

BEFORE THE COMPETITION COMMISSION OF INDIA

AT NEW DELHI

Case No.: RTPE 52 of 2006

July 30, 2012

In re: Alleged Cartelization by Cement Manufacturers.

Present:

1. M/s Shree Cement Limited-through Sh.Manas K.Chaudhry & Sh.Sagardeep
2. Cement Manufacturers Association -through Sh. Ashok Desai & others
3. M/s J.K Cement Ltd. -through Sh. P. K. Bhalla
4. M/s Binani Cement Limited -through Sh. AdityaNarain & Sh. R. Sudhinder
5. M/s Lafarge India Pvt. Ltd.-through Sh. A. Haskar & Sh. Samir Gandhi
6. M/s Jaiprakash Associates Limited-through Sh. ParagTripathi & Sh. G.R. Bhatia
7. M/s UltraTech Cement Ltd.-through Sh.Aspi P. Chinoy & Sh.Pravin Parekh
8. M/s India Cements Ltd. -through Sh.Harishankar
9. M/s Ambuja Cements Limited-through Sh.RamjiSrinivas&Ms.AnuTiwari
10. M/s ACC Limited -through Sh.K.Venugal&Ms.PallaviShroff
11. M/s Century Textiles & Industries Ltd.-through Sh.PramodAgarwala& others
12. M/s Madras Cements Ltd.-through Sh. T. Srinivas Murthy
13. Builders Association of India -through Shri O.P. Dua & Sh. Rahul Goel

Order Under section 27 of the Competition Act,2002

This case has been received on transfer from the Office of the DG
(IR), MRTP Commission under section 66(6) of the Competition Act,



2002 ('the Act'). The MRTP Commission had taken *suo moto* cognizance and initiated investigation on the basis of press reports published in the business daily, the Economic Times on 09.05.2006 and 29.06.2006 regarding increase in cement prices. Subsequently, a letter dated 16.9.2006 of the Builders' Association of India ('the BAI') was also received by the MRTP Commission through the then Ministry of Company Affairs on 26.09.2006.

2. Allegations, in brief, are noted below:

2.1 It was alleged that the cement prices were stable at the rate of Rs.125 to Rs.145 per bag between 2003 and 2005, but the prices started upward movement in December 2005 and were hovering around Rs.210 to Rs.230 per bag from January 2006 onward without any corresponding increase in limestone price, royalty, excise duty, sales tax, railway freight or demand-supply mismatch warranting such abnormal increase. It was also alleged that the cement manufacturing companies had resorted to unfair trade practices by under-production or choking up of supply in the market, thereby raising the sale price.

2.2 As per the complaint, the installed capacity of cement during 2005-06 was 179.25 million tonnes spread over 129 cement plants owned by 54 cement companies. Consolidation process in the industry initiated since last 4-5 years had given 26.38% of market



share in the hands of multinational cement companies and 17% in hands of Kumar Birla Group aggregating to 43.73% of total capacity enabling them to control supply and cement price movement.

2.3 It was narrated that alarmed by such unwarranted price rise, BAI represented to the Secretary, Industrial Policy & Promotion (IPP), Ministry of Commerce & Industry and the latter arranged a joint meeting with Cement Manufacturers' Association (hereinafter referred to 'the CMA') on 2nd May 2006. The CMA in its presentation to the Ministry bearing No.177 (Price)/2006 dated 3rd April 2006 stated that price of cement including profit was Rs.147.80 per bag. The Secretary (IPP) directed members of the CMA to bring down the price from Rs.230/- per bag to a realistic level by 12th May 2006. Cement Industry did not give positive response to that direction. The Minister of Commerce & Industry, therefore, warned that Government might impose ban on cement export, and called meeting of cement manufacturers on 15th May 2006. Cement Manufacturers offered 5% discount on government purchase. As per the complaint, this offer was deceptive and meaningless as the Government did not purchase cement for supplying to construction entities.

2.4 It was also mentioned in the complaint that in the absence of any deterrent action by the Ministry, cement companies were emboldened to charge higher rates. As per the averment, this fact



was apparent from abnormally high operating profit earned by four cement majors in 4th quarter of fiscal 2005-2006 and first quarter of 2006-2007 compared to third quarter of October – December 2005. Increased profit was a result of higher sale price charged by them.

2.5 As per the complainant, cement industry from the year 1990 onwards was resorting to unfair trade practice either by under-production route or choking-up supplies in a given market for a short period, thereby raising the sale price.

3. Following the receipt of the complaint the erstwhile MRTP Commission ordered an investigation into the matter. Accordingly, the DG (I&R) asked all the cement manufacturing companies to furnish their comments as well as break-up of cost of cement per metric ton including state levies. The Builders' Association of India was also asked to substantiate its allegations with regard to increase in prices. The replies of 41 cement manufacturers were received wherein the allegation of formation of cartel were denied. From the record, it appears that the DG (I&R) could not finalize the Preliminary Investigation Report (PIR). At this stage, consequent upon the repeal of the MRTP Act, 1969, the matter was transferred to the Commission. After receiving the matter the Commission considered the matter in its meeting and passed an order dated 24.06.2010 under section 26(1) of the Act directing the Director General to conduct an investigation into the matter in pursuance of the



direction of the Commission the DG conducted the investigation into the matter and submitted his investigation report dated 31.05.2011 to the Commission.

4. It is pertinent to mention here that a separate information was also filed by BAI bearing Case No. 29 of 2010 under section 19(1) of the Act against 11 cement companies and Cement Manufacturers Association with similar allegations. The Commission has already passed an order dated 20.06.2012 under section 27 of the Act in Case No. 29 of 2010 holding that the cement companies named in that case are parties to a cartel in violation of section 3 of the Act. By this order, the Commission is disposing of the present matter viz. Case No. 52 of 2006 received on transfer from the MRTP Commission, as noted earlier.

5. From the report of the DG in the present case, it is noticed that the DG has examined the conduct of various cement companies. The DG found CMA and 11 cement companies viz. (i) Associated Cement Companies Ltd.(ACC), (ii) M/s Ambuja Cement Ltd, (iii) M/s Ultratech Cement Ltd, (iv) M/s Jaiprakash Associates Ltd, (v) M/s India Cements Ltd, (vi) M/s Shree Cement Ltd., (vii) M/s Madras Cement Ltd, (viii) M/s Century Textile and Industries Ltd, (ix) M/s J.K. Cements Ltd, (x) M/s Binani Cement Ltd and (xi) M/s Lafarage India Pvt. Ltd in contravention of the provisions of section 3 of the Act. It may be also be mentioned that as cement business of M/s Grasim



Industries Ltd., was de-merged into M/s Samruddhi Cement Ltd from 18.05.2010 and the same was merged into M/s Ultratech Cement Ltd., with effect from 01.08.2010, therefore, a combined reply of M/s Grasim Industries Ltd and M/s Ultratech Cement Ltd., was filed by the latter.

Reply of the parties

6. The Commission also notes that parties in Case No. 29 of 2010 and in the present case are same except M/s Shree Cement Ltd., which was not a party in Case No. 29 of 2010. As the replies of the parties (except M/s Shree Cement Ltd.) have been noted in detail in Case No. 29 of 2010, hence, the submissions of the parties in this case which have been dealt with in the order passed in Case No. 29 of 2010 are not repeated in extenso. Accordingly, a brief resume of the additional submissions made by the parties in this case has been recorded below. However, since M/s Shree Cement Limited was not a party in Case No. 29 of 2010, its reply is being recorded in detail.

Reply of M/s Shree Cement Limited(Shree Cement)

7. It is stated by Shree Cement that it was not made a party by BAI in Case No 29 of 2010 as well as in the instant case. It is alleged that the very method of combining an enquiry instituted under the MRTP Act with another instituted under the Competition Act when Shree Cement was not named as a party by BAI and concluding a



common investigation report is inappropriate and such report is liable to be rejected.

8. It is also contended by Shree Cement that the intent and purpose of two legislations i.e. the MRTP Act and the Competition Act are different and, as such, the methodology adopted by the DG is flawed and bad in law.

9. It is further contended that clubbing the inquiry of instant case with Case No. 29 of 2010 is gross miscarriage of justice. It has been pointed out that the DG (I&R) could not conclude the investigation in RTPE 52 of 2006 i.e. the present case in time whereas a much latter investigation i.e. RTPE 15 of 2007 initiated suomoto, based on newspaper reports of September 2006, by the MRTP Commission against some other cement companies, not including Shree Cement, was not only concluded ahead of RTPE 52 of 2006 but also the same is being currently inquired into by the COMPAT in terms of the provisions of section 66(3) of the Act. It has also been pointed out that appeal, if any, from the orders of the Commission in Case No. 29 of 2010 and RTPE 52 of 2006 will lie before the COMPAT.

10. It has been submitted by Shree Cement that the scope of investigation by the DG is limited and in cases which are transferred under section 66(6) of the Act, the Commission has to first decide causal link between the inconclusive investigation of MRTP



Commission with that of the Competition Act, 2002 by its own regulations. Only then, it can proceed with the matter within the ambit of section 19(1) of the Act to form a *prima facie* view under section 26(1) of the Act for directing the matter for investigation to the DG. The DG, unlike its predecessor the DG (I&R), does not have suo moto power to investigate any breach of the provisions of the Act but his mandate is only to assist the Commission in terms of section 41(1) of the Act. Therefore, any investigation arising out of section 66(6) of the Act does not automatically confer any statutory powers upon the Commission to form a *prima facie* view under section 26(1) of the Act without routing the same through section 19(1) thereof. Reliance has been placed upon a judgment of the Supreme Court in Reliance Airport Developers (P) Ltd v. Airports Authority of India & Ors (2006) 10 SCC 1 in this regard .

11. It is the case of Shree Cement that the Commission, in the instant case, did not pass an order directing the DG to enlarge the scope of the original complaint. However, the DG submitted the investigation report enlarging the scope of the original complaint in complete disregard of the relevant provisions of the Act. The original information/ complaint of BAI addressed to Member of Parliament was relatable to the period from end of December 2005 to 16 September 2006 and, as such, the scope of the complaint/ information was restricted up to 16 September 2006 and could not have been enlarged by the DG in the absence of specific direction of



the Commission. It has been contended that the provisions of section 3 of the Act are not retrospective. To support the plea, reliance has been placed upon the following decisions: State of Punjab and Ors. v. Bhajan Kaur and Ors., AIR 2008 SC 2276, Garikapati Veeraya v. N. Subbiah Choudhry, 1957 1 SCR 488, Shyam Sunder & Anr. v. Ram Kumar and Anr., AIR 2001 SC 2472 and Land Acquisition Officer-cum-DSWO, A.P. v. B.V. Reddy and Sons, 2002 (2) ALD 47 SC.

12. Shree Cement has denied that it indulged in cartelization during December 2005 and thereafter as alleged by BAI. It has denied that input costs of cement remained unaltered or there was demand-supply mismatch during the alleged period of cartelization and the cement prices went up in spite of stable input costs. Further, it has been denied that Shree Cement resorted to limiting or restricting production and /or indulged in choking-up supply in the market and artificially raising cement prices.

13. It has been submitted by Shree Cements that it expanded its capacity from 2.6 Million Tons Per Annum (MTPA) in March 2005 to 13.5 MTPA by March 2011 through self-sponsored organic route rather than by acquisitions. With the increased production from 2005-March 2011, its market share registered an improvement which indicates its pro-competitive behaviour and the same is contrary to the attributes of anti-competitive practice or cartelization. As per the submission of Shree Cement, this is reflective of the fact that it has



been an efficient and a pro-competitive player in the Indian cement market. It has been further contended that Shree Cement had about 4.48% of all-India market share in 2010-11 and had much lower market share in 2005-06 (i.e. 2.27%) and, as such, it could not have controlled and cannot control the reins of the Indian cement market and/or price of the product thereof. It has also contended that there are other cement companies which had similar or higher market share in 2005-06 but have not been made party to the present investigation.

14. It has also been submitted that cement constitutes between 2 to 4 percent of total price of a dwelling unit sold by a builder in cities such as Jaipur or Delhi and, as such, the increase in cement price cannot be considered as affecting the fortunes of the construction industry.

15. As per Shree Cement, its pricing of cement supplied in the market falls in two categories viz. institutional and trade segments. The cement supplied to builders i.e. the members of BAI falls within the institutional segment category and the price of the cement to this segment is typically lower than that being supplied to the trade segment because these buyers have market power by virtue of their size. In view of this the sellers need to maintain their loyal customers and their ability to buy bulk allow them to negotiate discount to the price beyond what would be possible by a one-time trader.



16. Shree Cement has submitted that the price of Rs. 147.80 per bag indicated by CMA during April 2006 to the Secretary DIPP was not the correct price realized by the manufacturer as there are many other costs such as secondary freight, retailer and wholesaler's margin etc. which were not included.

17. As per Shree Cement, the DG in his report has cited profits of two quarters only and in the process has failed to provide the correct picture since profit of two quarters cannot reflect the picture of profit margins of whole cement industry over a longer period of time. Shree Cement has submitted that its profit from the cement business has never been unreasonable.

18. It has been further submitted that there was no basis for the DG to investigate only 11 companies out of 42 companies in the market. It has argued that the very conclusion that the said 11 companies controlled the cement market is arbitrary and represents a view or perception of the DG which is devoid of any analytical explanation based on the market structure and other related commercial and economic factors of cement industry.

19. It has been averred by Shree Cement that its attaining a capacity of cement to the tune of up to 320 MTPA by the end of 2012



is indicative of pro-competitive business scenario in cement industry.

- CMA data for 2009-10 and 2010-11 were based on year-end capacity while the data for the years (2005-06 to 2008-09) were based on aggregation of monthly capacities reported by CMA and, therefore, the figures relating to capacity utilization for 2009-10 and 2010-11 are incorrect. The correct figures of capacity utilization for the period 2009-2010 is 84% and 77% for the period of 2010-11 as against 83% in 2009-2010 and 73% in 2010-2011, as mentioned in the investigation report.

20. It has further contended that different varieties of cement have different applications which show that the cement as a product is not always strictly homogenous as concluded in the investigation report. With the deregulation of the cement in 1989 and dismantling of the Office of the Development Commissioner of Cement Industry (DCCI) in the same year, the Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce & Industry, Government of India had directed CMA to collect and submit data regarding production and capacity addition hitherto collected by DCCI. In complying with the aforesaid directions of the Government of India, individual members of the CMA including Shree Cement started submitting the data to CMA which hitherto were being submitted to DCCI by it and this very action cannot be attributed as misuse of the platform of CMA by the cement manufacturers including Shree Cement.



21. It has argued that the demand of cement in India fluctuates with seasons. During monsoon and festival seasons, demand goes down leading to uncertainties in manufacturing and underproduction on account of limited shelf-life of the final product *i.e.* cement and this factor together with its impact on the market and business has not been properly assessed by the DG in its report which has led to drawing wrong conclusions.

22. It has been submitted that the reference to the market study report by Motilal Oswal Securities Ltd. also did not indicate any anti-competitive trend rather it has highlighted an overall cement industry growth scenario and the report did not include names of any cement manufacturers including Shree Cement. Furthermore, Motilal Oswal report clearly mentioned that any decrease in capacity utilization would be due to the full impact of new capacities, coupled with seasonal low demand. Therefore, it has been argued that it is evident from the investigation report itself that any decrease in the utilization in the industry is not due to any collusive behaviour of the cement manufacturers including the Shree Cement.

23. As per the submission of Shree Cement, the DG has failed to analyse the factors essential to prove anti-competitive agreement as provided under section 19(3) of the Act. Further, the DG has failed to establish existence of any agreement between the various cement



manufactures and appreciable adverse effect on competition in India to prove the cartel. The DG has not mentioned as to how Shree Cement has directly or indirectly determined the sale price or limited / controlled the production or the supply of cement. It has been contended that unless both the above parameters are proved unambiguously, the allegation of cartel cannot be sustained.

24. It has argued that mere price parallelism is not enough to prove the existence of a cartel and a reference has been made to a judgment of the Commission in MRTP Case No. 161/2008 (In re: Glass Manufacturers of India) in this regard.

25. It has been further submitted that in a free market, enhancement of economic efficiencies by way of augmentation of production capacities by adoption of better technologies, R&D and better managerial skills of marketing is contrary to the principles of cartel. In cartel, members more often than not refrain from engaging 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 and also market shares of the players continue to remain static. In the instant investigation, none of these aspects has been proved or even has been attempted to prove.



26. As per Shree Cement, mere market share, in the absence of any evidence of agreement amongst competitors leading to actual cartelization, cannot by itself be the rationale for restricting the scope of investigation to the few cement manufacturers. It has been further submitted that the investigation report mentions that as on 31 March 2011 top cement companies were controlling about 70% of the total cement market, which even for argument's sake, if found to be true, cannot be considered per se illegal and/ or cause of the allegation of cartel in the year 2006, in the absence of agreement amongst them.

27. As per the submissions of Shree Cement, issues pertaining to demand supply position have not been focused by the DG and particularly the issue whether or not the supply was more than the demand has not been examined.

28. Shree Cement has further submitted that the DG in the report admitted that the industry witnessed a lot of investment and expansion by existing players in the market. It has been pointed out that this investment was not undertaken just by the existing cement manufacturers but was also undertaken by new players such as M/s My Home Industries Limited, M/s Bharti Cement, M/s Jayjyoti Cement Limited, M/s Bhavya Cement Limited and M/s Murli Industries Limited and this fact goes on to show the competitiveness of the Indian cement industry. In any case it has been argued, the



existence of very fact of such a large number of new entrants and expansion of existing players indicates that no entry barrier exists in cement industry.

29. As per Shree Cement, the demand is being driven by market forces and is not within its control. When the demand for cement is less, and its shelf-life being limited, it is not the prudent practice worldwide to produce more quantities in such a market situation of a perishable commodity like cement and, as such, the conclusion of the DG in this regard is misplaced and misconceived. It has submitted that even when the actual demand is lower than the forecast of demand, no negative inference can be drawn as demand for cement is price inelastic, as accepted by the DG himself, and such demand therefore cannot in any way be controlled by Shree Cement or any other party. To expect Shree Cement to increase production on the basis of projected rather than actual demand is unreasonable.

30. As per Shree Cement, because of the high transportation cost, the majority of supply is made in the region in which the plant is located. The market structure within which cement industry operates is much broader than what has been indicated by the DG. In fact, the cement industry is affected by both from upstream operators (who supply cement manufacturers with essential inputs, such as coal, over which the manufacturer has no control) and also from downstream customers (such as institutional buyers) who will exert



their influence by seeking to negotiate discounts to headline prices. In the midstream market, cement manufacturers who do not produce clinker or do not produce in sufficient quantities will be further affected by the availability and prices of clinker from other sources.

31. Shree Cement has also submitted that identification of 21 players controlling 90% of cement market by the DG by no means can be considered as reflective of high concentration in the industry. On the contrary, it shows that the industry has large number of players which make it highly difficult to form any cartel. It is, therefore, submitted that either 11 or 21 companies as per the DG's grouping of cement companies are too large a group to form a cartel. Hence, the market structure as conceived by the DG is liable to be rejected.

32. Shree Cement has also submitted that owing to the oligopoly in the cement market, the DG has concluded that there is a case for collusive price/ production behaviour. It has submitted that an oligopolistic market cannot per se be concluded to be a cartelized market. It has contended that the DG has failed to understand that 'oligopoly' is a market structure and is an indispensable precursor to the 'perfectly competitive market'. It has been further submitted that it is a well-accepted fact in economic theory and practice that an oligopolistic entity will factor into its pricing decisions the prevailing



prices of other players in the market and as a result similarity in pricing may be observed. The DG's analysis with regard to price parallelism and price leadership has also been denied and disputed on grounds of legal as well as economic theory and practice.

33. As per Shree Cement, there is no entry barrier in the market, the input and production costs of various companies differ from each other, the pricing of various companies also differ on the basis of different customers segments and the various cement companies produce different kind of cements such as PPC and OPC. It has been submitted by the answering opposite party that in view of the aforesaid facts the conclusions drawn by the DG including in respect of high profit margins are erroneous and are not possible in such a market.

34. As per Shree Cement, even companies which the DG has identified as 'local and small players' compete against other players including those identified by the DG as 'major players' in certain localities and in such situation, the distinction between 'local/small' and 'major/large' is arbitrary and irrelevant to the assessment of competition in the cement industry. The prices of local and small players may be lower than big producers because of the relatively poor quality perception by the consumers. Thus, it has been argued that the conclusion of the DG that small players are forced to sell at a lower price than set by big producers, is without any logical basis.



35. Shree Cement has also submitted that the DG has tried to compare the data of cement price index vis-à-vis WPI of all commodities and its other constituents such as coal, electricity and crude petroleum. It has submitted that the comparison between cement price and wholesale price index reveals that the increase in cement prices has been lower than WPI - all commodities as per 1993-94 series. The price of key input *i.e.* coal, whose price in WPI index is considered, takes into account only the price of the domestic coal as administered by M/s Coal India Limited and thus may not reflect the market price of the coal. At present, the supply of domestic coal on administered price is limited to only to 40-50% of the total fuel requirement of the industry and the balance requirement is met through import or procurement of pet coke or coal from open market. It has been submitted that if one compares the coal price as prevalent in the international market, say price of South African coal, the prices have increased by over 250% over 10 year period from 2000-01 to 2010-11.

36. As per Shree Cement, the price of diesel, which is used for transportation of goods and mining operations has also increased by 194% from 2000-01 to 2010-11. Further, the cost of other inputs such as raw materials, packing material, salaries/wages and administrative cost *etc.* can also be safely considered to be moving in tandem with general WPI.



37. Shree Cement has contended that the DG has selectively used the data to suit his findings and has stated that the cement price has risen from Rs. 150 per bag in 2004-05 to Rs. 300 per bag in March 2011. In giving this finding, the DG has used the average price level for the year 2004-05, while in 2010-11 it has used the data for the month of March only. Any price comparison has to be between equals ensuring that equals and unequals are not compared and, thus, it should be on an average price prevalent over a year for a particular territory. For example, the average price of the opposite party in Jaipur for 2004-2005 was Rs 146 per bag while the same in 2010-2011 was Rs. 229 per bag.

38. As per Shree Cement, there are many factors such as current demand and supply situation, projected demand of the cement in the market and shortage of trucks/ wagons etc. which lead to change in cement prices.

39. Shree Cement has also submitted that its price decisions are independent of its competitors and are based on market dynamics. There can be no business misconduct if business behaviour reflects the market dynamics being followed by any entity, in absence of existence of an agreement or understanding amongst players. In commodity like cement this behaviour is very common and cannot be attributed to an anti-competitive behaviour. It has submitted that



the decision on price is made at the central level of the opposite party and a decentralized method of pricing could cause unforeseen business complication for it and as such is normally refrained from being followed.

40. Shree Cement has further submitted that it makes an annual budgeting and planning to forecast its targets and strategies of market and based on such strategies it keeps adjusting the production and dispatches as per the demand supply situation and decides pricing from time to time.

41. As per Shree Cement, the profit margin calculated by the DG at Rs. 52 per bag for the period 2009-10 is based on retail sale price but it has ignored that deductions of the wholesaler's and retailer's margin and secondary freight which if taken into consideration would have indicated the correct profit margin which would be much lower than Rs. 52.

42. As per Shree Cement, its margins are better because of continuous increase in the production volume as a result of capacity expansions, resulting in reduction in overhead costs. It has further submitted that the capacity utilization worked out for Shree Cement has been quite high compared to the industry average.



43. As regards dispatch parallelism indicated by DG, Shree Cement has submitted that there is bound to be some positive correlation between the dispatch quantities of cement of different producers as all the producers are faced with similar market conditions. However, it has been submitted that cement is a commodity, and its dispatch, movement and sale is affected by many factors such as transport bottlenecks, availability of railway rakes and demand in the market. It has been further submitted that if one analyses the dispatch data given in the DG Report, it can be noticed that there is wide variation in the movement of dispatch in various months amongst different cement producers.

44. As per Shree Cement, there is no relationship whatsoever of price movement with meetings of high powered committee of CMA. There is no substance in the allegation of the DG that immediately after the meetings of high powered committee of CMA held on 3 January, 2011, 24 February, 2012 and 4 March, 2011, the prices of cement have increased. The opposite party has relied upon the judgment of the Commission in Case No. 01/2010 (In re: Sugar Mills) to contend that discussions on issues of price cannot automatically be an evidence of meeting of minds.

45. On the issue of price parallelism, the Shree Cement has relied upon the decisions in *Union of India v. Hindustan Development Corporation*, (1993) 3 SCC 499: *Baby Food Antitrust Litigation* (166 F.



3d 112) (1999), *Coleman v. Cannon Oil Co.*, 849 F. Supp. 1458, 1467 (M.D. Ala. 1993). Lastly, it has been prayed that the investigation report of the DG be rejected and name of M/s Shree Cement be deleted from the cause title.

Reply of Cement Manufacturers Association (CMA)

46. CMA in its objections to the report of the DG has pointed out that the investigation is based on press report published in the Economic Times on 09.05.2006 and 29.06.2006 regarding increase in cement prices and subsequent complaint received by the MRTP Commission from the then Ministry of Company Affairs on 26.09.2006. It has been contended that from a perusal of the said report it may be noticed that there is no allegation against CMA in the entire complaint. On this basis it has been contended that CMA has wrongly been implicated in the investigation.

47. It has also submitted that the investigations made by the DG in his report are based on facts and figures for the years 2007 onwards although from the perusal of DG report, it is disclosed that the cause for complaint arose either on 9th May, 2006 or on 29th June, 2006 or at the best on 16th September, 2006. Consequently, ✓ the facts, figures and events which took place in the industry after the said period are extraneous for forming an opinion of an alleged breach of provisions of the Competition Act, 2002 in the year 2006.



Based on above, it has been argued that the report is untenable, bad in law and no proceedings against the CMA based on such report can be initiated under the Competition Act.

48. It has also submitted that in the gist of allegations, as noted by the DG, there is no allegation against the CMA. Hence, proceedings against the CMA are improper and bad in law and are liable to be dropped.

49. CMA has further contended that the methodology adopted by the DG for the purposes of investigation, on the face of it, is defective, erroneous and untenable. Even if it is assumed (though denied) that nature of allegations in Case No. 29 of 2010 and RTPE No. 52 of 2006 are similar, even then time of occurrence and the prevailing situation in 2006 and 2010 were entirely different. The DG in order to implicate CMA has admittedly relied on facts and figures of 2007 and thereafter upto March, 2011. It has submitted that the said facts and figures are not relevant and cannot be relevant to implicate a party for alleged breach in the year 2006, and this factum renders the report untenable.

50. It has been submitted that even though the DG has implicated CMA for the alleged breach in the year 2006, the DG has not furnished any material in support thereof with the help of any



act, deed or event of the said relevant period. Without cogent evidence, no finding of breach can be arrived at against CMA.

51. It has also averred that the report of the DG is based on surmises and conjectures. It has not taken into consideration the correct factual data. The investigation report has also not appreciated the cement industry. It has been submitted that allegation of cartelization is serious in nature and invites penal consequences. Therefore, the report, based on irrelevant facts, surmises, and conjectures without appreciating the correct factual matrix and scenario in market at relevant time, is totally untenable, unreliable and is liable to be rejected.

52. CMA has submitted that no material, much less cogent materials has been placed on record to implicate it. The DG has wrongly investigated together separate and distinct complaints which may be similar in nature. This indicates that the DG was influenced by the facts of another complaint during investigation in the present matter. It has contended that it is a settled law that in forming an opinion in respect of a complaint, extraneous considerations cannot be taken note of nor, the person forming the opinion can be allowed to influence his mind with the conclusions drawn by him in respect of other complaint. As per CMA, in the present case the DG has mixed- up the facts of two complaints by



investigating them together resulting in gross error in law which renders the investigation and the report untenable.

53. It has also alleged that various material and witnesses have been examined by the DG behind the back of the CMA without giving it an opportunity to cross-examine the said witnesses in contravention of the principles of natural justice rendering the inquiry unsustainable and bad in law.

54. Challenging the investigation conducted by the DG, it has been contended by CMA that the findings arrived at by the DG are totally misplaced and contrary to the facts as on relevant date. Discussions in the report of the DG do not show anywhere that the cement manufacturers have been charging unreasonable price since 2005. It has been submitted that the said finding is bald and is not based on facts, as alleged or otherwise and no basis has been disclosed as to how the prices charged in 2005 and 2006 were unreasonable and what price could have been said to be a reasonable price. Additionally, it has been submitted by CMA that it is not a cement manufacturer and as an association of cement manufacturers, it does not play any role whatsoever in fixation of price of cement by any of its members.

55. Findings of price parallelism by the DG based on economic analysis have also been refuted by CMA by contending that the data



used for the said purpose pertain to the period from April, 2008 to February, 2011 and as such the same are not applicable in respect of alleged breach of the Act committed in the year 2006.

56. Findings of the DG relating to limiting of supply in the market by the cement industry have also been challenged by arguing that a perusal of the installed capacity and production of cement in the year 2005-2006 and 2006-2007 would disclose that during the relevant period not only the capacity utilization had increased but the production of cement had also increased.

57. Making reference to the finding recorded by the DG that there exists a system of exchange of price information among the members of the CMA on weekly basis across the country and that collection of weekly information raises serious concern under the provisions of the Act, it has been submitted by CMA that the said concern expressed by the DG is totally misplaced and untenable. It has been submitted that the price information during the relevant year and even now are collected under the instructions of the Government and its Departments. Complying with the directions of the Government and concerned Industrial Departments cannot be termed as an action with malice unless the same is established. The market prices of cement are collected and published by several magazines and newspapers on regular basis. It has been submitted that collection of stale data cannot raise any concern much less



alleged serious concern as has been expressed by the DG in his report. It has been submitted that in view of these facts the conclusion, if any, drawn based on the said alleged serious concern renders the said conclusion also bad in law.

58. The allegation that after the meetings dated 24th February, 2011 and 4th March, 2011 of CMA, prices of cement increased considerably has been termed by CMA as untenable. It is argued that the same cannot be a fact to be considered while investigating a complaint for a contravention which allegedly took place in 2006. The CMA has stated that it is not concerned with the price at which the cement is sold in market.

59. Rest of the pleas taken by CMA have also been taken in Case No. 29 of 2010 where it had filed a detailed reply. As the Commission has noted and considered the reply of CMA in Case No. 29 of 2010 in detail, the same need not be noted again in this order.

60. In view of the above, CMA has denied the finding of the DG that it has infringed the provisions of section 3(1) read with 3(3)(a) and 3(3)(b) of the Act .

Reply of M/s J.K Cement Ltd.

61. M/s J. K. Cement in its reply has submitted that the entire material used in the report of DG and the conclusions arrived at by



the DG are exactly the same as in his report in Case No. 29 of 2010 in the matter of *Builders Association of India v. Cement Manufacturers Association*. It has been submitted that that it is strange that Restrictive Trade Practices Enquiry of the year 2006 is being dealt with on the basis of records relating to the subsequent period and conclusions relating to such RTPE of 2006 being reached on the basis of records pertaining to an enquiry of 2010.

62. It has been submitted that that RTPE No. 52 of 2006 be closed in view of pending enquiry in Case No. 29 of 2010 which will be decided on its own merits. It has been further submitted that in the event the Commission decides to continue with RTPE 52 of 2006, M/s J K Cement adopts all the submissions made by it in Case No. 29 of 2010 for the purposes of RTPE No. 52 of 2006 also and the Commission may treat the response of M/s J K Cement in case No. 29 of 2010 as its response to the report of the DG in the present case also.

Reply of M/s Binani Cement Limited(Binani Cement)

63. Binani Cement has filed its reply to the report of the DG in the present matter. This reply is similar to the reply filed by Binani Cement in Case No. 29 of 2010. The Commission in its order dated 20.06.2012 in Case No.29 of 2010 has noted and dealt in detail the submissions made by Binani Cement and accordingly, the same are not reproduced again in this order. Essentially, Binani Cement has



argued that the newspaper reports and the letter written by Builders Association of India (BAI) have been wrongly treated as information as it is a settled law that no cognizance can be taken of newspaper reports. Grievance is made that the letter sent by BAI to Shri Kashi Ram Rana, MP was directed against the multinational cement companies and Kumar Birla Group and as such no investigation could have been made against Binani Cement based on such letter. The purported complaint dated 16.09.2006 of BAI is not a complaint within the meaning of the provisions of MRTP Act, 1969. The relief sought in the said letter pertains to matters of policy viz. reduction in import duty on cement, deletion of countervailing duty and ban on cement export and as such these policy matters are outside the jurisdiction of the Commission. It has also been submitted by Binani Cement that the DG did not have the jurisdiction to extend the period of investigation which was confined, if at all, to the period 2005-2006 and, therefore, the DG could not have extended the period of investigation from 2005 to 2011. The plea against retrospective operation of the Competition Act has also been raised by the Binani Cement.

Reply of M/s Lafarge India Pvt. Ltd.(Lafarge)

64. Lafarge has submitted that there is no merit in the findings of report of the DG and requested the Commission to set aside the report completely as the same is based on an erroneous interpretation and wrong application of the provisions of the Act. The



report has been prepared on the basis of a complaint filed in 2006 under the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) and at that time the relevant provisions of the Competition Act, 2002 relied upon by the DG, were not in force. By way of a preliminary objection, Lafarge has stated that there can be no finding of violation of the provisions of the Competition Act, 2002 in connection with a complaint filed on the basis of events taking place prior to the enforcement of the relevant provisions.

65. Lafarge has submitted that the present case RTPE No. 52 of 2006 was received by the Commission by virtue of section 66(6) of the Act whereby the matter was transferred from the Office of DG (IR), MRTPC. It has submitted that section 66(6) of the Act allows the Commission, on the receipt of a report from the DG (IR), MRTPC to conduct an investigation or proceeding in the manner as it deems fit.

66. It has been submitted that the Commission in its Order dated 24.06.2010 considered the matter and in its discretion, decided to proceed under section 26(1) of the Act. The Commission also considered the facts on record and consequently made a reference to the DG, CCI (DG) to make an investigation into the matter. The DG in its report found a violation of the provisions of section 3 of the Act and has not found any corresponding violation of the provisions of the MRTP Act. The report concludes that the top



cement manufacturers and Cement Manufacturers Association are in violation of the provisions of section 3(1), 3(3) (a), 3(3) (b) of the Act.

67. Lafarge has submitted that the Commission accepted the DG report and forwarded a copy of the report to the parties and at no point of time, the DG or the Commission applied either the principles the MRTP Act, or found a violation of any of the provisions of the MRTP Act. Instead, as Lafarge has submitted, it is very clear that both the DG and the Commission have based their entire investigation and findings on analyses conducted entirely under the provisions of the Competition Act and have not applied their mind to any separate contravention of the provisions of the MRTP Act.

68. After narrating the sequence of the proceedings the Lafarge has submitted that since the Commission has decided to investigate this case under the provisions of the Competition Act, in regard to the alleged acts and/ or omissions attributed to Lafarge pertaining to period prior to the coming into force of the relevant provisions of the Act i.e. 20.05.2009 are concerned, the Commission is precluded to take cognizance of the same in connection with any investigation for finding contravention thereof. It has been argued that this has been the consistent position and approach followed by the Commission in other cases arising out of the erstwhile MRTP Act. Thus, it has been submitted that there is no merit in the findings contained in the



report of the DG and the Commission should set aside the report completely.

69. Lafarge has denied all allegations made against it as mentioned in the report of the DG in respect to price parallelism and collusive price fixing / cartelization. As per Lafarge, the DG has erred in its conclusions pertaining to alleged violations of the provisions of the Act and erroneously determined that Lafarge has violated the provisions of Section 3 of the Act.

70. Lafarge has submitted that while the DG was investigating the present matter, another complaint was filed by the BAI in 2009 (Case No. 29 of 2010) against 11 cement industries and Cement Manufacturers Association on similar grounds alleging that the said cement companies and the CMA have indulged in cartelization by fixing prices and controlling the supply of cement and have thereby contravened the provisions of sections 3 and 4 of the Act. The investigating officer in his report in this case mentioned that 'as another Case No. 29 of 2010 was received by this office with similar allegations against cement manufacturers and CMA, the inquiry was conducted simultaneously to avoid repetition and wastage of resources'. In fact, while seeking information from Lafarge or summoning Lafarge for personal hearing, the DG himself requested Lafarge to furnish the information for both the cases together vide its letter dated 03.03.2011 and 23.03.2011 in relation to month wise



prices of cement in each state from January 2007 – February 2011.

The DG has submitted separate reports in relation to both the cases.

However, as has been submitted by Lafarge, on bare perusal of the reports it becomes apparent that the contents of the reports, the findings and the allegations therein are identical to each other. Lafarge has contended that this very fact suggests that the DG has not applied his mind in drawing conclusions in the present investigation as not only do the facts and the alleged contraventions pertain to different time periods but they also relate to different parties.

71. In the light of the above averments the Lafarge has submitted that the responses and submissions made by Lafarge in its reply to Case No. 29 of 2010 may be deemed to be reiterated in this case also.

Reply of M/s Jaiprakash Associates Limited(JAL)

72. The reply filed by JAL to the report of the DG in the present case is similar to the reply filed by it in Case No. 29 of 2010. As the Commission has noted in detail the reply / submissions / pleas made by JAL in its order dated 20.06.2012 passed in Case No. 29 of 2010, the same are not recorded herein.

Reply of M/s UltraTech Cement Ltd.



73. It has been submitted by the M/s UltraTech Cement Ltd. that the report of the DG in the present case i.e., RTPE 52 of 2006 is verbatim identical to the report of the DG in Case No. 29 of 2010 in so far as the analysis and the conclusions of the DG are concerned and M/s UltraTech has sought to rely upon the submissions made in the reply filed by it in Case No. 29 of 2010, in case the Commission finds that the present matter has not abetted or is not liable to be dismissed.

74. As the Commission has noted the submissions made by M/s UltraTech in detail in its order dated 20.06.2012 in Case No. 29 of 2010 and as such the same need not be reproduced in the present order again.

Reply of M/s India Cements Ltd.

75. The contentions/objections of India Cements in the present case which have been raised and dealt with in Case No. 29 of 2010 are not being repeated for the sake of brevity. It has been submitted by M/s India Cements Ltd. that the investigation report and the allegations made therein against it cannot be sustained in terms of the provisions of the Act and therefore the proceedings as against it ought to be rejected *in limine*.

76. It has been stated that as the Commission is proceeding against the opposite parties for offences under the Competition Act, 2002 in



terms of the procedure contemplated under that Act, it must first be satisfied that the above provisions are attracted in the present case.

77. It has been submitted that in the instant case, the investigation was transferred under Section 66(6) of the Act which provides that all investigations or proceedings that were pending under the MRTP Act, 1969 shall be transferred to the Competition Commission of India which shall deal with them in the manner it deems fit. Also, Section 66(1) (A) (b) and (d) read together clearly mandate that all existing investigations under the MRTP Act should be only in respect of violations of the MRTP Act and Section 66(6) merely empowers the Commission to remedy any procedural difficulties. It has been stated in this context that the investigation and consequent trial was ought to be conducted as per the MRTP Act and the failure of the DG to do so clearly deprives this Commission of the jurisdiction in the instant case.

78. It has been contended that the entire Investigation Report deals with whether the actions of the opposite parties between 2005 and 2011 violate Section 3 of the Competition Act, 2002. The DG report is the culmination of an investigation based on a complaint filed on 16.9.2006 and on suo moto cognizance taken by the MRTP Commission based on press reports dated 9.5.2006. Hence, the cause of action for the complaint, investigation and report arose in 2006. It has been submitted in this context that section 3 was brought into



force only on May 20th 2009 and thus Section 3 cannot be applied to actions prior to May 20th, 2009 as it did not exist in the eyes of law when the complaint was filed and when the actions alleged to violate the provision took place. It has been argued that due to the absence of the jurisdictional fact of a legal provision imposing liability, namely Section 3, the present action must necessarily be dismissed. Further, M/s India Cement, while answering a case of an alleged violation of section 3 of the Competition Act, 2002, cannot be tried under the MRTP Act for offences under that Act or vice versa.

79. M/s India Cement has submitted that in the present case the findings in the DG's Report being premised on the retrospective operation of Section 3 of the Act, which is not authorized by any provision of the Competition Act, 2002, are illegal and ultra vires the Act and hence wholly without jurisdiction.

80. It has further been contended that the actions of the DG in applying section 3 to actions prior to the said provision coming into force are in direct violation of the provisions of Article 20(1) of the Constitution which guarantees that no person can be convicted for an offence if the actions of the person do not constitute a violation of a law in force at the time of commission of the act. The report of the DG and the present proceedings are therefore clearly illegal and constitute a violation of Articles 14, 19, 20(1) and 21 of the Constitution.



81. India Cements has also submitted that the DG report is not valid even as regards to events and actions which took place after Section 3 of the Act was brought into force in May 2009 as the report has evidently considered extraneous matters such as acts prior to May, 2009 in determining whether there is a case to answer for the opposite parties.

82. It has been finally contended that the power of the DG to investigate under the Act is contained in Section 41(1) of the Act and the same can be exercised only upon a direction given by the Commission to do so. The said complaint was based on material pertaining to alleged offences up to the year 2006. Hence, the DG under section 41(1) could have only investigated the allegation contained in this material. It has been stated in this context that the DG has, on his own accord, included material up to the year 2011 in determining if the opposite parties have violated section 3 of the Act although he had no jurisdiction to do so. It has also been submitted that as the DG report is vitiated for want of jurisdiction and the report of the DG is a prerequisite for exercise of powers under Section 26 by this Commission, the Commission lacks jurisdiction to proceed with the present action.

Reply of M/s Ambuja Cements Limited



83. It has been pointed out that the present case relates to a transferred investigation from the office of the Director General of Investigation and Registration [DG (IR)] established under the MRTP Act under section 66(6) of the Act. The investigation before the DGIR was initiated on the basis of a complaint dated June 16, 2006 which was received by the MRTP Commission through the Ministry of Corporate Affairs. Following the repeal of the MRTP Act and dissolution of the MRTP Commission, on the basis of the material available on record before it, the Commission formed the prima facie opinion under section 26(1) of the Act and referred the matter for further investigation by the DG.

84. Referring to the provisions of section 66(6) and section 26(1) of the Act, M/s Ambuja Cements has submitted that the Commission could not have validly passed a prima facie order under section 26(1) of the Act in relation to the investigation which was transferred to it from the DG (IR) because there was no information before the Commission under Section 19 of the Act. It has been contended that passing an order under section 26(1) in relation to a transferred matter, under the circumstances where the Commission did not have any material on record which related to the alleged contravening conduct post the Act coming into force was itself devoid of any authority and consequently, it was also fatal to the DG's investigation.



85. It has been submitted that assuming that the Commission's prima facie order is correct, and the investigation by the DG is validly conducted, the DG could not have lost sight of the section 66(1A)(b) and (d) which clearly preserve the rights, liabilities or obligations of parties to an investigation which have or may have accrued to the parties subject to an investigation which was initiated under the MRTP Act and continued following the repeal of the MRTP Act. These provisions squarely protect M/s Ambuja Cements rights for being investigated or proceeded against, as this Commission deems fit, within the confines of the MRTP Act in so far as the substantive assessment is concerned.

86. M/s Ambuja Cements has further submitted that on a holistic reading of section 66(6) alongwith 66(1A) of the Act, it is clear that the procedure of conducting the investigation transferred under section 66(6) cannot take away the rights or privileges accrued to the alleged infringing parties (i.e., including ACC) to have the present case investigated under the old law (i.e., the MRTP Act) for the alleged offence that was committed when the said law was in force.

87. It has been also contended by the M/s Ambuja Cements that the DG under the instructions from the Commission to investigate the matter could not have extended the time frame of the investigation beyond March 2007 and investigated the present matter under the Competition Act, 2002. It has been submitted that



on these grounds, the DG's report is vitiated and the entire investigation is liable to be set aside.

Reply of M/s ACC Limited

88. The ACC Limited has taken the same pleas as have been taken by M/s Ambuja Cements and noted above, with regard to the jurisdiction of the Commission and the DG to deal with the present matter under the Competition Act, 2002.

Reply of M/s Century Textiles & Industries Ltd.

89. It has been submitted by M/s Century Textiles & Industries Ltd. that the MRTP Commission had taken *suo moto* cognizance and had started investigation in the matter on the basis of press reports published in the Economic Times on 09.05.2006, 29.06.2006 and Complaint dated 16.09.2006 which was received by the then MRTP Commission on 26.09.2006, while DG has considered data, facts, evidence and material related to 2007 to 2009, 2010 and 2011. Thus, it has submitted that the DG report is based on data and events posterior to the date of alleged infringement of the Act.

90. M/s Century Textiles & Industries Ltd. has submitted that the price of the cement during January, 2005 to December, 2005 was between Rs. 117/- to Rs. 211/- per bag at different centres. In December, 2005 the price ranged from Rs. 117/- to Rs. 184/- per bag in different centres. In January, 2006, the price ranged from Rs. 119/-



to Rs. 199/- per bag in different centres. Similarly, in February, 2006, the price ranged from Rs. 124/- to Rs.215/- per bag in different centres. It has denied the findings of the DG that the prices were stable between Rs. 125/- to Rs. 145/- per bag between 2003 and 2005, and hovered in the range of Rs. 210/- to Rs. 230/- per bag from January, 2006 onwards.

91. It has submitted that in the relevant year namely 2005-06 the M/s Century Textiles & industries Ltd had utilized 105.33% of its capacity. In the year 2006-07, it had utilized 105.04% of its capacity. The entire production in the relevant years was also sold in market.

92. It has also submitted that the DG has given his report against all the 42 cement companies, whereas, admittedly he had focused his inquiry only against 12 companies.

93. M/s Century Textiles & Industries Ltd. has further stated that similar allegations were levelled in another Case No. 29/2012 and the DG has conducted investigation in both the cases simultaneously. It has been submitted that the methodology adopted by DG renders the entire investigation and the report bad in law. Firstly, because while forming the opinion DG has considered facts in respect of two different periods together whereas both complaints pertain to different periods of alleged violation. Secondly, because it cannot be ruled out that by considering the different facts of different periods



and different sets of allegations together, the DG while drawing conclusions in one complaint was not influenced by the facts and alleged investigation in respect to the other one.

Reply of Madras Cements Ltd.

94. M/s Madras Cement has filed detailed objections to the report of the DG which are similar to the objections filed in Case No. 29 of 2010. As the objections of M/s Madras Cements have been noted in detail by the Commission in its order dated 20.06.2012 in Case No. 29 of 2010, therefore, the same are not reproduced in this order. In brief, M/s Madras Cements has contended that material on record does not disclose any cartelization by it based on any of the parameters adopted by the DG viz., price parallelism, super normal profits, capacity utilization and dispatch parallelism. The jurisdictional issues raised by M/s Madras Cements relating to the procedure followed with respect to the existing investigations under the MRTP Act, 1969 and the plea that the Competition Act, 2002 cannot have retrospective operation have been dealt with by the Commission at appropriate places in the present order.

Decision of the Commission

95. The Commission has carefully gone through information, report of the DG and averments of various parties in the instant case. The Commission notes that in addition to substantive issues involved



in the matter, the cement companies have also raised certain preliminary objections.

96. Before examining the various issues raised by the parties and before advertng to the merits of the case, it is noted that the Commission in Case No. 29 of 2010 has issued a cease and desist order and imposed penalties upon the opposite parties viz., CMA and Associated Cement Companies Ltd.(ACC), M/s Ambuja Cement Ltd, M/s Ultratech Cement Ltd, M/s Jaiprakash Associates Ltd, M/s India Cements Ltd, M/s Madras Cement Ltd, M/s Century Textile and Industries Ltd, M/s J.K. Cements Ltd, M/s Binani Cement Ltd and M/s Lafarage India Pvt. Ltd. It may be noted that the in addition to the contravening parties in Case No. 29 of 2010 named above, M/s Shree Cement Limited is also a party in the present case.

97. The other aspect which is noticed at this stage is that the Case No. 29 of 2010 was instituted post the notification of the provisions of sections 3 and 4 of the Act. The present case, however, was initiated under the MRTP Act based upon the newspaper reports published in May 2006 and June 2006 in the business daily viz., The Economic Times and the letter written by the Builders Association of India in September 2006.

98. It is pertinent to mention that in Case No. 29 of 2010 though Shree Cement Limited was not a party, yet the DG while noting the



overview of the Indian cement industry has fully considered the data, market share etc. of M/s Shree Cement Limited also. In fact, summonses were also issued by the Office of the DG to Shree Cement Limited to examine it on the facts gathered during the course of investigation. The Commission also notes that the entire analysis in that case was inclusive of Shree Cement Limited. However, role and conduct of Shree Cement Limited was not the subject matter of inquiry conducted by the Commission. Nor the report of the DG was supplied to Shree Cement and accordingly, the remedies ordered vide order dated 20.06.2012 passed by the Commission in Case No. 29 of 2010 were relatable to only those opposite parties whose conduct was examined by the Commission.

99. However, the conduct of Shree Cement along with other cement companies is the subject matter of the present matter viz., RTPE No. 52 of 2006. As the methodology adopted by the DG in both the matters was similar and since the data, market share, conduct etc., of Shree Cement Limited was also examined in detail along with the data, market share, conduct etc. of the other opposite parties, the Commission does not find it necessary to undertake the same analytical exercise in the present case. It would suffice if the findings recorded in Case No. 29 of 2010 are briefly referred in the present order at appropriate places. Needless to say, the said order shall stand part of the present order to this extent.



100. It may be pointed out that in Case No. 29 of 2010 while determining the period of contravention the Commission noted that since the DG had examined the conduct of the parties involved in the cartel only up to March 2011, the order dated 20.06.2012 captured the period from the date of enforcement of the relevant provisions of the Act, i.e., 20.05.2009 to 31.03.2011.

101. It is true that the present inquiry was instituted with reference to the allegations made in the year 2006. However, as may be seen from the report of the DG in this case and the order passed by the Commission in Case No. 29 of 2010, the anti-competitive conduct of the parties continued post notification of sections 3 and 4 of the Act i.e., May 20, 2009. Given this fact scenario the plea of the cement companies that the DG had no authority to examine their conduct for a period subsequent to the alleged period of contravention has no force and liable to be rejected.

102. In the aforesaid background, it would be appropriate to deal with the jurisdictional issues raised by cement manufacturers including Shree Cement in the present case.

Evaluation of Contentions Regarding Jurisdiction

103. It has been contented that the DG, unlike its predecessor DG (I&R), does not have *suo moto* power to investigate any breach of the provisions of the Act but shall only assist the Commission in terms of



section 41(1) of the Act. Accordingly, it has been argued that any investigation arising out of section 66(6) of the Act does not confer any statutory powers upon the Commission to form *prima facie* view under section 26(1) of the Act without routing the same through section 19(1) thereof. In the instant case, it has been argued that the Commission formed the *prima facie* view without establishing the causal link with section 19(1) of the Act and as such the *prima facie* order is bad in law. It has been argued that the Commission could have considered the inconclusive investigation as piece of information and instituted the inquiry under section 19(1) of the Act under its *suo moto* powers and proceeded to form the *prima facie* view in terms of section 26(1) of the Act. It has also been contended that as the allegations in the present matter pertained to year 2005 and 2006 the case ought to have been examined under the MRTP Act and the Competition Act cannot be applied retrospectively. It has also been argued that as the matter was being investigated by the DG (IR), MRTPC before being transferred to the Commission the rights, liabilities and obligations accrued to the parties under repealed MRTP Act are preserved and protected by virtue of Section 66(1A) of the Competition Act, 2002.

104. The Commission is of opinion that the preliminary objections taken by the parties are contrary to the scheme of the Act and the legal position on this aspect is quite clear. In this regard it is also noted that Hon'ble High Court of Delhi in W.P. (C) 6805 / 2010,



Interglobe Aviation Ltd. v. Competition Commission of India decided on 06.10.2010 has held on similar issue that where the investigation by the DGIR, MRTPC remained incomplete and the matter did not crystallize into a 'case' before the MRTPC, it was not incumbent on the DGIR, MRTPC to transfer the case to the Competition Appellate Tribunal and not to Commission. This view was reiterated by the Hon'ble High Court of Delhi in W.P. (C) 7766 / 2010, *Gujrat Guardian Ltd. v. Competition Commission of India* decided on 23.11.2010. In this case the petitioner advanced the argument that as the matter was pending before DGIR, MRTPC the case ought to have been transferred to Competition Appellate Tribunal and not to the Commission. It was also contended that the Commission had no power to pass order under section 26(1) of the Act in such matter and that the Commission had to proceed under the provisions of the MRTP Act. The Delhi High Court rejected the arguments raised by the petitioner and held that "This Court finds that since the investigation was incomplete the matter was rightly transferred to the CCI. On further consideration of the material on record the CCI formed a *prima facie* opinion to proceed under Section 26(1) of the CA. This was not contrary to Section 66(6) of the CA. It is possible in the course of investigation that the DG, CCI forms a *prima facie* opinion to proceed under the provisions of the CA, 2002 itself. There is no illegality per se in such action of the DG, CCI."



105. The Commission notes that in the present matter the DG(IR), MRTTP Commission undertook the preliminary investigation which was still pending when the MRTTP Act, 1969 was repealed *vide* ordinance dated 14.10.2009. As the investigation had not culminated into a 'case' the matter was rightly transferred to the Competition Commission by the DGIR, MRTTPC invoking the provisions of section 66(6) of the Act as the allegations involved were related to restrictive trade practices. 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 Competition 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 Competition Act. As the complaint filed before the DGIR, MRTTPC 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 MRTTP, 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 in which the investigation was pending before the DGIR, MRTPC before the MRTP Act was repealed.

106. 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 / 200, *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. In the present case, practices of the parties alleged to be anti-competitive have been found by the DG to be still continuing and there is nothing on record to contradict the



same. Accordingly, the Commission, therefore, is of the considered view that in the light of legal position as discussed above there is absolutely no illegality in the proceedings in the present case and the arguments and the contentions of the parties on this aspect have no force.

107. It may be noted that some of the parties herein have raised certain objections based on the alleged failure to provide opportunity of cross examination and for relying upon the reports which were not supplied to the parties. These objections were dealt with and found untenable by the Commission in its order dated 20.06.2012 in Case No. 29 of 2010. The reasons supplied by the Commission in that case hold true in this case also and therefore, it is unnecessary for the Commission to deal and examine these aspects in this order.

108. The Commission notes that the opposite parties in Case No. 29 of 2010 are also the parties in the present case. Besides, Shree Cements is also a party against which a finding of contravention has been recorded by the DG. In the present case, the investigations were initiated on the basis of news reports of the year 2006 as also the complaint of BAI of the same year. As the investigations under the MRTP Act could not be completed, the matter was transferred to the Commission in terms of the provisions of section 66 of the Act. In the meantime, as the provisions relating to anti-competitive



agreements and abuse of dominant position of the Act were notified, the conduct of the parties has been examined by the Commission post such notification of the provisions.

109. The Commission further observes that though Shree Cement was not a party named in the information filed in Case No. 29 of 2010, the DG while analyzing the data has fully taken into consideration the data and conduct relating to M/s Shree Cement Limited. The Commission also in its order dated 20.06.2012 in the said case in its analysis has also referred to the same. Moreover, admittedly as the Shree Cement is a member of CMA, and therefore, the conduct of this party was also analyzed therein.

110. It is also pertinent to note that the DG examined the conduct of the parties in Case No. 29 of 2010 as also in the present case spanning from year 2005 to 2011 for delineating the market construct and conducting competitive analysis of cement industry in a holistic perspective but the Commission while determining the contravention of the provisions of the Competition Act in its order dated 20.06.2012 passed in Case No. 29 of 2010 has restricted this period starting from 20.05.2009 i.e. the date on which the relevant provision of the Competition Act, 2002 were notified to 31.03.2011. As has been seen in para 103 above the Commission does not have power to adjudicate any matter invoking the provisions of the repealed MRTP Act, therefore, in the present matter also the



relevant period for the purposes of determining the contravention of the parties under inquiry including M/s Shree Cement, if any, will remain the same as in the Case No. 29 of 2010.

111. Based on the foregoing analysis the contentions raised by the parties including CMA regarding period of inquiry are liable to be rejected.

112. In view of the above, as the period for determining contravention of the provisions of the Act being same in both the cases, it would be unnecessary to reproduce the analysis *qua* the parties which were the subject matter of investigation in Case No. 29 of 2010. So far as Shree Cement is concerned, as noted earlier, although its role and conduct was also examined by the DG, no finding of contravention was recorded against it by the Commission in Case No. 29 of 2010 as its role was not subject matter of inquiry in that case. Thus, while analyzing the issues in the present case, the role and conduct of M/s Shree Cement will be highlighted at appropriate places whereas the role and conduct of the other parties which were also examined in Case No. 29 of 2010 are not needed to be scrutinized again for the reasons noted above and it would be sufficient if a reference in this regard is made to the order passed by the Commission on 20.06.2012 in Case No. 29 of 2010.



113. At this stage, before dealing with the substantive issues arising in the present case, it would be appropriate to deal with some other preliminary issues raised by Shree Cement. Some of these issues have been raised by other parties also which shall be deemed to have been dealt with similarly in the context of the decision given in case of Shree Cement.

114. It has been contended by Shree Cement that it was not made a party by BAI in Case No. 29 of 2010 as also in the present case. Hence, it is sought to be argued that a common investigation report in both the cases is inappropriate and deserves to be rejected.

115. In view of the Commission the plea taken by the Shree Cement is misconceived. The DG has submitted separate reports in both the cases. As in both the cases, the parties were common and issues involved were also similar in nature, the reports in both the cases are bound to be similar. The proceedings before the Commission being inquisitorial in nature the DG or the Commission is not required to confine the scope of investigation or inquiry to the parties only whose name figure in the allegations. It is difficult to accept the contention of the party that, on this ground, the report of the DG is liable to be rejected. Another contention of Shree Cement is that the intent and purpose of the two legislations are different, the methodology adopted by the DG is bad in law. Here again, it is difficult to accede to the contention since the methodology adopted



by the DG is for the purposes of collecting and gathering documents and evidences and the DG conducted investigations invoking the power conferred under the Competition Act, 2002. As such, no merit is found in this argument as well.

116. M/s Shree Cement has argued that clubbing of the inquiry in the present case with Case No. 29 of 2010 has resulted into miscarriage of justice. This plea also has no substance and cannot be accepted. Merely because the parties and issues were common and in these circumstances if investigation and inquiry have been conducted in parallel, the same is not suggestive of any prejudice or gross miscarriage of justice, as has been projected by the Shree Cement. M/s Shree Cement has failed to show any prejudice which has been caused due to the procedure or the methodology adopted by the DG.

117. The Commission also does not find any reason to adjourn the present proceeding to await the decision of COMPAT in RTPE 15 of 2007 which is said to be inquired into by COMPAT in terms of the provisions of section 66(3) of the Act.

118. Another plea which has been advanced by the parties including M/s Shree Cement relates to the scope of investigation by the DG. It has been argued that the original information/complaint was relatable to the period from end of December, 2005 to



September 16, 2006 and hence the scope of the complaint was restricted upto this period and could not have been enlarged by the DG in the absence of any such direction by the Commission.

119. The Commission has carefully considered the plea made by M/s Shree Cement. It may be noted that the Commission while passing order under section 26(1) of the Act did not specify any period for the reason that at that stage it was not found desirable to curtail the period of examination by the DG. As the proceeding before the Commission are inquisitorial in nature, it would not have been appropriate to restrain the DG from fully examining the allegations of cartelization in the cement industry. As such, the Commission is not inclined to agree with the submission that the proceedings are vitiated on this ground.

120. A grievance has also been made that there was no basis for the DG to investigate only 11 companies out of 42 companies in the market. As noted by the DG, the top cement manufacturers were controlling the cement market in all the regions and the small players followed the trend. Hence, the DG focused the detailed inquiry only on the top companies. The Commission does not find any reason to disagree with the reasons given by the DG in conducting the detailed investigation against the major cement companies only.



121. After dealing with the jurisdictional and other issues, the Commission proceeds to frame the substantive issues arising for determination in the present case.

Issues

122. The following issues arise for determination in the present case:

- (1) Whether the parties in the present case have contravened the provisions of section 4 of the Act?
- (2) Whether the parties in the present case have contravened the provisions of section 3 of the Act?

Determination of Issues

Issue No. 1

Whether the parties in the present case have contravened the provisions of section 4 of the Act?

123. The Commission in Case No. 29 of 2010 has looked into the market structure in the cement industry in India carefully. The Commission observed that the DG in his report has brought out that there are 49 companies operating with more than 173 large cement



plants in India. In addition, there are many mini plants scattered around limestone clusters.

124. The Commission noted that Holcim, a global cement company acquired management control of ACL (earlier known as Gujarat Ambuja Cements Limited) in 2006. It has now more than 50% stakes in both ACC and ACL. Holdreind Investments Limited (Part of Holcim group) has about 40.46% and Ambuja Cements India Private Limited has about 9.81% of share in Ambuja Cements Limited. Further, Holdreind Investments Limited has about 0.29% and Ambuja Cements India Private Limited has about 50.01% of shares in ACC Limited. Ambuja Cements India Private Limited now stands amalgamated with Holcim India Private Limited.

125. Similarly, in Birla Group, Grasim Industries holds 60.33% in Ultratech Cement. Pilani Investments & Industries Corp holds 18% shares in Grasim Industries & 36.78% in Century Textile Industries. Pilani Investments also has stakes in Kesoram Industries which has cement division by the name of Kesoram Cements. Mangalam Cements is also a concern of Birla group. Another cement company by the name of Birla Corp. also belongs to MP Birla of Birla group.

126. Thus, both Holcim group and Birla group have crossholdings among their companies engaged in production of cement.



127. ACC and Ambuja Cements Limited have about 20% of the market share in terms of total capacity and production and Ultratech which belongs to Birla group has about 18% of the market share in India. Thus, Birla and Holcim groups command a major portion of the cement market in India.

128. The Commission noted that there are other firms like Jaiprakash Associated Limited, Shree Cement, Lafarge, Binani group, India Cements, JK group, Madras Cement, Chettinad Cement, Dalmia Cement who are having market presence in one or two regions of the country. In addition, there are various small and mini cement plants with 1 to 2 MMT capacities.

129. The Commission noted that as per the report of DG, ACC Ltd., Ambuja Cement Ltd, Ultratech Cement Ltd, Jaypee Cement Ltd., India Cements Ltd., Shree Cements Ltd., Madras Cements Ltd., Century Cement Ltd., J.K. Cements, JK Lakshmi Cement Ltd., Binani Cement Ltd and Lafarge India Pvt. Ltd. control about 75% market share of cement in India. The market shares of major cement companies based on production has been computed by the DG as under;

S.No.	Name	Share in %
1.	Ultratech Cements Limited	18.12
2.	ACC	10.4
3.	Ambuja Cements	9.78
4.	Jaiprakash Associates Limited	7.41



5.	India Cements	4.89
6.	Shree Cement	4.47
7.	J.K.Group	4.29
8.	Century Textiles	3.65
9.	Madras Cement	3.39
10.	Lafarge India (P) Limited	3.22
11.	Others	30.38

130. The Commission observed that even if M/s Shree Cements and M/s JK Lakshmi Cements are not considered, the above details as regards market share of cement manufacturing companies present a picture of market structure in which no single firm can be said to be dominant in India. In fact, the two major groups-Birla and Holcim are having more or less comparable market share. There are other firms also who are competing with each other for gaining market shares and no single firm or a group is in position to operate independent of competitive forces or affect its competitors or consumers in its favour to make it dominant within the meaning of explanation (a) to section 4 of the Act.

131. The Commission accordingly held that no contravention of the provisions of section 4 of the Act by any single cement firm or a group was made out in Case No. 29 of 2010.

132. Since the market construct suggests that no single firm or group is dominant, the Commission observed that a detailed



determination of relevant market for the purposes of establishing any abusive conduct on the part of any opposite party is not necessary.

133. In the present case M/s Shree Cement Limited is an additional party and accordingly the conclusions reached there as to the effect that the market construct suggests that no single firm or group is dominant would apply in the present case also.

134. In view of the above, a detailed determination of relevant market for the purposes of establishing any abusive conduct on the part of any opposite party is not necessary in the present case also.

Issue No. 2

Whether the parties in the present case have contravened the provisions of section 3 of the Act?

135. The parties in the present matter are cement companies and their association CMA. These companies are engaged in the business of manufacturing of cement and are operating at the same level of production chain. As per the scheme and provisions of the Act, their allegations of agreements, decisions or practices among entities engaged in identical or similar trade of goods or provision of services are to be examined under the provisions of section 3(3) of the Act. Further, it may be noted that, in the present case, no allegation of vertical agreement in terms of the provisions of section 3(4) of the



Act has been made. Accordingly, it is held that the allegations pertaining to acts and conduct of the parties in the present case are subject matter of inquiry under section 3(3) of the Act.

136. Before invoking the provisions of section 3 of the Act, it is necessary to determine whether there exists an agreement or arrangement among the cement companies under which they share details of cement prices, production and capacities among each other using the platform of CMA.

137. This issue was examined in detail by the Commission in Case No. 29 of 2010. In particular, evaluation of communication and role of CMA was examined. From the findings of the DG in the report and records of investigation, it was observed that it is undisputed that the parties participated in the meetings of CMA which provided a platform to interact on regular basis.

138. It may be noted that M/s Shree Cement is admittedly a member of CMA. Further, M/s Shree Cement collected retail cement prices for Delhi centre on behalf of CMA.

139. On a detailed examination and analysis of the evidence and material available on record in Case No. 29 of 2010, it was held by the Commission that there are evidences which are indicative of existence of agreement, arrangement and understanding among the



opposite parties using the platform of CMA for sharing of information, communication as regards pricing and production among the competing cement companies. These evidences provide strong evidence of coordinated behaviour and existence of anti-competitive agreement among the opposite parties.

140. As noted above, M/s Shree Cement is a member of CMA. Further, it also attended the meetings organized by CMA. In this backdrop, the aforesaid finding of the Commission recorded in Case No. 29 of 2010 would also be applicable with reference to the conduct of M/s Shree Cement.

141. The Commission notes that the evidence regarding communication was analyzed by the Commission in Case No. 29 of 2010 and on the basis thereof, it was concluded that the same strongly indicated anti-competitive conduct and behaviour on part of the parties. In addition, the Commission also evaluated economic evidences to find out and test the veracity of the contention of the parties that they are acting unilaterally in accordance with the normal market forces and not under an agreement to collude and coordinate their behaviour. While evaluating economic evidence, the Commission also assessed the structural factors which exist and help facilitate collusion among the parties. It is not necessary to reproduce the evaluation of the economic evidence and the



structural factors as noted in Case No. 29 of 2010 and it would be sufficient if the salient features thereof are noted herein.

Price parallelism

142. The DG found that prices of the cement of all the companies moved in a particular direction in a given period of time in different zones. The range of price movement was also found to be the same for all the companies and in all zones of the country. The DG noted that whenever the prices of cement in case of one company went up, it was followed by other companies simultaneously in the different zones across the country.

143. From this, the DG concluded that this price parallelism indicated the possibility of prior consultation on price movement and its range amongst the cement manufacturing companies. The DG noted that no specific reason for price parallelism was given by the companies. According to the DG, the cost of production, particularly, transportation charge varies from company to company, which may affect the prices of particular brand of cement. This being so, the price movement of all the companies in the same range and direction is not possible unless there is pre-discussion on the price movement.

144. The data relating to the price movements of all the top companies in different States were analyzed by the DG to examine the degree of price parallelism and it was concluded that the



economic analysis of price data clearly indicated that there was very strong positive correlation in the prices of all the companies. According to the DG, the coefficient of correlation of absolute prices of cement of all the companies confirmed the price parallelism.

145. The Commission held that from the correlation data analyzed and concluded by the DG, it was evident that there was a case for existence of price parallelism among the players considered in their respective States of operations.

146. It may also be noted that correlation data *qua* M/s Shree Cement was also analyzed in the States where it operates and the same also confirmed the aforesaid finding.

147. As the correlation results as found by the DG have been noted in detail in tabular form in Case No. 29 of 2010, it is not necessary to reproduce the same results in the present order again.

148. In view of the above, the Commission held that evidences as analyzed were indicative of the fact that the opposite parties meet frequently in various meetings organized by CMA and collect retail and whole sale prices using the platform of CMA. The details of actual production, available capacities of competing cement companies are also circulated by CMA. In view of these facts, price parallelism does not remain a mere reflection of non-collusive



oligopolistic market as has been argued by certain parties but mirrors a condition of coordinated behaviour and existence of an anti-competitive agreement in violation of provisions of section 3(3)(a) of the Act which prohibits any agreement or arrangement which directly or indirectly determine the prices in the market.

Low capacity utilization

149. In addition to the exchange of information on prices and production using CMA as platform, the Commission noted that there are other 'plus' or 'facilitating' factors over and above the existence of price parallelism which indicated collusive behaviour among the parties. One of the 'plus' factors that suggested a concerted action among the cement companies including the parties herein is finding by the DG as regards overall low capacity utilization and lower supply of cement by them during 2010-11.

150. On a detailed analysis of the data relating to installed capacity and production of cement, the Commission observed that from data collected, collated and corroborated from different sources it was undisputed that there has been reduced capacity utilization during the years 2009-10 and 2010-11 as compared to previous years.

151. The Commission also noted that the statements recorded by the DG in course of proceedings also corroborated that the cement



companies including M/s Shree Cement indulged in controlling the supply of cement in the market.

152. In this connection, the reply given by Shri Diwakar Payal, Jt. President (Marketing) of M/s Shree Cement to the following question of the DG during investigation may be noted:

Q.27 I am showing you the production and price data for the period October & November 2010 for Beawar plants and October & November 2010 for Ras plants, where the production has gone down and prices have increased from Rs. 236/- to Rs.246/- in Chandigarh market. Kindly explain.

Ans. We are price takers. The prices in Chandigarh market were low in October. In November the prices started showing up so we followed the market. Production has no co-relation with the market prices. Because of the 'Diwali' festival and rains in November the overall consumption was low. Consequently the dispatches were also low.

153. Much has been made by M/s Shree Cement of the fact that it expanded its capacity from 2.6 MTPA in March 2005 to 13.5 MTPA by March 2011 through organic route and such conduct is indicative of pro-competitive behaviour of the company. The argument advanced by M/s Shree Cement Commission is unacceptable for the simple reason that the issue involved here is of lower utilization of capacities and in the absence of utilization, addition of capacities cannot be a decisive factor for absolving it from the allegation of being part of a cartel. One possible inference which can be drawn from the fact that the cement companies are creating huge



capacities but not utilizing would be that the companies have been creating capacities to prevent entry despite making huge profits.

154. Based on the analysis of data relating to installed capacity and production of cement, it was held by the Commission that the cement companies indulged in limiting and controlling the production and supplies in the market in violation of provisions of section 3(3)(b) of the Act which prohibit any agreement or arrangement among the enterprises which limits or controls the production or supplies in the market.

Production Parallelism

155. In Case No. 29 of 2010, the Commission observed from the data collected by the DG as furnished by all the companies in respect of the plant wise monthly production that there is a positive correlation in change in production output among the cement manufacturers operating in a particular region/state.

156. The data collated by the DG in respect of trends in production show that during November 2010, all the companies had reduced the production drastically as compared to October 2010, although this was not the case for the corresponding months in 2009.

157. From the above, it was noted by the Commission that in November–December 2010 the cement companies including the



parties herein had reduced the production together despite no apparent slackness in demand, although in 2009 while in some cases there was drop in production, in many cases there was increase also. This established that there was a coordinated effort on part of the cement companies including M/s Shree Cement to reduce supplies by curtailing production.

Dispatch Parallelism

158. Further, on the basis of the analysis of dispatch data for the period two years from January, 2009 to December, 2010 by the DG, the Commission observed that changes in dispatch of cement by the top companies including M/s Shree Cement were almost identical.

159. From the analysis of data on production, dispatch and supplies in the market, it was noted by the Commission that the cement companies coordinate their actions as is apparent from the data of dispatch in November 2010 which shows identical and similar behavioural pattern. In any cartelized behaviour, the parties to the arrangement may not always coordinate their actions; periodically their conduct may also reflect a competitive market structure. However, there will be periods when coordination rather than competition will be found more gainful. This is reflective in the similar pattern of dispatch observed among the cement companies during November 2010. The coordination among them gets facilitated since CMA circulates the production and dispatch details



of all the member cement companies on regular basis. Further, the cement companies including M/s Shree Cement are also exchanging information through CMA as regards retail and wholesale prices.

Price increase

160. The Commission in Case No. 29 of 2010 examined the effect of aforesaid coordinated acts of the parties on the increase in prices of cement and made a detailed analysis thereon including the analysis of price trend over the years, price leadership and high profit margins. This detailed analysis is not repeated herein and it is sufficient to record the findings of such analysis.

161. In Case No. 29 of 2010, the Commission observed that the act of limiting and controlling supplies on the part of the cement companies over the years has been aimed at first creating shortages leading to build up demand and thereafter raise prices in wake of high demand of the product in the market. Since in some seasons, the demand is more, the cement companies restrict the supplies just before the peak demand and thereafter sell cement at a higher price. This was found evident from the details brought out in the order passed in that case. The cement companies reduced production and dispatch of cement even when demand was positive during November and December 2010 and thereafter raised prices in the month of January and February 2011 in times of high demand as outlined in discussion above. It is also significant that the price



increased in the month of January and February 2011 after the meetings of High Power Committee of CMA. It was also noted by the Commission that the statements of third parties recorded by DG established that the cement companies curtailed supplies in the month and sold at a higher price in the month of January –February 2011. These statements were quoted by the Commission in the order dated 20.06.2012 and, for the sake of brevity, the same are not repeated herein.

162. The Commission also observed that statements of representatives of cement companies also confirmed that they resorted to curtailment of supplies and production in order to get better prices from the market and protect market share.

163. The Commission on the basis of data and discussion observed that there has been inverse relation between the prices and the capacity utilization. The Commission held that coordinated act of the cement companies including M/s Shree Cement to limit and control their production, dispatch and capacity is reflected on rising price of cement over the last few years.

Price Leadership

164. From the statements and submissions, the Commission observed in Case No. 29 of 2010 that the agreements and concerted action as regards price among the cement companies were led by the top cement companies who are the market leaders in their



respective regions. The statements recorded during the course of investigation indicated that the price is changed by cement manufacturers on the basis of price of market leaders. The big players holding the maximum share play the role of leaders in facilitating concerted action among the cement manufacturers.

165. The Commission from the details of cost and sales realizations observed that margins earned by the cement companies have been quite impressive. The parties have been able to maintain a good profit margin in spite of capacity additions over the years which repudiates their stand that they have been earning even below re-investment levels and that they are incurring losses.

166. Above analysis is valid for the present case also including for M/s Shree Cement. Therefore, the Commission holds that the economic evidences put together with the fact that the cement companies including M/s Shree Cement regularly meet at the platform of CMA and CMA collects both retail and wholesale prices and circulates details of capacity utilization, production and dispatch among all its members establish coordinated act on the part of the cement companies to restrict production and supplies in the market in contravention of provisions of section 3(3)(b) of the Act. Further, the prices of all the cement companies including the parties herein move together which in existence of other factors as above not only suggest mere price parallelism but establish that the Opposite Parties



are in agreement and acting in concert to fix prices of cement in contravention of provisions of section 3(3)(a) of the Act.

167. The Commission observes that in the present case, price parallelism among the cement manufacturers supported and corroborated by factors such as limiting and controlling supply by underutilizing capacity, maintaining similar and parallel behaviour in production and dispatch of cements with a view to maintain high prices in the market as discussed in the preceding paras establish that the cement companies including M/s Shree Cement have acted in concert under an agreement.

168. The Commission also observes that the companies have sought to argue that in the absence of direct evidence, no anti-competitive agreement can be inferred. However, the fact that the cement companies including M/s Shree Cement meet frequently at the platform of CMA give them an ample opportunity to discuss production and prices. CMA collects retail prices and wholesale prices through the competing companies on weekly and monthly basis which further provide them opportunity to discuss and exchange information on prices. The production and dispatch details of each company are circulated to all the members by CMA. The association is also engaged in benchmarking exercise in respect of its members. Therefore, it is evident that the competing cement companies exchange information and get to know each other's production, dispatch and prices.



169. The Commission further observes that the fact that such institutionalized interactions facilitate exchange of sensitive information is demonstrated by the parallel behaviour of prices, production and dispatch among the competing cement companies as brought out in the preceding paras of this order. Under this arrangement, CMA collects prices through a network of cement companies and the companies get an opportunity to know about the prices of each other. CMA not only collects prices but also circulates and disseminates information on capacities and production of competing cement companies. The companies who have resigned from the membership still attend the meetings of CMA. Thus, all the cement companies even if they are not the members of CMA are the part of the whole arrangement. Even if there could be difference in the cost structure of cement companies, the parallel behaviour in movement of prices reflects some arrangement and understanding among them.

170. As has been discussed in this order, the companies who are the leaders in different zones are followed by the other companies. The cement companies also keep supplies under control through lesser than optimal utilization of capacities and raise prices when the demand in the market goes up.



171. The way the production and supplies together with prices move in the market establish coordinated behaviour, action in concert and agreement on the part of the cement companies.

172. As per the provisions of section 3(3) of the Act, if due to an agreement within the meaning of section 2(b) of the Act, the parties operating at the same level of production or supply chain are found indulged in the acts of limiting the production and supplies and directly or indirectly determining the price of cement in the market, adverse effect on competition is presumed. In the backdrop of the rebuttals by the parties herein that competition has not been impacted, the Commission has also considered the factors mentioned in 19(3) of the Act carefully in light of all the material facts on record.

173. The Commission finds that the coordinated act on the part of the cement companies has neither caused any improvement in production or distribution of goods or provision of services nor any promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services. On the contrary, the capacity utilization has gone down in 2009-10 and 2010-11 over the last few years. Thus, there is no efficiency defence brought in by the parties as mentioned in section 19(3)(e) and (f) of the Act.



174. Further, it cannot be said that there is any accrual of benefit to the consumers since the prices of cement have gone up considerably in recent years. In addition, artificial shortages are also created in form of reduced capacity utilization and thereby reduced supply of cement in the market to the detriment of the consumers as has been discussed in the preceding paras of this order.

175. The Commission finds that while there was no accrual of benefit to the consumers, the parties herein have earned huge profit margins by acting together on prices, production and supplies. Considerably high profit margin in the backdrop of parallel behaviour in movement of prices, dispatch, and production of cement and reduced capacity utilization over the years indicate that the Cement companies have acted in their own self-interest to maximize the profit depriving both the consumers and economy from the possible benefits out of optimal capacity utilization and reduced prices. All these facts have been discussed in detail in the order passed in Case No. 29 of 2010 and therefore, they have only been briefly mentioned here.

176. The Commission holds that in view of analysis of factors mentioned in section 19(d), 19(e) and 19(f) of the Act, it is established that the cement companies have contravened the provisions of section 3(3)(a) and 3(3)(b) read with section 3(1) of the



Act by fixing the prices and limiting and controlling the production and supplies in the market.

177. The Commission also observes that as per the provisions of section 2 (c) of the Act, cartels have been defined as under;

(c) "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;

178. The act and conduct of the cement companies establish that they are a cartel. The Commission holds that the cement companies acting as a cartel have limited, controlled and also attempted to control the production and price of cement in the market in India and the allegations of the informant on these issues are substantiated. The Commission while holding so also notes that cement companies have been penalized in other jurisdictions also for their anti-competitive acts and CMA and some of Opposite Parties in coordination have also been found to be engaged in restrictive trade practices in the past by the erstwhile MRTP Commission in case No. RTPE 21 of 2001 and RTPE No. 99 of 1990. Holcim which has a majority stake in ACC and ACL and Lafarge have been penalized in European Union.



Parties to agreement

179. The Commission notes that the parties have in their arguments along with other points also contended that the report of the DG does not specify the names of the contravening parties and also the period of alleged cartel. In this regard, the Commission observes that the parties in the present case are the prominent players in the market in respective regions and are the key players in the whole arrangement.

180. The observation made by the Commission in Case No. 29 of 2010 that the act of the parties in limiting and controlling supplies in the market and determining prices through an anti-competitive agreement is not only detrimental to the cause of the consumers but also to the whole economy since cement is a crucial input in construction and infrastructure industry vital for economic development of the country holds true in this case also. Therefore, in the instant matter the parties together with CMA who has been found providing platform for exchange of sensitive information on production and price of the competing parties are held guilty of contravention of the provisions of section 3(3)(a) and 3(3)(b) read with section 3(1) of the Act.

Period of Contravention

181. As regards period of contravention, for the purposes of this order, the Commission finds that the parties have institutionalized the system of sharing the prices, capacities and production among each other using the platform of CMA in order to limit and control



the production and supplies and determine the prices of cement in the market. Since the DG has examined the conduct of the parties involved in the cartel only upto March 2011, this order captures the period from the date of enforcement of the relevant provisions of the Act, *i.e.*, from 20.05.2009 till 31.03.2011.

Order under Section 27 of the Act

182. The Commission finds the parties in the present matter including Shree Cement have contravened provisions of section 3(3) (a) and 3(3)(b) read with section 3(1) of the Act.

183. The Commission observes that since the cement companies which are parties in the present case have been found to be in cartel (except M/s Shree Cement) in Case No. 29 of 2010 also and penalized therein, hence, the Commission does not deem it fit to order remedies including imposition of penalty on such companies again for the same period of contravention.

184. It has been noted in the para 98 of this order that conduct of M/s Shree Cement Limited was not examined during the inquiry in Case No. 29 of 2010. However, in the present matter as the conduct of M/s Shree Cement has also been found in contravention of the provisions of sections 3(3)(a) and 3(3)(b) read with section 3(1) of the Act, the Commission decides to impose a penalty upon it in terms of proviso to section 27(b) of the Act.



185. The calculation of penalty limit based on turnover in terms of section 27(b) is as under;

Name	Gross turnover for 2009-10(in Rs. crore) taking into account period of contravention Post Notification i.e. 20.05.2009 on pro-rata basis (in Rs.crore)	10% of Turnover as calculated in column 2 (in Rs.crore)	Gross Turnover for 2010-11 (in Rs. Crore)	10% of Turnover as calculated in column 4 (in Rs.crore)	Total (in Rs.crore)
M/s Shree Cement Ltd.	3475.20	347.52	3937.78	393.77	741.29

186. The calculation of penalty limit based on net profit in terms of section 27(b) is as under;

Name	Net Profit 2009-10 taking into account period of contravention Post Notification i.e. 20.05.2009 on pro-rata basis (in Rs. crore)	3 Times of Net Profit as calculated in column 2 (in Rs. crore)	Net Profit 2010-11(in Rs.crore)	3 Times of Net Profit as calculated in column 4 (in Rs. crore)	Total (in Rs. crore)
M/s Shree Cement Ltd.	585.33	1755.99	209.70	629.10	2385.09



187. It would be seen from the above that the amount of three times of net profit calculated as above is higher than 10% of the turnover. Since as per the provisions of Proviso to Section 27(b) the penalty has to be determined on the basis of net profit or turnover whichever is higher, in this case the net profit has been taken into account by the Commission. Therefore, considering the totality of the facts and circumstances of the instant case, the Commission decides to impose a penalty of 0.5 times of net profit for 2009-10 (from 20.05.2009) and 2010-11 in case of M/s Shree Cement in this case.

Accordingly, the penalty amount is determined as under;

Name	Net Profit 2009-10 taking into account period of contravention Post Notification i.e. 20.05.2009 on pro-rata basis (in Rs.crore)	0.5 Times of Net Profit as calculated in column 2 (in Rs.crore)	Net Profit 2010-11 (in Rs. crore)	0.5 Times of Net Profit as calculated in column 4 (in Rs.crore)	Total (in Rs. crore)
M/s Shree Cement	585.33	292.66	209.70	104.85	397.51

188. Since the enforcement provisions of the Act have come into effect from 20.05.2009, for the calculation of penalty in the present case, the period from 1.4.2009 to 19.05.2009 has not been considered and amount of penalty has been calculated accordingly for the balance period of 2009-10.



189. The Commission also directs M/s Shree Cement to 'cease and desist' from indulging in any activity relating to agreement, understanding or arrangement on prices, production and supply of cement in the market.

190. The Commission decides accordingly. M/s Shree Cement should deposit penalty amount within a period of 90 days from the date of receipt of this order and also file an undertaking in compliance of direction given in preceding para within same period.

191. The Secretary is directed to communicate this order as per regulations to all the parties.

Sd/-
Member (G)

Sd/-
Member (R)

Sd/-
Member (GG)

Sd/-
Member (AG)

Sd/-
Member (T)

Sd/-
Member (D)

Sd/-
Chairperson

Certified True Copy



S. P. Gahlaut
30/07/2012
S. P. GAHLAUT
ASSISTANT DIRECTOR
Competition Commission of India
New Delhi