



AN ANALYSIS OF THE INDIAN CEMENT CARTEL VIS-À-VIS THE EUROPEAN CEMENT CARTELISATION

Cement Cartel in India and European Union

A cartel is basically a group of sellers or buyers who band together and try to eliminate competition.¹ Standard of proof in cartel cases has been very high since the beginning. The major problem with any form of cartel is busting. Actual applications of those standards have left many people dissatisfied. Looking at the trend of recent cement case in India and Europe - more specifically Germany, it is explicit that it depends on the judges how they look at evidentiary matters. Judges have a huge freedom in assessing the evidentiary matters and each case is necessarily different. Cartels are like cancers on the open market economy. Cartels destroy competition and cement cartelisation has caused serious harm to many developing economies and consumers.

India: The recent order² of CCI³ blamed the cement industry for deliberately producing less to earn higher profits. In the cement cartel case busted by CCI, the Cement Manufacturers Association were found to be fixing prices of cement in an arbitrary manner keeping the prices of several cement manufacturers in the same region uniform despite the fact that the cost of production of different units were different. The reason why time and again cement sector has been prone to cartelisation is that such sectors are generally characterised by high degree of

concentration, significant barriers to entry, similar cost structures and mature technologies.

Europe: In Aalborg⁴ case, the European Union (EU) carried out investigations into European cement producers and trade associations and adopted a statement of objections drawing a basic distinction between two types of objectionable practices namely prices at the international level and national level. The EU held that the cement undertakings infringed the provisions of Article 81 (1) of the EC Treaty by participating in an agreement designed to ensure non-shipment to home markets and to regulate cement transfers from one country to another by participating in an agreement on the exchange of price information.⁵ The European Court of Justice discussed the role of economic analysis in the detection of cement cartel case. The economic analysis can prove helpful in times when there is not sufficient documentary evidence to prove the existence of a cartel activity.

Germany: In 2002, the German Federal Cartel Office (FCO) unearthed a hard-core cartel in the cement industry. According to the FCO, numerous cement producers had divided the German cement market amongst themselves, agreed on sales quotas and fixed prices since the beginning of 1990's. The German Court finally in the 2009 judgment relating to cement cartel fined the cement producers. What is more important to note in the German Cement cartel is the manner in which the econometric evidence was presented in the court and the unique method adopted by the Court to calculate the fine that included 'determination of a basic amount' and

¹ Section 2 (c) of the Indian Competition Act defines "cartel" wherein it 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.

² Builders Association of India v. Cement Manufacturers' Association and Others, Order passed by Competition Commission of India on 20.06.2012, available at <http://www.cci.gov.in/May2011/OrderOfCommission/292011.pdf>, as accessed on August 15, 2013.

³ Competition Commission of India, hereinafter referred to as CCI.

⁴ Aalborg Portland A/S v. Commission of the European Communities (C- 204/00 P); [2004], ECR I-123.

⁵ Article 81 of the EC treaty prohibits agreements between undertakings that restricts or distorts competition within the common market.

'calculation of additional proceedings'.⁶ This assessment of fine was done by a group of economic experts appointed by the court.

In cases where the existence of cartel has already been established, the next step is determination of fine. The fine is set according to the gravity and the duration of a cartel. Therefore, impact of the cartel activity plays an important role in determining the fine. It is in this context that the economic analysis plays a pivotal role in assessing the impact of a cartel.

Fining Policy

It cannot be disputed that imposing fine is one of the best ways of combating cartels. This factor not only creates a deterrent effect, but also speeds the race for leniency. In Indian context, the rights of the companies and individuals should be strengthened who are victims of illegal anti-competitive conduct. Apart from enforcement by competition authorities, private action of damages by individuals must be encouraged in India similar to the German cement Cartel case wherein a class action type of private antitrust enforcement was encouraged. The trend in Cement cartel case in Europe has been that the private claims for damages are slowly finding place under the law. It should be encouraged under the Indian Law so as to increase the awareness about the impact of cement cartels. The cement cartel case⁷ decided by the MRTPC⁸ was not subject to any fine under the then MRTP Act, 1969⁹; however the case does not remain the same now. CCI has heavily fined the cement companies in 2012. Competition Appellate Tribunal (COMPAT) and Supreme Court upheld the order of CCI which establishes that CCI is not a 'toothless tiger'.

Leniency Policy

There is a provision for leniency program in the Competition Act, 2002¹⁰ however it is not well

⁶ For further details, See 'Cement Cartelisation in India and Europe', pp. 68-70, available at <http://cci.gov.in/images/media/ResearchReports/NidhiInte rns160311.pdf>, as accessed on September 6, 2013.

⁷ Director General (I & R) v. Cement Manufacturer's Association (CMA) and forty four others, Restrictive Trade Practices [2007 CTJ 21 MRTP].

⁸ Monopolies and Restrictive Trade Practices Commission hereinafter referred to as MRTPC.

⁹ Monopolies and Restrictive Trade Practices Act, 1969 hereinafter referred to as MRTP.

¹⁰ Hereinafter referred to as Act.

implemented in India. The number of applications filed under leniency program in Europe are greater in number than India. The leniency programs in India must endeavour to destabilise cartels, encourage the people to report cartel-like activity to the competition authorities. It is still at a nascent stage and no one has come up so far seeking a remedy under this provision of the Act. Therefore, it is recommended that Section 46 of the Act should be amended to give complete protection to the person who helps in busting of the cartel. The immunity should be absolute and not anything lesser than that. Under the European law, the community courts are increasingly required to examine the value of evidence in the context of leniency in order to assess whether an applicant should have been granted a greater reduction.

Empowering the Institutional set-up

The powers of the Director General should be increased and the institution should be strengthened. Appointment of economic experts seeking advice on cartel matters is also desirable. The German cement cartel case was decided mainly using economic evidences. In order to determine the fines, the court in that case had appointed economic experts who determined the market situation for cement in Germany and how it impacted the consumers. Though CCI currently employs economic experts to conduct research on market, however for effective detection of cartel using economic evidence in cement cartel cases, CCI should employ more economic expertise with exposure in international economic dimensions. Similarly, the European Commission has the power to seal premises during its investigations, to take statements from persons relating to the investigation and in addition to its powers to conduct raids at business premises, including the home of the individuals who are responsible for cartel.

Enforcement Resources

The substantial and sustained retreat of the prevalent cartel culture needs serious allocation of resources. There is a need to create specialist cartels directorate who should be given the responsibility of dealing with hard-core cartels uncovered by leniency applications. For instance, in December 2010 there were certain investigations carried out by the DG in South India where cement manufacturers were suspected of a cartel activity. For such instances, these specialist cartels directorates could be employed. This might

lead to early and efficient detection of cement cartel cases.

Conclusion

The primary objective of competition law is to protect consumer against harm, therefore it is consumer harm that must be ultimately proved in the court of law. The Federal Cartel Office in Germany calculated a 'basic amount' determined by reference to the gravity and duration of the infringement. The 'additional proceeds' make it possible to impose effective sanctions proportional to the higher degree of injustice in case of serious infringements. It can be inferred from these cases that the findings of the economic experts cannot take the place of legal assessment and adjudication but the examination of whether a practice is a restriction by object, needs to take into account both legal and economic context.

MRTPC could not successfully curb the cement cartel in India. The recent order of CCI is definitely a welcome step. Moreover the Supreme Court¹¹ upholding the decision of COMPAT¹² and CCI¹³ is an alarm for industries to take the 'watchdog' more seriously. However, there is a need for a properly structured leniency programme so that any member of the cartel group is encouraged to apply under this programme. CCI should establish bilateral cooperative arrangements with neighbouring countries and trading partners in Competition law enforcement. Such initiatives help in better detection of international cement cartel cases. It facilitates easy collection of evidences once a cartel is detected. There is a need to educate various business houses or associations on cartels.

The Department related Parliamentary Committee on Commerce¹⁴ has also accepted that to an extent even the government policies have created incentives for formation of cement cartels in India. Thus, there is a need to create all possible environments, which discourage cartel-like atmosphere.

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¹¹ Money Control, 'On cement cartel: The Supreme Court', June 13, 2013, available at http://www.moneycontrol.com/news/stocksnews/stocksnews-mmtc-sun-pharma-apollo-tyre-samtel-color_897923.html, as accessed on August 19, 2013.

¹² The Hindu Business Line, 'Competition tribunal tells penalized firms to deposit Rs 630 cr in a month', May 17, 2013, available at <http://www.thehindubusinessline.com/industry-and-economy/competition-tribunal-tells-penalised-cement-firms-to-deposit-rs-630-cr-in-a-month/article4724853.ece>, as accessed on August 17, 2013.

¹³ The Economic Times, 'CCI slaps Rs 6200 cr penalty on 11 cement firms for cartel sale', June 21, 2012, available at http://articles.economictimes.indiatimes.com/2012-06-21/news/32352361_1_cement-companies-cement-firms-india-cements, as accessed on August 17, 2013.

¹⁴ Department Related Parliamentary Standing Committee on Commerce, 95th Report on Performance on Cement Industry, February 2011, available at http://dipp.nic.in/English/Performance_Cement_Industry.pdf, as accessed on August 16, 2013.