



COMPETITION COMMISSION OF INDIA

Case No.: RTPE No. 09 of 2008 (MRTP)

In Re: Alleged cartelization by steel producers.

CORAM

Mr. Ashok Chawla
Chairperson

Dr. Geeta Gouri
Member

Mr. Anurag Goel
Member

Mr. M. L. Tayal
Member

Mr. Justice (retd.) S.N. Dhingra
Member

Mr. S. L. Bunker
Member

Appearances: Shri A.N. Haksar, Senior Advocate with Shri G. R. Bhatia,
Advocate for M/s Tata Steel Limited.

Shri Dileep Poolakkot, Advocate for M/s Rashtriya Ispat
Nigam Limited.

Shri Ramji Srinivasan, Senior Advocate with Shri Manas
Kumar Chaudhuri, Advocate for M/s JSW Steel Limited.



Ms. Indira Jaisingh, ASG with Shri Sunil K. Jain, Advocate for
M/s Steel Authority of India Limited.

ORDER

Consequent upon the repeal of the Monopolies and Restrictive Trade Practices Act, 1969 ('the MRTP Act'), the instant case pertaining to alleged cartelization in steel industry was transferred to the Commission from the Office of Director General (Investigation & Registration) of the MRTP Commission ('DG I&R') in view of the provisions contained under section 66(6) of the Competition Act, 2002 ('the Act').

Facts

2. The MRTP Commission took cognizance of the matter on the basis of an article published in the Financial Express on 11.03.2008 wherein it was reported that the steel companies raised the steel prices without any justification, which have a sharp inflationary impact. It was also reported that the prices immediately impact the construction and automobile sector. In the news article, it was further reported that even state-owned firms like Steel Authority of India Limited ('SAIL') and Rashtriya Ispat Nigam Limited ('RINL') have raised the prices.

3. Subsequently, Engineering Export Promotion Council (EEPC) - a body sponsored by Ministry of Commerce, Government of India - *vide* its complaint dated 18.03.2008 addressed to the DG I&R also apprehended possible cartelization in the steel industry and requested for intervention in terms of the provisions of the MRTP Act. The EEPC alleged that the steel majors increased the prices by more than three times across the different steel categories. During the period April 2007 – January 2008, steel prices were increased by



an average of 10%. EEPC further alleged that if Rs. 3,000/- per ton increase in the month of February 2008 was taken into account, then the price increase of steel amounted to an astounding 20% across the board for the period April 2007 - February 2008 and the increase was sharper during the period September 2007 - February 2008.

4. It was alleged by EEPC that the rise in the steel price in India is much higher in comparison to the world prices. Further, it was stated that such sharp steel price increase was detrimental to the Indian engineering industry and the exporters of engineering goods especially those belonging to the small and medium scale sectors like critical engineering industry segments *e.g.* Hand Tools, Bicycles and parts, Auto components, Castings *etc.* Accordingly, it was requested that the MRTP Commission may take a look at the steel prices in India and initiate suitable measures to control the monopolistic pricing in the steel industry for the benefit of the small and medium scale industry, who are at the mercy of steel majors.

5. DG I&R initiated investigation against 34 steel companies in compliance of the order of investigation dated 14.03.2008 passed by the MRTP Commission. All the 34 companies filed their replies denying the allegations made against them in the news article as well as in EEPC's letter.

6. At this stage, consequent upon the repeal of the MRTP Act, the matter stood transferred to the Commission under section 66 (6) of the Act.

Directions to the DG

7. The Commission after considering the entire material available on record *vide* its order dated 18.06.2010 opined that there existed a *prima facie* case and accordingly, directed the Director General (DG) to cause an investigation to be made into the matter and to submit a report.



8. The DG, after receiving the directions from the Commission, investigated the matter and submitted an investigation report dated 31.05.2011 to the Commission on 01.06.2011.

Investigation by the DG

9. The investigation by the DG concentrated on four major primary steel manufacturers, two each from public and private sectors, *viz.* SAIL, RINL, Tata Steel Limited (TSL) and JSW Steel Limited (JSW). Further, the investigation process was restricted to find out their conduct in the pricing of HR coils and HR Plates (Flat Products) & Bars and Rods (Long Products), which comprise of around 60% of total non-alloy steel production. The scope of investigations covered the period from April, 2007 to March, 2010.

10. For the purpose of investigation of cartelization, data pertaining to pricing, production, sales and cost of the aforesaid four products in respect of the four primary steel producers was collected and analyzed by the DG. Effect of changes in production/ supply and dispatches/ demand on price was also examined. Further, changes in the profit margin of these four companies with changes in cost of production were also analyzed.

11. Based on the investigations, the DG reached the following conclusions:

(i) The pattern in pricing of the four main products *viz.* HR coils, HR Plates, Wire Rods and TMT was found to be moving in tandem. Data on demand and supply also indicated periodic suppression of supply to prop-up demand and prices.

(ii) The steel production was found to be highly concentrated among the top 4 producers. These companies were found to have more than 40% market share



and top 6 companies were controlling more than 50% market share. Steel production market was therefore noted as oligopolistic and susceptible to concerted price fixation.

(iii) The investigations also revealed lack of transparency in deciding prices. The representative of top steel producers gave varied reasons for price changes which were not supported with any evidence.

(iv) The investigations further found a case for collusive price leadership. The DG concluded the possibility of existence of informal cartel amongst the top steel producers.

(v) Circumstantial evidence and economic analysis also indicated that the top steel producers have decided the pricing in a co-ordinated fashion.

12. In view of the above, the DG concluded that the steel producers have contravened the provisions of section 3(3)(a) & (b) of the Act due to their informal agreement for determining sale pricing, limiting and controlling production of steel products.

Consideration of the DG report by the Commission

13. The Commission in its ordinary meeting held on 08.06.2011 considered the investigation report submitted by the DG and decided to forward copies thereof to the parties for filing their replies/ objections to the report of the DG. The Commission also directed the parties to appear for oral hearing, if so desired.



Replies/ Objections/ Submissions of the parties

14. On being noticed, the parties filed their respective replies/ objections/ submissions to the report of the DG besides making oral submissions.

Replies/ objections/ submissions of the opposite parties

TSL

15. At the outset, it was submitted that since the investigation was transferred under the provisions of section 66(6) of the Act, the substantive law that would apply to the instant case is the MRTP Act, 1969. It was stated that the said provision clearly stipulated that even if the investigation is ordered as per the procedure contemplated under the Act, the substantive law with respect to the scope of the investigation that has been transferred cannot undergo a change. Therefore, it is the MRTP Act which should apply to the instant matter.

16. It was further submitted that under the MRTP Act the DG I&R had powers to initiate an inquiry on his own motion or take cognizance on the basis of a complaint addressed directly to him. However, the drafters of the Act, recognizing that the relevant provisions of the MRTP Act were susceptible to misuse, consciously ensured that under the scheme of the Act, only the Commission (as opposed to both the Commission and the DG) was vested with *suo moto* powers. This critical distinction is unequivocally clear from a bare perusal of both the Act and the Competition Commission of India (General) Regulations, 2009.

17. Furthermore, it was submitted that section 41(1) of the Act casts a duty upon the DG to assist the Commission in investigating into any contravention of the Act or any rules or regulations made thereunder. The DG shall provide



such assistance ‘*when so directed by the Commission*’. Therefore, absent such direction, the DG cannot, on its own motion, conduct investigations into matters unless the Commission has specifically directed it to do so.

18. Another crucial error committed by the DG during the course of the investigation was that the DG, while identifying the period relevant for investigation, states that ‘*the news item and EEPC complaint allege price rise in the primary steel products during the period April 2007, to February, 2008*’. However, despite having stated the above, the DG has gone beyond the scope of the investigation ordered by the Commission and decided to extend the scope of investigation to a period of three years starting with April, 2007 to March, 2010.

19. It was also averred that not only has the DG acted without appropriate directions from the Commission, but, where directions have been given, the DG has also failed in its duty to carry out such directions. The manner in which the DG has proceeded with the investigation is a telling tale of the lackadaisical approach adopted by the DG. The Commission had directed the DG to investigate into the alleged cartelization in the steel industry and specifically pointed towards 34 steel companies. The DG on its part and without any reason or logic has arbitrarily decided to investigate only four steel manufacturers *i.e.* SAIL, RINL, TSL and JSW and furthermore the DG has concentrated only on four steel products (HR coil, HR plates, Bars and Rods) while acknowledging that there are many more steel products that the DG has not included in its analysis. This, despite the clear direction of the Commission and the presence of several large players in the steel industry. Assuming without admitting that the DG has the ability to expand the scope or the period of investigation, the converse (where the DG unilaterally decides to restrict the scope of investigation) cannot be held to be valid.



20. It was argued that these *ultra vires* acts of the DG go to the root of the matter and have yielded erroneous, misconceived and fatally flawed results. Keeping in mind the above, it was submitted that the Commission ought to reject the report failing which grave injustice will result.

21. It was averred that the report lacks any cogent material to even assess the allegations of cartelization. It presupposes the existence of a cartel even before defining the relevant product or the relevant geographic market. This is palpable from the fact that the DG has thought it prudent to concentrate on only the above mentioned four Flat and Long Products. The DG in its report has arrived at baseless and unsubstantiated conclusions without having due regard to the context and factual background prevailing in the steel industry.

22. It was also submitted that the DG has adopted a careless and casual approach to this investigation. The products that have been selected by the DG are not always produced even by the limited number of companies that have been investigated by the DG. It is not only illogical but also preposterous to suggest or attempt to prove the existence of a cartel between manufacturers that do not even produce all the products that have been taken into account. Thus, the identification of the products that should be considered for the purposes of investigating the allegations of cartelization is misplaced in its entirety. The report is most unsubstantiated on this aspect and is based on flawed assumptions in as much as it completely overlooks the critical fact that the steel products produced by the secondary manufacturers constitute more than 60% of the crude steel production in India. This glaring omission compromises the entire investigation undertaken by the DG and as such renders the report inaccurate and unreliable.

23. The DG has glossed over the fact that under the scheme of the Act, the 'relevant market' is to be determined by reference to the 'relevant product market' and the 'relevant geographic market'. However, the report does not



contain even a single reference to the 'relevant geographic market'. This clearly demonstrate the utter disregard of the DG to establish and recognize anti-trust/ competition investigation methodologies.

24. On the issue of identification of the companies for the purposes of investigation, it was admitted that although the manufacturing method/ process adopted by the primary and secondary producers to manufacture their products differs from one another, it is critical to note that both primary and secondary producers manufacture and sell the same products in the market. The complete and unsubstantiated omission of the steel production of the secondary producers in the report by the DG renders the report wholly inaccurate and leads to the flawed and erroneous findings recorded therein.

25. The premise on which the DG has proceeded is completely incorrect, misconceived and flawed at its very foundation. For the purposes of ascertaining a case under section 3(3) of the Act, the DG appears to have based the entire investigation on an underlying theme of collective dominance. The Act in force does not recognize the concept of collective dominance. It was submitted that the report is biased as it appears that the DG commenced, continued and concluded the entire investigation on the basis of a pre-conceived, unsubstantiated and illogical assumption of the existence of a cartel amongst the various reputed players in the market without any evidence whatsoever. This is apparent from the aspect that the DG has allegedly established the dominance of the opposite parties only on the basis of 4 out of the 30,000 steel products. It is imperative to state that the DG's assessment/ determination of the products is untenable since, the said products, whether manufactured by primary or secondary producers are substitutable in terms of the target market. By completely excluding the secondary steel producers, the DG has itself committed a glaring error which goes to the root of matter.



26. The DG has conveniently and without any reason or logic opted for an allegedly comprehensive and methodical analysis to bring out the true picture and has restricted its investigation to only four companies despite the fact that the DG himself has noted the competitive pressures exerted by other manufactures.

27. Another glaring and flagrant defect in the report of the DG is the calculation of market shares of the various players in the steel industry. A mere perusal of the table set out at page 50 of the report demonstrates that whilst the DG has limited himself to four products, he has taken the market share of the opposite parties by reference to the total steel production in the country.

28. It was also pointed out that the products taken into consideration by the DG for the purposes of calculating the market shares are not manufactured by all the opposite parties under investigation. The DG has identified RINL as one of the opposite parties even though RINL does not produce HR coils and HR Plates net of the four products selected by the DG for the purposes of its analysis.

29. Giving reply on merits, it was submitted that the DG has admitted to the fact that there is no evidence to substantiate whether the parties had decided about the price increase in concert with each other. According to established and recognized competition jurisprudence, to prove a violation of competition law by way of a cartel, it must be shown that there has been 'meeting of minds' towards achieving a common goal or outcome. Further, to prove a violation of section 3 under the Act, there must be an agreement, which includes an arrangement or an understanding, amongst the enterprises engaged in identical or similar trade of goods or provisions of services. Thus, in absence of any evidence of an arrangement or understanding between the



parties under investigation, there can be no case of violation under section 3 of the Act.

30. On price parallelism, it was submitted that the DG has contended that the increase in prices of all the major steel producers has been simultaneous in almost all time zones. According to the DG, the correlation figures of absolute prices, price change and percentage price change have established prices parallelism in the industry. The DG has further concluded that price parallelism is a 'good measure' of collusive behavior by the steel producers.

31. Assailing the findings, it was submitted that steel is part of the commodity market where the product has to meet minimum quality standards and therefore, prices of various companies are bound to move towards a natural equilibrium. The market forces generally determine the prices and therefore, where demand increases, prices also see an upward trend. Thus, as demand increases or decreases, prices will also accordingly increase or decrease.

32. On the 'plus factors', it was pointed out the DG in its report states that price parallelism stands established as per the correlation figures of absolute prices, price changes and percentage price changes. Further, the report states that price parallelism is a good measure of collusive behavior by the steel manufacturers. Assuming without admitting that even if the DG has found characteristics of price parallelism, it does not by itself establish that the various steel manufacturers have been acting in concert or the parallelism is resultant of an agreement between them. It is widely recognized in competition law that evidence of price parallelism alone is not a sufficient proof of a cartel agreement. 'Facilitating' or 'plus' factors are needed in addition to parallel pricing evidence to conclude about any possibility of a cartel.



33. Lastly, it was argued that the DG's failure to accord reasons for the exclusion of Essar Steel Limited ('Essar') and JSPL from the analysis, in spite of Essar having the highest market shares in the product category of HR coil and HR plates and JSPL being one of the largest manufacturers of structurals, a product produced by all the companies under investigation. Also the choice of 4 companies even after stating that the top 6 companies control more than 50% of the market is baffling.

34. A grievance was also made of the fact that although the parties under investigation have stated numerous factors that are taken into consideration in the determination of the pricing of steel, the DG has proceeded with the investigation on a pre-conceived notion. The material placed on the DG's records contains the Joint Plant Committee Report, Metal Bulletin *etc.* which could have been relied upon by the DG to investigate the factors attributed by the parties towards pricing of steel. On the other hand, even from the analysis conducted by the DG, he has cherry-picked the data to suit the flawed conclusions set out in the report and has blatantly ignored the findings of the analysis contrary to his own stand, without stating any reason for such practice.

35. The circumstantial evidence relied upon by the DG *viz.* pricing, supply or profit margin *etc.* is merely an industry practice and similar patterns are observed in many other commodity markets. Therefore, the analysis of the DG, in the absence of any evidence to prove an understanding amongst the parties to cartelize, cannot be relied upon to hold TSL liable for a violation of the Act.

36. It was submitted that the findings of the DG in the report are based on incorrect assumptions and flawed reasoning. The report adopts an extremely narrow approach in its analysis and, if such report is accepted by the



Commission, then it would lead to disastrous ramifications for the steel industry as a whole as also for the economy of the country.

37. In the absence of any informal agreement/ understanding amongst the parties along with the fact that no evidence was brought forth by the DG to establish TSL was determining prices of steel products or limiting or controlling production, supply, market in concert with other parties, there is no case of violation of section 3(3)(a) and 3(3)(b) of the Act.

SAIL

38. At the outset, it was submitted that when SAIL is working as one of the instrumentalities of the Government, it is hard to presume any indulgence in cartelization on its part.

39. On jurisdiction, it was argued that the Commission has no jurisdiction to investigate under the Act where the investigation was initiated under the MRTP Act. The Commission has presumed its jurisdiction and gone beyond the scope of section 66(6) of the Act.

40. Impugning the findings of the DG, it was contended that the DG has, without any cogent reasons, on his own, decided to extend the period of investigation to much beyond the period mentioned in the EEPC's letter or the news item, based on which the *prima facie* order for investigation was issued. Moreover, the DG, without any cogent reasons, restricted its investigation to only 4 products out of the 30,000 odd products manufactured in the steel industry as mentioned in the DG's report itself.

41. It was submitted that there is no uniform increase in prices of SAIL, TSL, RINL and JSW. According to the data provided in the DG report for the



Flat and as well a Long Products, none of the four major producers seem to have increased the prices of steel at tandem.

42. It was further submitted that price parallelism cannot be considered as concerted effort as was held in the case of the *Alkali Chemical Corporation of India Ltd, Calcutta and Bayer(I) Ltd. Bombay*, RTPE 21 of 1981, order dated 03.07.1984. In the above mentioned case, the respondents were engaged in manufacture and sale of rubber chemicals which commanded a dominant share in the market. The respondents did not deny price parallelism, but denied the allegation that it was due to concerted effort.

43. In absence of evidence, cartelization cannot be presumed and reliance was placed upon order of COMPAT in *Delhi Development Authority v. Shree Cement Ltd.* 2010 CTJ 17 (COMPAT) (MRTP), to contend that in the absence of any direct evidence of cartel and the circumstantial evidence without a shred of evidence in proof of any plus factor to bolster the circumstances of price parallelism, it is unsafe to conclude that there is a cartel. A mere offer of a lower price by itself does not manifest the requisite intent to gain monopoly and in the absence of a specific agreement by way of an action suggesting conspiracy, a cartel among the producers cannot readily be inferred. In the instant case, except the fact that identical prices were quoted, there is no other material to establish cartelization. Quoting of identical prices by different persons at the most is a suspicious circumstance but it does not *per se* establish cartelization, contended SAIL.

44. In view of the above rulings, the bare conclusion made by the DG with respect to price parallelism was denied in its entirety, also because the data provided in the report does not lead to the adverse conclusion drawn by the DG. The data which has been provided in the report speaks for itself, therefore it was contended that the prices of SAIL, TSL, RINL and JSW have not



increased in tandem and, hence, there is not even a distant possibility of price parallelism.

45. Furthermore, it was asserted that the DG has not looked into factors of production to reach the conclusion on price fixing. There are number of factor which affect the cost, some of them are: duties and taxes, international price movement, landed price of imports, freight charges, cost of input material, rising input cost, cost of iron ore, coking coal, coke, rise in cost of transportation, impediments to find land to increase capacity, market-concentration of raw material supply and market situation.

46. It was argued that apart from the international market and pricing there are various other factors which have led to increase in prices of steel such as cost of raw materials which also include salaries and wages. It was averred that the report of the DG under the section concerning the reply submitted by SAIL noted that there was a steep increase in cost of labour during 2007-08, which was to the tune of 56% over 2006-07. Prices are also influenced by the demand and supply factors and the prices can vary depending upon size, quality, nature of contracts, the market conditions and locations.

47. The DG report has clearly stated that in five years (2002-03 to 2006-07) imports were growing at much faster rate than exports. While imports grew by CAGR of 24.49%, exports grew just by a CAGR of 2.16%. Therefore in a situation where the market prices are determined by the prevailing market conditions and most likely by the fact that imports are free, it is incorrect to conclude that the prices were increased or decreased by the four producers in consonance with each other according to their whims and fancies or by agreement. The DG has not placed on record any detail from which an inference can be drawn that the increase in the prices of steel is not commensurate with the escalation in the cost of raw materials and international pricing.



48. Further, it was vehemently contended that the DG has held cartelization amongst the four steel companies, against the market research study report commissioned by the Commission in January 2009 on '*Public Enterprise and Government Policy Impact on Competition- Indian Steel Industries*' which clearly states as follows:

There is no doubt that the concentration level in certain products market such as HR Coils is significant with the dominance of a few at the top. However, there is no evidence of formal 'agreements' to fix prices in real sense of the term. The evidence of the HR coils producers responding identically to external conditions such as changes in global prices etc. is not sufficient enough to be rated as anti-competitive. HR coils segment, is by far the most likely to be 'cartelized', the competition levels and/or imports in other segments are too high to enable any sustainable joint action by the current incumbents. In other words, there is no evidence of anti-competitive behavior by the steel industry.

49. It was also submitted that the DG report did not refer to the geographical extent of the market in order to come to the conclusion for presumption of cartel in case of these companies, which is mandatory under section 19(5) of Act. In case of Steel Industry, whole globe can be taken as geographical extent of the market.

50. It was further submitted that there is nothing on record to establish that there is a presence of a formal or informal agreement between the four steel manufactures viz. SAIL, TSL, RINL and JSW for the purpose of controlling the prices of steel or for creating a monopoly. In the absence of any evidence, it is not correct to infer existence of a formal or an informal agreement.



51. Reliance was also placed upon the decision in the case of *All India Distillers Association, New Delhi v. Haldyn Glass Gujarat Ltd. Baroda & Ors.*, UTPE Case No. 30(146)/ 2008 where the respondents were accused to have entered into an agreement to fix the prices of glass bottles, it was held that definitely something more than bare allegation is needed to show concerted action on the part of the respondents to fix prices of glass bottles. Similar conclusion was drawn in the case of *The Alkali and Chemical Corporation of India Ltd. Calcutta and Bayer (I) Ltd.*, Bombay, RTPE 20 of 1981, order dated 03.07.1984 where it was held that price parallelism or even price leadership is a common feature of an oligopolistic market and cannot be considered as concerted effort.

52. Reference was also made to the decision in the case of *Hindustan Lever Ltd. and TATA Oils Mills Co. Ltd.*, RTPE 4 of 1978 order dated 22.07.1982 wherein twin requirements for a trade practice to be treated a concerted one were pointed out. First, the trade practice must either influence the market behavior of undertakings concerned and second, that there should be a positive contact between the parties either by meeting or decision or in any manner. It was observed that in an oligopolistic industry, a few units will be dominating the industry and each would be having an eye on the other to see what its behavior will be. They will be interdependent without any overt acting together.

53. Based on above, it was sought to be canvassed that in order to prove existence of a formal or an informal agreement, it is important to establish that the manufacturing units have contacted each other directly or indirectly. Hence, the assertion made by the DG in its report that the prices of the main products have moved in the similar direction for all the companies at the same time which indicate presence of an informal agreement is completely



incorrect. It was further submitted that as far as Flat Products are concerned, more than 50% is sold through MoU basis only.

54. Based on the above, it was summed up that it is established that the prices of steel have moved up or down due to market forces and not due to the concerted effort of the four companies in order to form a cartel or monopoly in the market. Increase or decrease in the prices of the four companies have not taken place at tandem and hence there is not a slightest possibility of parity of prices or price parallelism.

RINL

55. In the beginning, it was pointed out that the answering party is a Navratna Public Sector Undertaking directly under the control of Ministry of Steel, Government of India and has been the recipient of many awards and recognition during its 28 years journey so far.

56. It was also submitted that RINL while performing its task and functions as a commercial and manufacturing organization, has also taken its role as a responsible corporate citizen in right earnest. Long before the concept of CSR came into being, RINL has been in the forefront of social upliftment. Since 1993 it has emphasized upon peripheral development projects. RINL was one of the first companies which has formulated CSR policy for the organization and became a member of UNO Global Compact.

57. Assailing the findings of the DG, RINL denied all the findings made in the report submitted by the DG. It was pointed out that the investigation report put before the Commission has the following conclusions *qua* RINL:



(a) the pattern in pricing of the four main products *viz.* HR coils, HR Plates, Wire Rods and TMT found to be moving in tandem with each other for all the producers.

(b) periodic suppression of supply to prop-up demand and prices.

(c) steel producers market is oligopolistic market and is susceptible to concerted price fixation.

(d) lack of transparency in deciding prices.

(e) collusive price leadership

(f) top steel producers (main producers) have decided the prices in a coordinated fashion.

58. Giving reply/ objections to the aforesaid conclusions, RINL submitted that it does not produce HR coils, HR Plates and holds only 12% of the market share in the product group of bars and rods and the DG has grossly erred in ignoring the presence of various important players *viz.* JSPL, Kamadhenu, Amba, Shyam Steel, Rathi Udyog *etc.* while considering the issue of price cartelization and limited the investigation to only four main producers. RINL further submitted that the long products steel market in India today is such that no single producer can ever expect to be a dominant player in the market. Almost 75% of steel is produced by hundreds of secondary producers in secondary sector while the so called main producers have a dwindling share of 25% put together. Therefore, it is impossible for a few producers including RINL to dominate and control the market in any manner including pricing.

59. It was further submitted that the DG has arrived at wholly erroneous conclusion that the pattern in pricing of some products was found to be



moving in tandem with each other for all the producers. In an open economy, price cartel is practically not possible as the price is purely market driven. There are several market forces acting on the pricing mechanism as a result of which the market prices are corrected on a continuous basis. In the present economy, steel is completely de-controlled and customers have at their disposal various alternative sources and can select the best option which suits them most. There is no ban on import of steel and approximately more than 6 million tonnes of finished steel is imported in the country every year through major ports like Mumbai, Kandla, Chennai, Kolkatta, Vishakapatnam and Kochi Ports.

60. In case the domestic prices become even slightly higher as compared to international prices, imports start taking place immediately to take advantage of this situation. Customers are free to choose their source and a single player cannot dominate the market as market dynamics play a major role in this aspect. Long Products steel market is more of a buyers' market than a sellers' market.

61. The conclusion in the investigation report that there was periodic suppression of supply of RINL to prop up demand and prices was vehemently denied. It was submitted that RINL always produced more than 100% of its installed capacity of 3 million tonnes liquid steel during the past several years except during the year of global melt down and has been operating at a level of around 115 to 120% of the rated capacity.

62. It was further submitted that RINL's installed capacity is 3 million tonnes of liquid steel *per annum* and the saleable steel capacity is 2.656 million tonnes *per annum*. During the period 2009-10, the production of saleable steel was 2.96 million tonnes against the saleable steel production of 2.56 million tonnes during 2008-09, registering a growth of 15% over the



period 2008-09. Further, the production of saleable steel during 2009-10 year was 111% of the installed capacity for finished steel.

63. From the above, it was sought to be argued that RINL has registered increased production which is wholly contrary to the findings that it is restricting production. Furthermore, it was submitted that after examining the production and sales figures during the investigation, the DG has arrived at wholly erroneous conclusions. In case of TMT Bars, the production and sales figures of only one mill was considered whereas both WRM and LMMM produce TMT Bars in different size ranges. It was also submitted that the stocks were also available for sale at different stockyards at various locations as well as at plants during the period under investigation which shows that the observation/ conclusion in the investigation is not correct.

64. RINL submitted that the conclusion in investigation report that prices of RINL along with other producers moved in similar direction indicating informal agreement among all main producers including RINL, is not true and is vehemently and completely denied as far as RINL's own prices are concerned. It was reiterated that the prices are always market driven and reviewed and corrected on a regular basis depending upon the market situation. The price correction process as practised by RINL is independent of other producers and although sometimes the quantum of correction in prices may look similar to other producers; this cannot and ought not to be understood as RINL's collaboration or collusion with other producers for controlling the market prices.

65. RINL also submitted that price determination is a dynamic process and various factors are considered in fixing prices. Data/ records as desired by the DG were duly submitted during investigation. Therefore, the conclusion in the investigation report that none of the companies could provide the possible



explanation for price determination is not correct as far as RINL is concerned and is totally denied.

66. It was further submitted that RINL had during the investigation informed the DG that there is no direct link between the cost of production and the prices fixed for various items. It was submitted that the same is clearly established from the Net Sales Realization and cost data analysis as both are not always moving in tandem.

67. Lastly, it was submitted that the observation in the investigation report that steel production market was an oligopolistic market is not correct more so in the Long Products market, in which RINL operates, since there are numerous steel manufacturing companies in India in the secondary sector and the contribution and market share of these companies is fairly significant and cannot be ignored.

68. After giving para wise reply to the report of the DG, it was prayed by the answering party that the case as sought to be set-up by the DG is wholly without any basis or justification, proceeds on assumptions, surmises, conjectures and apprehensions, contrary to the materials/ data/ information furnished, devoid of any merit and deserves to be rejected.

JSW

69. JSW submitted its chapter wise replies/objections to the investigation report. All the allegations, and adverse findings /analyses as contained in the investigation report against it, were denied.

70. It was pointed out that the original complaint *i.e.* RTPE 09 of 2008 was instituted by the erstwhile MRTP Commission in the month of March 2008 and the investigation of the same could not be completed by the Office of the



DG I&R, investigating wing of the MRTP Commission, till September 2009, the date when the MRTP Act was repealed. In the process, a period of valuable 18 months was wasted by the Office of the DG I&R in an allegation of a cartel in respect of an industry segment which besides being one of the most dynamic segments of Indian industry has also been growing in India's post-economic liberalization, bringing out an undisputed pro-competitive market behaviour.

71. It was averred that the genesis of the investigation against the steel industry and more particularly against JSW commenced on the basis of a newspaper report published on March 11, 2008 in the Financial Express and subsequently a formal complaint dated March 18, 2008 filed by EEPC. The entire investigation report prepared by the Office of the DG, set up under the Act, does not indicate as to whether or not depositions of the reporter of the Financial Express and/or of the complainant, have been recorded during the course of the investigation which would have ascertained the veracity of the complaint, since the complaint was received under the repealed MRTP Act and investigation was conducted under the new Act. Having said that, the entire investigation report appears to be based on the DG's own perception/assessment of the matter and on the basis of the depositions made by the steel companies allegedly involved in the cartelization and without corroboration of the allegations made by the newspaper reporter and/or EEPC.

72. It was also submitted that as per the complaint of EEPC, the period of alleged cartel operated from April 2007 to February 2008 when the average prices of steel increased by 10%. EEPC also alleged that increase in the steel prices in India during the period was much higher in comparison to the steel prices in the world and made an adverse impact on small and medium engineering segments of Indian industry. However, the DG during preliminary investigation found varied trend in the prices of steel during later period *i.e.* 2008-09 and 2009-10. As such, the DG decided to extend the scope of the



investigation to a period of 3 years instead of the original period of allegation and decided to investigate from April 2007 to March 2010. It was reiterated that post-repeal of the MRTP Act and in the absence of the depositions of the newspaper reporter and/or EEPC, the scope and the period of allegation *i.e.* from April 2007 to February 2008 cannot be enlarged, distinguished or altered by the DG and outcomes thereof be included in the investigation report to the detriment of the answering party.

73. It was further submitted that the complaint was aimed against 34 steel companies and the investigation report found only four amongst 34 primarily responsible for cartelization in steel industry of India. This *prima facie* appears to be misconceived and misleading and liable to be rejected on the maxim of bias, a fundamental principle of natural justice.

74. It was pointed out that the statutory mandate provided under sub-section (6) of section 66 of the Act empowers the Commission to conduct and/or order for conduct of investigation or proceedings post-transfer of the case in such a manner as the Commission deems fit. Looking at the intent of the legislature, the scope of investigation by the DG is limited. On perusal of the copy of the *prima facie* opinion dated June 18, 2010 of the Commission formed under section 26(1) of the Act, it was noticed that the Commission did not pass an order directing the DG to enlarge the scope of the original complaint and further directed it to submit the investigation report within 60 days from June 18, 2010. However, the DG submitted the investigation report on May 31, 2011 enlarging the scope of the original complaint in complete disregard to the relevant provisions (relating to time within which the investigation report was to be submitted) of the Competition Commission of India (General) Regulations, 2009 as well as the directives of the Hon'ble Supreme Court of India dated September 09, 2010, given to the Commission to complete investigation in a time-bound manner. From the foregoing, it was argued that the DG acted in a manner devoid of procedure to conduct an



investigation and the entire investigation report appears to be colourable exercise of the statutory powers besides contempt of the order of the Hon'ble Supreme Court of India and as such the same is liable to be rejected.

75. It was submitted that the DG has highlighted the provisions of the Act relating to anti-competitive agreements including 'cartel' read with the definition of the 'agreement' and while doing so he has reaffirmed and reiterated that the relevant period of allegation is from April 2007 to February 2008. JSW denied and disputed that its steel prices of Hot Rolled Coils increased by 20% as alleged by EEPC during this period. On the contrary, the increase of Hot Rolled Coils prices of JSW was in fact to the tune of 8% only when world Hot Rolled Coils prices for export increased by approximately 25% for the same period.

76. It was further contended that the provisions of the Act relating to breach of section 3 do not operate with retrospective effect. The Act came into effect on May 20, 2009 and the period of allegation, as per foregoing, is between April 2007 and February 2008 and the *prima facie* order of the Commission under section 26(1) passed on June 18, 2010 too did not direct the DG to examine the allegation beyond the period *i.e.* February 2008, collectively restrict the DG not to venture out or change the scope of the allegation beyond what had been made by the newspaper report and/ or by the complainant, EEPC in March 2008.

77. The entire process of investigation continued from April 2007 to March 2010 against the answering party at a time when the market dynamics have changed drastically resulting in a futile exercise causing wastage of time and energies to all involved in responding to this process.

78. It was pointed out that the DG while concluding its investigation report did rely upon the Commission's internal market study report and it was sought



to be suggested that the market study report and the DG's investigation report mismatched.

79. On merits, it was stated that JSW continued to enhance its crude capacities from 0.8 MnT in 2001 to 11 MnT as of today growing at 30% CAGR indicating in unambiguous terms its intent to enhance economic efficiencies in steel manufacturing in the post-economic liberalized scenario of India especially at a time when it does not have any raw material security whereas its competitors have such security in abundance. This is sought to be suggestive of the fact that JSW cannot and shall not have any reason to form a cartel with competitors when benefits of the same shall not be made by it.

80. Referring to the market study report of the Commission relating to steel sector, it was pointed out that the same categorically indicated the growth phenomena of the steel industry and more particularly the said report did not find presence of anti-competitive behaviour amongst steel producers in India. It was submitted that the said report of the Commission, based on a detailed market study by an independent agency, goes on to strengthen the argument of JSW that no anti-competitive practice exists in the steel sector.

81. It was highlighted that in chapter 8, the DG specifically concluded that there was no evidence to find whether these 4 companies had decided about the price increase in concert with each other and as such it was sought to be suggested that there was *prima facie* no evidence of agreement between them.

82. It was further submitted that an 'agreement' with competitors is a condition precedent to establish an allegation of cartel. Once an 'agreement' is found amongst players in the same business thereafter the investigation shall follow to ascertain causation of appreciable adverse effect on competition in India in terms of the statutory factors laid down under section 19 (3) of the Act. It was submitted that unless both these parameters are proved



unambiguously, the allegation of cartel fails. In the present matter, it was submitted that both these parameters have failed miserably. Since the DG remained inconclusive about existence of an agreement amongst the opposite parties, it relied upon the economic principles of price parallelism and concluded that the allegations of complainant have been proved. The entire exercise of the DG in this behalf appears to have been founded on his own perception about steel industry rather than on facts and empirical evidences adduced during the course of investigation and depositions made by the answering party.

83. Elaborating further, it was argued that in an allegation of cartel, the condition precedent to pin down a party shall have to be the existence of 'agreement including an action in concert'. In the absence of existence of an agreement among the steel manufacturers, the other issues as highlighted by the DG in the investigation report seem to be an academic exercise not relatable to the facts in issue. The rest of the findings based on 'price parallelism', appears an effort to somehow pin down JSW when no action in concert is established.

84. It was stated that the raw material costs especially in respect of JSW's manufacturing processes have steeply increased. Further, it was pointed out that the DG in the report has concluded that steel production is an oligopolistic market with 4-5 big producers controlling more than 40% of the market in terms of production. But the DG did not really appear serious enough to analyze the role of remaining 60% of the market in terms of production. Having failed to do so and not following a uniform pattern for HR coils, HR plates, Wire Rods and TMT bars the numerical figure of 40% seems misplaced and could not lead to price parallelism when the ultimate prices of the enterprises vary drastically.



85. It was argued that owing to the oligopoly in the steel market, the DG concluded that there is a case for collusive price leadership. It was submitted that an oligopolistic market cannot *per se* be concluded to be a cartelized market. The DG failed to understand that 'oligopoly' is a market structure and is an indispensable precursor to the 'perfectly competitive market'. It is a well-accepted fact in economic theory and practice that oligopolistic will factor into their pricing decisions the probable decisions of their competitors and as a result similarity in pricing will be observed. The DG's analysis as to price parallelism and price leadership was strongly denied and disputed on grounds of legal as well as economic theory and practice.

86. It was reiterated that in a free market enhancement of economic efficiencies by way of augmentation of production capacities is contrary to the principles of cartel. In cartel, members more often than not do not engage in efficiency enhancement and continue to make the industry suffer on account of stagnation in production, poor quality of product by a handful of few players and reaping astronomically high profits not related to input cost. In the instant investigation, nothing relating to the foregoing has been proved or even attempted to be proved. The factual analysis of the steel sector in India indicated efficiency gains, pro-competition trends and absence of barriers to entry in the segment. It was also submitted that setting up of integrated steel plants, though gained momentum post-1991 yet the same happened as part of huge capital investment on the part of the private enterprises.

87. In view of foregoing, the allegations against the answering party were stated to fail on the following grounds:

(i) the DG did not find any agreement or action in concert being indulged by JSW with other competitors to fix price of primary steel;



(ii) the Act does not have retrospective application and the same cannot be bridged by the provision of sub-section (6) of section 66 of the Act and the DG failed to appreciate this basic tenet of law;

(iii) the confidential business information of JSW was disclosed by the DG in his report to competitors leading to irreparable loss to it in disregard to international best practices besides making the investigation report a farce;

(iv) the DG did not find any breach by JSW of any of the statutory provisions as laid down in sub-section (3) of section 19 and more particularly sub-clauses (a), (b) and (c);

(v) the DG did not find existence of any membership to which JSW had associated itself with which could have assisted and aided JSW to meet up with competitors and form the basis of a cartel;

(vi) the DG had the burden of proof to discharge but he failed to do so;

(vii) the DG relied upon flawed data causing irreparable loss and damage to the reputation of JSW at a time when it commenced its journey to a growth path in line with the vision of the Government of India;

(viii) the DG failed to appreciate that JSW entered the markets of Bars and Rods much later than other competitors yet JSW was compared with all to support its pre-conceived mindset - a gross breach of principles of natural justice;

(ix) the DG failed to establish information sharing between JSW and other competitors during the continuance of the alleged cartelization;



(x) the DG failed to take a common denominator to compare various products between JSW and other competitors thereby led to wrong conclusions;

(xi) the DG failed to appreciate that import of HR coil is freely importable and in fact is being imported freely giving fierce competition to JSW *qua* its customers;

(xii) the DG failed to summon the EEPC and its functionaries to depose before it to ascertain the veracity of the original complaint under the new Act since the original complaint by EEPC was filed under the repealed Act; and

(xiii) the DG took unreasonably long time to conclude its report in disregard to the CCI General Regulations and the directives given by the Hon'ble Supreme Court of India on September 09, 2010.

Further Consideration of the DG report by the Commission

88. The Commission considered the investigation report of the DG, replies of the parties, their oral submissions and all other material available on record and *vide* its order dated 29.02.2012 arrived at a conclusion that in view of the flaws in the methodology adopted in investigating the case and inconsistencies in the analysis carried out therein, the case cannot be decided at this stage for reaching a finding about the existence of cartel(s) or otherwise.

89. After noting the methodology adopted by DG and the reasons given therein, the Commission observed that there were inconsistencies in the methodology adopted in the investigation and analysis of the case, as in the report submitted by the DG, often the data provided did not support the conclusions drawn therefrom.



90. Further, the Commission observed that the methodology adopted by the DG was flawed because the focus of the investigation was not based on the prevalent market structure of the steel industry, and the criterion adopted for sample selection was not very robust. It was further observed that the selection of products for the investigation, which was done on a random basis by only considering those products that constituted the major portion of steel production, ought to have been done based on the factors that may facilitate cartel behaviour and collusion among the firms, such as small number of firms in the market in respect of a particular product, high-entry barriers, excess demand, lack of availability of substitutes, countervailing buying power *etc.* in a particular product segment.

91. The Commission also observed that finished steel products were generally distinguished as flat steel products or long steel products. While flat steel products are primarily characterized by presence of large integrated steel producers, long steel products are characterized by presence of large number of small and regional steel producers. In case of flat steel products where the number of players in the market is limited, entry barriers may be high and with increase in demand, the possibility of cartelization is required to be investigated, keeping in view the competition from imports and presence of the large integrated players which constitute major proportion of the market. As regards the long products, the market is highly fragmented, and the possibility of cartelization is required to be investigated keeping in view regional nature of market, capacity utilization, price differences between domestic and landed price *etc.* Thus, combining flat and long products for purpose of the said investigation does not seem to be appropriate, noted the Commission in its order.

92. Furthermore, it was also opined by the Commission that further categorizations of steel products also have to be appropriately taken into account for the purposes of investigation.



93. It was observed that considering the fact that in India, the steel industry comprises main/ major domestic producers having presence across almost all varieties of finished steel products such as SAIL, TSL, RINL, Essar Steel, JSW, JSPL, and Ispat Industries and is also characterized by presence of various leading global steel producers engaged in sale of variety of iron and steel products in India through imports in India, the investigation has to appropriately take into account the various companies engaged in sale of steel products in India, the large number of other domestic producers engaged in production of various semi-finished and finished steel products spread across the country serving markets which may be regional in nature, may also be need to be looked at in this context, using an appropriate statistical sample and survey.

94. In view of the above, the DG was directed to fully investigate, including in regard to the following issues:

(i) In addition to the four companies *i.e.* RINL, TSL, JSW and SAIL, also duly consider for purposes of investigation, other major companies such as Essar Steel, JSPL, Ispat Industries *etc.*

(ii) In addition to the four products considered in the investigation *i.e.* HR coils, HR plates, Bars and Rods, market for other products where either due to constraints in quantity or quality or other factors, the possibility of cartelization may exist, may also be investigated.

95. Lastly, it was ordered that for the purpose of investigation, specific companies and products need to be identified through a more robust analysis by keeping in mind that steel industry has been largely classified into three major categories based on form/ shape/ size, composition and end use. An informed analysis of the market structure and deep understanding of the



differentiated features of different products have to be important inputs in designing the investigation methodology itself. Conclusions drawn need to be consistent with the data analysed and relied upon.

96. Resultantly, the DG was directed to further investigate the matter accordingly.

97. The DG, after receiving the directions from the Commission, further investigated the matter and submitted a supplementary investigation report dated 26.09.2013 to the Commission.

Supplementary Investigation by the DG

98. The DG undertook further investigations on the issues as highlighted in the order of the Commission dated 29.02.2012, as noted *supra*.

99. The DG, after highlighting an overview of steel production process and different products, identified the product and parties for investigation. In this regard, the DG noted that during the course of investigation no specific allegation/ information of cartelization relating to long steel product segment was received either from the informant or from the other stakeholders of the industry. Further, in light of the market conditions (large number of players), the DG did not proceed further to incorporate the long steel products segment in the investigation. It was further noted by the DG that in the flat steel segment, HR coil is the most concentrated segment within the steel industry. The share of top 5 firms is about 90% of the total production. Thus, the nature of market of HR coil was found to be oligopolistic making the possibility of collusion easy among the players. Further, a gap of about 15-20% between the domestic supply and consumption was noted making the consumers dependent on the sellers. In view of the above, HR coil was taken up as the product for the purposes of investigation of alleged cartel in the supplementary report.



100. To identify the players for the purposes of investigation, the DG examined the data relating to production of HR coil by domestic producers and percentage of their respective market share in the production. Market share of the players was also examined on the basis of sales. Based upon these factors, the DG concluded that 5 major players produce about 90% of the total domestic production and jointly have about 75% of share in total domestic sales in the HR coil steel segment. Accordingly, for the purpose of investigation, 5 major players [*i.e.* SAIL, TSL, JSW, M/s Ispat Industries (ISPAT) and M/s Essar Steel (Essar)] were identified as the main domestic players in the segment of HR coil.

101. The focus of analysis of the various relevant issues in the report was restricted to these 5 players only. The investigation, however, did not find any direct evidence or information of any instance of meeting of the HR coil producers to indicate collusive price fixing. No information whatsoever on the *modus operandi* of the alleged cartel or any detail of the tacit understanding came to the notice of the DG during the course of investigation.

102. Thus, on the basis of the analysis of information and evidences gathered during the course of supplementary investigation, the DG did not find evidence indicative of anti-competitive conduct by the steel producers in the segment of HR coil, during the period of investigation *i.e.* 2007-08 to 2009-10 which can be held in contravention of the provisions of section 3(3) of the Act.

Consideration of the Supplementary Investigation report of the DG by the Commission

103. The Commission in its ordinary meetings considered the supplementary investigation report submitted by the DG and decided to pass appropriate order in due course.



Analysis

104. On a careful perusal of the informations, the reports of the DG and the replies/ objections/ submissions filed by the parties and other materials available on record, the following issues arise for consideration and determination in the matter:

(i) Whether the present proceedings shall be governed by the substantive provisions of the MRTP Act, 1969 or the Competition Act, 2002?

(ii) Whether the opposite parties have contravened the provisions of section 3 of the Act?

105. It has been contended by some of the opposite parties that since the investigation was transferred under the provisions of section 66(6) of the Act, the substantive law of the MRTP Act shall govern the present proceedings.

106. The Commission notes that in the present matter the DG I&R, MRTP Commission undertook the preliminary investigation which was still pending when the MRTP Act was repealed *vide* ordinance dated 14.10.2009. As the investigation had not culminated into a 'case' the matter stood transferred to the Commission from the DG I&R, MRTPC by virtue of the provisions of section 66(6) of the Act. Even a plain reading of section 66(6) of the Act clearly demonstrates that on receiving the matters where investigation was pending, the Commission may order for conduct of the investigation in the manner as it deems fit. If the Commission were to order investigation in such matters, the only section of the Act which empowers the Commission to do so is section 26 by treating the complaint as information under the Act. Further, on receiving the matter, the order for investigation under section 26(1) can be passed only if in the view of the Commission there existed a *prima facie* case of violation of the provisions of the Act. As the complaint filed before the DG



I&R, MRTPC was still at the stage of preliminary investigation no right, liability, privilege or obligation can be said to have been accrued to any party and, therefore, the provisions of section 66(1A) or 66(10), are not applicable in the present situation. Furthermore, the Commission has not been conferred any power to adjudicate any matter invoking the provisions of repealed MRTP, Act. This premise becomes clear when the provisions of section 66(6) are contrasted with the provisions of section 66(3) of the Act. Whereas the Competition Appellate Tribunal has been specifically conferred power to adjudicate cases pertaining to monopolistic and restrictive trade practices pending before MRTP Commission in accordance with the provisions of repealed MRTP Act under section 66(3) of the Act, no such power has been given to the Commission under section 66(6) of the Act. In the backdrop of the provisions of the Act as analysed above, the Commission finds that there is no illegality in entertaining and examining the present case under the Competition Act, 2002 the investigation was pending before the DG I&R, MRTP Commission before the MRTP Act was repealed.

107. Further, even in cases where the alleged anti-competitive conduct was started before coming into force of section 3 and 4, the Commission has the jurisdiction to look into such conduct if it continues even after the enforcement of relevant provisions of the Act. This position has been settled by the Hon'ble High Court of Bombay in W.P. No. 1785 of 2010, *Kingfisher Airlines Ltd. v. Competition Commission of India* decided on 31.03.2010. In the said case, it has been held by the Hon'ble Bombay High Court that though the Act is not retrospective, it would cover all agreements covered by the Act though entered into prior to the commencement of the Act but sought to be acted upon now *i.e.* if the effect of the agreement continues even after 20.5.2009. Issue No.1 is decided accordingly.



108. In view of the above, the Commission proceeds to examine as to whether the opposite parties have contravened the provisions of section 3 of the Act.

109. At the outset, it may be noted that though the DG found the steel production market oligopolistic and hence susceptible to concerted price fixation, it may be observed that existence of such conducive scenario for cartelization in itself is not enough to reach a finding of contravention against the parties. The same has to be established with the help of cogent evidence. Though, such evidence may be of circumstantial nature and the anti-competitive conduct may be inferred from the circumstances brought on record.

110. In terms of the provisions contained in section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can 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(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void. Further, by virtue of the presumption contained in sub-section (3), 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 or provision of services, which-(a) directly or indirectly determines purchase or 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.

111. To invoke the provisions of section 3 of the Act, the existence of an 'agreement' is *sine qua non*. The term 'agreement' has been defined in section 2(b) of the Act as including any arrangement or understanding or action in concert whether or not formal or in writing or is intended to be enforceable by legal proceedings. The understanding may be tacit, and the definition covers situations where the parties act on the basis of a nod or a wink. There is rarely direct evidence of action in concert and the Commission has to determine whether those involved in any dealings have some form of understanding and are acting in co-ordination with each other. In the light of the definition of the term 'agreement', as noted supra, the Commission has to find sufficiency of evidence on the basis of benchmark of 'preponderance of probabilities'.

112. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. Considering the remote possibility of getting direct evidence in the case of a cartel in many cases, the existence of an anti-competitive practice or agreement can also be inferred from the conduct of the colluding parties which may include a number of coincidences and indicia which, taken together, may, in the absence of any other plausible explanation, constitute evidence of the existence of an agreement. Thus, in case of agreements as listed in section 3(3) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition; the onus to rebut this presumption would lie upon the opposite party.

113. In the aforesaid backdrop, the findings of the DG may be examined.



114. As noted above, the DG took up HR coil as the product for the purposes of investigation of alleged cartel in the supplementary report. For the purpose of investigation, five major players (*i.e.* SAIL, TSL, JSW, ISPAT and Essar) were identified as the main domestic players in the segment of HR coil. The focus of analysis of the various relevant issues in the report was restricted to these five players only. The period of investigation was confined to 2007-08 to 2009-10.

115. The following issues were identified by the DG for the purposes of investigation:

(i) Whether the prices of HR coil of all the players were similar and moved simultaneously in unison during the relevant period *i.e.* April 2007 to March 2010.

(ii) Whether the players have determined the prices collusively during the relevant period in violation of the provisions of section 3(3)(a) of the Act.

(iii) Whether there was an attempt to restrict supply or production in the market by HR coil producers during the relevant period.

(iv) Whether the HR coil producers diverted the supplies from the domestic market by resorting to higher export during the relevant period.

(v) Whether the export at lower prices were made deliberately to create shortage in the market during the relevant period.

(vi) Whether there was allocation or sharing of territory or customers by the HR coil producers.

(vii) Whether the conduct of HR coil producers during the relevant period have resulted in violation of the provisions of section 3(3) of the Act.

116. To begin with, the DG examined the sales pattern in the domestic market by recording the statements of producers and consumers of HR coil. On the basis of the information so gathered, it appears that about 90% of the quantity of HR coil is supplied by the steel producers on long term contract basis and the prices are determined through negotiations. The prices are, however, subject to monthly or quarterly revisions by the steel producers. As the maximum sales are done through long term contracts, the prices remain stable for at least a period of one month. Further, the price changes were found to be effected based on factors like landed import prices, cost of production, position of demand *etc.*

117. The consumers of HR coil were issued questionnaires by the DG to verify the market position reported by the producers. Letters were issued to the top five consumers of each producer to obtain feedback on various issues relating to the case. From the responses received, the following aspects relating to the prices in the market were recorded by the DG:

(a) *Frequency of price changes*

The prices of HR coil are generally changed by the steel producers in last week or beginning of every month. These prices are applicable from the first day of every month irrespective of the date of declaration. In case of SAIL, however, the declaration of price changes is done on quarterly basis.

(b) *Price negotiations*

After the declaration of price changes, the buyers generally negotiate the prices for their respective supplies and the actual price is different from the



declared prices in most of the cases. In case of SAIL, however, the invoices are issued on their list prices only and the buyers are allowed discounts at the end of month through credit notes. The prices are also subject to transportation cost as the supplies are negotiated on FOR basis. If the distances are higher, the transportation cost component may form about 5% of the prices. The spot/retail sales prices are determined by the sellers on the basis of the current market prices based on market conditions. The spot prices may change on daily or weekly basis as per the situation of demand and supply *etc.* The scope of negotiation in this segment is negligible for the customers. The prices in long term contracts are kept fixed at least for a period of one month as negotiated mutually with the customers. In some cases, prices are fixed for a period of one quarter also.

(c) Actual transaction prices

Thus, the declared prices by the companies are not found to be actual transaction price in the market. The data submitted by the producers have confirmed that the actual prices may be higher or lower than the declared prices. The prevailing market conditions, buying power of the customer and terms and conditions of contract do play a vital role in the determination of prices.

(d) Effect of transportation cost

It was stated by the consumers that there is no restriction on supply from any player. However, buyers prefer the supplies from the nearest plant to play on the transportation cost. The customers have choice to negotiate with the domestic producers or source it from import route as the HR coil is available under open license in India from other countries. However, the import normally involves one month to two months' time between the date of order and date of receipt due to logistic constraints. Thus, the prices and quantity of



steel available from import source for coming months are generally known to the buyers as well the sellers.

118. The DG also examined pattern of pricing and declaration of prices by the players. From the details of price declarations, no fixed pattern was found or is otherwise discernible in the date or timing of announcement of change in the prices by the parties. In this connection, it may be noted that the largest domestic player SAIL was found to be announcing price changes quarterly, whereas other players declared their prices every month. As the actual transaction prices are decided by the customers after negotiations, the declared prices act as a benchmark for determination in the prices.

119. The material available on record does not disclose any fixed pattern or price leadership of any player in declaring prices at all India level or at the regional levels. Moreover, as noted above, SAIL declares its price on quarterly basis, whereas other players announce on monthly basis and hence, the practice of price leadership is ruled out. No fixed pattern of price communications was noticed.

120. Analyses of absolute monthly prices of HR coil and monthly price changes thereof were conducted by the DG. Based on this, it was concluded by the DG that the prices of top five players were moving in tandem and there existed price parallelism among the HR coil producers during the investigation period (2007 to 2010). The DG, therefore, confronted the producers on the issue of price parity. The producers filed their detailed replies before the DG claiming that the price changes are determined by each company on the basis of market conditions and landed import price as well as cost of production. In sum, the steel producers attributed the landed import prices, cost of production and the market demand and supply position as the reason for price parallelism.



121. To ascertain the veracity of the claims made by the parties, the DG conducted an analysis of landed price of import with the domestic prices. Based on the analysis, it was found by the DG that the comparison of the prices of domestic producers with the landed import price showed a positive correlation. However, in absence of any evidence, it could not be concluded that the domestic producers have adopted a concerted practice of determining their prices at some fixed amount higher than the landed import prices. The analysis of prices reflected that the import prices play a vital role but is not the only factor while determining the transaction prices.

122. Further, as the steel producers also stated the cost of production as one of the important factors for price changes, the analysis of data relating to cost of production of each company was compared with the prices by the DG. It was noted by the DG that analysis of profit margin of the parties revealed a lack of price under cutting among the domestic producers. This was also found to confirm the fact that the parties are normally competing with the landed import prices only and there is absence of active competition among them.

123. As has been seen above, the DG found price parallelism amongst the producers under investigation during the relevant period. But without additional evidence *i.e.* 'plus factors', proof of conscious parallel behavior, such parallel behavior, is not enough to establish a violation. The additional evidence or plus factors need not take the form of direct evidence of an explicitly illegal agreement. Parallel pricing or other matching behaviour does not in itself establish the existence of a combination or conspiracy, nor should it, if it is equally consistent with the lawful behaviour of firms acting separately and independently of one another. Additional evidence is instead necessary to further bolster the inference of collusion. A wide range of circumstantial evidence can be used to establish the needed plus factors. Plus factors are economic actions and outcomes, above and beyond parallel conduct by oligopolistic firms, that are largely inconsistent with unilateral



conduct but largely consistent with coordinated action. Possible plus factors are typically enumerated without any attempt to distinguish them in terms of a meaningful economic categorization or in terms of their probative strength for inferring collusion. Generally it is observed that in an oligopolistic industry, the firms recognize their mutual interdependence, acknowledge that they are players in a repeated game, and act according to it. In antitrust decisions, mere conscious parallelism does not suffice for determination of firms engaged in concerted action because such pricing can emerge from firms acting non-collusively where they understand their role as players. In such cases, it is required that economic circumstantial evidence go beyond the parallel movement in price to reach a finding that the firms have crossed that line thereby violating the provisions of the Act.

124. In the present case, the DG after finding price parallelism amongst the parties under investigation proceeded to analyze the rationale advanced by the firms for such behavior. The steel producers attributed the landed import prices, cost of production and the market demand and supply position as the reason for price parallelism. As noted above, the DG found a positive correlation between the domestic prices and landed import prices. The analysis of data revealed that the reason for price parallelism was in the main tendency of the domestic producers to base their price movement as per the landed import prices. The behavior of the firms in respect of price changes showed that they did not undercut the prices of each other when the international prices were higher even when there was scope for reduction due to gap between the cost and prevailing prices. Even during the period when international prices crashed and most of the HR coil producers incurred losses, their prices were found to be mainly guided by landed import prices.

125. Furthermore, the DG did not find, on the basis of analysis of data relating to production and sales, any concerted effort on the part of the



producers under investigation to create pressure in the market to increase the prices or maximize profits.

126. The DG also obtained the information from the consumers of HR coil. From the replies furnished by the consumers, it appears that the prices are determined after negotiation with the suppliers. The consumers did not confirm that they have observed any cartel like conduct among the players. No specific activity or evidence to show the existence of alleged cartel was furnished by the consumers to the DG. No evidence was found which was suggestive of geographical allocations of territories or the customers by the steel producers. No active trade association of HR coil producers was found to be operative during the investigation period.

127. From the analysis of the evidence available on record in this case it appears that like in many oligopoly markets, HR coil producers recognized their interdependence and simply mimicked their rivals' conduct. There is no cogent material on record to contradict this inference.

128. The non-competitive nature of a market, by itself, does not imply an 'agreement'. Interdependent behaviour of enterprises does not necessarily indicate collusive conduct.

129. For all the aforesaid reasons, the Commission is of the opinion that sufficient evidence has not been brought on record to establish a finding of contravention against the opposite parties. In such a scenario, the Commission deems it appropriate to order closure of the case.

130. The opposite parties had raised various other issues *qua* the investigations conducted by the DG. In light of the findings of the Commission on contravention, it is unnecessary to express views on such pleas.



131. It is ordered accordingly.
132. The Secretary is directed to inform the parties accordingly.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(Geeta Gouri)
Member

Sd/-
(Anurag Goel)
Member

Sd/-
(M. L. Tayal)
Member

Sd/-
(S.N. Dhingra)
Member

New Delhi

Sd/-
(S. L. Bunker)
Member

Date: 09/01/2014