Cement Cartel Cases: Lessons for India's Competition Law Regime

Introduction

India is the second largest producer of cement in the world, only after China.[1] The cement industry is a vital part of the Indian economy, employing millions of people directly or indirectly. The Competition Commission of India ("**CCI**") has recently passed orders adjudicating allegations of anti-competitive agreements and abuse of dominance amongst the cement manufacturers under the Competition Act, 2002 (the "**Act**") and imposed a penalty of more than INR 60 billion (USD 1.1 billion).[2]

This newsletter aims to critically analyze two CCI orders of August 31, 2016, namely: (i) Builders Association of India vs. Cement Manufacturers Association & Ors. ("**BAI case**") and (ii) In Re: Alleged Cartelization by Cement Manufacturers ("**Cement case**"). It attempts to highlight the impact of these landmark orders on the cement industry and Indian competition law.

1. Facts

1.1 BAI case: An information was filed under S. 19(1)(a)[3] of the Act by the Builder's Association of India (the "**Informant**") against Cement Manufacturers Association ("**CMA**") and 11 cement manufacturing companies[4], for alleged violation of S. 3 (anti-competitive agreement) and S. 4 (abuse of dominant position) of the Act. On June 20, 2012, the CCI found the parties in contravention of S. 3(3)(a) and S. 3(3)(b)[5] read with S. 3(1)[6] and imposed monetary penalty along with directions to cease and desist from indulging in any anti-competitive activity. It further prohibited CMA to engage and associate itself from collecting and circulating information about wholesale and retail prices and details on production and dispatches of cement companies to its members.

[1] See at http://www.cmaindia.org/industry/facts-about-cement-industry.html (Last accessed on September 13, 2016)

[2] USD 1 = about INR 67

[3] The CCI may under S.19(1) may inquire into any alleged contravention of S.3(1) or S.4(1) either on its own motion or receipt of any information from any person, consumer or their association or trade association

[4] These are ACC Limited, Gujarat Ambuja Cements Limited (now Ambuja Cements Limited), Ultratech Cements, Grasim Cements (now merged with Ultratech Cements), JK Cements, India Cements, Madras Cements, Century Textiles & Industries Limited, Binani Cements, Lafarge India and Jaiprakash Associates Limited

[5] S. 3(3)(a) and S. 3(3)(b) provides that any agreement between parties such as producers, sellers, distributors, traders or service providers, i.e. parties that are engaged in identical or similar trade of goods or provision of services, which (a) directly or indirectly determines purchase or sales price (b) limits or controls production, supply, markets, technical development, investment or provision of services, would fall within the ambit of prohibited anti-competitive agreement.

[6] S. 3(1) provides for anti-competitive agreements, which are likely to cause an appreciable adverse effect on competition within India.

1.2 Cement case: This case was received as a transfer from the office of the erstwhile Monopolies and Restrictive Trade Practices Commission under S. 66(6) of the Act.[7] In the instant case, MRTP Commission had taken *suo moto* cognizance and initiated investigations based on the press reports published regarding the increase in the cement prices.[8] Since the allegations and parties were similar to the BAI case, except Shree Cement Limited (respondents in BAI case and Shree Cement Limited are hereinafter collectively referred to as "**Respondents**"), simultaneous investigations were conducted and the report was filed on May 31, 2011. As findings and penalty for violation of S. 3(a) and S. 3(b) read with S. 3(1) had been imposed in CCI's order in BAI case, CCI limited this case for Shree Cement Limited and observed that, it had violated the above stated provisions of the Act and consequently imposed a penalty of INR 3 billion (USD 59 million).

1.3 COMPAT Order: Aggrieved by CCI's orders, the Respondents appealed before the Competition Appellate Tribunal ("**COMPAT**"), on the grounds of violation of principles of natural justice. One of the questions that rose was, whether CCI's Chairperson who did not participate in the hearing of arguments of the Respondents could become a party to the final order dated June 20, 2012. The Respondents also raised objections on the grounds of unfair hearing, bias and pre-determined mindset. COMPAT noted that thorough consideration was not given to the report of the Director General ("**DG**"), parties' submissions and interlocutory orders.[9] COMPAT observed that procedural defect in nature of non-observance of principles of natural justice cannot be cured in appeal, because if natural justice is violated in the first stage, the same cannot be given as true right in an appeal. No party can be compelled to satisfy an unjust trial. Accordingly, the COMPAT set aside the impugned orders and remitted the matter to the CCI for fresh adjudication of the issues relating to the alleged violation of S. 3(3)(a) and S. 3(3)(b) read with S. 3(1) of the Act, in accordance with law.

2. Issues and Arguments

2.1 CCI framed 2 questions for determination; whether alleged conduct of the Respondents was an (i) anti-competitive agreement under S. 3 and (ii) amounted to abuse of dominance under S.4 of the Act.

Informant had alleged that Respondents were engaged in cartelization by limiting and restricting production and supply of cement and collusive price fixing through price parallelism.[10] It was argued that they purposefully did not make maximum utilization of installed production capacity, resulting in artificial scarcity, restricted supply, higher cement prices and abnormal profits. It was submitted that respondents had divided Indian market into 5 zones, based on their operations and increased price without any direct nexus with the varied input costs and production value incurred at different regions. These activities have triggered an adverse affect on the competition in the real estate sector and affected consumer interests at

[7] According to S. 66(6), all investigations or proceedings, pending before the DG of Investigation and Registration other than those relating to unfair trade practices, transferred to the CCI, to conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.
[8] Published in the Economic Times on May 9, 2006 and June 29, 2006
[9] It was evidenced from the fact that two orders were passed (public and confidential versions) despite an earlier order rejecting confidentiality treatment to the Respondents earlier in December 2011.
[10] Price parallelism refers to the following up of the price strategy set by one player by another player in the market.

large. Regarding the abuse of dominance, it was submitted that the cement manufacturing companies had a dominant position by collectively holding 57.23% market share in India, which they abused to arbitrarily increase cement prices.

2.2 Abuse of Dominance: On this point the CCI observed that cement market was characterized by several players where no single firm or group was in a position to operate independent of competitive forces or affect its competitors or consumers in its favor. Further, since the Act did not provide for concept of collective dominance, the Respondents could not collectively be considered to hold a dominant position. Hence, no investigation into abuse was required.

2.3 Anti-Competitive Agreement: With respect to S.3, the Respondents questioned the legality of the manner in which the DG conducted the investigations and the economic soundness of the evidence relied upon. It was contended by the cement manufacturing companies that:

- There was no direct evidence to showcase existence of a cartel between the Respondents and mere circumstantial evidence falls far from sufficient.

- Price parallelism per se cannot justify cartelization, unless adverse affect on the competition is established.

- Mere price correlation, dispatch parallelism and generalized under utilization of capacity to cost benchmark is inadequate to analyze concerted action for cartelization.

Further CMA contended that, collection of information about prices and production was under the instructions from Department of Industrial Policy and Promotion which was not confidential information, but available in the public domain and also widely published.

3. CCI's Decision on Anti-Competitive Agreement

Relying on statistical information on price, production, supply in cement industry, minutes and reports of CMA, facility utilization reports, party testimonies, the CCI held that the Respondents operated in a cartel to cause appreciable adverse effect in competition in cement industry for May 2009 to March 2011. CCI observed that:

(a) S. 2(b) which defines "agreement" (any arrangement or understanding or action in concert, whether or not the same is in formal or in writing or intended to be enforceable by legal proceedings), is wide and will include tacit agreement. In cartelization, parties are cautious to avoid explicit and direct evidence such as minutes, paper trails, call records, inevitably mandating an inference to be based on circumstantial evidence taken as a whole and economic indices. CCI relied on Dyestuff's case,[11] where European Court of Justice observed that, whether there was a concerted action can only be correctly determined if the evidence considered as a whole and not in isolation, bearing in mind the peculiar feature of the market in

[11] Case No. 48/69 ICI, [ECR 619

question. It further noted that given the clandestine nature of cartels, circumstantial evidence is of no less value than direct evidence to prove cartelization.

(b) CMA, through its meetings, and reports provided a platform for sharing of price, production, supply related information for sharing between the cement manufacturing companies. CCI relied on the T-mobile case[12] where European Court of Justice had held that, in an oligopolistic market[13] (like cement industry) the exchange of such information that increases the predictability of market operations between competitors leads to restricted scope for competition.

(c) Where there is strong price correlation between involved parties, a positive inference is drawn towards price parallelism indicating concerted action. Cement industry being seasonal, homogenic market is subject to volatile prices, higher variable costs and is susceptible to parallel price pattern. However, CCI noted that even though price parallelism is not conclusive evidence, the same in conjunct with other "plus factors", such as easy access to competition information, product and dispatch parallelism, and capacity under utilization will suffice to prove cartel.

(d) Cement manufacturing companies had deliberately reduced their production and produced much less than the installed capacity to create an artificial scarcity and raise the prices of cements in order to earn abnormal profits.

Based on this, CCI upheld that the Respondents were in breach of S. 3(3)(a) and S. 3(3)(b) read with S. 3(1) of the Act. This, in effect, means the Respondents have to deposit the specific penalty imposed on each of them. The figure can be computed as a percentage of the turnover or net profits, whichever is higher. CCI computed it on the basis of net profits over a defined period for each cement manufacturer. Additionally, CCI also imposed a penalty of 10% of total receipts over a two year period. The penalty is payable within 60 days of receipt of the order.

Analysis

In case of S. 3(3) agreements, once it is established that concerted action exists, it will be presumed that the agreement has an appreciable adverse affect on competition within India. The onus to disprove this presumption lies upon the alleged parties. In the light of this, it is pertinent for companies to maintain accurate price, produce, supply, market feedback and economic strategy. Further, trade associations should have a protocol where they not only work in promoting the interests of their members and the industry they serve, but also for enhancing fair competition. They should be sensitive to the discussions and delineate lines between facilitating competition and anti-competition. Further, as noted by COMPAT, much of the appellate litigation would be obviated if CCI devise a just and fair procedure for conducting investigation and inquiry and passing orders. Thus, it is important that CCI formulate (specifically in oligopolistic markets like petrol, steel, automobiles etc.) regulations for conducting investigations and admitting evidence.

[12] Case No. C-8/08, T-Mobile & Ors. v. Commission, 2009 [ECR] I-04529
[13] An oligopolistic market is a market dominated by a small number of sellers

Conclusion

These two cases implemented the "parallelism plus" approach adopted by the US and European Courts which requires, showing the existence of "plus factors" beyond merely the firm's parallel behavior, in order to establish the existence of a cartel. Competition authorities across the globe are persuading whistleblowers in approaching them to give information about companies coming together and forming a cartel. The Act provides for leniency provisions[14] where the party seeking the same can avail concessions by way of cooperating in an inquiry. Awareness of this can go a long way in detecting and cracking the presence of cartels.

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[14] S.46 provides that on the satisfaction of the CCI any producer, seller, distributor, trader or service provider in violation of S.3 makes a full, true and vital disclosure in respect of the alleged violation would be imposed with a lesser penalty.