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ABUSE OF DOMINANCE AND MSME AS PERPETRATORS- Dwaipayan Ray¹**ABSTRACT:**

This paper deals with an important aspect on the field of competition law i.e abuse of Dominance and MSME as perpetrators. Abuse of dominance occurs when a dominant company in a market engages in conduct that restricts competition, such as price discrimination or exclusionary practices. In the context of competition law, abuse of dominance is prohibited because it can harm consumer welfare and restrict the ability of smaller competitors to compete in the market.

Micro, small and medium enterprises (MSME) are often the victims of abuse of dominance by dominant firms. This is because MSME are generally more vulnerable to anti-competitive behaviour due to their smaller size, limited resources, and lack of bargaining power.

However, MSME can also be perpetrators of abuse of dominance in certain circumstances, such as when they dominate a specific niche market or when they engage in predatory pricing. In such cases, the competition law authorities need to take action to ensure that competition is not unfairly restricted in the market.

Competition law authorities play a crucial role in regulating abuse of dominance and protecting the interests of MSME. They can take a range of measures to address abuse of dominance, such as imposing fines, requiring behavioural remedies, or even breaking up dominant firms. By promoting fair competition in the market, competition law can help to create a level playing field for all market participants, including MSME.

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INTRODUCTION:

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ABUSE OF DOMINANCE

1.1. Concept of Dominance in the Market place:

When we talk about having "dominance" over a market, we imply that a company/provider is in an environment of economic strength that gives it the ability to act somewhat independently from rivals, clients, and ultimately consumers.

The Competition Act of 2002 defines the power or dominant position as the level of power an enterprise has in the crucial market in India that allows it to:

- operate independently from the competitive forces prevalent in the relevant market;

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- affect its competitors, consumers, or the important market in its favor.²

While discussing in depth the two points as stated above the elements of the independent operation of the forces can be understood with the relevant reference to Porter Five Force Analysis, that act as a business tool to analyses and study the competitive environment of a particular industry;

1. Threat of new entrants
2. Bargaining power of suppliers
3. Bargaining power of buyers
4. Threat of substitutes
5. Competitive rivalry

And when a particular industry remains unaffected by these five points, it stands out as the dominant power in the market.

2.2. Abuse of Dominant Position:

The interplay of market forces is a characteristic of a given market/sector based on demand and supply, several forces including government policy or regulations, demographic factors and natural conditions of land availability are affecting them on the other hand.³

The phrase "dominant position" is defined as "a position of dominant strength" in Explanation (a) of Section 4.

As stated in Section 19 (4) of the Act, the determination of this "strength" is considered based on a variety of stated factors as well as the enterprise's market share in the relevant market, including the number and significance of competitors, the enterprise's economic power, entry barriers, etc.

² Pdf , Cci, https://www.cci.gov.in/public/images/publications_booklet/en/provisions-relating-to-abuse-of-dominance1652177254.pdf

³ Belaire Owners' Association Vs Dlf Limited, Huda & Ors (2013) , 19/2010

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If an enterprise of a given sector has its strength that is being derived from other markets, and that rises on to give those particular enterprise abilities as stated above, then it would make such an enterprise “dominant” in a relevant market.

The potential of a company to "affect its competitors, consumers, or the relevant market in its favor" is another facet of dominance described in Explanation (a) (ii) to section 4. An organization could, for instance, be able to influence its rivals, customers, or the market as a whole in its favor in addition to being able to function independently of competitive pressures. This, in a way, is a higher level of vitality where an organization may freely be able to implement a price or quasi-price tactics to overcome a reduction in its financial results from competitors, to seize or bind consumers, or to create a competitive atmosphere that would hinder newer competitors, both in terms of engaging enterprises or products from rivals.

According to the Act, a dominating position is a financial advantage a business has in the relevant market that allows it to operate independently of the competitive dynamics present there or to influence a rival, a consumer, or the current market situation in its favor. The enterprise's capacity to operate freely of competitive forces must be evaluated in the context of all pertinent facts and the variables stated under Section 19(4) of the Act. A thorough and accurate analysis of the market's competitive environment is required, taking into consideration all relevant market features, market structure, competition types, participant competitive tactics, and other elements that might either enhance or undermine the market position of the enterprise under scrutiny. Thus, the assessment of a case would be unique to its facts and market under consideration.⁴

2.3 Determination of Abuse of Dominant Position:

- *Determination under Section 19 (4) of the Act*

According to Section 19(4) of the Competition Act, 2002, the Competition Commission of India (CCI) must consider the following elements while evaluating whether an agreement is anti-competitive or not:

1. the construction of barriers to new market entrants;

⁴ Fast Track Call Cab Pvt. Vs Ani Technologies Pvt. Ltd. (2017), Case No. 6 & 74 Of 2015

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2. the expulsion of existing competitors from the market;
3. the foreclosure of competition by impeding entry into the market;
4. the accrual of benefits to consumers;
5. the increase in performance in the production or distribution of services or goods; and
6. the advancement of technical, scientific, and economic development through the manufacture or distribution of goods or provision of services.⁵

To further understand how the CCI uses these variables to determine whether an agreement is anti-competitive, let's look at an example. Let's say that Company X and Company Y, two pharmaceutical corporations, agree to fix the cost of a specific medication in India. Because it limits competition throughout the pharmaceutical sector, this agreement looks to be anti-competitive.

The following criteria would be used by the CCI to determine whether this agreement is anti-competitive:

- a. The agreement would make it more difficult for new pharmaceutical businesses hoping to sell the specific medicine in India to enter the market. As a result, it would be challenging for new competitors to compete with firms X and Y. As a result, there may be less competition in the market, which would eventually hurt consumers.
- b. Driving out current rivals: Since they would be unable to compete with both the lower pricing provided by businesses X and Y, the agreement might result in the driving out of competing firms who are not parties to it.
- c. Foreclosure of competition: By barring new companies from entering the market and preventing current rivals from competing on price, the agreement would freeze competition.
- d. Consumer advantages: As consumers are unlikely to have access to competitive pricing and a greater selection of pharmaceutical items, the agreement would not produce any benefits for them.

⁵ Section 19(4)

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- e. Improvements in product or service production, distribution, or delivery: The agreement would not lead to any improvements in pharmaceutical product manufacture or distribution.
- f. Technical, scientific, and economic development in the pharmaceutical industry: The agreement would not further technological, scientific, or economic growth in the industry. Instead, it would undermine competition and innovation.

Based on this assessment, the CCI is likely to find the agreement between companies X and Y anti-competitive and take appropriate action to address the same.

- Determination under Section 4(2) of the Act

The Competition Act, 2002's Section 4(2) addresses the misuse of a dominant position by businesses in the Indian market. It is a non-exhaustive list of actions that could be seen as abuses of power. According to the clause, any company with a monopoly market structure in the given industry must not take advantage of it. In Section 4(2), the following actions are listed:

- a) placing unjust or discriminatory restrictions on the selling or purchase of services or products;
- (b) restricting investment, manufacturing, or technical advancement to the detriment of consumers.
- (c) participating in a practice or series of practices that prevent access to the market;
- d) making agreements subject to the willingness of any additional parties of supplemental obligations that, by their nature or following custom, have no bearing on the agreements' topic; and
- (e) using its monopoly status in a specific market to enter or defend other pertinent markets.

The intent of Section 4(2) is to stop businesses from indulging in anti-competitive behavior that might hurt market competition and consumers. The clause acknowledges that while possessing a dominant position is not criminal in and of itself, doing so by a company that abuses it is.

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The size and the firm's share of the market, the structure of the relevant market, entry obstacles, and the impact of the company's actions on customers and competition are all considerations that the courts take into account when deciding whether an entity has misused its dominant position.

Under Section 4(2) of the Competition Act, decisions in several instances have been made. The *Competition Commission of India v. Grasim Industries Ltd*⁶ is one such instance (2015). Grasim Industries Ltd was the subject of proceedings started by the Competition Commission of India (CCI) in this case for purportedly misusing its dominant position in the market for the sale of viscose staple fiber (VSF). According to the CCI, Grasim Industries Ltd misused its dominating position by putting unfair restrictions on its dealers and distributors, treating them differently, and demanding exorbitant rates for VSF.

Grasim Industries Limited had misused its dominant position in the relevant market, according to the Bombay High Court, which affirmed the CCI's ruling. The court found that Grasim Industries Ltd had imposed discriminatory terms on its dealers and distributors and held a market share of more than 80% in the market for VSF. The court also determined that Grasim Industries Ltd had overcharged for VSF, which harmed market competition and consumers.

CARTELISATION OF MSME:

The meaning of Cartel as defined by the Turkey Competition and Anti-Trust states the term "cartel" is used to describe common anti-competitive agreements and/or carefully orchestrated practices between rivals, such as price manipulation, (ii) market allocation, (iii) collectively refusing to supply or engage in business (group boycotts), (iv) imposing quotas, or (v) collusive bidding in tenders. Such agreements and coordinated actions have historically been seen as illegitimate by themselves. The most severe kind of competitive limitation is often regarded as cartels. They are the end consequence of rivals trying to boost their profits by upregulating market-related factors, including pricing and output.⁷

In industries with several rivals and distinctive goods, cartels are thought to have originated. Facilitating behaviors, which can make it simpler for rivals to come to or maintain an agreement,

⁶ Competition Commission Of India Vs M/S. Grasim Industries Ltd. On 12 September, 2019

⁷ Mondaq Competition Law, Anti Trust.

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are one type of economic behavior evidence. It's crucial to remember that behavior referred to regarded as enabling activities is not always illegal. Yet, the presence of enabling activities might be a crucial supplement when a competition authority has discovered other circumstantial evidence relating to the essential nature of a cartel agreement.⁸

I. MSMEs acting as Perpetrators in the marketplace.

- Bid- Rigging.

In the case of *Jupiter Gaming Solutions Private ... vs Government of Goa & OR's*.⁹ of the case a short and distinct meaning of Bid- Rigging has been mentioned in para 28 "*bid rigging where some of the bidders bid an amount knowing that it is too high or contains conditions that they know would be unacceptable to the agency calling for the bids.*"

In para 29 as stated Bid Rigging has been defined in Explanation to Section 3, Sub-Section (3) of the Competition Act, 2002 which reads as follows:

*"Any agreement, between enterprises or persons referred to in subsection (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding."*¹⁰

The objective to secure and acquire favorable prices and the very concept of bid rigging negates the objective of inviting tenders and acts as inherently anti-competitive. Bid- Rigging is difficult to detect as the very execution of it is done in

In the case of *Dutcher Lotto -und Totoblock's* of the German lottery, wherein the Higher Regional Court in Dusseldorf ruled that the contract between the lottery operators to restrict the operations in their given territories was a cartel and hence anti-competitive in violation of the German and European Laws. This demonstrates that the lottery industry has come under scrutiny

⁸ Rajasthan Cylinders And Vs U.O.I (2018) Sc Online Sc 1718 (India).

⁹Jupiter Gaming Solutions Private Vs Government Of Goa , Case No. 15 Of 2010.

¹⁰ Sub-Section (3) Of The Competition Act, 2002

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for engaging in cartel-like behavior in other foreign countries, which strengthens the case for bid-rigging as being anti-competitive in character and violation of *section 3(3)(d) of the Act*.¹¹

Clause (d) of Section 3's sub-section (3), discusses collusive bidding or bid rigging. Hence, it would be required to comprehend what "bid rigging" and "collusive bidding" represent. The explanation for Part 3 is replicated and defines "bid rigging" as follows:

S. 3: Justification. —

By definition, the term " Bid rigging means Any arrangement between businesses or individuals listed in subsection (3) engaged in the same or comparable manufacturing, trade, or service providing is characterized as "bid rigging" if it has the effect of reducing or eliminating competition for bids or negatively affecting or manipulating the bidding process."¹²

In the case of **Excel Crop Care Limited case** ¹³under para 34) "*As the **Leigman of the law**, it is our task, nay a duty, to give proper meaning and effect to the aforesaid 'Explanation': it can easily be discussed that the Legislature had in mind that the two expressions are interchangeably used*".

The intent underlying Section 3 and indeed the goal it aims to accomplish must also be kept in mind. No enterprise, association of enterprises, person, or organization of individuals shall enter into any agreement when such agreement relates to the production, supply, distribution, storage, acquisition, or control of goods or the provision of services, and when such agreement causes or is anticipated to have a significant disruption to competition within India, according to Sub-section (1) of Section 3. It can be seen that the first portion of the paragraph underlined refers to the parties who are forbidden from entering an agreement like this arrangement and includes both individuals and businesses, indicating a fairly broad scope.

This is clear when reading Section 2(h) definition of "business" and Section 2(h) definition of "person" in the Act. The agreement's topic is covered in the second section. Again, it involves

¹¹ Section 3(3)(D) Of The Act.

¹² Rajasthan Cylinders And Vs U.O.I (2018) Sc Online Sc 1718 (India).

¹³ Excel Crop Care Ltd. Vs Competition Commn. Of India (2017), 2017(6) Scale241.

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the creation, supply, distribution, storage, purchase or control of commodities, as well as the rendering of services, therefore its ambit and extent are quite broad. The third portion of the clause deals with the agreement's effect, namely its "appreciable harmful effect on competition," and if such effect materializes, the clause's goal is to forbid it. The clear intent of this benevolent clause is to prevent any such agreements that are anti-competitive in character and to promote healthy competition. Such agreements are declared invalid by Section 3 Subsection (2).

Subsection (3) discusses specific types of agreements that would be considered to have a considerably negative effect on competition. In this context, 'Explanation' under sub-section (3), which employs the word 'bid rigging,' must be interpreted and given a suitable interpretation. It was not ever going to be the Legislature's purpose to exclude "collusive bidding" by narrowly construing the term "bid rigging." Although clause (d) of sub-section (3) of Section 3 contains both the terms "bid rigging" and "collusive bidding," the Explanation only refers to "bid rigging."

Following paragraph 69 of the Act, no enterprise, a partnership of enterprises, or individual, or group of individuals, is permitted to enter an arrangement regarding the manufacture, supply, distribution, storage, acquiring, or acquisition or control of goods, or the performance of services, which has or is anticipated to have a substantial detrimental impact on domestic competition in India. Section 3(2) of the Act declares void any such agreement entered in contravention of the provisions of Subsection (1) of Section 3.

Additionally, any agreement made between businesses, groups of businesses, individuals, groups of individuals, or between any individual and a business, as well as any practice used by groups of businesses, individuals, or groups of individuals, including cartels, undertaking resembling or trade in products or the supply of services, will be presumed to have been made by sub-section (3) of Section 3.:

- (a) sets purchase or sale prices;
- (b) restricts or controls supply, markets, technical advancement, investment, or the provision of services;

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- (c) divides the market or source for the manufacture or provision of amenities by allocating the type of goods or services, the number of consumers in the market, or any other similar method; or
- (d) directly or indirectly leads to bid-rigging or collusive behavior.¹⁴

CONCLUSION:

There have been certain benefits for Cooperation between MSMEs likewise an Economic efficiency: This term refers to the wise use and distribution of the economy's resources. Both in a static and dynamic sense, competition tends to increase efficiency because it forces businesses to produce at the lowest possible cost and pass those savings on to customers. It also pushes businesses to invest in R&D to meet consumer needs.

Economic expansion and development: One of the most important indicators of economic development is economic growth, which is the rise in the value of the products and services provided by an economy. A larger definition of economic development includes employment growth, education and rates of mortality, as well as other indicators of quality of life.

As a result, the market may reallocate resources more quickly, boost productivity, and achieve greater economic development. A higher quality lifestyle and more economic development are often brought about over time through continuous economic expansion.

Contributes to economic expansion in a way that ultimately benefits consumers by giving them more options (more items), better products, and cheaper pricing. To correct the apparent disparity between the market strength of buyers and sellers, consumer safety protection may be necessary. It's possible that market imperfections including information asymmetries, a lack of negotiating power for producers, and excessive transaction costs are to blame for the disparity

¹⁴ Western Coalfields Limited Vs Ssv Coal Carriers Private Limited (2017), Case No. 34 Of 2015

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between consumers and producers. To remedy these market flaws, competition policy may be used in conjunction with consumer protection policies."¹⁵

The promotion of small businesses, the consolidation of nationwide markets and promotion of localization, the advancement of technology, the advancement of innovation in goods and processes, the promotion of industrial expansion, the protection of the environment, the fight against inflation, the creation of jobs, and equal opportunity are just a few of the other strategic goals (both economic and social) that competition policy can accommodate.¹⁶

With an ongoing number of benefits for a company, the harm to the consumer happens due to fixing of price due to the presence of cartels or an anti-competitive agreement. Effective and strong enforceable forces/practices affect the market prices.

¹⁵Flipkart Internet Private Limited V. Cci, Slp (C) No. 11518 And 11615 Of 2021

¹⁶Flipkart Internet Private Limited V. Cci, Slp (C) No. 11518 And 11615 Of 2021

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