non-negotiable. Its members have also forcibly obstructing other truck operators in the market to execute their contract, resulting in denial in market. The CCI, thus, held the opposite party in violation of anti-competitive practices and abuse of dominant power (section 3 and 4) and imposed a penalty on the parties based on the average income of the last three financial years[9].

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 it the artists, distributors, exhibitors, and sometimes the industry as a whole. Most of these associations have strict rules for members and members are not 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 CCI has initiated and/or acted against enterprises active in this sector on twenty (20) occasions[10]. 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*.[11] (Bengal Artists Case). The defining characteristic of this sector is the control exercised by trade associations. Most aspects of this industry are unionised, and these associations and unions exercise significant influence on the way in which their constituent members carry on the business. By far, the largest chunk of cases under the Act have been because concerted action by trade associations.

[9] CCI order in Case no. 43 of 2013. Decision of COMPAT is not yet finalised
[10] CCI (2018)
[11] Ref. Case No. 01 of 2013

In the case of *Kerala Cine Exhibitor's Association (Informant) vs. Kerala Film Exhibitors Federation and Others*.[12], 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 exhibitors 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 the opposition 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 and Others., 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 may 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 opposition parties would attract the provisions of section 3(3) of the Act being a horizontal agreement and thus the commission ordered the opposition parties to stop indulging in such practices and opposition parties 1,2 and 4 were liable to pay a penalty.

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".*[13]

MSMEs sometimes may also be 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

[12] Case No. 45 of 2012
[13] CCI (2018)

pharmaceutical distribution chain and in particular at the All India Organization of Chemists and Druggists and various other state-level associations of chemists and druggists. In the case of *P.K. Krishna (Informant) vs. Paul Madhavana and Others*[14], the informant was engaged in distribution of medicines manufactured by pharmaceutical companies in Kerala and has a valid drug license. Informant alleged that Alkem Labs Ltd (one of the opposite parties) had denied his application to become a stockist as he did not receive a NOC from the All Kerala Chemists and Druggists Association. Subsequently, Alkem Labs 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 made with the approval of state/district units of the Association. Also, it was very clear from the evidence that was earlier submitted by Merck Ltd., which is a third party that, the association unanimously decided to boycott Merck Ltd. by requesting stockists to stop the supply and 95 per cent of the stockists complied with the request. This clearly shows that the association had been exercising influence and controlling the supply of medicines. This resulted in restricting provisioning of goods in the market and thus, in contravention of certain provisions of the act.

In the case of *Bengal Chemist and Druggist Association*[15], the CCI imposed a penalty of INR 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 anticompetitive conduct of the association.

Thus, associations of SMEs formed with an objective of promoting the sector or improving the bargaining power of the enterprises have been found to abuse their power. Associations of SMEs in the informal sector helped to 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.

Another anti-competitive practice that the SMEs have been following is 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 superficially look like competitive process and ensure that competition is suppressed. Bid-rigging is a main concern for government departments which procure goods and services from the non-state enterprises. 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-

[14] CCI order in Case No. 28 of 2014
[15] CCI order in Case No 01

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 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 INR 3,02,78,300 was imposed on 13 colluding suppliers.

In *Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans*[16] 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 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 16 lakhs instead of INR 62 lakhs.

In another case, the *Union of India through Secretary, Ministry of Health and Family Welfare*[17], invited bids for supply of pre-fabricated modular operation theatre to which six 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 three bidders - MPS, MDD and Unniss did not have the exclusive authorisation for integration of modular operation theatre. 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 three 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 had already imposed penalty on the three parties in similar case (Case no. 43 of 2010) it did not feel the need to impose any further penalty[18].

5. Conclusion

This paper analysed the recent cases of CCI, involving MSMEs ,under section 3 and section 4 to understand and assess whether SMEs are only victims of anti-competitive behaviour, as defined by the Competition Act, 2002 or are they also perpetrators. The cases clearly demonstrate that the small size of the SMEs does make them vulnerable. In the case of FIA vs Adani Gas, the enterprises had to accept unfair and one-sided terms. In the Auto parts case, the SMEs were subjected to restrictive trade practices. However, the paper goes on to find that the small size of SMEs necessitates them to form associations and these trade associations have acted as a focal point and facilitated cartelisation in India. Apart from associations, one legacy business practice that SMEs

[16] CCI order in Suo Moto Case No.03 of 2014
[17] CCI order in Case No. 43 of 2010
[18] CCI Order in Case no. 40 of 2010.

have been following to ensure survival is bid rigging or bid rotation. Recent cases and orders of CCI shows evidence to this effect.

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 for 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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