

Consortium of MSME: Cartel or Not?

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Abstract

This paper is an attempt to analyse government policies and legal position in regard to the status of Micro, Small and Medium Enterprises (MSME) from the perspective of the Competition Act, 2002, especially with respect to their cartel behaviour. Presently, there is no specific legal provision exempting MSMEs from the ambit of the Competition Act, 2002. Yet, there are certain government policies which promote cooperation among MSMEs. In other countries, where there is more or less an exemption to small enterprises under the garb of *de-minimis*. Government policies promoting cooperation among MSMEs needs attention, preferably through revisiting the legal provisions under the Competition Act, 2002. Therefore, this paper, while touching upon the challenges faced by CCI in this regard, concludes that the contradictions in the policies of different arms of the government are to be sorted out. It further makes suggestions to address the same in light of the practices in other countries.

Keywords: MSME, *de-minimis*, cartel, competition law, Raghavan Committee, NSIC

1. Introduction

Micro, Small and Medium Enterprises (MSME) are regulated by the Micro, Small and Medium Enterprises Development (MSMED) Act, 2006. The act provides the definition and nature of enterprises that can be listed as MSME. The Act was enacted to help facilitate the promotion,

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development, and enhancement of the competitiveness of Micro, Small and Medium Enterprises (MSMEs).¹ MSMEs contribute enormously to the Indian economy in terms of Gross Domestic Product (GDP), exports, and the generation of employment.² As per the 73rd round of the National Sample Survey (NSS) conducted during 2015–16, the MSME sector has been creating 11.10 crore jobs in the rural and urban areas across the country, which has increased by 3.63% since the fourth All India Census of MSMEs 2006–07 held every ten years.³ Thus, after agriculture, this sector has been the second largest employer in the Indian economy and accounts for almost 45% of total industrial production and 40% of total exports. It also contributes significantly to the GDP. The manufacturing sector within MSMEs contributes approximately 7.0% and approximately 30.5% of services of GDP. The total contribution of MSMEs to the GDP is around 37.5%.⁴

The National Small Industries Corporation (NSIC) is a government enterprise established under the Ministry of Micro, Small and Medium Enterprises. It works to promote the growth of MSMEs in the country by providing integrated support services such as marketing, technology, finance, and other services. The structure, working, and nature of NSIC is such that it promotes working together by means of policies or for mere survival of MSMEs. NSIC promotes MSMEs by helping them work together through the policy of consortia. It promotes the formation of consortia among micro and small units manufacturing the same product, thereby pooling their capacities.

The Competition Act, 2002 was enacted to maintain healthy competition in the market and deal with offences such as cartel and vertical restraints. If enterprises enter into an agreement in regard to factors like production, supply, etc., or provision of services, which causes or is likely to cause an appreciable adverse effect on competition (AAEC) within India, such agreements are declared void by the Competition Act, 2002. The Act does not differentiate between enterprises on the basis of their size for inclusion in its ambit. Thus, there is no special treatment for MSMEs.

The paper discusses the evolution of the rationale for establishment of MSME from post-Independence period to the present times, wherein

MSMEs are threatened by the regulatory radars. The paper further discusses the definition and role of MSMEs in the Indian economy and its intersection with the regulatory law of competition in India. The paper also traces the working models of MSMEs, which may be considered anti-competitive under the offence of cartel. While also demonstrating the exemptions available to MSMEs under competition law in some countries, the paper, after balancing the benefits and negatives of cooperation among MSMEs, also suggests the way forward to protect the interest of MSMEs without being threatened by the Competition Commission of India.

It is observed that MSMEs working together have a thin line to cross which may place them as indulging in anti-competitive formation of cartel. This may even be for their survival and with the support of NSIC. Keeping in mind the policy and practices governing MSMEs, the role of competition law cannot be diffused. Therefore, the relation between MSMEs and competition law is indispensable. This paper analyses the rationale behind the reservation policies along with the present policies of MSMEs and its impact on competition law. The paper examines various aspects which are observed to be conflicting with the existence of MSMEs themselves and suggests measures to overcome the challenges faced by government authorities on this front.

2. Economic Rationale for Reservation

After independence, the primary concerns of India were increasing employment opportunities and creating a self-sufficient national economy. The emphasis and promotion of cottage industries by Mahatma Gandhi, by presenting khadi as a symbol of nationalism and self-reliance, encouraged the country to focus on its small-scale industries. The concept was aimed at introducing industrialisation to the rural level. Small industries also found a special place in the Industrial Policy Resolution of 1948, wherein concerns regarding the protection of small industries from competition by large scale industries and their coordination without threat to each other were highlighted.

Moreover, the first five-year plan by the Planning Commission (1951–56) dealt with the village industries.⁵ The Commission recognised eight spheres which required the development of village industries. These were (1) organisation; (2) state policy; (3) finance; (4) raw materials; (5) research; (6) technical guidance; (7) supply of equipment; and (8) marketing. The Planning Commission observed that to deal with different aspects of village industries, it is required that a field is set up within which the cottage industry can organise itself. The Commission recognised common production programmes as an appropriate course for the cottage industry and large-scale industries. These common production programmes were to include the reservation of spheres of production, non-expansion of the capacity of a large-scale industry, imposition of a cess on a large-scale industry, arrangement for the supply of raw materials, and coordination for research, training. This displays the intention of the government to control the organised large-scale industry and promote small-scale industries. The Planning Commission also observed that there was no distinction between cottage industries and small-scale industries. The Commission observed that, in the engineering industry, the manufacturing process may be allocated to the small-scale industries, which can be achieved by the principle of reservation in favour of small-scale industries to expand these fields.

The most important development which led to the reservation was the Reservation Policy of 1967, which had the objective of improving competitiveness for small-scale industries and was statutorily recognised in 1984 in the Industries (Development and Regulation) Act, 1951.⁶

3. Micro, Small and Medium Enterprises and their Role in the Indian Economy

MSMEs in India play a major role in the growth of the GDP of the country. These firms are small-scale industries promoted by the country to help economic growth and employment opportunities. MSMEs are defined under the Micro, Small and Medium Enterprises Development Act, 2006. The classifications of an industry as an MSME are based on the plant and

machinery investment by a firm or a company. The Micro, Small and Medium Enterprises Development Act, 2006 defines MSMEs⁷ as:

1. Micro enterprises are those having investment in plant and machinery which does not exceed 1 crore rupees and an annual turnover of not more than 5 crore rupees.
2. Small industries are those having an investment in plant and machinery more than 10 crore rupees and an annual turnover not more than 50 crore rupees.
3. Medium enterprise are those where the investment in plant and machinery is more than 50 crore rupees and an annual turnover is not more than 250 crore rupees.

Therefore, considering the provisions, it can be said that MSMEs are basically small scale industries where the investments in plant and machinery does not exceed 50 crores, ranging from a category of micro enterprise to medium enterprise. Examples of such industries include khadi and village industries, the coir industry, etc.

4. National Small Industries Corporation and the Role of Government in Promotion of MSMEs

The objective of the Ministry of Micro, Small and Medium Enterprises is to promote the growth and development of the MSME sector. The government helps MSMEs by facilitating policies, plans, and organisations to promote the MSME industry. One such effort has been made by Ministry of MSME by forming National Small Industries Corporation (NSIC), which is a government of India enterprise. It was formed to promote the growth of MSMEs in the country by providing support services such as marketing, finance, technology, and other services. NSIC also facilitates various schemes to enhance the competitiveness of these enterprises. NSIC regulates and promotes the consortia of micro and small units manufacturing the same products, thereby pooling their capacities. “NSIC applies the tenders on behalf of single MSE/Consortia of MSEs for securing orders for them. These orders are then distributed amongst

MSEs in tune with their production capacity.”⁸ This scheme is called the Consortia and Tender Marketing Scheme.

It is imperative to state that the government promotes Micro and Small Enterprises (MSEs) to the extent that the Public Procurement Policy for MSEs (notified under the Section 11 of MSMED Act, 2006) requires every Central Ministry/Department/Public Service Undertaking (PSU) to set an annual target of 25% procurement from the MSE sector. Therefore, considering the above facts and policies, it can be summarised that Government Ministries/Departments/PSUs mandatorily have to ensure 25% of its yearly procurement from MSEs. Therefore, a large amount of money is spent by the government in public procurement from the MSE sector. This practice requires high transparency and healthy competition among MSE industries.

5. The Competition Act, 2002 and its Application to MSMEs

As observed above, the role of Competition Commission of India comes into play to maintain healthy competition and transparency. However, it is hereby asserted that the Competition Act, 2002 gives no exception in its application to MSMEs. According to Section 3(1) and 3(2) of the Act, no enterprise or association of enterprises is allowed to enter into any agreement in respect of production, supply, distribution, storage, acquisition, or control of goods or provision of services, where these agreements cause or are likely to cause an appreciable adverse effect on competition within India. Such agreement shall be void.

While Section 3(3) states that any agreement entered into between enterprises, including cartels, engaged in identical or similar trade of goods or provision of services, which determines prices, limits productions, shares the market, or results in bid-rigging are presumed to have appreciable adverse effect on competition. The only exception to this is for joint ventures if such an agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods, or provision of services.

Therefore, any agreement between enterprises engaged in identical or similar trade of goods which directly or indirectly determines sale or purchase prices, limits or controls production, etc., shares the market or results in collusive bidding shall be presumed to be an agreement in violation of Section 3(1) of the Act.

The relevant facts and statutory provisions have been discussed above separately under the MSMED Act and the Competition Act, 2002. There is no meeting point for the two. However, in terms of practical implications, it has been observed that since there is no exception for MSMEs in the Competition Act, 2002, various cartel cases are being filed before the Competition Commission of India (CCI) wherein Ministries/Government Departments/PSUs have, reportedly and as alleged, been suffering from bid-rigging at the hands of the MSMEs due to collusive bidding in Public Procurement Tenders. The government's mandatory requirement of at least 25% of procurement from MSEs may further enhance the chances of MSEs indulging in cooperative behaviour bordering on cartelisation. It can be better explained with the example that in various Railway tenders, procurement is made from the MSME regarding various different Railway parts, wherein cartel cases have been filed before CCI alleging bid-rigging. However, when the same is looked into, the factor that the NSIC promotes and facilitates such activities which result in collectively bidding by way of filing bids on behalf of all the participating MSEs is also a point in consideration. NSIC also conducts various conferences and meetings and has access to all the information of participating MSMEs.

Therefore, quoting the same prices in some cases for different participating MSEs or different prices for the same product for the firms/companies established in the same region is a clear signal of anti-competitive practices. Moreover, if the same is done by MSMEs themselves, which are mandatorily registered with the NSIC, it displays a common objective or cooperation. The practice of collusive bidding or determining sale price of goods or allocation of regions is very common among MSMEs in Public Procurement Tenders across India for various goods whether attributed to NSIC or not, such as in *Ref. Case No. 03 of 2016, Chief Materials Manager, South Eastern Railway/Hindustan Composites Ltd. &*

Ors., and certain other cases under the investigation with confidentiality. NSIC is one of the factors which promotes such practice which works like an association for MSMEs formed by the government with the clear intent of formation of a consortium.

6. Background to the Application of Competition Law to MSMEs

In 1999, the then Finance Minister stated that there is a need to shift focus from curbing monopolies to promoting competition in the market. Consequently, to protect the interests of consumers and to ensure freedom of trade, the Raghavan Committee was constituted on Competition Policy and Competition Law chaired by Mr. S. V. S. Raghavan in October 1999.

The report of High Level Committee on Competition Policy and Law SVS Raghavan Committee, 2000, in para 3.3.7 of the Competition Policy and Competition Law, acknowledges that in Germany, certain cartels have been given exemption, such as the small and medium business cartels which are associated with economic advantages. It further states that the logic behind the exemption is that it improves the market opportunities of small business against large companies. However, the application of the same in India is not favoured. The Raghavan Committee discussed the competition policy in lieu of the small and medium scale industry; the relevant part of the draft has been reproduced below:

“3.3.8 Taking a cue from the German pattern and exempting small scale industries from the applicability of Competition Policy may not be and will not be necessarily a solution for the welfare and interest of the small scale sector. Protection of such units can only be a drag on the economy and waste of scarce resources (particularly capital resources). If at all there should be a national goal in this area, it should be the welfare of the efficient and wellmanaged small scale sector. Exemption from the competition principles cannot be a handmaiden to be used for protecting laggards in the small scale sector.

3.3.9 Having said this, in order to encourage and assist the efficient and well-managed small scale sector units, the following suggestions may merit consideration.

- a) *There should be no reservation of products which are on Open General Licence (OGL) for imports.*
- b) *There should be progressive reduction and ultimate elimination of reservation of products for the small scale and handloom sector. However, cheaper credit should be made available to them. More specifically, the bank credit rate may be linked to the inflation rate, so that the small scale sector and handloom sector units may be enabled to be competitive not only domestically but also internationally.*
- c) *The threshold limit for the small scale industrial sector may be increased appropriately as the existing limit is too small, having regard to inflation over the last few years and the exchange rate changes."*

Therefore, it can be observed that, as per the Raghavan Committee, which forms the origin of the competition law, MSMEs don't require a special exemption under competition policy, as it will result in wastage of scarce resources and protect laggards in the small-scale sector. Thus, there is no provision for any exemption to MSMEs under the Competition Act, 2002. However, the intention of the Raghavan Committee is clear—that though the protection of MSMEs is not required, they should be promoted to compete with the big firm industries. The idea is to have efficient and well-managed MSMEs. Therefore, the cartel among MSMEs is not permitted and any such alleged act will be scrutinised under the Competition Act. Considering the same, the policy of NSIC which encourages cooperation among MSMEs is a challenge faced by CCI.

7. Practices in Other Countries in Regard to MSMEs and Competition Regime

The competition law in India does not designate MSMEs any special status, and if an MSME indulges in any anti-competitive practice, it has to face the music for contravention of the Act. However, in various countries, the same has been dealt with very differently under the category *de-minimis cartels*. The practice of various countries⁹ has been summarised below:

Germany

Under the German competition law, which is governed by the Act against Restraints of Competition (Competition Act—GWB), the cartelisation

practised by the Small and Medium Sized Enterprises (SMEs) is not actionable if it has insignificant effect on the market and the object of such cartel is to maintain economic activities, and if the agreement between undertakings improves the competitiveness of small or medium sized enterprises, these agreements are considered exempted agreements and are non-actionable. These exemptions were introduced in 1973. However, it is dealt on case-to-case basis and if the cooperation between SMEs is to eliminate competition rather than promote efficiency, then it is not to be exempted. However, the exemption of SMEs has been widely used in Germany.

European Union

The EU cartel regulation, i.e., Art. 101 of the Treaty on the Functioning of the European Union (TFEU), does not explicitly exempt SMEs. The regulation exempts cartels that contribute to economic progress and result in consumer benefits. The *de-minimis* notice¹⁰ dated 30.08.2014 laid down the rule of *de-minimis*, wherein certain cartels, with negligible effect on competition, are exempted and not actionable. It considers a combination of 5% of market share and EUR 40 million as a threshold for agreements having negligible effect on competition.

Japan

The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947), also called the Anti-Monopoly Act of Japan, exempts certain SMEs from being prohibited under the regulations of the cartel, such as partnerships to support small-scale industries unless it results in unjust price increase. Moreover, they have a Small and Medium-Sized Enterprise Co-operative Act (Act No. 181 of June 1, 1949), which exempts certain cooperatives and federations of small business associations under Article 7 and 75-2.

USA

In the USA, under provisions of Section 11 of the Small Business Act of 1953, certain agreements are exempted from antitrust laws. The Section empowers the president to allow certain voluntary agreements or programmes of small business concerns to be exempted from the ambit of

antitrust laws. These agreements are exempted by the president if they are in public interest as contributing to national defence.

UK

In the UK, the Competition Act, 1980 by the Anti-competitive Practices (Exclusions) (Amendment) Order 1994 only applies to behaviours of firms recording a minimum turnover of 10 million pounds and holding a market share of 25%. Therefore, cartel proceedings are initiated only when thresholds are exceeded.

Table 1. Comparative Chart of Exemptions Threshold

Country	Exemption (Yes/No)	Threshold
Germany	Yes	Case to case basis
European Union	Yes	Minimum turnover: EUR 40 million Market Share: 5%
Japan	Yes	Small business associations
United States of America	Yes	Only in public interest
United Kingdom	Yes	Minimum turnover: 10 million pounds Market Share: 25%

Source: OECD Policy Roundtables, "General Cartel Bans: Criteria for exemption for Small and Medium -sized Enterprises", 1996, Paris, Treaty on the functioning of the European Union (TFEU), Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947) and Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (2014/C 291/01).

As observed from Table 1, it can be summarised that every country has dealt with the issue of MSMEs primarily without a blanket exemption but from case to case depending on the character of such cooperation among the MSMEs. This forms a relevant footprint which can be followed by India in dealing with the issue of MSMEs in regard to cartels. As observed from

the comparative chart, Germany grants exemption from the provision of cartel on a case-by-case basis, and in the USA, it is exempted only in public interest. However, the EU and UK have prescribed a minimum turnover and Japan exempts small business associations. Therefore, it will be correct to conclude that there are exemptions for small-scale businesses across countries from being prosecuted for a cartel. Considering that India is a developing country where small-scale industries are required to be protected, it is suggested to analyse and formulate its regulatory scheme in line with the above jurisdictions.

8. Weighing the Benefits and Harms of Co-operation Among MSMEs

The execution of cooperation or agreement among MSMEs in India has various benefits and harms in the economic market. The same has been analysed herein; however, it is important to see that the benefits of the cooperation among MSMEs has to be analysed in regard to the market and not merely for the benefit of cooperating MSMEs themselves. The benefits of the same can be seen below:

- **Healthy Competition to Large Firms**

MSMEs are called small-scale industries for various reasons that include small scale productions, i.e., single-product firms, lack of marketing skillset, and low number of qualified employees, which places them at a disadvantaged position compared to larger firms. When these MSMEs cooperate or work together, they become larger than before by increasing productivity, pooling marketing skills and qualified employees, etc. They become better placed to compete in the market, which would otherwise have been difficult.

The agreements or cooperation between MSMEs have a better footing in the market against larger firms. Therefore, markets where there is only one player, i.e., a monopolistic market, MSMEs together can help avoid abuse of dominance by the single player by giving a competition in the market by sticking together and availing the benefits of MSMEs.

- **Increased Efficiency**

MSMEs are small-scale industries with basic machinery and plants; by cooperating, they can efficiently use the resources and reduce the investment, which further increases the productivity and efficiency of the firms. For example, two MSME firms may invest in machineries and share the output of the same for supply wherein investment will be limited with increased output to compete with big firms.

- **Uniform Distribution of Resources**

Due to cooperation between MSMEs, it is usually observed that the procurement process is uniformly distributed among MSMEs, wherein they divide the tender either geographically, on a rotation basis, etc. They mutually agree, and therefore, all the companies survive.

However, while considering the benefits, certain harmful effects of such a practice can be observed, as follows:

- **Restricts Entry of New Players in the Market**

The most common trend that can be observed in cases of cooperation between MSME players is that new players, whether MSME or not, are restricted from entering the market, unless the new player becomes part of the cooperation between the MSMEs. The agreement between the MSMEs are such that it acts as a barrier for new entrants in the market.

- **Price Inflation Causes Loss to the Exchequer**

The agreement/cooperation between MSMEs causes the inflation of prices, especially when there are few or no other players in the market. In such circumstances, the MSMEs may collude to increase the prices of the product, forcing the buyer to succumb and procure the product at the given rate, causing losses to the buyer.

- **Bid Rigging**

The cooperation between MSMEs are not always lucid, as it can be in regard to the restriction of supply of products, sharing of markets in regard to geographical areas, refusing to negotiate, etc., which are

the methods used to rig the bidding process of procurers. There are no empirical studies or research to demonstrate the effect of cooperation amongst MSMEs, as the competition law in India is still in its nascent stage and evolving specifically in regard to government setups such as tender schemes, MSMEs, etc. Therefore, the present paper is an attempt to bridge the gap between the lack of studies and regulatory complications between the protection of MSMEs while complying with the economic law of competition.

It can be observed from the above that the tree can be swayed either way, and the situation has its own pros and cons. But this indicates that there may definitely be no blanket permission or restriction on MSMEs. However, an analysis of both factors may result in the fact that efficiency gained by MSME entities by consortia may lead to substantial effect on competition. The combined share of MSMEs may threaten new players or another large player from entering into the market. Therefore, there cannot be a general exemption on such MSMEs. However, for such enterprises to thrive against dominant players, there is need for a classified exemption.

9. Need of the Hour: Revisiting the Legal Position

The status of MSMEs is delicate and crucial, especially in a country like India, which is still a developing country. In 2019, MSMEs' contribution to India's GDP was 29%. It is not only responsible for GDP growth but also provides employment to the masses, increases exports, and decreases imports. Therefore, limiting MSMEs' growth and productivity by restricting them is not advisable, especially considering the benefits and exemptions that the government of India announces from time to time which display the importance of such MSMEs in the country. Therefore, there is a need to explore a new dimension of the status of MSMEs in regard to the practices of cartelisation. With growing cases of cartel in regard to MSMEs alleged before CCI, the need of the hour is to lay down the ground rules for the same.

MSMEs may indulge in cartels due to lack of knowledge of competition law in regard to a cartel. Since it has been discussed above that MSMEs

are small-scale business houses with minimum investment, lack of technical know-how, and less specialised staff and employees, there is a high chance for lack of knowledge leading to the practice of cartel. While the practice of cooperation/agreement among MSMEs is one thing, the consequences of such agreements leading to price determination or controlling of production, sale, or purchase is another. The lack of legal knowledge as to the existence of such law may be one of the reasons that MSMEs indulge in the practice of cartel.

There is also a need to educate and advocate MSMEs about the provisions of the Competition Act, 2002. Since MSMEs are established in remote areas, with a small-scale setup and access to basic technicalities, it is difficult for them to be aware of the implications of their actions and practices; even if they are aware of it being wrong, they may be unaware of its legal implications. Therefore, it's not always necessary that the indulgence in cartel is *mala fide*.

As observed earlier, the Raghavan Committee discussed the status of MSMEs in regard to cartel in 1999. It is pertinent to mention here that the policy of reservation of products was begun in 1967, wherein the objective was socio-economic development by helping small enterprises in India. The other objective was to ensure increased production and increased employment in this sector and also help small-scale industry capable of competing in the market¹¹. Though the professed objective of reservation was to improve competition in the sector, it was practically not possible by making a reservation exclusively for a manufacturer as it restricts competition. The period from the 1970s until the 1990s was a golden period for MSMEs, wherein they emerged as a source of employment and helped reduce poverty in the country. The Indian government took steps to increase exemptions on various duties and taxes for MSMEs even though there was loss of revenue. From 1967 till 1984, the reservations for commodities increased significantly. The industrial policy in 1977 played a crucial role in the development of MSMEs, wherein the production of various items was exclusively given to MSMEs and technical support was given by the government to such industries by setting up support centres at district levels.

Moreover, in 1985, credit facility was arranged by setting up the Small Industrial Development Bank (SIDBI) with IDBI. In the early 1990s, MSMEs were protected and secured by the government with increases in the reserved items, government subsidy, credit facility, and technological support. In 1997, the term “small-scale industries” since an enterprise covers all kinds of businesses, including the service sector. These enterprises were divided into the tiny sector and small sector depending on limit. The investment turning point for the reservation of items for small-scale enterprises was observed in 1997 after recommendation by the Abid Hussain Committee Report, which suggested a gradual abolition of reservation policy. The de-reservation of items opened SMEs to competition from domestic as well as the international sector, and therefore, the government helped them cope with competition by providing the necessary support in terms of credit facility, technological support, etc. This further led to the emergence of the MSME Act, 2006, wherein the micro and medium sector were defined for the first time in India. With regard to the impact and enforcement of the policy, 17.5% of firms in the manufacturing sector produced at least one reserved product in 2000, and these firms accounted for 20% of the employment and 27.5% of gross value-added in the manufacturing sector.¹²

Therefore, the rationale of the policy of reservation can well be summarised as a policy formulated by the Indian government to ensure the spirit and competitiveness of small-scale enterprises in India. Under this policy, certain items or products were exclusively reserved for manufacturing by small-scale enterprises. The list for the items reserved expanded from 504 in 1978 to 836 in 1989. But after the Abid Hussain Committee Report, there was de-reservation for items every year since 2000. However, the items reserved for manufacture by the small-scale sector are de-reserved from time to time to improve the growth of MSMEs. As non-MSME units can also manufacture these reserved items if they oblige with certain export regulations, large organisations can easily manufacture these products and compete with MSMEs. The grounds on which products were de-reserved each year is unclear, with no clear explanation in government documents, media reports, and conversations

with ministry officials.¹³ Presently, there are 358 items reserved for MSEs in India. However, in the year 1999,¹⁴ there were a total 812 items reserved for MSEs, and with time, certain de-reservations were made leading to the current status. Therefore, as the Raghavan Committee suggested, there was progressive reduction in the reservation of items for MSEs with the years, which means that big firms/companies can manufacture the de-reserved items, giving competition to MSEs without any restrictions. As per the final report of the fourth all-India census of MSMEs, 60.22% enterprises operate in the rural sector. In terms of value, 45% of the manufacturing output and employment of 6 crore people is estimated in this sector, therefore the labour-to-capital ratio is much higher in MSMEs than large industries.¹⁵ The impact of de-reservation of items for MSMEs as suggested by one of the researchers is as follows:¹⁶

- Increase in demand of skilled labour
- Increase in unemployment
- Decrease in capital productivity
- Manufacturing requires technology upgrades and innovation, which are used by big companies which outsource the same to MSMEs in case of reservation of products; however, after de-reservation, these big companies can directly manufacture and sell these without MSMEs.

The above conclusion is also supported by another research¹⁷ where it was concluded that de-reservation decreased employment in small and older enterprises. Although it was concluded that de-reservation may overall increase employment in large enterprises, employment has decreased in small enterprises due to de-reservation. It was also concluded that de-reservation has a negative impact on labour productivity. It is also interesting to note that, in 2015, certain de-reservations by the government attracted various complaints from the small and medium sector alleging the destruction of the small and medium sector and supporting large industries.¹⁸

Therefore, it can be observed that, even though the impact of de-reservation may be positive on the overall economy, the small industries

face a negative impact. From the above observations, it can be concluded that de-reservation does not necessarily reflect a developing trend in the economy and may make MSEs more vulnerable. The process of de-reservation is required to push MSEs forward and help expand in productivity and investments to compete in the globalised and liberalised economic world with other competitors, but on the other hand, it also makes MSEs vulnerable. As Raghavan Committee considered the need to de-reserve slowly and ultimately removing all items from reservation, this is in process and has not been achieved completely. Therefore, a complete state of de-reservation for MSEs has not been attained, reflecting the status of the MSMEs, which are still developing.

It is also imperative to mention the development that took place after the Raghavan Committee recommendations:

- The NSIC formulated the “Consortia and Tender Marketing Scheme” in 2011, much after the Raghavan Committee suggestions.
- The policy of Public Procurement for Micro and Small Enterprises (MSEs) Order, 2012 floated new regulations in regard to central government Ministries, Departments, and PSUs, which required procuring a minimum of 20% of their annual value of goods or services from MSEs, which was later made mandatory from April, 2015.
- In 2018, the Public Procurement Policy for MSEs Order, 2018 was notified under Section 11 of the MSMED Act, 2006. Under the provision of the same, every Central Ministry/Department/PSU was required to procure 25% from the MSE Sector. Therefore, the public procurement target increased from 20% to 25% and items have been de-reserved.
- Various schemes and facilities were introduced in 2020–21 to promote and help MSMEs in India under the objective of Make in India.

Therefore, there has been a tremendous change in regard to the public procurement schemes with the introduction of NSIC consortia schemes since the suggestions of the Raghavan Committee, which could not have been foreseen almost a decade ago, and there has been no recent work/suggestions in this regard after the Raghavan Committee. The need to support and promote MSMEs is the need of the hour considering the

downfall of the economy for reasons such as COVID-19. Therefore, this paper highlights the complexities and delves into the recent changes in the regulatory framework of MSMEs, which may be scrutinised for being anti-competitive. The paper further suggests ways by which the multi-fold complexities can be smoothened out by legislature.

Further, in certain alleged cartel cases, there are two types of cartels dealing with MSMEs: Firstly, when the cartel is among the MSMEs only participating in certain tenders, and secondly, between MSMEs and big companies or non-MSMEs. There is also a third type, wherein cartel may be engaged in the products reserved only for MSMEs as per government guidelines. It cannot be suggested that a blanket exemption may be granted to all MSMEs. However, there is a need for exemption of MSMEs in certain cases as they are not well established to sustain the competition in the economy in isolation. There is a reason for promoting cooperation among MSMEs by NSIC. Even so, the objective of the Competition Act is to promote the economy and maintain healthy competition, which may not be achieved by holding MSMEs liable and imposing penalties.

Moreover, CCI invests a great amount of time and labour in dealing with such cases which, in many cases, may have no adverse effects on competition and economy. Cartel is one offence which has a presumption in law and requires no proof of appreciable adverse effect on competition. But certainly, in these cases, it can be observed that enforcing the Competition Act on such MSMEs may have a more negative impact than positive on competition and economy. These industries may not survive the penalty, which would benefit big players and act as an entry barrier for others. Today, MSMEs in India are extremely sensitive and crucial for the country, which was not foreseen in 1999. Therefore, it is time that the Competition Act prevents unwanted time and labour on investigating such cases.

With growing cases within CCI, there is a need to deal with the status of MSMEs, as imposing penalties and prosecuting MSMEs under the Competition Act sometimes defeats the purpose and the objective of the Competition Act, 2002.

10. Scope for Legal Evolution: Discussion and Suggestions

Considering the policies, development, and statutory provisions of MSMEs and the Competition Commission of India, giving a blanket exemption to MSMEs is not a proper solution. Additionally, considering that the acts of cooperation between MSMEs fall under the provision of Section 3, as cartelisation is prohibited under the Competition Act, when government policies encourage cooperation among MSMEs through NSIC, it is not apt to presume the objective of cartels and whether it is done to inflate the price or compete against a big player for mere survival. Therefore, a blanket exemption on the one hand or strict prohibition on the other hand is not fair and equitable for a developing country like India, which needs the encouragement of MSMEs, as their existence contributes to the GDP of the country and increases employment. It has thus become apparent that there is a need for an alteration/adaptation in the legal position so as to encourage MSMEs to sustain competition and strive. The main purpose of the Competition Act is to promote healthy competition in the economy, which may also be interpreted as a means to control big organised companies from abusing their dominance in the market and promoting and sustaining competition in the market, which may include protecting MSMEs from exiting the market. Therefore, there is a need to come to a meeting point to deal with such issues.

Considering the above facts and circumstances, a few suggestions are made here, primarily to trigger discussion on the possible changes in legal provisions:

- Countries such as Germany and other EU nations do not grant blanket exemptions to Small and Medium-sized Enterprises (SMEs). The exemption under German competition to SMEs are based on the idea of “structural equalisation,” i.e., they tend to favour the SME for the competitive advantages that large firms have owing to their size, thereby improving the structural condition of competition.¹⁶ Therefore, they exempt:

- *De-minimis* cartels, i.e., if co-operation among SMEs has an insignificant effect on the market. The combined market share of the SMEs participating in cooperation should not exceed 5% and it should be made to promote the efficiency of the firms. However, they ensure that agreements related to price, quota, and territorial agreements are not regarded as efficiency promoting and hence, are not exempted.
- Small business cartels, wherein the agreements between SMEs are admissible if their object is the rationalisation of economic activities and if the competition in the market is not substantially impaired. However, the exemption to this rule is that an agreement not focused on promoting efficiency but on eliminating competition is not granted exemption, such as a mere price fixing agreement. Even cooperation between large companies and SMEs are exempted provided it promotes the efficiency of the SME and does not restrain competition in the market. In case of agreements on prices and discounts, a combined market share of 10-15% is assumed to be a critical limit.
- Purchasing associations have been exempted from the ban on cartels. The joint purchases by SMEs are exempted if the participating companies are not compelled to purchase, competition in the relevant market is not substantially impaired, and it promotes competitiveness of the SME. The purpose of allowing the joint purchase is to allow the SME to obtain prices and conditions more favourable than large companies.

Therefore, an analysis of such foreign exemptions suggests that it is better for Indian competition law to adopt a similar policy that exempts MSMEs on a case-by-case basis, wherein the cooperation agreements with the objective of promoting the efficiency of MSMEs may be exempted. While presently, Section 3(3) prohibits agreements which directly or indirectly result in bid-rigging irrespective of any other factor, certain exemptions may be taken into consideration in this case. However, agreements in regard to mere price fixation and territorial jurisdiction may not be exempted. Further, the rule of *de-minimis* may also be considered

to be implemented in India as per the factors and circumstances in the market.

- The first step, however, is the classification of industries in SMEs or MSMEs for the purpose of the Competition Act. The definition of micro, small and medium industries under the MSMED Act has been given in line with the investments on plants and machinery. However, in other countries, MSMEs are classified differently for different purposes. A rough classification is done upon the number of staff and turnover. However, when MSMEs or SMEs are to be classified for the purpose of the Competition Act, countries such as Germany and other EU countries classify them in relation to the other firms/companies in the relevant market. Therefore, market structure plays a decisive factor. A company may have substantial turnover but it can be classified as SMEs/MSMEs because there may be other firms/companies recording a higher turnover in that market. Similarly, in another market, the same company may be a large firm in comparison to other competitors. The position of a firm is measured in relation to the overall assessment of the relevant market. These countries depend on the market condition to judge a firm as an MSME or not. However, in India, there is no other definition of MSME than that provided in the MSMED Act. Therefore, considering the same, the definition of the MSME as per the MSMED Act cannot be dispensed. While moving hand-in-hand with the existing MSMED Act, the Indian Competition Act may first recognise MSMEs registered with the government (under the MSMED Act), then go on to classify these MSMEs in relation to their status in that relevant market for the purpose of competition law. For example, in a tender for a product where cartel is alleged amongst certain firms or companies, CCI should first see whether these are registered as MSMEs, then see whether the firm/company falls under the threshold for being giving an exemption as may be set by the Commission as per the conditions of the relevant market and study of other competitors.
- The Act may provide an exemption to MSMEs on a case-by-case basis, wherein factors such as combined market share of MSMEs, the status of the MSME in regard to other competitors, and the position of the MSME firm in the relevant factor may be considered to decide whether the MSME falls under the criteria of competition law.

- There may be an exemption on case-by-case basis for MSMEs; however, it cannot be exempted when it is clear that the objective is to eliminate competition and inflate prices. However, certain considerations can be given on a case-by-case basis where the impact on competition in the relevant market is almost negligible or not substantial.

Therefore, it is crucial that changes regarding the recognition of MSMEs under the radar of Section 3(3) is dealt with by the legislation. There is a need to undertake a three-step process to deal with the required changes: (1) recognising the importance of MSMEs under the competition regime; (2) limited exemptions to MSMEs under defined circumstances with the stipulation of a case-by-case basis or based on the facts of each case; and (3) defining blanket minimum threshold for certain MSMEs. There is a need to understand and analyse the act of the government of India, wherein the new definition of MSMEs have increased the ambit of enterprises to include enterprises whose investment in plant and machine/equipment is less than 50 crore rupees and annual turnover is less than 250 crore rupees, irrespective of a manufacturing or service enterprise. The government provides various benefits and tax exemptions to MSMEs to encourage and promote small businesses. Therefore, increasing the ambit of MSMEs displays the intention of the government to help and support such industries, which must be recognised by the competition regimes of the country.

11. Conclusion

Considering all of the above, we believe that it is crucial that CCI and the Ministry of MSME should formulate policies in tune with each other regarding whether or not the agreements between MSMEs are to be treated as cartel. CCI receives numerous information regarding cartels among MSME in different procurements by the government as well as other sectors and departments. The same can be attributed to the fact that, as per various policies of the government, if a cartel is suspected as a protocol, the cases are referred to CCI. It has also been observed that cooperative behaviour among MSMEs may also be attributed to the policies of NSIC regarding MSMEs which, as discussed, are formulated to encourage and

promote MSMEs to get along and cooperate with each other. Even though MSMEs are not exempted under the Indian Competition Act, considering the financial benefits and schemes introduced by the government of India since 2019 to promote MSMEs under the objective of “Make in India,” prosecuting MSMEs under the Competition Act intensifies and broadens the gap between the policies of the government. Imposing penalties under the Competition Act for cartels on MSMEs may impede the objective of promoting MSMEs. Identifying the present situation of the country and in the interests of saving its own time and resources, the Competition Act may amend its provisions to promote healthy competition in the market.

12. Disclaimer

It is hereby affirmed that the facts, findings, and opinions shared in the above paper are solely the personal views of the authors and only suggestive in nature. Therefore, no unreasonable conclusions shall be drawn against any government policy/organisation and no inference or view be drawn whatsoever as a representation of the authors’ official status or professional designation in any manner.

Endnotes

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⁸<https://www.nsic.co.in/Corporate/AboutUs.aspx>

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