I. CCI IMPOSES INR 60 BILLION (APPROXIMATELY USD 1092 MILLION) PENALTY ON CEMENT MANUFACTURERS' CARTEL

1.1 On June 20, 2012, the Competition Commission of India (**CCI**) passed a landmark order on the issue of cartelization and anti-competitive practices in the matter of ***Builders Association of India* v. *Cement Manufactures Association and Others***,[1] where the CCI has imposed a penalty of about INR 60 (sixty) billion (approximately USD 1092 (one thousand and ninety two) million) on 11 (eleven) cement manufacturing companies (**Cement Companies**) for violating the provisions of the Competition Act, 2002 (**Competition Act**) that prohibit anti-competitive practices, including limiting of production and supply and determination of prices by cartels. In the above case, the CCI found that the Cement Companies had exhibited cartel like behaviour by concertedly increasing prices of cement and restricting the production and supply of cement across the country. A brief analysis of the case is provided below.

1.2 BRIEF FACTUAL BACKGROUND AND THE PARTIES' CONTENTIONS

(a) The CCI initiated an inquiry into the activities of the Cement Companies and the Cement Manufacturers Association (**CMA**) upon receipt of information from the Builders Association of India (**Informant**) alleging that the Cement Companies had directly or indirectly indulged in restrictive trade practices. The Informant alleged that the Cement Companies created an artificial deficit of cement in the market by limiting and restricting the production and supply of cement. The Informant also alleged that the Cement Companies were involved in collusive price fixing and had formed a cartel, and were acting in violation of the provisions of the Competition Act.

(b) The Informant further alleged that the Cement Companies together held a huge stake in the Indian cement market and were thus in a dominant position, and that the Cement Companies were abusing their dominant position to raise the prices of cement exorbitantly. The Informant also alleged that although the growth in the construction sector had reduced over the last few years, the cement prices continued to increase during this phase, which showed that the increase in prices was due to cartelization and abuse of dominant position by Cement Companies and not due to the demand and supply co-relation. It was also alleged that the prices and the information exchanged at the meetings of CMA were used by the Cement Companies to increase the prices and restrain their production and supply in tandem.

(c) Based on the above, the CCI believed that there was a *prima facie* case against the Cement Companies and the CMA, and ordered the Director General appointed under the Competition Act (**DG**) to investigate into the allegations made by the Informant. The DG, in its report remarked that 12 (twelve) cement manufacturing companies controlled 75% of the cement manufacturing market in India. The DG also reported that the cement manufacturing companies had divided the cement industry in 5 (five) different zones/regions, which allowed them to maximize profits in each region because of lack of competition. Further, it was also reported by the DG that the Cement Companies increased the prices of cement frequently even when the cost of cement manufacturing did not change or vary in similar proportion. According to the DG's Report, the fixing of prices by Cement Companies was arbitrary in nature and there was no economic rationale that explained such pricing.

(d) The Informant contended that the Cement Companies in connivance with and under the aegis of the CMA, were involved in collusive price fixing, as the pattern of production and pricing of cement could not be uniformly consistent across the country without an understanding or agreement amongst the Cement Companies. Further, the Informant contended that the Cement Companies were deliberately not undertaking production at their maximum installed capacities and that they were producing only at around 70% of their installed capacities to create an artificial shortage of cement in the market. Additionally, the DG's report and

[1] Case No 29 of 2010, order passed on June 20, 2012

the contentions of the Informant suggested that the price rise in cement was not due to inflationary pressures but was artificially created by the Cement Companies.

(e) In reply to the contentions of the Informant and the DG's report, the Cement Companies replied that increased installed capacity did not immediately result in increased production capacity and that the increase in installed capacity by the Cement Companies was to cater to future forecasts and demands and was not meant to immediately increase production. Further, it was contended that the DG's report or the Informant have not produced any agreement which indicates formation of a cartel and that the cement industry is of oligopolistic nature in India and price parallelism is a characteristic of an oligopolistic market. It was further contended that the DG had not employed any scientific or economic method to establish that the price movement was collusive and was not governed by market dynamics. The Cement Companies contended that there was inflationary pressure on all components of production of cement and therefore the uniform price of cement was not a result of collusion but was largely consistent with market behaviour and dynamics. The Cement Companies also contended that there had been a constant increase in the production of cement and hence the contention of the DG and the Informant that the production was controlled and regulated was refuted.

1.3 CCI'S ORDER AND DIRECTIONS

(a) Relying on the DG's report and other material placed before it, the CCI concluded that although the Cement Companies together held a majority share in the cement market in India, none of the Cement Companies were individually in a dominant position in the market and hence the Cement companies were not in violation of the rule against abuse of dominant position. Further, on the issue of Cement Companies being involved in cartelization, the CCI ordered that although there was no explicit agreement amongst the Cement Companies which reflected that they had formed a cartel, the circumstantial evidence based on the concerted behaviour of the Cement Companies strongly indicated towards the existence of a cartel.

(b) The CCI was of the view that there was no need of a written agreement, that evidences a common understanding, common design, common motive or concerted conduct, to establish a cartel amongst the parties against whom there are allegations of cartelization. The CCI also held that once the parties at the same level of production were found to be engaged in limiting of production or supply or in directly or indirectly determining the price, as per the provisions of the Competition Act, an appreciable adverse affect on competition could be presumed. Further, the CCI held that the above presumption had not been successfully rebutted by the Cement Companies and that the actions of the Cement Companies had neither caused any improvement in production or distribution of goods nor any promotion of technical, scientific and economic development.

(c) The CCI, based on the DG's report and the material placed before it, found that the CMA was used by the Cement Companies to gather production, supply and price data from all over the country. Further, the CCI found that the cement market was subject to production shortfalls, decreased capacity utilization, product and dispatch parallelism and price parallelism, all of which together lead to a conclusion that through the platform of the CMA, the Cement Companies had formed a cartel and were involved in limiting production and artificially causing increase in prices, all of which had caused an adverse effect on the cement market in India.

(d) As per the Competition Act, where it can be established that the enterprises against whom the complaint has been filed are involved in cartelization, CCI has the authority to impose a fine of up to 3 (three) times of the profit for each year of the continuance of cartel or 10% of the annual turnover of the company for each year of continuance of cartel, whichever is higher. In the present case, CCI calculated the fine on the basis of the turnover of the Cement Companies and imposed a total fine of about INR 60 (sixty) billion (approximately USD 1092 (one thousand and ninety two) million). Further, the CCI also passed a "cease and desist" order

against the Cement Companies from indulging in any agreement or understanding on prices, production and supply of cement in the market. Also, the CMA was directed to disengage and disassociate itself from collecting wholesale and retail prices through the member cement companies and also from circulating the details on production and dispatches of cement companies to its members.

1.4 IMPACT OF THE CCI'S DECISION

The CCI's decision clearly establishes that the CCI can rely on circumstantial factors and market data to determine the existence of a cartel and that it is not required for the CCI to find a written agreement of understanding amongst the parties to a cartel. Further, the decision can have a far reaching impact on the functioning of various industry confederations and bodies, as the existence of the CMA as a common platform for collection and exchange of data was a crucial reason for the CCI's finding that a cartel indeed existed amongst the Cement Companies. The CCI's decision has been criticized on the grounds that the CMA was only collecting the industry information for sharing it with the Government; however, the CCI's decision did not solely rest on the collection of information but also on the fact that the CMA supplied the information to its member companies apart from providing it to the Government. The CCI has also validly noted that parties to a cartel are unlikely to enter into formal agreements and leave traces of their concerted behaviour, in which case, circumstantial indicators become the basis for determining the existence of anti-competitive practices by cartels. It is likely that the CMA and the Cement Companies will file an appeal against the order before the Competition Appellate Tribunal, after which an appeal can also be filed before the Supreme Court of India. In view of the above, although the decision of the CCI is not the final finding on the matter, the decision is a welcome addition to competition law jurisprudence in India.

II. CCI'S RECENT ORDERS ON ABUSE OF DOMINANT POSITION

2.1 On July 3, 2012, the CCI passed two orders on abuse of dominant position in the Indian market in relation to the broadcasting industry in the State of Punjab and in the Indian market for scientific, technical and medical (**STM**) academic journals in English, respectively. The above orders are briefly discussed below.

2.2 KANSAS NEWS PRIVATE LIMITED V. FAST WAY TRANSMISSION PRIVATE LIMITED [2]

(a) The informant, Kansas News Private Limited (**Informant**), was a broadcaster of a news and current affairs television channel and the opposite parties, including Fast Way Transmission Private Limited (**FTPL**), were multi system operators (**MSOs**), who were all part of the same group or under common control of one party. The Informant had entered into an agreement with FTPL for broadcasting its channel in Punjab and Chandigarh, for which the Informant was required to pay a placement fee to FTPL. The Informant claimed that although it was paying the placement fee to FTPL, the transmission of its channel was being disrupted as some of the content was not favourable to the ruling party in Punjab. Furthermore, the agreement was unilaterally terminated by FTPL on the basis of "mid year" review after the Informant had reported the matter to the CCI.

(b) Based on the above information, the DG conducted an investigation to ascertain if the Opposite Parties were abusing their dominant position in the relevant market. The DG submitted its report to the CCI, wherein it identified cable distribution as a separate market segment from Direct-to-Home services (**DTH**), Internet Protocol Television services (**IPTV**) and terrestrial TV services, and concluded that the Opposite Parties had gained control and dominance in the relevant market and had abused their dominant position by refusing to deal with the Informant broadcaster or provide the Informant access to its network, if the Informant did not accept its unreasonable conditions. The DG identified that the Opposite Parties were imposing onerous conditions on broadcasters, including payment of placement fee and were denying market access to broadcasters in violation of the provisions of the Competition Act. The Opposite Parties contended that the

[2] Case No. 36/2011, order passed on July 3, 2012

DG had wrongly identified the relevant market and product, as DTH and cable distribution were part of the same market as cable television was substitutable with DTH, IPTV etc. The DG's findings and report were further challenged on the grounds that the DG did not use any economic test in its report and that it was based on surmises.

(c) Based on the DG's report and other material placed before it, the CCI concluded that the Opposite Parties had control on 85% of the relevant market and was in a dominant position. Additionally, the agreement executed between various broadcasters, including the Informant, and the Opposite Parties, contained conditions which denied market access to the Informant and other broadcasters by imposing onerous conditions, and FTPL had denied market access to the Informant by disrupting its broadcast and unilaterally terminating the agreement without any valid reason. Based on the above, the CCI held that the Opposite Parties were abusing their dominant position in the market, and accordingly, the CCI imposed a penalty of 6% of the average turnover of the Opposite Parties' last three financial years and also passed a "*cease and desist*" order against the Opposite Parties.

2.3 *PRINTS INDIA V. SPRINGER INDIA PRIVATE LIMITED AND ORS.*[3]

(a) The informant, Prints India (**Informant**), was engaged in the business of distribution of Indian journals, primarily STM journals in English. The opposing parties included Springer India Private Limited (**Opposite Party**) and research institutes who had entered into co-publishing agreements with the Opposite Party. The Informant alleged that once the Opposite Party had obtained the co-publishing rights for a large number of STM journals, it increased the price of the journals and imposed new adverse terms and conditions on the Informant.

(b) The Informant stated that under the terms of the new agreement, it had to pay a higher USD list price for journals instead of the earlier, lower INR price. Further, the Opposite Party had reduced the discount margins on the list price of the journals considerably as compared to the margins that had been offered by the publishing institutes earlier. The new agreement also imposed an obligation on the Informant to provide certain commercially sensitive information to the Opposite Party as a pre-condition to the sale of journals.

(c) Based on the above, the CCI found a prima facie case against the Opposite Party and directed the DG to investigate the matter. The DG concluded that the Opposite Party was in a dominant position in the English STM journals market, and that, by stipulating onerous terms and conditions on the distributors, the Opposite Party was abusing its dominant position.

(d) The DG had identified the relevant market as English STM journals published in India. Further, in order to determine dominance, the DG had relied on the market share figures supplied by the Informant and the analysis that the journals that the Opposite Party published were "must haves" and unique and accordingly, the Opposite Party had a dominant position. The CCI found that the DG's report and finding that the Opposite Party was in a dominant position, was not based on adequate data and that the evidence placed before the CCI was insufficient to establish the dominance of the Opposite Party.

(e) The CCI was of the view that the changing dynamics of the publishing market had not been correctly taken into account and that the relevant market was "STM academic journals" and not "STM journals", as suggested by the DG. Further, the CCI found that the "must have" test or basis used by the DG was incorrect as there were no objective criteria to determine which journals were "must haves". The CCI was also of the view that the DG had not collected any market share figures or a list of competitors independently, to determine if the Opposite Party was in a dominant position in the relevant market. Also, the CCI was of the view that print and

[3] Case no. 16 of 2010 decided on July 3, 2012

e-publishing segments were both a part of the relevant market and the DG had failed to take the above into account while determining existence of a dominant position.

(f) As the CCI found that the Opposite Party was not in a dominant position in the relevant market, it concluded that the question of abuse of dominant position did not arise.

2.4 IMPACT OF THE CCI'S ORDERS

The CCI's order in the MSO case is a step in the right direction to preserve competition in the Indian market and for preventing holders of dominant positions in unfairly treating the other stakeholders. In the case of FTPL and MSOs in Punjab, the CCI has come down on unfair treatment of broadcasters by MSOs that had a dominant position and were using such position for their political motives and gains at the cost of broadcasters. The decision of the CCI in the above case, apart from protecting broadcasters from unfair practices and denial of market access, also helps clamp down politically motivated censoring of television channels.

In the case of STM journals, the CCI has refused to be swayed by mere allegations of the informant (which were relied upon by the DG to some extent) and has refused to hold that the opposite party was in a dominant position in the absence of substantial evidence. The CCI has appreciated the developments and nuances applicable to a niche product such as academic journal and refused to hold the opposite party to be a dominant player without sufficient empirical evidence. The above approach of the CCI would be of comfort to various market participants and help further establish the credibility of the CCI and its approach of clearly understanding the market and its unique features, which are highly relevant to determine if certain actions are anti-competitive.

However, in both the above cases, questions have been raised on the role of the DG and its investigation processes. In the MSO case, an objection to the DG's report was the DG's failure to use economic tools and methodologies such as the SSNIP or the Critical Loss Analysis method to delineate the relevant market. However, the above was refuted by the CCI on the grounds that the tests would not have a bearing on the DG's findings. Further, in the STM journals case, the decision of the CCI that the opposite party was not a dominant player was based on the fact the evidence on record was not enough to prove dominance and that the DG had not undertaken a proper analysis of the competitors and the market shares of various players. In a scenario where the informants may not be able to undertake economic analysis themselves, or in a scenario where the opposite parties may be resourceful enough to engage independent economic analysts and provide reports in their favour, it becomes imperative that the DG act in accordance with high standards and undertake investigations diligently and with enough caution so as to ensure that its findings are well substantiated. In the STM journals case, it is possible that if empirical data had been collected, the DG could have proved that the opposite party was a dominant player based on market share and number of competitors; however, in the absence of adequate evidence, the CCI ruled otherwise. Therefore, the findings of the DG are essential to the analysis of any anti-competitive behavior and it is imperative that the office of the DG be adequately and appropriately staffed and equipped to allow it to perform its duties efficiently.

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