



COMPETITION COMMISSION OF INDIA

RTPE No. 52 of 2006

In re: Alleged cartelisation by Cement Manufacturers.

Against

1. Shree Cement Limited
2. Cement Manufacturers' Association
3. J. K. Cement Ltd.
4. Binani Cement Limited
5. Lafarge India Private Limited
6. Jaiprakash Associates Ltd.
7. UltraTech Cement Ltd.
8. The India Cements Ltd.
9. Ambuja Cements Limited
(formerly, Gujarat Ambuja
Cement Limited)
10. ACC Limited
(formerly, Associated Cement
Companies Limited)
11. Century Textiles and Industries Limited
12. The Ramco Cements Limited
(formerly, Madras Cement Ltd.)



CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

Mr. Justice G. P. Mittal
Member

Appearances: Shri Amit Sibal, Senior Advocate alongwith Shri Manas Kumar Chaudhuri and Gaurav Bansal, Advocates, Shri S. S. Khandelwal (Company Secretary) and Shri Atul Kharkwal (Dy. GM) for Shree Cement Limited.

Shri Krishnan Venugopal, Senior Advocate alongwith Shri Pramod B. Agarwala, Advocate, Shri S. K. Dalmia (Secretary) and Harish Panchal (Sr. Dy. Secretary) for Cement Manufacturers' Association.

Shri A. N. Haksar, Senior Advocate alongwith Shri P. K. Bhalla, Advocate and Shri Anoop Kr. Shukla, V P for J. K. Cement Ltd..

Mrs. Meenakshi Arora, Senior Advocate alongwith Shri Siddhesh Kotwal and Shri Raghunatha Sethupathy, Advocates for Binani Cement Limited.



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Shri Rajshekhar Rao, Ms. Nisha Kaur Uberoi, Shri Bharat Budholia, Ms. Arunima Chandra, Shri Kaustav Kundu, Ms. Gauri and Shri Smit Andrews, Advocates alongwith Shri Ujjwal Batria (CEO), Shri Ajai Jain (General Counsel) and Shri Ajay Singh (Company Secretary) for Lafarge India Private Limited.

Shri Amit Sibal, Senior Advocate alongwith Shri G. R. Bhatia, Ms. Tripti Malhotra and Ms. Kanika Chaudhary Nayar, Advocates for Jaiprakash Associates Ltd.

Shri Sameer Parekh, Shri Abhinay Sharma and Ms. S. Lakshmi Iyer, Advocates for UltraTech Cement Limited.

Shri C S Vaidyanatha, Senior Advocate alongwith Shri Aditya Verma, Ms. Arti Goyal and Shri K Harishankar, Advocates for The India Cements Ltd.

Shri Ramji Srinivasan, Senior Advocate alongwith Ms. Nisha Kaur Uberoi, Ms. Anisha Chand and Ms. Aishwarya Gopalakrishnan, Advocates and Shri Kanaiya Thakker (General Counsel) for Ambuja Cement Limited.

Shri Ramji Srinivasan, Senior Advocate with Mrs. Pallavi S. Shroff, Shri Harman Singh Sandhu, Shri Prateek Bhattacharya and Ms. Nitika Dwivedi, Advocates alongwith Shri Raju Mehra (Head-Legal) for ACC Limited.

Shri Pramod B. Agarwala and Shri Prashant Mehra, Advocates alongwith Shri P. K. Dave (Chief Executive) and



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Shri R. S. Doshi (Sr. Ex. President) for Century Textiles and Industries Limited.

Shri T. Srinivasa Murthy, Shri Rahul Balaji and Ms. Shruti Iyer, Advocates for The Ramco Cements Limited.

Order under Section 27 of the Competition Act, 2002

1. This case was received on transfer from the office of the Director General (Investigation and Registration) [DG (IR)], Monopolies and Restrictive Trade Practices Commission ('the MRTPC') under Section 66(6) of the Competition Act, 2002 ('the Act'). The MRTPC had taken *suo moto* cognizance and initiated investigations on the basis of the press reports published in the Economic Times on 09.05.2006 and 29.06.2006 regarding the increase in the cement prices. Subsequently, a complaint dated 16.09.2006 filed by Builders' Association of India ('BAI') was also received by the MRTPC through the then Ministry of Company Affairs on 26.09.2006.
2. Briefly stated, 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 an upward movement in December, 2005 and were hovering around Rs.210 to Rs.230 per bag from January, 2006 onwards without there being any corresponding increase in the 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 have resorted to unfair trade practices by under-production or choking up of supply in the market, thereby raising the sale prices.
3. As per the complaint, the installed capacity of cement during 2005-06 was 179.25 million tones spread over 129 cement plants owned by 54 cement



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companies. Consolidation process in the industry initiated since last 4-5 years has given 26.38% of market share in the hands of multinational cement companies and 17% share in the hands of Kumar Birla Group aggregating to 43.73% of the total capacity enabling them to control the supply and price movement of cement.

4. It was narrated that alarmed by such unwarranted price rise, BAI made a representation to the Secretary, Industrial Policy and Promotion (IPP), Ministry of Commerce and Industry and the latter arranged for a joint meeting with the Cement Manufacturers' Association (CMA) on 02.05.2006. CMA in its presentation to the Ministry bearing no.177 (Price)/2006 dated 03.04.2006 stated that the price of cement including profit is Rs.147.80 per bag. The Secretary (IPP) having been convinced directed members of the CMA to bring down the price from Rs.230/- per bag to a realistic level by 12.05.2006. However, the cement industry did not give a positive response. The Minister of Commerce and Industry, therefore, warned that the Government may impose a ban on cement export, and called a meeting of the cement manufacturers on 15.05.2006. Thereat, the manufacturers offered a 5% discount on government purchase. As per the complaint, this offer was deceptive and meaningless as the Government does not purchase cement for supplying to construction entities.
5. It was also mentioned in the complaint that in the absence of any deterrent action by the Ministry, the cement companies were emboldened to charge higher rates. As per the averment, this fact was apparent from the abnormally high operating profit earned by the four cement majors in 4th quarter of fiscal 2005-2006 and the first quarter of 2006-2007 compared to third quarter of 2005-2006. Increased profit is a result of the high price charged by the cement companies.



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6. As per the complainant, the cement industry from the year 1990 onwards is resorting to unfair trade practices either by under-production route or choking-up of supplies route in a given market for a short period, thereby raising the sale prices.
7. Consequent upon the receipt of the complaint, the erstwhile MRTPC Commission ordered an investigation into the matter. Accordingly, the erstwhile 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. Builders' Association of India was also asked to substantiate its allegations with regard to the increase in prices. The replies of 41 cement manufacturers were received where the allegation of formation of cartel were denied. From the record, it appears that the erstwhile DG (I&R) had not reached any conclusion and had only prepared a draft Preliminary Investigation Report (PIR). At that stage, the matter stood transferred to the Commission. Accordingly, the Commission considered the matter in its ordinary meeting and passed an order dated 24.06.2010 under Section 26(1) of the Act directing the Office of Director General (DG) to conduct an investigation into the matter. Accordingly, the DG conducted the investigation into the matter and submitted his investigation report dated 31.05.2011 to the Commission.
8. Separately, another information was filed by the BAI *i.e.* Case No. 29 of 2010 under Section 19(1)(a) of the Act against 11 cement companies and CMA with similar allegations whereupon the Commission passed an order dated 20.06.2012 under Section 27 of the Act holding that the cement companies named therein alongwith CMA were parties to a cartel in contravention of the provisions of Section 3 of the Act.
9. So far as the present case is concerned, the Commission *vide* its final order dated 30.07.2012 passed under Section 27 of the Act found the above



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named Opposite Parties in contravention of the provisions of Section 3(3) (a) and 3(3)(b) read with Section 3(1) thereof.

10. The Commission *vide* its aforesaid final order dated 30.07.2012 passed under Section 27 of the Act *inter alia* imposed a penalty of Rs. 397.15 crore upon Shree Cement Limited. As all the parties in the present case (except Shree Cement Limited) were also parties in Case No. 29 of 2010 where they were found to be in cartel and were penalised, the Commission did not deem it fit to order remedies including imposition of penalty on such companies again for the same period of contravention in this case.
11. The aforesaid order of the Commission was challenged by Shree Cement Limited by filing an appeal before the Hon'ble Competition Appellate Tribunal which came to be allowed by an order dated 11.12.2015 upon similar terms as in the order of even date of the Hon'ble Competition Appellate Tribunal in the appeals arising out of the order of the Commission dated 20.06.2012 in Case No. 29 of 2010. The relevant portion of the order of Hon'ble Appellate Tribunal is quoted below:

“10. Since the impugned order is mainly founded on the findings recorded in Case No. 29 of 2010 and the order passed in that case under Section 27 of the Act has been set-aside on the ground of violation of principle that ‘only one who hears can decide’, the order under challenge is also set aside in similar terms.

11. The detailed reasons recorded in the order passed today in Appeal No.105 of 2012 and connected matters and the directions contained therein shall be read as part of this order.”

12. Pursuant to the aforesaid directions of the Hon'ble Competition Appellate Tribunal, the matter was heard at length during 19-22.01.2016 when the



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counsel appearing for the parties made elaborate submissions and the order was reserved.

13. Before proceeding any further in the matter, it may be pointed out that the order passed by the Commission in Case No. 29 of 2010 dated 20.06.2012 was also put in appeal before the Hon'ble Competition Appellate Tribunal and which was set aside by order dated 11.12.2015, was also heard by the Commission again and a separate order has been passed therein. *Vide* that order, the Commission has held the cement companies named therein alongwith CMA as parties to a cartel in contravention of the provisions of Section 3 of the Act. By this order, the Commission is disposing of the present matter *i.e.* RTPE No. 52 of 2006 consequent upon the remand order dated 11.12.2015 passed by the Hon'ble Competition Appellate Tribunal in this matter, as noted *supra*.

Directions to the DG

14. Earlier, the Commission after considering the entire material available on record *vide* its order dated 24.06.2010 passed under Section 26(1) of the Act had directed the Director General (DG) to cause an investigation to be made into the matter. The DG, after receiving the directions from the Commission, had investigated the matter and submitted the investigation report on 31.05.2011.

Investigation by the DG

15. After receiving the order under Section 26(1) of the Act, DG investigated the matter and submitted his report on 31.05.2011.
16. While explaining the methodology adopted for investigation, it has been noted by the DG that since Case No. 29 of 2010 also contained similar



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allegations, the investigation is being conducted in both the cases simultaneously to avoid repetition and wastage of resources.

17. Further, it has been mentioned that during the investigation process, through a detailed questionnaire was sent to 42 cement manufacturing companies as well as CMA to seek requisite information, yet the investigation was focused upon the top companies only as the top cement companies were controlling the cement market in all the regions and the small players only followed the trend. From the report of the DG, it is noted that the DG found CMA and the above noted 11 cement companies to be in contravention of the provisions of Section 3 of the Act.

18. In brief, the findings of the DG are noted in the following paras.

- (i) The investigation carried out revealed that the major cement manufacturers are controlling the cement market in India.
- (ii) The top 5 companies are having a market share of more than 50 %. Further, the cement industry is geographically scattered, as the production is concentrated to various clusters of limestone mines in Andhra Pradesh, Rajasthan, Madhya Pradesh, Gujarat, *etc.* The cement being a low value high volume product makes transportation as one of the important factors of cost.
- (iii) Cement is a homogeneous product having low cross elasticity of demand as there is no substitute of cement for the consumers.
- (iv) Investigation also revealed that the market shares of top companies were even higher than the all India shares in a particular region. The region-wise analysis of market share



showed that the top three or four companies control a market share of more than 50%.

(v) During the course of investigation, analysis was done on the basis of market structure, behavioural methodology and by collecting evidences from various stakeholders and third parties. References from various studies and international cases were also made during the course of investigation.

(vi) Investigation hence, revealed that the top cement manufacturers and CMA are violating the provisions of Section 3(1), 3(3)(a) and 3(3)(b) of the Act. The circumstantial evidences as well as the oral evidences gathered during the course of inquiry established that the cement manufacturers were indulging in collusive price fixing. The circumstantial evidences clearly indicated the meeting of mind and coordinated activities.

(vii) Price parallelism was also proved on the basis of analysis of the price data of all the companies. The economic analysis of the price data established that the prices of all the companies were moving in the same direction in all the States. The analysis showed that the coefficient of correlation of price changes in terms of absolute price data as well as price change data was very high and close to 1 which established strong correlation amongst the companies.

(viii) The analysis of cost to sales ratio of all the top cement companies showed that the companies were earning super normal profit by eliminating the competition. The data relating to cost of sales and sales realisation clearly proved that all the companies were earning very good profits since last 4-5 years. The concerted action of the Opposite Parties and top cement



manufacturers with a motive of profiteering and charging unreasonable prices had adversely affected the consumers and various sections of business in India.

- (ix) The investigation further revealed that the top cement manufacturers were controlling the supply of cement in the market by way of some tacit agreement. The analysis of production data showed that the companies had regulated the capacity utilisation in the last 3 years by restricting the output to extract maximum profit and maintain higher prices of cement.
- (x) The investigation had also revealed that the decision of reduction or increase in the production of cement was taken by all the companies in a coordinated manner as there was a positive correlation in production and dispatch pattern of cement of all the top companies.
- (xi) The examination of third parties had established that by entering into the agreement, the Opposite Parties were adversely affecting the competition in the market resulting in losses to the consumers.
- (xii) During the course of investigation, the conduct and activities of CMA was also found to be in violation of the provisions of the Act. CMA was providing a platform for coordination amongst the cement manufacturers by way of various meetings including High Power Committee (HPC) meetings. It was found that the companies who had withdrawn from the membership of CMA *i.e.* ACC and ACL Ltd., were also attending such meetings which were conducted in the guise of some academic/ technical discussions. The collection and dissemination of prices of cement from 34 centres on weekly



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basis by way of phone calls and e-mails through nominated cement companies allowed the opportunity of exchanging the prices of cement by the cement manufacturers. The companies collecting data on a continuous basis from all the important centres, in fact, facilitated the exchange of current prices while gathering the information of market prices. Further, the monthly publications of CMA relating to plant-wise, region-wise, as well as company-wise data of cement production, dispatch and movement also facilitated the exchange of vital information relating to the competing cement manufacturers. The activities of CMA had thus, also been found to be anti-competitive, as its various conducts and activities led to lessening the competition in the cement industry.

- (xiii) In view of the investigation conducted by the DG, as discussed in detail in the investigation report, the allegations leveled against the Opposite Parties *i.e.* the top cement manufacturers, had been found to be substantiated and hence the conduct of Opposite Parties was noted by the DG to be anti-competitive and in violation to Section 3(1), 3(3)(a) and 3(3)(b) of the Act.

Consideration of the DG Report by the Commission

19. The Commission considered the investigation report submitted by the DG in its ordinary meeting held on 08.06.2011 and *vide* its order of even date decided to forward copies thereof to the parties for filing their respective replies/ objections thereto, if any.

Replies/ Objections/ Submissions of the Parties

20. On being notified, the parties filed their respective objections/ suggestions to the report of the DG besides making oral submissions. It may be



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observed that all the cement companies arrayed in Case No. 29 of 2010 are also parties in the present case. Besides, Shree Cement Limited is also a party in the present case. Consequent upon the remand orders passed by the Hon'ble Appellate Tribunal, both the matters were heard together during 19-22.01.2016 when parties made common submissions. It is further observed that most of the parties have filed common/ similar replies to the DG Reports in both the cases since the same were similar. These replies have already been captured in detail in the order passed in Case No. 29 of 2010. The only additional plea which was taken in these proceedings by some of the parties related to the jurisdictional issue pertaining to applicability of the Competition Act to the enquiries which were transferred to the Commission from the MRTP Commission. This aspect shall be separately dealt with in this order. As such, it is not necessary to reproduce again the replies of the parties in this order. Hence, only the reply of Shree Cement Limited is being noted in this order.

Objections/ suggestions of Shree Cement Limited

21. Shree Cement Limited ('Shree Cement'), at the outset, has challenged the jurisdiction of the Commission, in so far as Shree Cement has been found to have contravened the provisions of Section 3 of the Act.
22. It is stated that the case against Shree Cement was initiated pursuant a letter dated 16.09.2006 of BAI, which was forwarded by the then Ministry of Company Affairs on 29.06.2006 to the erstwhile Monopolies and Restrictive Trade Practices Commission ("MRTP Commission"). The MRTP Commission took *suo moto* cognizance and initiated investigation and directed the matter to the Director General (Investigation & Registration) [DG (IR)] for investigation. However, before the DG(IR) could complete the investigation, the Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act") was repealed by Section 66 of the Act and RTPE No. 52 of 2006 was transferred to the Commission. The



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Commission considered the matter in its meeting held on 24.06.2010 and passed an order under Section 26(1) whereby the DG was directed to conduct an investigation into the matter.

23. Shree Cement has stated that upon the notification of Section 66 of the Act, the inconclusive investigation under RTPE No. 52 of 2006 under the MRTP Act stood transferred to the Commission in terms of the provisions contained in Section 66(6) of the Act. It has been alleged that the method of combining an inquiry instituted under the MRTP Act with another enquiry instituted under the Act, violates the provisions of Section 66 of the Act. It has been stated that pursuant to the provisions of Section 66(6) of the Act, the Commission could not have clubbed the investigation (in RTPE No. 52 of 2006) with the investigation of the DG in Case No. 29 of 2010 and, in any case, the findings recorded in the latter case could not have been relied upon for holding Shree Cement guilty of violating Section 3 of the Act and any order, if any, could only have been passed against Shree Cement under Section 37 of the MRTP Act. It is stated under Section 66(1)(A)(d) of the Act, read with the General Clauses Act, 1897, the Commission is vested with the power to decide whether transferred investigation/proceedings that were pending under the MRTP Act should continue or no further investigation is required. If the Commission were to decide to continue the pending investigation, then such investigation could only be conducted, completed and adjudicated upon as per the provisions of the MRTP Act alone and not as per the provisions of the Act.
24. It has further been alleged by Shree Cement that the letter of BAI showed 11 cement companies with about 65% market share and the remaining 43 cement companies were shown to have only 35% market shares. As Shree Cement did not feature in the top 11 cement companies, it has been alleged that the investigation against it cannot be clubbed with investigation against these 11 cement manufacturers, as it would fall only within the ambit of the "other" 43 companies.



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25. It has been further stated that the Commission's order under Section 26(1) of the Act dated 24.06.2010 (in RTPE No. 52 of 2006) was passed after applying its mind to the available materials on record which were only up to 30.09.2007 and the order under Section 26(1) of the Act dated 15.09.2010 (in Case No. 29 of 2010) filed by the BAI against 11 cement companies (not including Shree Cement) and CMA under Section 3 of the Act cannot retrospectively apply to it. Based on the same, Shree Cement has alleged that no material relating to Case No. 29 of 2010 could have been considered by the Commission when it passed the Section 26(1) order to complete the pending investigation under the MRTP Act.
26. Shree Cement has stated that Chapters 1 and 2 of the DG Report pertaining to RTPE 52 of 2006 indicate that the DG prepared a 'gist of allegations' pertaining only to the complaint of BAI dated 16.09.2006 and therefore, it is evident that the DG understood and acknowledged that the material/information before Commission related only to the period of 2005-2007. However, the DG Report subsequently adopts the same methodology in another investigation in Case No. 29 of 2010. It has been submitted that the very premise of the methodology adopted by the DG is grossly erroneous as all the Opposite Parties of RTPE 52 of 2006 are not the same as those of Case No. 29 of 2010 and Shree Cement is not a party to Case No.29 of 2010. Further, it is stated that the DG has found Shree Cement to be in contravention of the provisions of Section 3 of the Act which is alleged to be beyond the scope of the Commission's Section 26(1) order dated 24.06.2010. Also, the DG on its own motion, has investigated Shree Cement for the period after 20.05.2009 on the alleged contravention of Section 3 of the Competition Act in the absence of any direction in this behalf by the Commission, which is without jurisdiction. It is stated that unlike the DG(IR) under the MRTP Act, the DG-CCI does not have the power to initiate a *suo moto* inquiry, and accordingly, the DG could have only investigated Shree Cement in terms of the order dated 24.06.2010 in



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RTPE No. 52 of 2006. Shree Cement has additionally stated that the DG has failed to investigate the transferred case under Section 11 of MRTP Act in terms of the allegations made under Section 37 read with Sections 33(d) and (g) of the MRTP Act.

27. Further, it was stated that in the event the Commission was to consider the order dated 24.06.2010 in RTPE No. 52 of 2006 as an order under directing investigation under Section 3 of the Act, the same would fail to satisfy the following fundamental requirements of an order under Section 26(1) of the Act set out by the Supreme Court in *Competition Commission of India v. Steel Authority of India* (2010) 10 SCC 744: (i) there is no information furnished to the Commission that Shree Cement has contravened the provisions of the Act in the period after 20.05.2009; (ii) a *prima facie* opinion must bear reference to the information alleging the contravention and, in this case, there is no such material; and (iii) a *prima facie* opinion must record minimum reasons substantiating the formation of such opinion.
28. In addition and without prejudice to the arguments above on lack of jurisdiction, Shree Cement has also made the following submissions on the merits of the DG's finding of a contravention of Section 3(3) of the Act. It was submitted that the DG investigated only 11 cement companies out of 42 cement companies arrayed in RTPE No. 52 of 2006. It is stated that the DG has analysed the important national players and several other regional players in the DG Report, though investigation is only against the top 11 cement companies. It is stated that the DG has considered Shree Cement as only a regional player and yet investigated it though he has arbitrarily left out other strong regional players. It is submitted that such arbitrary selection leaving out other competitors without justification is contrary to the objective of the competition law, as delineated in the duties of the Commission under Section 18 and objectives of the Act enshrined in the Preamble. Shree Cement has further stated that it is a small player in comparison to the other Opposite Parties as the market share of Shree



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Cement was only 2.48% in 2006 with 2.6 MMT capacity which increased hardly to 4.46% in 2011 and the capacity rose to 13.5 MMT. It is further stated that Shree Cement has witnessed high growth rate and extraordinary increase in market share, which demonstrates that it has no involvement in any alleged cartel behaviour (as high growth and vastly improved market share is contrary to the stable market share and coordination necessary for imputing cartel behaviour).

29. Shree Cement has also stated that the DG has grossly understated the capacity utilisation by Shree Cement. The DG considers full capacity of the Jobner plant of Shree Cement which commenced its operation in the 11th month of FY 2010-11 *i.e.* February 2011. By erroneously taking into consideration the entire capacity of the Jobner Plant for the FY 2010-11, the DG has grossly overestimated the available capacity and underestimated the utilisation. Shree Cement has submitted that the DG ought to have considered the pro-rated capacities (based on the number of months in that FY after the plant became operational), in addition to effective capacity utilisation, which would have shown that Shree Cement's capacity utilisation was 82.5%. It is further submitted that Shree Cement sells a portion of its clinker to third parties and does not use it for the purposes of producing cement. The DG ought to have considered this factor as well in assessing capacity utilisation but he has failed to do so while calculating capacity utilisation by Shree Cement.
30. Shree Cement has also challenged the DG's finding that the cement market is an oligopoly where the firms reach at a consensus on the price to charge above competitive levels by coordinating their behaviour. Shree Cement has stated that an oligopoly involves high concentration in the market dominated by 3-4 large players, whereas in the cement industry, there are more than 20 major players as per the DG Report itself and the presence of a large number *i.e.* 25, players rebuts the DG's findings. Shree Cement has also added that even if it is presumed that there is a cement oligopoly in



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India, there is no material to suggest that Shree Cement is a part of the same. Shree Cement is also not in the category of the three top companies with pan-India presence controlling approx. 40% of the market. In any event, it is stated that mere oligopoly is not equivalent to cartel as in an oligopolistic market, producers recognize their interdependence and simply mimic their rival and there is no material or cogent evidence to conclude that the Opposite Parties are not acting independently.

31. Shree Cement has argued that the DG has not followed a uniform methodology for assessing price parallelism and that the DG has compared price figures based on different parameters. For example, UltraTech Cement Ltd. submitted billing rates/month, Ambuja Cements Ltd. submitted monthly averages while Jaiprakash Associates Ltd. and Shree Cement submitted prices for 1st of every month. Further, it is alleged that the DG has relied on correlation analysis based on absolute change as well as percentage change in prices and percentage correlation analysis is a more suitable approach in order to determine price parallelism as compared to absolute change in prices. It is also alleged that Shree Cement's price correlation with other cement manufacturers in Shree Cement's prominent trading States of Punjab, Chandigarh and Rajasthan shows that correlation coefficient is predominantly lower than 0.5. It was further pointed out that for correlation analysis in Rajasthan, the prices of birla cement of Birla Corp. Ltd. appears to have been considered even though Birla Corp. Ltd. has been left out of the investigation by the DG. It is alleged that this has been done only to show an incorrect picture of high-correlation (apart from showing arbitrary selection of Opposite Parties by the DG).
32. In relation to the DG's assessment of dispatch parallelism, it is stated that dispatch parallelism cannot be used as an indicator of parallel behaviour as different dispatch patterns across various parts of India are due to seasonal/ political reasons and festivals which affect dispatches in different parts of India. In relation to the finding of high profit margins of the Opposite



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Parties, Shree Cement has submitted that it has captive power plants, from which surplus power (after meeting captive requirements) is sold – these have been included by the DG in calculating the profit margins of Shree Cement. Pure profit margins from cement business are submitted to be much lower. Finally, on the issue of prices of top companies before and after the meetings of HPC of the CMA, Shree Cement has stated that this list does not provide any data relating to Shree Cement and therefore any liability imputed to Shree Cement ought to be disregarded.

Analysis

33. Before examining the case on merits, it would be appropriate if the developments in this case are summarised in chronological order for better appreciation of the issues presented in these proceedings.
34. The instant matter was taken up *suo moto* by the MRTPC based upon press reports and the letter of BAI which was forwarded to it by the then Ministry of Company Affairs. Subsequently, the matter stood transferred to the Commission in terms of the provisions contained in Section 66 of the Competition Act, 2002. The Commission, after considering the matter in its meeting held on 24.06.2010, passed an order under Section 26(1) of the Act directing the DG to conduct an investigation into the matter.
35. The Commission *vide* its final order dated 30.07.2012 passed under Section 27 of the Competition Act, 2002 *inter alia* imposed a penalty of Rs. 397.15 crore upon Shree Cement. As all the parties in the present case (except Shree Cement Limited) were also parties in Case No. 29 of 2010 where they were found to be in cartel and were also penalised therein, the Commission did not deem it fit to order remedies including imposition of penalty on such companies again for the same period of contravention in this case.



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36. The aforesaid order of the Commission was challenged by Shree Cement Limited by filing an appeal before the Hon'ble Competition Appellate Tribunal which came to be allowed by an order dated 11.12.2015 upon similar terms as were there in the order of even date of the Hon'ble Competition Appellate Tribunal in the appeals arising out of the order of the Commission in Case No. 29 of 2010. The relevant portion of the order of Hon'ble Competition Appellate Tribunal is quoted below:

“10. Since the impugned order is mainly founded on the findings recorded in Case No. 29 of 2010 and the order passed in that case under Section 27 of the Act has been set-aside on the ground of violation of principle that ‘only one who hears can decide’, the order under challenge is also set aside in similar terms.

11. The detailed reasons recorded in the order passed today in Appeal No.105 of 2012 and connected matters and the directions contained therein shall be read as part of this order.”

37. For ready reference, the directions issued by the Hon'ble Competition Appellate Tribunal in Appeal No.105 of 2012 and connected matters while remanding the matter (Case No. 29 of 2010) back to the Commission, are noted below:

“99. The Commission shall hear the advocates/ representatives of the appellants and BAI and pass fresh order in accordance with law. We hope and trust that the Commission shall pass fresh order as early as possible but within a period of three months from the date, which may be notified after receipt of this order.

100. The parties shall be free to advance all legally permissible arguments. They may rely upon the documents, which formed part of the record of the Jt. DG



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or which may have been filed by them before the commencement of hearing on 21.02.2012. The parties shall also be free to press the applications already filed before the Commission. However, no application, which may be filed hereinafter for cross-examination of the persons, whose statements were recorded by the Jt. DG or for any other purpose shall be entertained by the Commission.”

38. In the aforesaid backdrop, the present matter may now be examined.
39. To begin with, some of the parties raised the pleas seeking cross-examination and challenging the jurisdiction of the Commission in light of the observations made by the Hon’ble Competition Appellate Tribunal, as noted *supra*.
40. In this connection, the Commission notes that CMA had raised the plea seeking cross-examination in its reply to the DG Report. This plea was pressed by the CMA during the course of arguments in the present proceedings. It was pleaded that the DG had examined various non-members of CMA besides consumers/ builders/ cement dealers/ highway contractors as witnesses during the course of investigation. It was alleged that no opportunity of cross-examination was afforded to CMA and, as such, it was submitted that the DG had contravened the principles of natural justice rendering the report and the findings arrived by it as untenable and bad in law. Similarly, Ramco Cement Ltd. moved an application dated 13.01.2016 seeking to press the applications dated 14.02.2012 raising preliminary issues. In these applications, it was alleged that the DG has purported to refer, rely and hold the Opposite Parties under the provisions of the Act guilty even for actions prior to May, 2009 in complete ignorance of the fact that Section 3 of the Act itself was brought into force *w.e.f.* 20.05.2009. Hence, it was submitted that the investigation undertaken by



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the DG and the report prepared on the basis of such investigation are without any authority of law and devoid of jurisdiction. It was pleaded that operation of the provisions of a statute is necessarily prospective in nature unless the authority to apply the provisions retrospectively is traceable to the provisions of the statute either expressly or by way of necessary implication. Further, it was argued that the DG Report, in rendering a finding of violation of Section 3 of the Act on the basis of actions and reliable information and data prior to the date of coming into force of the said provision, is contrary to and in ignorance of the express terms of the provisions of Section 66 of the Act. It was also argued that several findings in the DG report are based solely upon the report of the Tariff Commission on the Performance of Cement Industry and the Report of the Department Related Parliamentary Standing Committee on Commerce on the 'Performance of the Cement Industry'. It was alleged that Ramco Cement Ltd. was not provided with copies of these reports. The failure to provide the same was stated to be grossly unfair and in violation of fairness and due process. It was also argued that the DG Report itself states that the cement industry is region specific and as such, there cannot be a national market.

41. The India Cements Limited also raised some preliminary and jurisdictional issues which were taken in its earlier application dated 13.02.2012 including issues relating to retrospective application of the Act, violation of principles of natural justice *etc.*
42. UltraTech Cement Limited moved an application dated 07.01.2016 bringing out the specific para from its reply dated 14.02.2012 to the DG Report before the Commission whereby liberty was specifically sought to cross-examine the witnesses. It was averred therein that the DG had relied upon oral testimonies of some of the consumers of cement and as such liberty was sought to cross-examine those witnesses. Further, it was pointed out that the DG has extracted the statement of one of the cement dealer and also made reference to various statements made by small cement



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- manufactures who were not the members of CMA, highway contractors *etc.* As such, it was prayed that UltraTech Cement Ltd. be permitted to cross-examine the witnesses.
43. Century Textiles and Industries Limited in its reply dated 12.01.2012 stated that the DG examined various witnesses referred to in the Investigation Report to come to the alleged findings of violation of the Act by the answering Opposite Party and others. It was stated that the answering Opposite Party would like to cross-examine the said witnesses to bring out the correct facts.
44. Before advertng to the merits of the case, it would be apposite that the preliminary issues raised by the Opposite Parties including the jurisdictional pleas and applications/ pleas relating to cross-examination are taken up first.
45. So far as the pleas/ applications seeking cross-examination are concerned, it would be appropriate to note the statutory scheme on the issue of cross-examination as envisaged under the framework of the Act and the Competition Commission of India (General) Regulations, 2009 (hereinafter, 'the General Regulations') framed thereunder.
46. In this regard, reference may be made to the provisions contained in Regulation 41 of the General Regulations which deals with the procedure for taking evidence including cross-examination of the persons giving evidence. The same is quoted below:

"Taking of Evidence

Regulation 41(1)...

(2)...



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(3)...

(4) The Commission or the Director General, as the case may be, may call for the parties to lead evidence by way of affidavit or lead oral evidence in the matter.

(5) if the Commission or the Director General, as the case may be, directs evidence by a party to be led by way of oral submission, the Commission or the Director General, as the case may be, if considered necessary or expedient, grant an opportunity to the other party or parties as the case may be, to cross-examine the person giving the evidence.

(6)...

(7)..."

47. It is, thus, evident that the Commission or the DG has the discretion to take evidence either by way of Affidavit or by directing the parties to lead oral evidence in the matter. However, if the Commission or the DG, as the case may be, directs evidence by a party to be led by way of oral submissions, the Commission or the DG, as the case may be, if considers necessary or expedient, may grant an opportunity to the other party or parties, as the case may be, to cross-examine the person giving the evidence. Thus, it is only when the evidence is directed to be led by way of oral submissions that the Commission or the DG may grant an opportunity to the other party or parties to cross-examine the person giving the evidence, if considered necessary or expedient. Hence, even when the evidence is led by oral submissions, the Commission or the DG retains the discretion to consider the request for grant of opportunity to the other party or parties to cross-examine the person giving the evidence if the same is considered necessary or expedient. Thus, the only issue which needs to be examined is when it would be necessary and expedient to grant an opportunity to the other party



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or parties to cross-examine the person giving evidence by way of oral submissions. Whether an opportunity of cross-examination is to be given or not depends upon the circumstances of each case. In this regard, the Commission notes that the words '*if considered necessary or expedient*' are of great import. Whenever the DG, or for that matter the Commission, finds that some incriminating evidence (statement) has come up during investigation before the DG or during inquiry before the Commission against any party, the same has to be put up to the party against whom that evidence has come, and if such party refutes the evidence and gives some explanation, the DG or the Commission (as the case may be) is under an obligation to examine the explanation and accordingly decide whether the witness concerned may be called for cross-examination or not. In the connection, it may be observed that when the information supplied by a party is based on personal knowledge, the other party may be granted the right to cross-examine the party giving evidence. However, when the information provided by a party is documentary or based on documents, the same can be rebutted by filing Affidavits and cross-examination of such party is not required in all cases.

48. Viewed in the aforesaid backdrop, none of the Opposite Parties has been able to justify the prayer seeking cross-examination. The Opposite Parties have made requests in a general way without in any manner specifying the portions of the testimonies/ depositions of the witnesses which they dispute and require cross-examination to controvert the same and which could not be otherwise responded to through replies/ Affidavits. The thrust of the conclusions drawn by the DG is essentially based upon economic analysis and therefore, no prejudice would be caused to the parties if parties are allowed to respond to the DG Report by filing their respective replies/ Affidavits. Further, the parties were granted full opportunity by way of oral submissions before the Commission and as such, the issue of violation of principles of natural justice cannot sustain.



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49. Next, the jurisdictional challenge laid by the parties to the maintainability of the present proceedings on the issue of applicability of the Competition Act, 2002 may also be now examined. It was contended that as the allegations in the present matter pertained to the year(s) 2005/ 2006, the case ought to have been examined under the MRTP Act and the Competition Act, 2002 cannot be applied retrospectively. It was 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 the MRTP Act are preserved and protected by virtue of Section 66(1A) of the Competition Act, 2002. Further, it was also argued that the DG, unlike its predecessor DG (IR), does not have power to *suo moto* investigate any breach of the provisions of the Competition Act but he can only assist the Commission in terms of the provisions contained in Section 41(1) of the Act. Any investigation arising out of the operation of Section 66(6) of the Act does not confer any statutory power upon the Commission to form *prima facie* view under Section 26(1) of the Act without routing the same through Section 19(1) thereof. It was argued that the Commission formed the *prima facie* view in the present case without establishing a causal link with Section 19(1) of the Act and as such, the order forming *prima facie* view is bad in law. It was argued that the Commission could have considered the inconclusive investigation as a piece of information and instituted inquiry under Section 19(1) of the Act under its *suo moto* powers and proceeded to form the *prima facie* view in terms of the provisions contained in Section 26(1) of the Act. However, the same has not been done.
50. The Commission has carefully examined the jurisdictional plea raised by Shree Cement and some other parties.
51. Before examining the merits of the plea, it may be observed that the Hon'ble High Court of Delhi in *Interglobe Aviation Ltd. v. Competition Commission of India*, WP(C) 6805/2010 decided on 06.10.2010 held that



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where investigation by DG (IR) – MRTPC remained incomplete and the matter did not crystallise into a “case” before the MRTPC, it was not incumbent on the DG (IR) – MRTPC to transfer the case to the Competition Appellate Tribunal. This view was also reiterated by the Hon’ble High Court of Delhi in *Gujarat Guardian Ltd. v. Competition Commission of India*, W. P (C) 7766 of 2010 decided on 23.11.2010. In this case, the Petitioner argued that as the matter was pending before DG (IR) – MRTPC, the case ought to have been transferred to the Competition Appellate Tribunal and not to the Commission. It was further contended that the Commission had no power to pass an order under Section 26(1) of the Act in such matters and that the Commission had to proceed only under the provisions of the MRTP Act. While repelling the arguments, the Hon’ble High Court of Delhi held as under:

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.

52. Further, the aforesaid view also found approval by the Hon’ble Competition Appellate Tribunal in the appeal preferred by Shree Cement against the order passed by the Commission on 30.07.2012 in this very case itself while dealing with the interim application seeking absolute stay upon the penalty. The Hon’ble Competition Appellate Tribunal, while repelling similar contentions urged before it *vide* its order dated 29.04.2014 passed in Interim Application No. 258 of 2012 in Appeal No. 121 of 2012, observed as under:



“The learned counsel canvassed before us that it was an old case of MRTP Commission, which came to be transferred under section 66(6) of the Competition Act before the CCI. He, therefore, urged that the inquiry before the CCI pertained not to the period after 20.05.2009, when section 3 and 4 came on the anvil, but to the period prior to it and as such the inquiry suffered jurisdictional error. However, during the debate, the learned counsel contended that it could not be said that the CCI did not have the jurisdiction, particularly in view of the clear language of section 66(6). Therefore, there would be no jurisdictional question to be decided. The learned counsel, however, contended that the CCI on the basis of that inquiry could not have found the Appellant guilty of the breach of section 3 because the earlier inquiry pertained to the period prior to 20.05.2009, when sections 3 and 4 came on the anvil. The contention is clearly incorrect, for the simple reason, that in its meeting on 24.06.2010, the CCI had directed the DG to do a thorough inquiry into the matter, which was not restricted only to the period prior to 20.05.2009. The concerned period, in fact was extended right upto 2011. It has been clarified by the CCI in its impugned order that the concerned period of breach was not prior to 20.05.2009, but it pertained to that date upto the year 2010-2011. It can also be seen that under section 26(1), the CCI considered the question of the inquiry and directed a total inquiry. When we see the order dated 24.06.2010, it is clear from the order that the CCI had ordered a thorough inquiry and complete investigation and the investigation was not to be restricted to the pre May 2009 period. It must be seen here that the CCI has suo-moto powers to order an investigation and indeed, one of its duty is to see that



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competition law is not breached, which is clear from the language of section 18 of the Competition Act. Under the circumstances, it has to be held that the inquiry ordered by the CCI was not pertaining to the pre Act period, but it pertained to the period when the Act and more particularly sections 3 and 4 were invoked. In that view, we do not find any jurisdictional error by the CCI in ordering the inquiry.”

53. A challenge to the aforesaid order of the Hon’ble Competition Appellate Tribunal by Shree Cement before the Hon’ble High Court of Delhi by way of writ petition also remained unsuccessful. The Hon’ble High Court of Delhi *vide* its order dated 27.05.2014 dismissed the writ petition filed against the said interlocutory order dated 29.04.2014 passed by the Hon’ble Competition Appellate Tribunal.
54. In the present case, the DG (IR) – MRTP Commission undertook preliminary investigation which was still pending when the MRTP Act, 1969 was repealed. As the investigation had not culminated into a “case”, the matter was transferred to the Commission by the DG (IR) – MRTPC in terms of the provisions contained in Section 66(6) of the Act as the allegations related to restrictive trade practices. It may be pointed out that by virtue of the provisions contained in Section 66(6) of the Competition Act, all investigations or proceedings, other than those relating to unfair trade practices, pending before the DG (IR) on or before the commencement of the Act shall, on such commencement, stand transferred to the Commission, and the Commission may conduct or order for conduct of such investigation or proceedings *in the manner as it deems fit*. Thus, in the event the Commission were to order investigation in such matters, the same could have been done only by taking recourse to Section 26 of the Act by treating the complaint as an information. Furthermore, it is pertinent to contrast the provisions of Section 66 (6) of the Act with Section 66(3)



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thereof which *inter alia* provides that all cases pertaining to monopolistic trade practices or restrictive trade practices pending before the MRTTP Commission shall stand transferred to the Competition Appellate Tribunal and shall be adjudicated by the Competition Appellate Tribunal *in accordance with the provisions of the repealed Act as if that Act had not been repealed.*

55. Moreover, if the alleged anti-competitive conduct which started prior to notification of the provisions of Section 3 of the Competition Act and continues post-notification of such provisions, the Commission has the necessary jurisdiction to look into such conduct. This aspect has also been affirmed by decision of the Hon'ble High Court of Bombay in *Kingfisher Airlines Limited v. Competition Commission of India*, W.P. No. 1785 of 2010. This is also borne out by the *suo moto* power conferred upon the Commission under Section 19(1) of the Competition Act. In the present case, the DG examined the conduct of the parties during the period spanning from 2005 to 2011 for delineating the market construct and conducting competitive analysis of cement industry in a holistic perspective. However, while determining the contravention of the provisions of the Competition Act and the consequent penalty, the Commission has confined the relevant period from 20.05.2009 (*i.e.* the date on which the provisions of Section 3 of the Competition Act were notified) to 31.03.2011 *i.e.* the date till which the DG had examined the conduct of the parties.

56. As such, the Commission finds no merit in the plea challenging the jurisdiction of the Commission.

57. Further, the objection raised by the Opposite Parties on the ground that certain reports relied upon by the DG such as Report of the Tariff Commission on the 'Performance of Cement Industry, Report of the Department Related Parliamentary Standing Committee on the



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‘Performance of Cement Industry’ *etc.* have not been supplied to them, is also misconceived. The Commission notes that the relevant portions of these documents relied upon by the DG form part of the investigation report which was made available to the Opposite Parties. It is not understood as to how the parties have been prejudiced by the non-supply of the entire reports when the relevant portions thereof have already been supplied to them. Moreover, at this point of time, this plea is of no consequence in as much as the entire record including the documents/ information which were granted confidential treatment have been made available to the parties for inspection during the pendency of the appeals before the Hon’ble Competition Appellate Tribunal.

58. Some of the Opposite Parties have raised objections on the ground that their names have not been properly reported. It is made clear that the correct names of the parties have been correctly reflected in the array of parties in the beginning of this order alongwith the details about the change of name wherever applicable. JK Cements has raised a contention that in the information, it has not even been named as an Opposite Party since the information mentions of some ‘JK Group’ only. It has also been stated that the Informant made a grave error by combining its capacity, production and market share with the data of another independent and unrelated company operating under the name and style of ‘JK Lakshmi Cement Ltd.’ and the DG without ascertaining the true facts, simply adopted the data and figures provided by the Informant.
59. In this connection, it may be observed that the DG had issued notices to J K Cements, a part of J K Group and a separate notice to JK Lakshmi Cement Ltd. was not issued. The Informant has also mentioned J K Cement Limited of J K Group as the Opposite Party. The Commission also sought replies from J K Cement only. Thus, while ascertaining the contraventions of the Act, details/ data of J K Cement alone have been considered. As such,



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nothing further turns upon this aspect as no prejudice has been caused to this answering party.

60. In view of the above, nothing turns upon the preliminary issues and objections raised by the Opposite Parties and the same are dismissed. Accordingly, the Commission proceeds to examine the substantive issues arising for determination in the present case.

Point for determination

61. On a careful perusal of the information, the Report of the DG, the replies/objections filed and submissions made by the parties and other materials available on record, the following point arises for consideration and determination in the matter:

Whether the Opposite Parties have contravened the provisions of Section 3 of the Act?

62. Before examining the above point, the Commission deems it appropriate to highlight the conduct of Shree Cement in taking plea to the effect that it was not supplied with the copy of the Investigation Report in Case No. 29 of 2010.
63. The Commission notes that during the course of arguments, no such objection or plea was raised before the Commission. In fact, such plea only finds mention in the post-hearing written synopsis of the arguments dated 25.01.2016.
64. In this regard, it may be observed that the DG submitted two separate, though similar, reports in both the cases *i.e.* the present case (RTPE No. 52 of 2006) and C. No. 29 of 2010 due to the commonalities involved. As the issues involved were common, the investigation in both the cases was



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conducted in parallel by the DG. The Commission notes that though Shree Cement was not arrayed as a party in the information filed in Case No. 29 of 2010, the DG while analysing the data in that case, has taken into consideration the data and conduct relatable to Shree Cement also. In fact, summonses were also issued by the Office of the DG to Shree Cement in Case No. 29 of 2010 to examine it on the facts gathered during the course of investigation in that case. Further, in RTPE No. 52 of 2006 also, information had been sought from Shree Cement and summonses were also issued to Shree Cement, a party being investigated in RTPE No. 52 of 2006. A copy of the DG Report in the said case was duly supplied to enable Shree Cement to file its objections/suggestions.

65. It is, as such, observed that since both the DG Reports were similar, as noted *supra*, no prejudice, much less gross miscarriage of justice, has been caused as sought to be suggested by Shree Cement. In fact, far from showing any miscarriage of justice, Shree Cement has failed to point out any prejudice which might have been caused to it due to such a course and procedure adopted.
66. It may be noted that post-remand of both the matters, they were heard together during 19-22.01.2016 before the Commission and no exception was taken by any of the parties including Shree Cement challenging such common schedule of hearing.
67. In fact, an application seeking recusal of one Hon'ble Member was made on behalf of Shree Cement Limited based on some past correspondence between the then Secretary, Competition Commission of India and Shree Cement in respect of obtaining of the investigation report in C. No. 29 of 2010. Yet when the Commission heard the arguments on behalf of Shree Cement Limited on 21.01.2016, Shri Amit Sibal, learned Senior Counsel appearing on its behalf, sought the permission of the Commission to withdraw the application dated 18.01.2016 seeking recusal of the Hon'ble



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Member. Thus, it is evident that though an application was moved seeking recusal, yet at the time of hearing, no whisper was uttered much less making any request/application, to have a copy of the investigation report in Case. No. 29 of 2010, if at all the same was required. Far from showing any prejudice, Shree Cement continued to take the plea of non-supply of the investigation report in Case No. 29 of 2010 only in its written submissions. Furthermore, from the order dated 29.04.2014 passed by the Hon'ble Competition Appellate Tribunal in Appeal No. 121 of 2012 preferred by Shree Cement against the order of the Commission disposing of the Interim Application seeking stay, it is evident that the learned counsel appearing on behalf of the Commission expressed his willingness to supply a copy of the DG Report in Case No. 29 of 2010 to Shree Cement. However, for reasons not readily discernable, Shree Cement continued to maintain its studied silence before the Hon'ble Competition Appellate Tribunal as well as during the hearing before the Commission post-remand, only to raise this plea of non-supply of DG Report in Case No. 29 of 2010 at a later stage. The Commission deprecates such conduct and sharp practice resorted to by Shree Cement Limited.

Whether the Opposite Parties have contravened the provisions of Section 3 of the Act?

68. The Commission notes that in terms of the provisions contained in Section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void. Further, by virtue of the presumption contained in sub-section (3), any agreement entered into



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between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which- (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

69. As the Opposite Party cement companies are engaged in the similar business of manufacturing of cement and, thus, operating at the same level of production chain, the allegations may be examined under Section 3(1) read with Section 3(3) of the Act.
70. Further, it may be noted that the definition of 'agreement' as given in Section 2(b) of the Act requires *inter alia* any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings. The definition, being inclusive and not exhaustive, is a wide one. The understanding may be tacit and the definition covers situations where the parties act on the basis of a nod or a wink. There is rarely any direct evidence of action in concert and in such situations, the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. In light of the definition of the term 'agreement', the Commission has to assess the evidence on the basis of benchmark of preponderance of probabilities.



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71. In view of the above and further considering the fact that prohibition on participating in anti-competitive agreements and penalties the offenders may incur are well known, it is normal that such activities are conducted in a clandestine manner, where the meetings are held in secret and the associated documentation reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful conduct between enterprises such as minutes of a meeting, it will normally be only fragmentary and sparse. So it is often necessary to reconstruct certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of co-incidences and *indicia* which, taken together, may, in the absence of any other plausible explanation, constitute evidence of the existence of an anti-competitive agreement.
72. Parallel behaviour in prices, dispatch and supply accompanied with some other factors indicating coordinated behaviour among the firms may become a basis for establishing concerted action. Even in foreign jurisdictions, circumstantial evidences have been used and relied upon in cartel cases. Such circumstantial evidences are of no less value than direct evidence as the law makes no distinction between direct and circumstantial evidence.
73. In the *Dyestuffs* case (Case No. 48/69 *ICI*, [1972] ECR 619), the European Court of Justice observed that “[a]lthough parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. This is especially the case if the parallel conduct is such as to enable those concerned to attempt to stabilize prices at a level different from that to which competition would have led, and to consolidate established positions to the detriment of



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effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers. Therefore the question whether there was a concerted action in this case can only be correctly determined if the evidence upon which the contested decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the market in the products in question.”

(emphasis added)

74. Applying the aforesaid test to the present case, the Commission is of the considered opinion that nothing turns upon the submissions made by the Opposite Parties to the effect that the DG has found infringement of the provisions of Section 3 of the Act based solely upon economic analysis and market behaviour to prove some kind of meeting of minds and there was no direct evidence to support any cartelisation or anti-competitive agreement amongst them.
75. Accordingly, the Commission may now proceed to examine the conduct of Opposite Parties as to whether they have acted in a concerted manner and thereby violated the provisions of Section 3 of the Act.

Platform of CMA

76. Before dealing with the issue of CMA as a platform for anti-competitive conduct by the cement manufacturing companies, it may be appropriate to deal with some legal pleas raised by CMA during the hearings before the Commission.
77. It was argued that the agreement referred to in Section 3(3) is really an instance of the type of agreement that is prohibited under Section 3(1) which is presumed to have an appreciable adverse effect on competition within India. Under Section 3(3), it is necessary that the agreement must be



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among enterprises or associations of enterprises or persons or association of persons or between any person and enterprise who are "engaged in identical or similar trade of goods or provision of services". In other words, an agreement between CMA and a third party is a necessary pre-requisite for violation of Section 3(3) of the Act. Elaborating further, it was submitted that when Section 3(1) and 3(3) are read together with Section 2(b) and 2(c), it is clear that the association itself cannot be made liable unless all of its members together are found to have engaged in the prohibited conduct. Assuming without admitting that some members are found to have engaged in the conduct prohibited by Section 3(3) and 3(1), (*i.e.*, an anti-competitive agreement) under the "umbrella" of the association or by using it as a platform for arriving at a formal or informal arrangement that violates Section 3, this still does not amount to the association itself being guilty of the prohibited conduct.

78. The Commission observes that by virtue of the provisions contained in Section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Further, by virtue of the provisions contained in Section 3(3) of the Act, any decision taken by any association of enterprises engaged in identical or similar trade of goods or provision of services which are engaged in the specified activities described therein is presumed to have an appreciable adverse effect on competition within India.

79. Thus, when a decision taken by an association of enterprises is explicitly covered within the purview of Section 3(3) of the Act, it is futile for CMA to contend that its conduct cannot be made amenable within the ambit of



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Section 3 of the Act as it is not engaged in any trade of goods such as cement.

80. Similarly, the plea taken by CMA that the DG has cherry picked the alleged cartel members is also not tenable. It was argued that CMA had 42 members at the relevant time out of which the DG has chosen to proceed against only 8 members.
81. The Commission notes that the present case was instituted on an information filed by BAI against the parties named therein. It is not a case where the Commission proceeded *suo moto* and cherry-picked a few cement companies for the purpose of ordering investigation. Needless to add, to ascertain contraventions as alleged by the Informant against the Opposite Parties, the investigation and the consequent inquiry have been confined to the parties named in the information and therefore the question of cherry-picking some or leaving out others does not arise in the present case.
82. The Commission observes from the DG Report that the Opposite Parties participated in the meetings of CMA which provided a common platform to them to interact on a regular basis. The Commission also notes that CMA collected retail prices and wholesale prices of cement from different centres and transmitted it onwards to the Government. The retail prices collected from different centres were transmitted to DIPP, while the wholesale prices were transmitted to the Office of Economic Advisor of the same Department.
83. From the records, it is seen that consequent upon the closure of the Office of the Development Commissioner for Cement Industry (DCCI), at a meeting convened on 13.11.1991 by the Secretary, Ministry of Commerce and Industry, CMA was to collect cement prices (minimum and maximum) on a weekly basis as were earlier being collected by DCCI. Accordingly, the President, CMA, in his letter no. 438/1304/91 dated 09.12.1991



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addressed to the Secretary, Ministry of Commerce and Industry, referring to the decision in the aforesaid meeting, assured that CMA would collect cement prices from the cement companies and give a feedback to the Ministry. On 05.06.2008, CMA wrote a letter to the Under Secretary (DIPP), Ministry of Commerce and Industry seeking clarification as to whether it should continue to furnish the retail cement prices to the Government in light of enactment of the Competition Act, 2002. In response thereto, the Under Secretary (DIPP), *vide* its letter dated 28.07.2008 requested CMA to continue to furnish retail prices of cement in different consumption centres to DIPP. Accordingly, CMA has been collecting and sending a statement of weekly retail cement prices to DIPP. In this connection, it may be observed that clarification was sought when the relevant provisions of the Act were not even notified. No effort appears to have been made by CMA to seek clarification or appropriate legal advice post-notification of the provisions of Section 3 of the Act on 20.05.2009 when the provisions of Section 3 of the Act relating to anti-competitive agreement came into effect and the prices continued to be collected on a regular basis using CMA as platform. It may, however, be noted that collection of prices by CMA - either at the behest of the Ministry or otherwise - in itself is not anti-competitive unless such information is shared with or otherwise disseminated/ published to the cement companies.

84. It may be seen that CMA used to collect retail cement prices from 34 centres all over the country as detailed below:

Centre	Source Cement Co.	Mode	Concerned Official
Delhi	Shree Cement Ltd.	Phone	Mr. Pawan Agarwal
Karnal, Rohtak, Jaipur, Bhatinda, Meerut	J.K. Lakshmi Cement	E-Mail	Mr. Ashwani Sharma
Chandigarh, Ludhiana, Jammu, Simla	Ultra Tech Cement Ltd.	E-Mail / Phone	Mr. Pawan Kothiyal



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Mumbai, Nagpur, Pune, Ahmedabad, Baroda, Surat, Rajkot	Ultra Tech Cement Ltd.	E-Mail	Mr. Prashant Kaduskar
Patna, Guwahati, Muzaffarpur	Ultra Tech Cement Ltd.	Phone	Mr. Shyam Menon
Silchar	NA		
Kolkata	Century Cement Ltd	E-Mail	Mr. S.K. Sultania
Bhubaneswar	OCL	E-Mail	Mr. S. K Pradhan
Chennai, Trivandrum, Bangalore, Hyderabad, Calicut, Visakhapatnam, Goa	India Cements Ltd.	E-Mail	Mr. T.S. Raghupathy
Lucknow	Birla Corporation Ltd.	E-Mail	Mr. Manish Maliwal
Faizabad, Bhopal	Jai Prakash Associates Ltd.	E-Mail	Mr. Niranjan Singh
Bareilly	Prism Cement	Phone	Mr. M.K. Singh

85. CMA also used to collect wholesale prices of cement from 10 centres on a monthly basis viz. Delhi, Jaipur, Kolkata, Bhubaneswar, Mumbai, Ahmedabad, Chennai, Hyderabad, Lucknow and Bhopal. It was vehemently urged that CMA was collecting prices of cement for transmission to the concerned authorities in the Government. The Commission, however, notes that this does not preclude the possibility of CMA sharing this data with its members. In this connection, the Commission notes from the reply filed by CMA that there is evidence to the effect that target and production data were filed with CMA by the cement companies. Further, it may be noted that production, pricing and demand are interrelated and cannot be segregated in any meaningful sharing of information. Thus, the platform of CMA was apparently used in sharing of critical information amongst the cement companies.

86. In this regard, the Commission observes that in *T-Mobile v. Commission*, (Case No. C-8/08, *T-Mobile & Ors. v Commission*, 2009 [ECR] I-04529), in relation to information exchanges amongst competitors, the European



Court of Justice held “ ... with regard to the exchange of information between competitors, it should be recalled that the criteria of coordination and cooperation necessary for determining the existence of a concerted practice are to be understood in the light of the notion inherent in the Treaty provisions on competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market ... While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market ... At paragraphs 88 et seq. of *Deere v Commission*, the Court therefore held that on a highly concentrated oligopolistic market, such as the market in the main proceedings, the exchange of information was such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders. It follows that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted. ... Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such. ... as the Advocate General observed ... while not all parallel conduct of competitors on the market can be traced to

the fact that they have adopted a concerted action with an anti-competitive object, an exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object ... It is for the referring court to determine whether, in the dispute in the main proceedings, the information exchanged at the meeting held on 13.06.2001 was capable of removing such uncertainties In the light of all the foregoing considerations, the answer to the first question must be that a concerted practice pursues an anti-competitive object for the purpose of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings” (emphasis added).

87. In the aforesaid backdrop, the Commission notes that CMA had also constituted a HPC which held regular meetings. Details of the meetings of CMA HPC meetings held during the period January, 2010 to March, 2011, as reported by the DG, are as under:

S. No	Date of Meeting	Venue
1.	04.03.2011	Hotel Orchid, Mumbai
2.	24.02.2011	Hotel Orchid ,Mumbai
3.	03.01.2011	Hotel Grand Hyatt, Mumbai
4.	28.06.2010	Hotel Orchid, Mumbai
5.	09.04.2010	Hotel Sonar, Kolkata
6.	08.03.2010	Hotel Orchid, Mumbai
7.	11.01.2010	Hotel Claridges, New Delhi



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88. As noted by the DG in the investigation report, prices in respect of the Opposite Parties increased after the meetings held in January and February 2011.

Prices of top cement companies before & after the High Power Committee meetings of CMA

(Rs. Per Bag)

S. No.	Name of Company	December 2010 (Prior to the meeting)	January 2011 (After the meeting on 03.01.2011)	February 2011 (After the meeting on 24.02.2011)
1.	ACC Ltd.			
	Delhi	225	227	257
	Maharashtra	238	245	260
	Tamil Nadu	243	244	245
	West Bengal	246	255	281
2.	ACL			
	Ahmedabad	221	225	254
	Delhi	226	227	258
	Mumbai	254	257	267
	Howarh	246	255	283
3.	UltraTech Cement Ltd.			
	Delhi	230	235	265
	Mumbai	253	256	265
	Cossipore (W.B)	242	252	279
	Chennai	254	255	257
4.	Jaiprakash Associates Ltd.			
	Delhi	216	228	275



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	Lucknow	207	222	270
5.	Lafarge India Pvt. Ltd.			
	West Bengal	247	260	281
	Bihar	276	289	298
6.	Century Textiles and Industries Ltd.			
	Allahabad	202	235	270
	Bihar	220	260	285
7.	The India Cements Ltd.			
	Pune	240	242	265
	Hyderabad	237	235	250
8.	JK Cement			
	Ambala	237	250	290
	Udaipur	197	215	272
9.	Madras Cements Ltd.			
	Tamil Nadu	240	242	252
	Kerala	290	295	300
	Andhra Pradesh	215	225	240
10.	Binani Cement L td.			
	Delhi	221	249	282
	Mumbai	249	254	271

89. Though the Opposite Parties have not seriously disputed the above facts, a lot was made of the fact that the DG had not looked into the changes in prices after all the other meetings when either the prices had remained the same or had gone down. The plea is misconceived. In an ongoing cartel activity where prices are being kept high over a long period of time, it is not necessary that prices would increase after every meeting. In any cartelised behaviour, the parties to the arrangement may not always coordinate their



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actions and periodically their conduct may also reflect a competitive market structure.

90. In this connection, the Commission also takes cognizance of the fact that CMA issues several publications such as 'Executive Summary-Cement Industry' and 'Cement Statistics-Interregional Movement of Cement' which give details of production and dispatch of each company. Such documents are circulated amongst its members. The sharing of such sensitive information makes co-ordination easier amongst the Opposite Parties.
91. The glaring inconsistencies in the submissions of CMA and the other Opposite Parties in regard to participation in the meetings convened by CMA, only further adds link to the concerted practice under the umbrella of CMA. It may be noted that with regard to the meetings of CMA, there were contradictions in the submissions of CMA and the other Opposite Parties. The DG noted that ACC Ltd. and ACL admitted to have attended two meetings of HPC of CMA, even though they had resigned from the membership of CMA. However, CMA and Jaiprakash Associates Ltd. denied the presence of ACC Ltd. and ACL at these meetings. This inconsistency in the replies of the parties indicates that the parties were hiding the truth. Furthermore, the presence of ACC and ACL at the meetings even though they were not official members of CMA also reflects unnatural conduct, raising serious suspicion about the very object of severing their association with CMA. It appears that the same was actuated more to create a façade of compliance than any serious attempt to de-risk themselves from the anti- competitive behaviour of the association. From the reply filed by CMA, the Commission is constrained to note that instead of being forthcoming about the activities conducted by the association, the tenor of the response has been that of denial and evasion. Instead of pointing out what the DG should or ought to have done during investigation, CMA would have sub-served the cause of its members better



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by giving details of the activities carried out by them and the discussions held in meetings. It needs to be highlighted that the proceedings before the DG and the Commission are not adversarial in nature and therefore, any omission on the part of the Informant or the DG could not in itself be of any avail to a party under investigation without it making clean of its activities before the DG or the Commission, as the case may be. From the communications placed by CMA itself which it exchanged with the Government Department, it is abundantly clear that sensitive commercial information was available to its members which could greatly facilitate anti-competitive outcomes.

92. To substantiate the above deductions, it would be appropriate to note the statements recorded by the DG and the replies of the Opposite Parties and CMA:

Statement of Shri Jayanta Datta Gupta, Chief Commercial Officer, ACC Ltd.

Q.59: Whether your company or the senior officers of your company has attended any meeting with other cement companies in the recent past.

Ans: I had attended two meetings in the recent past one on 24.02.2011 and the other on 04.03.2011 in Mumbai on specific invitation to discuss our initiatives with CII on concrete road and post budget excise complexity. In these meetings, representatives of other cement companies were also present.

Statement of Shri B.L. Taparia, Company Secretary, ACL

Q.49: Whether any of your officers has attended any meeting of cement industry and where?

Ans: On 24.02.2011, we made a representation for stimulating demand for cement through concrete roads and on 04.03.2011, we



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requested for understanding the changes in excise law in Union budget. Both the meetings took place at Hotel Orchid in Mumbai.

Q.50: Who were the other participants in the above mentioned meetings?

Ans: We did not attend the entire meeting. Our discussions took place with representatives of UltraTech, JK Lakshmi Cement, ACC and Shree cement.

Reply of Cement Manufacturing Association dated 12.01.2012

The Answering Respondent denies that ACC and ACL have attended the meetings of CMA on 24.02.2011 and 04.03.2011 as alleged or otherwise. It is submitted that no invitations was sent to the said companies. The records of the meeting also disclose that none of the representatives/officers of either ACC or ACL had attended the meetings on 24.02.2011 and 04.03.2011 as alleged or otherwise. It is submitted that ACC and ACL ceased to be members of the Answering Respondent they have not attended any High Power Committee meeting of Answering Resident as alleged or otherwise.

With reference to para 6.18.9, it is submitted that the allegations and inferences drawn by the DG are wrong and contrary to records. After ACC and ACL ceased to be members of the Answering Respondent they have not attended any High Power Committee meeting of Answering Respondent as alleged or otherwise.

Reply of ACC Ltd. dated 11.01.2012

During the course of the DG's investigation, Mr. Jayanta Dattagupta, on behalf of ACC stated that he had attended two meetings of the CMA (i.e., on 24.02.2011 and 04.03.2011.) As stated during the summons hearing, the purpose of discussion of the meeting on 24.02.2011 was to discuss the' issues relating



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demand through promoting concrete roads and the meeting on 04.03.2011 was to discuss and understand the complexities relating to application of excise duties that would result post the Union budget. After discussions on the above mentioned topics, Mr. Jayanta Dattagupta left the meeting.

Reply of ACL dated 14.02.2012

During the course of the DG's investigation, Mr. B.L. Taparia, on behalf of ACL stated that ACL had made a representation ahead of two meetings of the high powered committee of the CMA, i.e., on 24.02.2011 and 04.03.2011. As stated during the summons hearing, the purpose of discussion of the representation on 24.02.2011 was to discuss the issues relating to stimulation of demand through promoting concrete roads and on 04.03.2011 was to discuss and understand the complexities in relation to application of excise duties that would result post the Union budget. In this behalf, it is important to note that ACL did not attend the entire duration of the meetings.

93. In its reply, while rebutting the findings of the DG, Jaiprakash Associates Ltd. had stated that ACC Ltd. and ACL did not participate in these meetings and therefore, the report of the DG was unreliable. The reply is noted below:

Reply of Jaiprakash Associates Ltd. dated 14.02.2012

The DG in the Report has reached a finding that ACC and ACL have withdrawn themselves from the membership of CMA, however, they have still attended the meetings that took place on 24.02.2011 and 04.03.2011..It is humbly submitted that this fact is not reflected in the minutes of the aforesaid meetings where the presence of all the members of CMA is marked who have attended it. It is submitted with utmost respect that the DG is misleading the



Hon'ble Commission by making such statements in its report without having any evidence to prove the same. As stated above, this clearly demonstrates the DG's attempt to reach his pre-determined conclusion that the cement manufactures have cartelized even though the DG has been not been able to collect any information to prove his baseless allegations.

Further the DG in its report has reproduced portions of the statements by ACC Ltd. where Mr. Jayanta Datta mentions the fact that he had attended meetings on 24.02.2011 and 04.03.2011 in Mumbai on a specific invitation for discussing the initiatives with CII on concrete road and post budget excise complexity. It is critical to mention here that Mr. Datta has not stated that he ever attended the High Powered Committee Meeting and the DG has very conveniently presumed that the officials of ACC attended the High Powered Committee Meetings to reach his flawed and erroneous conclusions.

Further the DG in its report has referred to the reply submitted by ACL dated 19.04.2011 which contains information relating to the meetings attended by ACL where other cement manufactures were also present and 23 occasions where ACL interacted with other cement manufactures. On a mere perusal of the information submitted, it becomes apparent that ACL has not attended any of the said High Power Committee Meetings and instead attended meetings with Government officials, Clinker Sale or steel manufactures where other cement manufactures have been present. This shows the complete non application of mind by the DG and only making bald allegations to suggest that ACL is still attending the meetings of CMA.

JAL humbly submits that the DG's analysis that ACC and ACL are still attending the High Powered Committee Meetings of CMA is wrong and hence denied and the minutes of the various meetings



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that have been submitted by the CMA before the office of the DG are proof of the same.

JAL humbly submits that keeping in view the aforementioned reasons it becomes palpably clear that CMA does not provide a common platform for discussing the information relating to prices to its members.

94. Thus, it is evident that the Opposite Parties have been inconsistent in their response in relation to the issue of interaction by the cement companies under the platform of CMA. The fact that prices had increased after the HPC meetings held in January and February, 2011 further establishes that they co-ordinated their decisions and fixed prices after due consultations.
95. In this connection, it is also useful to refer to the minutes of the meetings of CMA from the records of the DG. These minutes reveal that the cement companies were discussing prices of cement using the platform of CMA.

Minutes of the 84th Meeting of the Managing Committee of Cement Manufacturers' Association held on 15.03.2007 in Mumbai

06. The post-budget 2007-08 ten days were hectic since the President of CMA along with captains of the industry had meetings with Hon'ble Shri P. Chidambaram, Union Finance Minister and Hon'ble Shri Kornai Nath, Union Minister of Commerce and Industry as also Dr. Ajay Dua, Secretary (IPP), MOCI and others. During the discussion there has been pressure from government to reduce cement prices and avail of the excise duty concession. All attempts have been made to establish that pre-budget ruling cement prices (Feb 07) have been lower than the inflation adjusted prices prevailing in 1995 (April 95)-lower by Rs 12 to Rs 48 per bag. All members would reiterate that



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improvement in the GDP has improved in all sectors of economy and cement is no exception. However, Cement industry has been ploughing back the profits in creation of additional capacities, which is the need of hour. The cement industry is producing at the optimal level of more than 95% and to meet the growing demand for cement in the XI Plan period (2007-08 to 2011-12), the cement companies have planned for addition of adequate capacity, which would require huge investment. Forced Price Reduction resulting in reduction on margin would adversely affect capacity materialization in time.

(emphasis applied)

Minutes of the 92nd Meeting of the Managing Committee of Cement Manufacturers' Association held on 26.03.2009 in New Delhi

- 7 (a) Supply of Cement in the State of Uttar Pradesh Secretary General, CMA mentioned that Secretary (DIPP) had called a Meeting of Chief Executives of Cement Companies supplying cement in the State of UP and also CMA on 16.03.2009, to discuss the complaint by the UP Govt. Departments, wherein Secretary (DIPP) insisted that the prices be brought down to reasonable levels within 4 weeks' time, failing which he would be obliged to resort to recommending withdrawal of CVD and SAD on Cement Imports and also reintroduction of Ban on Cement Exports.

Shri Rahul Kumar, COO (Cement), Jaiprakash Associates Ltd. informed Secretary (DIPP) that while the growth of cement supplies during the period April-Oct '08 was only 2.6% over the corresponding period of the previous year, the sudden spurt in demand during Nov.08 to Jan 09 was 24%.

Shri Rahul Kumar, further apprised CMA after attending the Meeting taken by Chief Secretary, Govt. of UP in Lucknow on



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17.03.2009 where the cement manufacturing cement to UP were also resent and on behalf of Jaypee Cement that it was agreed by Jaypee to supply cement to the Govt. Departments during the month of March 2009 at the rate of Rs 245/-per bag. The UP Govt. was satisfied and orders were being placed for supply of cement. The other suppliers also similar(ly) responded by offering similar special rates for Govt. supplies and assuring to meet the requirements.

(emphasis applied)

96. Further, not only that CMA was collecting data relating to prices, even company-wise and factory-wise data regarding capacity, production, dispatches and exports etc. was also being collected and furnished by CMA not only to the Ministry of Commerce and Industry but also to the cement companies. This is evident from the minutes of Managing Committee of CMA held on 18.12.2008 at Mumbai.

Managing Committee of CMA held on 18.12.2008 in Mumbai

3.5 Further Company-wise, Factory-wise data regarding capacity, production, dispatches, exports etc. are being collected and regularly furnished by CMA to Ministry of Commerce and Industry and also circulated to Cement Companies.

(emphasis applied)

97. From minutes of the Meeting of CMA HPC held on 04.03.2011 in Mumbai, it is apparent that CMA provides a platform to the members for evaluation and determination of impact of incidence of tax on cost:

"2.1 President referred to the detailed Agenda Note on the subject. She referred to the plus points in the Budget 2011-12 such as GDP Growth, enhancement in the provision under Rural Housing Fund etc. While this will help the Cement Industry, there are certain proposals in the Budget that will have adverse impact such as



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increase in Minimum Alternative Tax (MAT), Excise duty on RMC without CANVET Credit. Change of Excise Duty Rates on Cement and Cement Clinker from specific to ad valorem plus fixed (composite rate)- which would further add to the cost of Cement was also considered.

2.2 As regards the new excise duty rates on cement, it was mentioned that some of the cement companies in their own capacity have already referred for/ obtained legal opinion of Experts on various aspects of its applications. Shri H.M. Bangur, Shree Cement Ltd., stated that it is advisable to obtain a legal opinion on applicability of excise duty in different situations by CMA and circulate it to members.

2.3 President requested Shri O.P. Puranmalka, UltraTech Cement Ltd. and Shri S. Chouskey, J K Lakshmi Cement Ltd. to forward to CMA the issues they have formulated in this regard for obtaining clear cut legal opinion. CMA may kindly consolidate the two and frame the issues.

2.4 Clarification/ opinion may also be sought on treatment of Excise Duty on Clinker transferred by Mother Unit to its Grinding Unit — where Grinding Unit enjoys exemption from the Duty of Excise but the Mother Unit is not exempt from Excise. In such a case whether duty shall be payable by the Mother Unit on Clinker transferred to its other Unit for Grinding and in case such duty is payable then on what value the duty is to be calculated and paid as there is no Sale/ Transaction by the Mother Unit.

2.5 It was decided that CMA should obtain legal opinion of Expert in the light of the discussions held and circulate the same to members.

(emphasis applied)



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98. In view of the above discussion, the Commission has no hesitation in holding that the cement companies were interacting with each other at the platform of CMA, sharing information about cost, prices, production and capacities and such interactions facilitated discussions amongst members on determination of prices and production.
99. So far as collection of prices of cement companies from all over India is concerned, as noted in the earlier part of the order, the Minutes of the 95th Meeting of Managing Committee of CMA held on 30.11.2009 in New Delhi are quite pertinent to note:

10.1 Weekly Retail Cement Prices to DIPP

10.1.2 President informed the meeting that CMA has been furnishing weekly Retail Cement Prices to DIPP every Wednesday for the period pertaining to the previous week. The information so furnished gives only the range of prices prevailing in each of the markets (Minimum and Maximum) for the relevant period. CMA, traditionally, has been collecting this information from representatives of certain Cement Companies.

10.1.3 In addition, CMA has also been required to furnish Wholesale Prices to Economic Adviser, Ministry of Commerce and Industry as on the last working day of each month by the 10th of the following month. For this, the companies have been designated by DIPP itself after a meeting of Cement Companies and CMA in Feb.2009. This is the information, which is used by DIPP for working out Wholesale Price Index (WPI).

10.1.4 President further informed that in view of the recent developments, the Stations covered by ACC Ltd. and Ambuja Cements Ltd. would have to be served by some other representatives of the Cement Companies who have a presence in each one of these places.



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10.1.5 President requested Members to come forward and voluntarily take this up on a regular basis so that a system and procedure is put in place for collection of this information. The concerned Companies were also requested to send the names of their Nominated representatives to CMA, with their contact numbers, e-mail details, etc.

10.1.6 The following cement companies agreed to furnish range of the Wholesale and Retail cement prices details for the cities mentioned against their names.

Co./Station	Retail Cement Price	Wholesale price
Grasim Inds. Ltd.		
Chandigarh	Retail Cement Price	
Ludhiana	-do-	
Jammu	-do-	
Simla	-do-	
UltraTech Cement Ltd.		
Mumbai	Retail Cement Price	(Already being given by Grasim Inds. Ltd.)
Ahmedabad	-do-	Wholesale Price
Nagpur	-do-	
Pune	-do-	
Rajkot	-do-	
Baroda	-do-	
Surat	-do-	
India Cements Ltd.		
Goa	Retail Cement Price	

10.1.7 As regards the following stations, it was decided that Jaiprakash Associates Ltd. may furnish the information for Retail Cement Price and also Wholesale Cement Price.



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Faizabad	Retail Cement Price	
Bhopal	-do-	Wholesale Price

10.1.8 It was also decided that other Members may also contribute in the exercise for collecting the prices giving maximum and minimum range in whichever market they are comfortable for supplying the price details.

100. Furthermore, in a meeting with Under Secretary, DIPP on 04.02.2009, a decision was taken that information on wholesale prices in each region would be provided by the cement company earmarked for the regions to CMA as on the last day of the month by the 10th of the following month for 10 centers as under:

Region	Centers	Cos./Unit to provide information on wholesale price as on the last day of the month
North	Delhi	Shree Cement
	Jaipur	Lakshmi Cement
East	Kolkata	Century Cement
	Bhubneshwar	Orissa Cements Ltd
South	Chennai	Madras Cements
	Hyderabad	India Cement
West	Mumbai	Grasim/ Rajashree Cements
	Ahmedabad	Gujarat Ambuja Cement
Central	Bhopal	ACC
	Lucknow	Birla Corporation, Satna

101. It is also seen that with regard to collection of retail prices, CMA itself nominates (and not the Government) companies for collection from different centres, as is evident from the aforesaid minutes of the 95th



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meeting of the Managing Committee of CMA held on 30.11.2009 in New Delhi. The Commission notes that this presents clear opportunities for the companies to share commercially sensitive information because the prices are collected over phone and emails. Further, certain rules of CMA which were inconsistent with the provisions of the Act remained in the rule book of CMA till a notice of inquiry was received from the Commission. The amendments in such rules were discussed in the meeting of CMA held on 30.11.2009 and it was considered that in order to be clear of any charges of anti-competitive conduct, amendments in certain rules may be carried out. However, it may be noted that amendments were not given effect till notice dated 20.08.2010 was issued to CMA under Section 41 (2) of the Act from the Office of the DG. Pursuant to receipt of notice from the Office of DG, an Extra-Ordinary General Meeting of the Association was called on 23.09.2010 in which it was decided to effect the changes in the rules as recommended by the Managing Committee in November, 2009. The existing provisions and the amendments carried out in the rules and regulations are as under:

Rule No.	Existing provisions	Amendment as per December 2010 Memorandum of Association and Rules
3 (b)	To increase co-operation and unanimity amongst cement producers.	Deleted
3(d)	To collect and disseminate statistical and technical information in respect of cement trade and industry and other industries to the members of the Association.	Addition: “and General Public” after the word “Association.”
3(f)	To make representation to	Substituted clause:

Rule No.	Existing provisions	Amendment as per December 2010 Memorandum of Association and Rules
	local and central authorities on any matter connected with the trade, commerce and manufactures of its members.	“To make representation to the Local and Central Authorities on Industry specific issues prevalent from time to time.”
3(g)	To take steps in the settlement of disputes arising out of commercial transactions between parties.	Deleted
3(j)	For all or any of the purpose aforesaid or in the interest of all concerned, to assist individual members to commence, continue, defend or refer to arbitration any action, suit of other proceedings whatsoever in any Court of justice or before any other tribunal, authority or person whatever.	Deleted
2(b)	Addition of new clause in Rules and Regulations.	Membership in the association shall be recognized as implying that the member is absolutely free to conduct his business exactly as he pleases in every respect and particular.

102. In view of the above discussion, it is evident that the platform of CMA was used by the cement companies for resorting to anti-competitive conduct and



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not for merely protecting the legitimate interests of its members. It is noted that there are evidences, as discussed above, which are indicative of the existence of an agreement, arrangement and understanding among the Opposite Parties using the platform of CMA for sharing of information, as well as 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 amongst the Opposite Parties.

Economic Evidence

103. The Commission observes that in addition to the communicative evidence noted above which is reflective of anti-competitive conduct resorted to by the Opposite Parties, the Commission has also evaluated the economic evidence to ascertain as to whether the Opposite Parties were acting unilaterally in accordance with the normal market forces or under an agreement to collude and co-ordinate their behaviour.
104. The Commission finds it necessary to first assess whether there are structural factors that exist which help facilitate collusion among the Opposite Parties. Thus, it is necessary to analyse the structure of the market before moving to analyse the economic factors.
105. The DG in his report has brought out that there are 49 companies operating with more than 173 large cement plants in India. The Commission notes that, as highlighted earlier, in the cement industry, no single player is dominant and 12 companies control about 75% of the cement market in terms of production capacity. As regards available capacity, the data of CMA for the year 2010 reveals that there were 47 cement companies having 142 plants and installed capacity of 97% of total capacity. The DG has reported that 21 companies control about 90% of the market share in terms of capacity.



106. Based on the analysis in the preceding paragraph, the Commission notes that only a few firms have a pan-India presence with plants located all over the country and remaining firms operate on regional basis. Given that a few large players control majority of the market, the Commission holds that the cement market in India is oligopolistic in nature.

107. In this connection, the Commission also deems it appropriate to deal with the plea of the Opposite Parties that the DG has not delineated the relevant market with respect to which the alleged contravention has been established. There is no requirement under the provisions of Section 3 of the Act read with Section 19(3) thereof to determine and construct a relevant market, although the determination of relevant market for examining the contraventions under the provisions of Section 4 of the Act is prerequisite. Section 3 is concerned with the effect of anti-competitive agreements on markets in India. There is a distinction between 'market' as in Section 3 and 'relevant market' as defined in Section 4 of the Act. There is no need of determination of relevant product market or relevant geographic market for the purposes of establishing any anti-competitive agreement.

108. No doubt in a market which is oligopolistic in nature, it is more than likely that each market player is aware of the actions of the others and influences the others' decisions. Interdependence between firms is an important characteristic of such a market which would mean that each firm in such a market takes into account the likely reactions of other firms while making its decisions particularly as regards prices. Interdependence between firms may lead to collusion (implicit as well as explicit). However, knowing that overt collusion is easily detected, firms often collude in a manner which leads to non-competitive outcomes resulting in higher prices than warranted by the demand-supply conditions.



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109. In the present structure of the cement market, apart from the ready availability of the platform provided by the CMA to share prices and output, the DG has given his findings on various parameters to establish the presence of collusion and cartelisation amongst the firms. The same are: (i) existence of price parallelism amongst the Opposite Parties involved in the case, (ii) price determination, (iii) low levels of capacity utilisation and reduced rate of growth in production, (iv) existence of production and dispatch parallelism, and (v) super-normal profits earned by the Opposite Parties.

110. The Commission has analysed the aforesaid findings of the DG in light of the submissions of the parties and evaluated the same on the basis of materials on record.

Price parallelism

111. The DG conducted a correlation analysis of the cement prices of all the companies in different States to examine the degree of price parallelism. Correlation analysis is a statistical tool to ascertain the degree of linear association between two variables. The coefficient of correlation ranges between -1 and +1 and provides the direction and strength of the linear association between the two variables. The correlation between two variables can be positive or negative. A coefficient value of 1 represents a perfect positive correlation and a coefficient value closer to 1 represents a high degree of positive correlation between the variables. For instance, a correlation value of 0.9 represents a high degree of positive linear association between the variables *vis-a-vis* a correlation value of 0.4 which represents a weak positive linear association between the variables. Given below are the tables of correlation analysis conducted by the DG in respect of absolute prices of cement companies in different States for the overall time period between January, 2008 to February, 2011.



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Correlation Coefficient Matrix (Absolute Prices)

Uttar Pradesh

	<i>ACC</i>	<i>ACL</i>	<i>Shree</i>	<i>Century</i>	<i>UTCL</i>	<i>JP</i>	<i>India C</i>	<i>JK</i>	<i>Birla</i>
ACC	1								
ACL	0.912879	1							
Shree	0.887711	0.949671	1						
Century	0.971348	0.884849	0.914251	1					
UTCL	0.793003	0.832613	0.760742	0.741339	1				
JP	0.845788	0.925053	0.945671	0.85369	0.82682	1			
India Cement	0.773319	0.824163	0.871433	0.791469	0.66916	0.850831	1		
JK	0.971171	0.943648	0.920477	0.9511	0.804604	0.90502	0.797981	1	
Birla	0.960714	0.856287	0.88308	0.984963	0.757948	0.831577	0.761198	0.932374	1

Haryana

	<i>ACC</i>	<i>ACL</i>	<i>Shree</i>	<i>UTCL</i>	<i>JP</i>	<i>India c</i>	<i>JK</i>	<i>Birla</i>
ACC	1							
ACL	0.960768	1						
Shree	0.907272	0.958479	1					
UTCL	0.945853	0.975601	0.938609	1				
JP	0.933102	0.961189	0.944037	0.924325	1			
India C	0.887939	0.936759	0.923587	0.909569	0.944077	1		
JK	0.885348	0.919743	0.897118	0.911937	0.874799	0.852046	1	
Birla	0.890205	0.921076	0.946632	0.886668	0.906738	0.861746	0.865683	1

Bihar

	<i>India C</i>	<i>JP</i>	<i>Birla</i>	<i>Lafarge</i>
India C	1			
JP	0.792783	1		
Birla	0.749723	0.93123	1	
Lafarge	0.860328	0.852125	0.80026	1

Delhi

	<i>ACC</i>	<i>ACL</i>	<i>Shree</i>	<i>UTCL</i>	<i>India C</i>	<i>Birla</i>
ACC	1					
ACL	0.977984	1				
Shree	0.913046	0.901211	1			
UTCL	0.883099	0.887902	0.826966	1		
India Cement	0.829278	0.804768	0.930655	0.716964	1	
Birla	0.911061	0.884534	0.867349	0.715982	0.801589	1

Punjab

	<i>ACC</i>	<i>ACL</i>	<i>Shree</i>	<i>UTCL</i>	<i>JP</i>	<i>India C</i>
ACC	1					
ACL	0.966156	1				
Shree	0.93429	0.968923	1			
UTCL	0.971017	0.991426	0.951263	1		
JP	0.769903	0.814648	0.833246	0.783957	1	
India C	0.876276	0.908326	0.927362	0.900343	0.765996	1

Chandigarh

	<i>ACC</i>	<i>ACL</i>	<i>Shree</i>	<i>India C</i>	<i>JK</i>
ACC	1				
ACL	0.958859	1			
Shree	0.966345	0.924327	1		
India C	0.915417	0.875399	0.93283	1	
JK	0.916699	0.845631	0.877482	0.829813	1



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Rajasthan

	<i>ACC</i>	<i>ACL</i>	<i>Shree</i>	<i>UTCL</i>	<i>India c</i>	<i>JK</i>	<i>Birla</i>
ACC	1						
ACL	0.720995	1					
Shree	0.675365	0.934529	1				
UTCL	0.729528	0.982991	0.895475	1			
India C	0.686274	0.92631	0.919718	0.883049	1		
JK	0.752857	0.919831	0.825251	0.941018	0.807251	1	
Birla	0.66443	0.898871	0.958862	0.837687	0.901974	0.80703	1

Gujarat

	<i>India c</i>	<i>JK</i>	<i>Birla</i>	<i>ACL</i>
India C	1			
JK	0.472913	1		
Birla	0.680905	0.81913	1	
ACL	0.681065	0.861186	0.812779	1

Maharashtra

	<i>ACC</i>	<i>ACL</i>	<i>Century</i>	<i>India C</i>
ACC	1			
ACL	0.568086	1		
Century	0.792225	0.574761	1	
India C	0.526125	0.502294	0.708049	1



West Bengal

	<i>ACC</i>	<i>ACL</i>	<i>Century</i>	<i>JP</i>	<i>India C</i>	<i>Birla</i>	<i>UTCL</i>	<i>Lafarge</i>
ACC	1							
ACL	0.98431	1						
Century	0.961657	0.961945	1					
JP	0.960755	0.958235	0.950428	1				
India C	0.898394	0.902056	0.888901	0.890607	1			
Birla	0.8389	0.83757	0.854225	0.860972	0.887083	1		
UTCL	0.942044	0.964485	0.944394	0.916694	0.821825	0.797429	1	
Lafarge	0.972615	0.988729	0.971237	0.950146	0.899963	0.83947	0.960929	1

Assam

	<i>ACC</i>	<i>Century</i>	<i>India C</i>
ACC	1		
Century	0.567726	1	
India C	0.40383	0.445605	1

Orissa

	<i>ACC</i>	<i>ACL</i>	<i>Century</i>	<i>India C</i>	<i>UTCL</i>	<i>Lafarge</i>
ACC	1					
ACL	0.983731	1				
Century	0.961498	0.933139	1			
India C	0.916653	0.911202	0.83018	1		
UTCL	0.978123	0.971407	0.930394	0.918547	1	
Lafarge	0.959458	0.955127	0.946251	0.879158	0.958367	1

Madhya Pradesh

	<i>ACC</i>	<i>ACL</i>	<i>Century</i>	<i>UTCL</i>	<i>JP</i>	<i>India C</i>	<i>JK</i>	<i>Birla</i>
ACC	1							
ACL	0.661583	1						
Century	0.71322	0.830941	1					
UTCL	0.745851	0.965754	0.879976	1				
JP	0.803028	0.769198	0.954389	0.847271	1			
India C	0.701555	0.835128	0.733503	0.868578	0.746644	1		
JK	0.667962	0.877043	0.889456	0.920343	0.855561	0.764143	1	
Birla	0.771339	0.959653	0.88366	0.968033	0.840428	0.874248	0.862696	1



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Andhra Pradesh

	<i>Kesoram</i>	<i>Rain</i>	<i>ACL</i>	<i>UTCL</i>	<i>GIL</i>	<i>India C</i>	<i>ACC</i>
Kesoram	1						
Rain	0.964316	1					
ACL	0.989023	0.954636	1				
UTCL	0.983491	0.92902	0.965239	1			
GIL	0.980667	0.928726	0.964329	0.992554	1		
India C	0.957398	0.941362	0.941607	0.94331	0.936523	1	
ACC	0.960398	0.93021	0.957844	0.952676	0.94826	0.970058	1

Kerala

	<i>Madras</i>	<i>India C</i>	<i>ACL</i>	<i>Dalmia</i>
<i>Madras</i>	1			
<i>India C</i>	0.91871	1		
ACL	0.580648	0.730303	1	
Dalmia	0.98221	0.911184	0.593414	1

112. The Commission notes that the price correlation analysis clearly indicates that there was strong positive correlation in the prices of most of the companies in a given State.

113. Some of the Opposite Parties contended that there was no clarity on the source of the data used by the DG for the price correlation analysis. To address this grievance of the Opposite Parties, the Commission independently conducted the State-wise correlation analysis for the time period January 2007 to February 2011 using the data submitted by the Opposite Parties to the DG. It needs to be highlighted that the Commission has used data for the same/ common city as a representative of the price at the State level for each company wherever such data was available. In all other cases, a representative city has been used to reflect the prices at the State level for a company. The correlation tables are as follows:



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Uttar Pradesh

	Ambuja	ACC	Binani	India Cement	JP	Lafarge	Shree Cements	UltraTech	JK	Century
Ambuja	1	0.886957	0.742997	0.78657	0.876515	0.415287	0.892705	0.970436	0.827143	0.829469
ACC		1	0.809351	0.96	0.785399	0.575659	0.831658	0.899049	0.883745	0.962488
Binani			1	0.931149	0.670278	0.69289	0.790376	0.797924	0.773343	0.876001
India Cement				1	0.734245	0.709956	0.811339	0.812482	0.890838	0.967404
JP					1	0.389226	0.879717	0.863074	0.714967	0.746718
Lafarge						1	0.462721	0.465657	0.511541	0.619015
Shree Cements							1	0.90126	0.724019	0.806598
UltraTech								1	0.86999	0.865425
JK									1	0.877526
Century										1

Haryana

	Ambuja	ACC	Binani	India Cement	JP	Shree Cement	UltraTech	JK
Ambuja	1	0.984879	0.880679	0.940914	0.886211	0.897139	0.975424	0.832862
ACC		1	0.870422	0.948979	0.857526	0.888353	0.982774	0.84911
Binani			1	0.922877	0.738429	0.832999	0.891475	0.78395
India Cement				1	0.891056	0.973443	0.974776	0.878451
Jaypee					1	0.900245	0.891689	0.664131
Shree Cement						1	0.9299	0.747534
UltraTech							1	0.842046
JK								1

Bihar

	ACC	Century Cements	India Cement	JP	Lafarge	UltraTech
ACC	1	0.901879	0.9527	0.878136	0.992589	0.993179
Century Cements		1	0.924426	0.923155	0.872923	0.911128
India Cement			1	0.935777	0.94202	0.953171
JP				1	0.851875	0.904957
Lafarge					1	0.988469
UltraTech						1



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Delhi

	Ambuja	ACC	Binani	India Cement	Shree cement	UltraTech
Ambuja	1	0.961835	0.778749	0.924191	0.921828	0.989318
ACC		1	0.794868	0.911475	0.922189	0.95885
Binani			1	0.884526	0.65019	0.759632
India Cement				1	0.902763	0.901372
Shree cement					1	0.932439
UltraTech						1

Punjab

	Ambuja	ACC	India Cement	Binani	Jaypee	Shree Cement	Ultratech
Ambuja	1	0.756567	0.969697	0.495018	-0.13792	0.759692	0.816574
ACC		1	0.968065	0.904388	0.693119	0.959698	0.994775
India Cement			1	0.921891	0.723371	0.964661	0.971225
Binani				1	0.555377	0.869512	0.885214
Jaypee					1	0.688179	0.656855
Shree Cement						1	0.965574
Ultratech							1

Chandigarh

	Ambuja	ACC	Binani	India Cement	Shree Cement	JK
Ambuja	1	0.929603	0.866727	0.864409	0.878397	0.816656
ACC		1	0.912736	0.984077	0.962971	0.883676
Binani			1	0.918484	0.865459	0.770697
India Cement				1	0.964935	0.848946
Shree Cement					1	0.864451
JK						1



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Rajasthan

	Ambuja	ACC	Binani	India Cement	JP	Shree cement	UltraTech	JK
Ambuja	1	0.946477	0.909149	0.961229	0.75	0.93919	0.996327	0.920668
ACC		1	0.948747	0.974784	0.806	0.909657	0.941855	0.895925
Binani			1	0.960061	0.621	0.793517	0.908306	0.917156
India Cement				1	0.946	0.957546	0.961767	0.923024
JP					1	0.920616	0.76761	0.729203
Shree cement						1	0.933352	0.817127
UltraTech							1	0.920446
JK								1

Gujarat

	Ambuja	Binani	India Cement	JP	UltraTech	JK
Ambuja	1	0.942519	0.942195	0.883019	0.965961	0.877678
Binani		1	0.937007	0.717918	0.887299	0.855489
India Cement			1	0.847954	0.955335	0.894721
JP				1	0.911771	0.79303
UltraTech					1	0.909111
JK						1

Maharashtra

	Ambuja	ACC	Binani	Century Cement	India Cement	JP	Lafarge	UltraTech
Ambuja	1	0.77393	0.589279	0.541664	0.274698	0.71833	0.903766	0.962451
ACC		1	0.824584	0.900993	0.650477	0.462644	0.906081	0.859519
Binani			1	0.801032	0.77927	0.5079	0.621541	0.79903
Century Cement				1	0.74513	0.504144	0.856775	0.702968
India Cement					1		0.545164	0.597774
JP						1		0.58023
Lafarge							1	0.944888
UltraTech								1



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West Bengal

	Ambuja	ACC	Binani	Century Cement	India Cement	JP	Lafarge	UltraTech
Ambuja	1	0.991542	0.711824	0.976663	0.926271	0.969433	0.980888	0.991849
ACC		1	0.748537	0.986262	0.935604	0.971306	0.987822	0.993071
Binani			1	0.818865	0.810411	0.77674	0.805903	0.715172
Century Cement				1	0.962814	0.97505	0.986592	0.986614
India Cement					1	0.931415	0.944666	0.933695
JP						1	0.96258	0.971557
Lafarge							1	0.990975
UltraTech								1

Assam

	Century	ACC	India
Century	1	0.578363	0.779326
ACC		1	0.786054
India			1

Orissa

	ACC	Century Cement	Lafarge	UltraTech	ACL	India
ACC	1	0.965536	0.959422	0.99012	0.986001	0.987283
Century Cement		1	0.968058	0.950721	0.948281	0.965307
Lafarge			1	0.962326	0.947111	0.969315
UltraTech				1	0.984442	0.988197
ACL					1	0.972955
India						1



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Madhya Pradesh

	Ambuja	ACC	India Cement	Jaypee	Lafarge	JK	Century	UltraTech
Ambuja	1	0.9192	0.902774934	0.844417	0.821668	0.808799	0.845411	0.953269
ACC		1	0.963536024	0.9277	0.904402	0.817487	0.91702	0.9554
India Cement			1	0.937282	0.921358	0.832018	0.966569	0.92972
Jaypee				1	0.861298	0.761112	0.913302	0.925954
Lafarge					1	0.697569	0.900686	0.873844
JK						1	0.790637	0.857012
Century							1	0.900679
UltraTech								1

Andhra Pradesh

	Ambuja	ACC	India Cement	Madras Cement	Ultra Tech
Ambuja	1	0.981133	0.961758	0.935238	0.978572
ACC		1	0.963557	0.932271	0.955592
India Cement			1	0.975201	0.954814
Madras cement				1	0.936492
Ultra Tech					1

Kerala

	Ambuja	ACC	India Cement	UltraTech	Madras Cement
Ambuja	1	0.986367	0.982109127	0.979021662	0.940332298
ACC		1	0.93419353	0.98201935	0.937994673
India Cement			1	0.948818761	0.943774429
UltraTech				1	0.947901111
Madras Cement					1



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Karnataka

	ACC	India Cement	Madras Cement	Ultra Tech	JK
ACC	1	0.866906	0.87188	0.966436	0.873938
India Cement		1	0.9112	0.92711	0.656687
Madras Cement			1	0.93557	0.884338
Ultra Tech				1	0.903115
JK					1

Tamil Nadu

	ACC	India Cement	Madras Cement	Ultra Tech
ACC	1	0.918569	0.948804	0.935535
India Cement		1	0.942679	0.966881
Madras Cement			1	0.936294
Ultra Tech				1

H.P.

	Ambuja	ACC	India Cement	JP
Ambuja	1	0.944737	0.990734	0.932534
ACC		1	0.935161	0.909206
India Cement			1	-0.98783
JP				1

J&K

	Ambuja	ACC	Binani	India Cement	JP
Ambuja	1	0.389465	0.549966	0.413638	0.711925
ACC		1	0.740351	0.749229	0.752253
Binani			1	0.938026	0.732804
India Cement				1	0.522114
JP					1



Uttarakhand

	Ambuja	ACC	JP	Lafarge	Shree Cement	UltraTech	JK	Century	Binani
Ambuja	1	0.800023	0.764485	0.736265	0.722674	0.790283	0.287792	0.690756	0.568837
ACC		1	0.917415	0.860448	0.89891	0.972789	0.50619	0.891444	0.81212
JP			1	0.752304	0.904101	0.929457	0.476644	0.774655	0.721037
Lafarge				1	0.748042	0.899716	0.351377	0.680182	0.486436
Shree Cement					1	0.889792	0.554966	0.810749	0.734309
UltraTech						1	0.510307	0.826474	0.729994
JK							1	0.587305	0.440358
Century								1	0.883669
Binani									1

Chhattisgarh

	Ambuja	ACC	Century	Lafarge	UltraTech
Ambuja	1	0.990759	0.968025	0.961658	0.986646
ACC		1	0.965597	0.968137	0.986837
Century			1	0.949203	0.966331
Lafarge				1	0.97291
UltraTech					1

Jharkhand

	Ambuja	ACC	Century Cements	JP	UltraTech
Ambuja	1	0.990992	0.971712	0.830825	0.990356
ACC		1	0.958193	0.901155	0.986273
Century Cements			1	0.821049	0.982437
JP				1	0.838153
UltraTech					1



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114. From the tables above, it is evident that in several cases the pairwise price correlation has been found to be greater than 0.9 indicating a high degree of positive correlation in prices. In many States such as Delhi, Orissa, Andhra Pradesh, Kerala, H.P., Bihar, Tamil Nadu and Chhattisgarh, most of the correlation values in the correlation matrices were found to be more than 0.9. Thus, the results from the correlation analysis done by the Commission using the data submitted by the Opposite Parties themselves also provide strong price correlation between the parties in different States as was also evident from the State-wise price correlation analysis done by the DG.

115. For assessing price parallelism, the Opposite Parties have argued for use of R^2 instead of r , *i.e.*, use of regression instead of correlation. In this regard, it may be observed that statistical tools are only to put a number to the understanding of price parallelism. It is important to point out that R^2 measures the explanatory power of an independent variable over a dependent variable. R^2 in this context would mean how much change in price of cement of one manufacturer is explained by change in price of cement by another manufacturer, which is not the subject matter of inquiry. What is being verified is whether the price of cement of the Opposite Parties moved in tandem. This is best explained by correlation, which explains the nature and strength of relation and not a cause and effect relationship.

116. The Opposite Parties have further argued that use of correlation of percentage change in prices is more appropriate than correlation of absolute prices. There are a number of possibilities. For instance, one can argue for correlation of absolute prices, correlation of absolute change in prices, correlation of percentage change in prices, correlation of log natural of change in prices *etc.* The Commission is of the view that such a hair splitting may be of no help, particularly when this does not change the finding of price parallelism. It could have had some bearing if the price parallelism was observed at the margin, say if the correlation was +/- 0.3 or



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so. Without getting into the merits of each of the options, it is sufficient to state that the cartel participants do not necessarily change prices in the same ratio, nor do they effect changes on the same day. The same absolute change in prices by two different producers having two different prices before the change would yield two different percentage change in prices and is likely to distort the correlation slightly. Thus, correlation of absolute prices is a sufficient indicator to establish price parallelism.

117. Moreover, the Commission feels that one does not need to use high level econometrics or statistical tools to observe price parallelism. For a visual appreciation, the monthly prices of cement of the Opposite Parties (as used in the correlation analysis) in 22 States for the period January 2007 to February 2011 have been plotted. The State-wise price trend graphs, as incorporated in **Annexure-I** to this order, depict that the State-wise prices of the Opposite Parties have moved in tandem during the relevant period.

118. As regards specific parallel movements, the following table illustrates that in February 2011 the median percentage increase in cement prices by the Opposite Parties in the States of UP, Haryana, Delhi, Punjab, Chandigarh, Rajasthan, Gujarat, West Bengal, Odisha, Madhya Pradesh and Uttarakhand was around 13%.

	UP	Haryana	Delhi	Punjab	Chandigarh	Rajasthan	Gujarat	West Bengal	Odisha	Madhya Pradesh	Uttarakhand
	% change in Price (Feb 2011 over Jan 2011)	% change in Price (Feb 2011 over Jan 2011)	% change in Price (Feb 2011 over Jan 2011)	% change in Price (Feb 2011 over Jan 2011)	% change in Price (Feb 2011 over Jan 2011)	% change in Price (Feb 2011 over Jan 2011)	% change in Price (Feb 2011 over Jan 2011)	% change in Price (Feb 2011 over Jan 2011)	% change in Price (Feb 2011 over Jan 2011)	% change in Price (Feb 2011 over Jan 2011)	% change in Price (Feb 2011 over Jan 2011)
Ambuja	15.42	13.45	13.66	-5.58	11.72	13.42	12.89	10.98	13.27	12.32	9.92
ACC	14.96	12.81	13.22	10.81	11.33	15.67		10.20	14.35	18.09	11.48
JK Cement	10.43	10.89			8.68	19.61	8.29			13.95	



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Binani	15.98	12.84	13.25	13.11	13.11	12.90	13.19	10.64			16.00
Lafarge								8.08	12.62	16.76	2.85
Jaiprakash	22.06	15.18		11.38		25.29	12.20			15.01	18.26
Century	14.89							5.88	15.35	13.95	14.29
Ultratech	14.20	14.20	12.73	10.02		13.31	11.70	10.28	11.02	12.10	12.46
Shree	19.62	15.38	12.73	15.06	13.92	12.80					18.72

^Cells which are blank indicate that either the OP is not present in that state or data for January and February 2011 were not provided by the OP for that particular State

119. Opposite Parties, however, argued that any parallelism in the cement industry could be attributed to the nature of this industry. It has been stated that price parallelism is expected in an industry with homogenous product and in a market characterised by seasonal increases and decreases in demand. Hence, this tendency cannot be considered as an evidence of cartelisation.

120. The Commission notes that price parallelism in itself may not be decisive of cartelisation or concerted action in any industry, yet the same in conjunction with other plus factors may indicate and establish cartelisation. In the present case, the Commission, apart from noticing price parallelism in the industry, has also considered various other factors such as platform of CMA, as discussed earlier, and other economic evidence by way of low capacity utilisation, production and dispatch parallelism *etc.*, as discussed hereinafter.

Determination of prices

121. The Opposite Parties were asked by the DG to provide the methodology followed by them for determination of cement prices. Based on the submissions of the Opposite Parties with regard to the factors affecting cement price movement, the DG observed that factors such as increase in cost or taxes/ levies of Government and the logistics and transportation costs in a particular territory do have an impact on price determination but



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once the basic price is set, these factors do not have any impact on the regular price movements. The changes in the price on a regular basis are the result of market dynamics including market feedback, market forces such as demand and supply of cement and price movement of market leaders. It was also accepted by all the companies that although their decisions of price changes are taken independently but the prices of competitors are regularly monitored to respond to any price change by them.

122. The DG further noted that although it is claimed by almost all the companies that the prices are decided on the market feedback, no formal mechanism or documentation system was found to be maintained by any of the companies to substantiate the argument pertaining to reliance on market feedback.

123. It was submitted that the prices were changed on the basis of feedback received from sales offices. It was found that the communication to the dealers was always made orally on telephone and no written circular or communication was issued by any of the companies regarding change in prices. It was stated that price changes are communicated to the dealers normally one or two days in advance.

124. Further, none of the Opposite Parties was sure about the communication methodology to substantiate their stand that the pricing decisions were based on the feedback of the market. In none of the communications, data relating to demand or any other detail were found to make a case for price changes. The communications reflected merely the prices to be changed and not the reason or any data to show that there was more or less demand.

125. Based on the above, the DG concluded that in such circumstances, it was evident that the argument of the Opposite Parties that prices were changed on the basis of feedback of the market was not supported by documents,



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which was a reflection that the prices could be fixed/ changed in a discretionary manner without any plausible reason.

126. Thus, it can be seen that though the Opposite Parties sought to suggest that the changes/ volatility witnessed in the company-wise cement prices was a consequence of market dynamics/ market feedback, yet the companies were not able to corroborate the same by presenting any mechanism/ data used or adopted by them to determine demand conditions in the market. Further, the parties have stated in their submissions that a sharp reduction in capacity utilisation is a result of low demand, yet the companies were charging high prices in 2010-11, a period in which the average capacity utilisation of the companies came down to 73% from 83% in 2009-10. Further, the companies have also submitted that capacity utilisation is maximum during periods of peak demand season and *vice versa*. However, from the data submitted by some of the parties, it is observed that when price has gone up, production has gone down. In this regard, the companies were unable to provide an explanation as to how they were able to charge such high prices in a period of falling capacity utilisation as well as production. Thus, such conduct indicates that factors other than the prevailing demand-supply conditions in the market had a role to play in explaining the volatility witnessed in cement prices.

Low levels of capacity utilisation

127. The Commission notes from the data in the DG Report that the overall capacity utilisation of the cement companies came down from 83% in 2009-10 to 73% during 2010-11. The DG submitted that while the capacity has increased in the last four years, the increase in production has not been commensurate to the capacity additions.

128. The Opposite Parties in their submissions strenuously challenged the findings of the DG on this count.



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129. UltraTech Cement Ltd. contended that capacity utilisation of its old existing plants has risen from 87% to 94% and had even reached 99-101%. It was also stated that in 2010-11, four plants had achieved capacity utilisation of 125%, 109%, 108% and 101%. Further, UltraTech Cement Ltd.'s new plants capacity utilisation had ranged from 39 to 51%. For Grasim Cement also, capacity utilisation of old existing plants ranged from 96% to 101% while the capacity utilisation of its new plants increased from 33% to 55%. It has also been submitted that UltraTech Cement Ltd.'s production from 2007-08 to 2010-11 has increased year on year basis by 7.78 MMT *i.e.* an increase of 25.56 %.

130. Jaiprakash Associates Ltd. in its replies argued that there are certain factors which have been hindering the full utilisation of the cement plants, such as, availability of the key raw materials, erratic power supply, break down of machinery or stoppage of plants for upgradation, high inventory of clinker, logistic constraints, demand growth and labour disturbance. It has been argued that whenever a new plant is installed, the ramp up of the capacity utilisation to optimum level takes considerable time due to the teething problems encountered in the initial period and therefore, the DG should have taken pro-rate capacity instead of the installed capacity for the whole year. According to JAL, calculated correctly, the actual capacity utilisation for 2009-10 is 81.7 % which is much higher than the DG's calculation.

131. Similarly, Ramco has submitted that the right working of capacity utilisation in its case works out above 90% and not as worked out by the DG. ACC Ltd. and ACL in their replies have also submitted that the DG has not considered the capacity available for production and the actual production and instead has considered nameplate capacity which does not account for ramp-up time, maintenance, age of plants *etc.* It was also submitted that capacity utilisation across the industry in 2010 averaged at 81% based on available capacity instead of nameplate capacity. Further,



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over a twenty year period till 2010, the capacity utilisation levels have ranged between 75-85% and, only on four occasions, they have exceeded 85%. Thus, the performance of the industry during 2010 was comparable to any other normal year.

132. Lafarge India Pvt. Ltd. argued that its capacity utilisation in the last three years has been 100% in 2008, 97% in 2009 and 100% in 2010. It has submitted that installed capacity has outpaced demand and therefore, the findings of the DG that the cement manufacturers are withholding or limiting the output are erroneous. India Cements Limited in its reply has contended that it is incorrect to make general assumptions based on the installed capacity, as production depends upon various factors and lower utilisation of capacity is possible in a period of lack of demand for the product. In its replies, Century Cement has submitted that it had utilised 98.47% of capacity in 2010-11, while it was 97.22% in 2009-10. JK Cement in its submissions has submitted that its capacity utilisation in Northern India plant was around 90% or more except in the year 2010-11 when it was 82% because of major maintenance activity. Its southern plant was also producing at around 49.14% despite the fact that it is taking time for stabilisation and facing teething troubles being a green field project. Binani Cements stated that while alleging that cement industry has underutilised the capacity and withheld supplies, the DG has compared production with the installed capacity of the grinding mill rather than clinker manufacturing capacity of the cement plants. It has argued that the maximum cement that could have been produced by it on an assumption that it had utilised 100% (4 lac MMT) of its clinker capacity could have been 5.25 MMT and it has utilised almost 100% of its installed clinker production capacity.

133. On perusal of the DG Report, it is evident that the capacity utilisation was at its lowest level in 2010-11 when compared with the prevailing levels in the last few years as can be seen from the figures given below:

Installed Capacity and Production of Cement

Year	Installed Capacity in MMT	Growth in %	Production in MMT	Growth in %	Capacity utilisation in %
2005-06	157.35	--	141.81	--	90
2006-07	165.64	5.26	155.64	9.75	94
2007-08	179.1	8.12	168.31	8.14	94
2008-09	205.96	14.99	181.61	7.90	88
2009-10	246.75	19.80	205	12.87	83
2010-11	286.38	16.06	210.85	2.85	73

134. It can be seen from the above that the capacity utilisation was around 73% in 2010-11 which was much lower than the levels in the previous years. The Commission notes that evidently the growth rate in production lagged substantially in 2010-11 as against the growth rate of capacity additions. Installed capacity witnessed an increase in growth rate by 16.06%, but the production grew marginally by 2.85% only. In comparison, in the year 2009-10, the growth rate in capacity addition was 19.80% and growth rate in production was 12.87%.

135. The parties have contended that if nameplate additions and capacity additions for the current year are taken out from the calculations of capacity utilisation *vis-a-vis* available capacity, then capacity utilisation would be higher than as has been assessed and calculated by the DG. In this regard, the Commission viewed capacity utilisation data as reported in publications of CMA titled 'Cement Statistics - 2010' and 'Executive Summary- Cement Industry, March 2011' where capacity utilisation is defined on the basis of capacity available for production.

136. Based on the data available in the publications of CMA, the installed capacity till 31.03.2010 was 222.60 MMT (excluding the data pertaining to ACC and ACL) which increased upto 234.30 MMT on 31.03.2011. The



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capacity expansion included new capacity addition of 12.65 MMT and expansion of 1.50 MMT. The following data from the CMA report provides the figures for capacity utilisation, the production and dispatches.

137. As can be seen from the table below, the capacity utilisation of 75% (excluding the data pertaining to ACC Ltd. and ACL) as given in CMA report which is calculated on the basis of available capacity of 224.41 MT of the remaining cement companies as on 31.03.2011 is not very different from the capacity utilisation of 73% as computed by the DG on the basis of installed capacity.

Capacity utilisation based on available and installed capacity

Total Installed capacity excluding ACC Ltd. and ACL as on 31.03.2011	234.30 MMT
Total Installed capacity including ACC Ltd. and ACL as on 31.03.2011	286.38 MMT
Actual available capacity excluding ACC Ltd. and ACL as on 31.03.2011	224.41 MMT
Capacity utilisation excluding ACC Ltd. and ACL on 31.03.2011	168.29 MMT
% Capacity utilisation excluding ACC Ltd. and ACL on actual available capacity of 224.41 MMT as on 31.03.2011	75%
% Capacity utilisation including ACC Ltd. and ACL on reported installed capacity of 286.38 MMT as on 31.03.2011	73%

138. Even if due consideration is given to the nameplate capacity additions argument presented by the Opposite Parties and thereby the installed capacity of previous year *i.e.* 31.03.2010 is taken to calculate the utilisation of capacity in percentage terms in the current year, the utilisation has been around 76% *i.e.* less than 80%. Therefore, the arguments of the Opposite Parties that if the nameplate capacity addition in current year is taken out



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and capacity additions are considered on pro-rata basis, then their capacity utilisation would be much more than what has been computed by the DG, is not tenable.

139. From the details provided in the CMA publications, it is evident that in case of many plants of UltraTech Cement Ltd., capacity utilisation was very low. For instance, the grinding units of Aligarh, Kotputli, Panipat and Ginigera had capacity utilisation of 22.79%, 54.60%, 63.97% and 54.47% respectively. Furthermore, in case of other companies also, the capacity utilisation has been quite low during 2010-11 even when the available capacity is taken as on 31.03.2010 and capacity additions for the current year are not considered.

140. It may be seen that in case of Ramco, for 2010-11, just as in the case of UltraTech Cement Ltd., the capacity utilisation was very low for certain plants. For instance, the capacity utilisation was 21.45% in Kolaghat grinding unit, 50.19% in Uthiramerur and 58.56% in Salem grinding unit. In case of certain plants of The India Cements Ltd., the capacity utilisation was also very low like 56.11% in Parli Plant, 65.69% in Sankaridurg, 67.67% in Yerraguntla Plant and 68.68% in Vallur Plants. In case of Binani Cements, its Sikar grinding unit utilised only 72.86% of capacity during 2010-11. In case of Jaiprakash Associates Ltd. also, its Roorkee Plant had a capacity utilisation of 71.53 % and Wanakbori unit produced at 45.60% of its capacity.

141. The Commission notes that the fact that these companies witnessed low capacity utilisation is also substantiated from the details of total capacity utilisation reported by the aforesaid companies in their annual reports. In case of other companies also, the capacity utilisation as per their own annual reports have gone down during 2009-10 and 2010-11. For instance, while capacity utilisation in case of ACC Ltd. was 91%, 93% and 91%



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respectively during the years 2007, 2008 and 2009, it has fallen to about 78% in 2009-10 and to 81% in the 2010-11. In case of JK Cement also, the total capacity utilisation has come down to about 82% from 90 % as per its own admission. The annual reports of Madras Cements Ltd. and The India Cements Ltd. also indicated that the total capacity utilisation had been quite low during 2009-10 and 2010-11. In case of Madras Cements Ltd., capacity utilisation was 79.1% in 2009-10 and 69.6% in 2010-11 while in case of The India Cements Ltd., the capacity utilisation was 74% in 2009-10 and 65.3% in 2010-11.

142. Data collected from the reports of CMA suggests that there has been decline in capacity utilisation in almost all the months of 2009-10 and 2010-11 as compared to the previous year. During 2010-11, the decline in capacity utilisation had been the most significant in the months of November and December when the capacity utilisation has come down to 65% and 74% respectively, the lowest in all the years under reference.

Month-wise capacity utilisation 2005-06 to 2010-11

Month	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11
April	90	96	98	90	88	81
May	93	95	99	89	87	80
June	89	94	94	87	85	76
July	82	89	92	87	84	73
August	82	80	88	77	79	71
Sep.	80	88	87	81	73	70
Oct.	90	94	94	86	76	81
Nov.	85	91	89	83	77	65
Dec.	94	98	95	92	86	74
Jan.	98	102	97	93	87	78
Feb.	92	94	95	91	82	78
Mar.	106	107	99	98	88	87
During the year	90	94	94	88	83	76

143. The Commission has also considered the month wise data as gathered from the records of CMA on actual available capacity and production data in respect of cement companies excluding ACC Ltd. and ACL for the years 2009-10 and 2010-11 as under:

Month-wise capacity and production during 2009-10 and 2010-11

Months	Capacity		Production in MMT		% of Capacity utilisation	
	2009-10	2010-11	2009-10	2010-11	2009-10	2010-11
April	15.66	18.55	13.40	14.70	88	81
May	15.66	18.55	13.28	14.47	87	80
June	15.86	18.55	13.19	13.77	85	76
July	15.92	18.55	13.01	13.23	84	73
Aug.	16.12	18.55	12.51	12.85	79	71
Sep.	16.60	18.37	11.83	12.67	73	70
Oct.	16.69	18.52	12.39	14.87	76	81
Nov.	16.69	18.52	12.52	11.84	77	65
Dec.	16.75	18.52	14.07	13.59	86	74
Jan.	17.31	19.04	14.65	14.70	87	78
Feb.	17.40	19.16	13.93	14.78	82	78
Mar.	18.55	19.53	15.97	16.82	88	87
Total	199.21	224.41	160.75	168.29	83	76

144. The aforesaid figures of production *vis-a-vis* actual available capacity show that the capacity utilisation in 2010-11 was much lower in comparison to 2009-10 except in the month of October. The figures show a fall in production in the months of November–December, 2010-11, in comparison to the same months in 2009-10 which translated into lower levels of capacity utilisation. During November, 2010, the utilisation was around 65% as against 77% during November, 2009. Similarly, in December, 2010, the utilisation was 74% as against 86% in December, 2009. For the months of January and February, 2010-11 as well, the utilisation came



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down to 78% in comparison to 87% and 82% in the months of January and February, 2009-10, respectively.

Production parallelism

145. 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.

Rajasthan

(in tonnes)

Company	2009			2010		
	October	November	Remarks	October	November	Remarks
ACC	103327	88425	Decrease	120695	115481	Decrease
Shree	701611	708686	Increase	869064	655290	Decrease
Ultra	275423	249253	Decrease	490792	348675	Decrease
India Cements	316365	300175	Decrease	305757	261469	Decrease
ACL	149654	152995	Increase	173758	132051	Decrease
Birla	206659	185529	Decrease	234887	200098	Decrease

Madhya Pradesh

Company	2009			2010		
	October	November	Remarks	October	November	Remarks
ACC	196936	180052	Decrease	211029	170027	Decrease
Century	270295	323544	Increase	383555	320774	Decrease
Jaypee	445236	539645	Increase	549274	383390	Decrease
Ultra	294250	286842	Decrease	322006	216861	Decrease

Karnataka

Company	2009			2010		
	October	November	Remarks	October	November	Remarks
ACC	329822	356502	Increase	411030	393274	Decrease
Madras	17132	14727	Decrease	11802	11701	Decrease
Ultra	253456	275136	Increase	273023	202847	Decrease

Chhattisgarh

Company	2009			2010		
	October	November	Remarks	October	November	Remarks
ACL	120011	111012	Decrease	124043	115123	Decrease
Century	162780	163880	Increase	180980	160400	Decrease
Lafarge	337981	294215	Decrease	366239	316538	Decrease

Tamil Nadu

Company	2009			2010		
	October	November	Remarks	October	November	Remarks
ACC	79212	78652	Decrease	79452	68483	Decrease
Ultra	169795	153401	Decrease	184430	121582	Decrease
India Cements	365833	334334	Decrease	343304	239878	Decrease

Gujarat

Company	2009			2010		
	October	November	Remarks	October	November	Remarks
ACL	565768	615864	Decrease	721665	576275	Decrease
Jaypee	2888	9322	Increase	121584	103533	Decrease
Ultra	430472	412498	Decrease	466749	397585	Decrease

Andhra Pradesh

Company	2009			2010		
	October	November	Remarks	October	November	Remarks
India	425797	465583	Decrease	449985	317488	Decrease
Ultra	250027	276440	Increase	347702	287377	Decrease
Madras	147632	148362	Increase	112957	104343	Decrease

146. From the data tabulated above, it is evident that during November, 2010, all the cement companies including the Opposite Parties had reduced production, although in 2009, in some cases, there was drop in production and in many cases there was increase also.



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147. Hence, the aforesaid conduct further indicates that there was a coordinated effort on part of the Opposite Parties to reduce supplies by curtailing production.

Dispatch Parallelism

148. Based on the analysis conducted by the DG for the company-wise dispatch data of cement for a period of two years from January, 2009 to December, 2010, it may be observed that the pattern of changes in dispatches of cement by the top companies were similar.

Company-wise and month-wise Cement Dispatches

(in '000 tonnes)

S.No.	Company	Jan'09	Feb'09	Mar'09	Apr'09	May'09	Jun'09	Jul'09	Aug'09	Sep'09	Oct'09	Nov'09	Dec'09
1	J.K. Group	666	655	743	644	642	707	656	644	604	648	644	789
2	Centrury Textiles	690	652	732	679	638	617	629	558	559	584	612	639
3	India Cement	710	754	828	784	804	823	896	835	785	837	837	995
4	Grasim Indus.	1499	1461	1713	1581	1617	1691	1539	1544	1471	1436	1476	1656
5	Madras Cements	502	502	581	607	598	624	704	683	647	603	553	653
6	UltraTech Cement	1484	1436	1628	1580	1534	1422	1135	1317	1270	1351	1411	1590
7	Jaypee Group	727	688	782	791	807	781	743	695	695	780	954	1000
8	Shree Cement	749	742	837	788	735	779	830	689	680	702	709	858
9	Lafarge India	471	470	546	505	485	516	478	525	425	560	511	629
10	Binani Cement	414	414	471	439	451	455	426	404	406	361	418	472
11	ACC Ltd.	1864	1720	1979	1769	1789	1788	1753	1634	1612	1668	1646	1861
12	Ambuja Cement	1626	1649	1724	1639	1638	1588	1438	1429	1359	1464	1550	1729



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(in '000 tonnes)

S. No.	Company	Jan'10	Feb'10	Mar'10	Apr'10	May'10	Jun'10	Jul'10	Aug'10	Sep'10	Oct'10	Nov'10	Dec'10
1	J.K. Group	840	736	858	812	789	687	620	639	667	834	645	705
2	Centrury Textiles	723	633	679	641	595	601	592	617	627	711	611	639
3	India Cement	922	929	1045	918	895	911	971	864	819	840	615	711
4	Grasim Indus.	1692	1555	1903									
5	Madras Cements	636	639	792	663	625	670	744	665	542	557	433	462
6	UltraTech Cement	1672	1550	1779	*3363	3333	3141	2897	2942	2831	3403	2643	3252
7	Jaypee Group	1037	1078	1233	1197	1240	1279	1162	1021	1054	1330	1000	1242
8	Shree Cement	882	771	939	753	846	790	665	706	697	869	655	829
9	Lafarge India	601	494	628	548	478	604	572	484	526	615	547	601
10	Binani Cement	498	463	495	442	459	430	380	384	377	516	402	468
11	ACC	1885	1688	1900	1765	1733	1756	1532	1541	1550	1872	1691	1863
12	Ambuja Cement	1748	1690	1916	1895	1863	1686	1407	1413	1481	1752	1416	1826

* Data of Grasim was merged with UltraTech from Apr'2010 onwards

149. Controverting the aforesaid data, Opposite Parties such as UltraTech Cement Ltd. and Ambuja Cements Ltd. have argued that they increased their dispatches for the period January 2010-December 2010 while the other cement companies have shown a decline in dispatches during the same period. JAL has argued that during Jan-Dec, 2009 it had the highest increase in dispatches in comparison to other cement manufacturers. ACC Ltd. and ACL have argued that there does exist parallelism in the production and dispatches in the cement industry but that is not a result of collusive behaviour, rather, this tendency is a consequence of the inherent market characteristics of this industry *i.e.* commoditised nature of cement, cyclical nature of cement industry and the ability of competitors to intelligently respond to the actions of their competitors.

150. The plea is misconceived as it can be observed that there was a decline in the dispatches in November 2010 for all the Opposite Parties unlike in November 2009 when there was an increase in dispatches for some Opposite Parties and a decline in dispatches for others.

Company-wise Cement Dispatches (Oct-Nov 2009 and 2010)

(in '000 tonnes)

Company	Oct - 09	Nov- 09	Remarks	Oct-10	Nov-10	Remarks
J.K. Group	648	644	Decrease	834	645	Decrease
Century Textiles	584	612	Increase	711	611	Decrease
India Cement	837	837	Same	840	615	Decrease
Grasim Indus	1436	1476	Grasim merged with UltraTech			
Madras Cements	603	553	Decrease	557	433	Decrease
Ultra Tech Cement	1351	1411	Increase	3403	2643	Decrease
Jaypee Group	780	954	Increase	1330	1000	Decrease
Shree Cement	702	709	Increase	869	655	Decrease
Lafarge Cement	560	511	Decrease	615	547	Decrease
Binani Cement	361	418	Increase	516	402	Decrease
ACC Ltd	1668	1646	Decrease	1872	1691	Decrease
Ambuja Cement	1464	1550	Increase	1752	1416	Decrease

151. From the analysis of data on production, dispatch and supplies in the market, it is apparent that the cement companies coordinated their actions as is evident from the data of dispatch in November, 2010 which shows identical and similar behavioural pattern. This cannot be a sheer coincidence. The coordination amongst the Opposite Parties gets facilitated since CMA circulates the production and dispatch details of all the member cement companies on a regular basis. Further, the companies are also



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exchanging information through CMA meetings as regards retail and wholesale price, as noted *supra*.

152. The Commission would also like to emphasise that in any cartelized behaviour, the parties to the arrangement may not always coordinate their actions (as is observed in the company-wise trends witnessed above); periodically their conduct may also reflect a competitive market structure. However, there will be periods when coordination rather than competition will be found to be more gainful. This is reflective in the similar pattern of dispatch observed among the cement companies during November 2010.

153. Further, the Commission notes that dispatch of cement during a year is expected to be on the lines of pattern of consumption during the previous year. Data on aggregate dispatch and consumption as gathered from the records of CMA for its member cement companies is as under:

Month-wise dispatch and consumption during 2009-10 and 2010-11

Month	Dispatch in MMT		Consumption in MMT	
	2009-10	2010-11	2009-10	2010-11
April	13.26	14.44	13.03	14.30
May	13.06	14.18	12.93	14.07
June	13.21	13.81	13.23	13.66
July	12.73	13.30	12.69	13.23
August	12.39	12.81	12.27	12.66
Sep.	11.74	12.68	11.61	12.56
Oct.	12.22	14.58	12.06	14.45
Nov.	12.48	11.69	12.37	11.55
Dec.	14.30	13.60	14.17	13.47
Jan.	14.59	14.61	14.41	14.47
Feb.	13.75	14.73	13.61	14.62
Mar.	16.00	16.72	15.87	16.59

154. In most of the months of 2010-11, dispatch exceeded the actual consumption observed in 2009-10. However, in the two months of November-December, 2010, as is seen from the figures in the table above, the dispatch was lower than the actual consumption of cement during November-December, 2009. Furthermore, as will be seen later, the construction industry which is the most important consumer of cement had been growing significantly during this period which meant a high demand for cement during this time. Based on the above, the Commission observes that lower dispatches in the months of November-December, 2010-11 in comparison to actual consumption in the corresponding months of 2009-10 coupled with lower capacity utilisation in these months even though there were no demand constraints given the strong positive growth in the construction industry, establishes that the cement companies indulged in controlling and limiting the supply of cement in the market.

Increase in prices of cement due to coordinated behaviour

155. To analyse the issue of increase in prices, first, company-wise price trends for the period September, 2010 to February, 2011 and related Excise Duty argument may be examined.

156. From the DG Report, the Commission observes that the price of cement per bag charged by Opposite Parties for the period September, 2010 to February, 2011 showed a distinct upward movement:

Uttar Pradesh

(in Rs)

Name of Company	Sep 2010	Nov 2010	Jan 2011	Feb 2011
ACC	227	242	234	269
Shree	222	225	209	250
Century	209	237	242	282
Birla	191	225	196	250



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Haryana

(in Rs)

Name of Company	Sep 2010	Nov 2010	Jan 2011	Feb 2011
ACC	241	241	242	273
Shree	228	230	221	255
Birla	228.5	220.5	204.5	243.5

Bihar

(in Rs)

Name of Company	Sep 2010	Nov 2010	Jan 2011	Feb 2011
Birla	210	240	200	255
Lafarge	296	294	289	298

Delhi

(in Rs)

Name of Company	Sep 2010	Nov 2010	Jan 2011	Feb 2011
ACC	224	233	227	257
Shree	228.5	235.5	219.5	247.5
Birla	218.5	226.5	204.5	241.5

Punjab

(in Rs)

Name of Company	Sep 2010	Nov 2010	Jan 2011	Feb 2011
ACC	255	259	259	287
Shree	243	248	239	275

Chandigarh

(in Rs)

Name of Company	Sep 2010	Nov 2010	Jan 2011	Feb 2011
ACC	251	254	256	285
Shree	241	246	237	270

Rajasthan

(in Rs)

Name of Company	Sep 2010	Nov 2010	Jan 2011	Feb 2011
ACC	209	213	217	251
Shree	220	223	211	238
Birla	213	217	206	234



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Gujarat

(in Rs)

Name of Company	Sep 2010	Nov 2010	Jan 2011	Feb 2011
JP	170	190	205	230
Birla	161.75	174.75	184.75	208

Maharashtra

(in Rs)

Name of Company	Sep 2010	Nov 2010	Jan 2011	Feb 2011
ACC	219	246	245	260
Century	191	214	206	236

West Bengal

(in Rs)

Name of Company	Sep 2010	Nov 2010	Jan 2011	Feb 2011
ACC	272	278	255	281
Century	261	271	265	275
Birla	236	254	191	242
Lafarge	267	267	260	281

Assam

(in Rs)

Name of Company	Sep 2010	Nov 2010	Jan 2011	Feb 2011
ACC	211	217	218	264
Century	319	316	310	316

Odisha

(in Rs)

Name of Company	Sep 2010	Nov 2010	Jan 2011	Feb 2011
ACC	231	238	216	247
Century	196	206	211	230
Lafarge	215	224	214	241

Madhya Pradesh

(in Rs)

Name of Company	Sep 2010	Nov 2010	Jan 2011	Feb 2011
ACC	197	206	199	235
Century	196.5	201	215	245
Birla	172	198	171	219

Kerala



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(in Rs)

Name of Company	Sep 2010	Nov 2010	Jan 2011	Feb 2011
Madras	250	290	295	300

157. It has been stated by the Opposite Parties that the reason for rise in cement prices in 2011 was on account of change in excise duty. The Commission notes that the change in excise duty was effected after the annual budget for 2011-12 which was presented in the Parliament on 28.02.2011 and therefore, the change in cement prices on account of this could have only been implemented from 01.03.2011. However, the increase was witnessed in many cases in January, 2011 and was uniformly high in February, 2011 in all the cases. In fact, there was a quantum leap in price of cement in the month of February, 2011. Based on the above, the Commission notes that the contention of the Opposite Parties that the increase in cement prices was on account of change in excise duty, is not tenable.

158. Now, the aspect relating to price leadership may be examined to fully analyze the price trends. As discussed previously, the market for cement in India can be divided into 5 regions *i.e.* North, South, East, West and Central. In this regard, it is noted that each region has a few market leaders controlling a majority of the market share. For instance, in the Northern region ACC Ltd., ACL, UltraTech Cement Ltd. and Shree Cement are the major players controlling more than half of the market share. In the Central region, ACC Ltd., Jai Prakash Associates Ltd. and UltraTech Cement Ltd. are the market leaders and ACL, UltraTech Cement Ltd., The India Cements Ltd., Jai Prakash Associates Ltd. are the market leaders in Western region. While in the Southern region, UltraTech Cement Ltd., ACC, The India Cement Ltd. and Ramco are the leaders.

159. In this regard, the statements recorded by the DG of Opposite Parties on the issue of price leadership indicated that players did follow the prices of a perceived market leader in a region. For instance, Jaiprakash Associates



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Ltd. has stated that while determining its price, it does keep the price of the perceived market leader in mind. It also stated that ACC Ltd., Ambuja Cements Ltd., UltraTech Cement Ltd. and Lafarge India Pvt. Ltd. are the perceived market leaders in most of the States. Ramco has stated that big players decide the trend in a particular region and the prices determined by Madras Cements Ltd. do depend upon the prices of the big cement companies to certain extent. It also stated that, in Tamil Nadu – The India Cements Ltd., UltraTech Cement Ltd. and Ramco are the perceived market leaders; in Kerala - India Cements Ltd., Ramco and ACC Ltd. are the perceived market leaders; in Karnataka - UltraTech Cement Ltd. and ACC Ltd. are the leaders; and in West Bengal - ACL, UltraTech Cement Ltd. and Lafarge India Pvt. Ltd. are the perceived market leaders.

Trends in cement production and related demand sectors

160. It would also be necessary to analyse the trends in production and to see whether they are in tandem with the trends in the related demand sector for cement. In this regard, the Commission has looked at the following data to make an assessment:

Revised Estimates of GDP at factor cost by economic activity (at 2004-05 prices)

Industry	Figures in Rs. crores			% change over previous year	
	2008-09	2009-10 (QE)	2010-11 (QE)	2009-10	2010-11
Construction	332557	355918	384629	7.0	8.1
GDP	4162509	4493743	4877842	8.0	8.5

Revised Estimates of GDP at factor cost by economic activity (at current prices)

Industry	Figures in Rs. crores			% change over previous year	
	2008-09	2009-10 (QE)	2010-11 (QE)	2009-10	2010-11
Construction	451414	501706	591864	11.1	18.0
GDP	5282086	6133230	7306990	16.1	19.1

Quarterly estimates of GDP for 2010-11 (at 2004-05 prices)

Industry	% change over previous year							
	2009-10				2010-11			
	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4
Construction	5.4	5.1	8.3	9.2	7.7	6.7	9.7	8.2
GDP	6.3	8.6	7.3	8.9	9.3	8.9	8.3	7.8

Quarterly estimates of GDP for 2010-11 (at current prices)

Industry	% change over previous year							
	2009-10				2010-11			
	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4
Construction	6.0	5.5	13.0	19.7	18.9	16.3	19.2	17.6
GDP	10.5	13.0	16.8	23.3	21.6	19.2	19.0	17.2

Cement Production and Dispatches

Month	Cement Production			Cement Dispatches		
	In Absolute		%age change in 10-11 over 09-10	In Absolute		%age change in 10-11 over 09-10
	2010-11	2009-10		2010-11	2009-10	
April	14.70	13.40	9.70	14.44	13.26	8.90
May	14.47	13.28	8.96	14.18	13.06	8.58
June	13.77	13.19	4.40	13.81	13.32	3.68
July	13.23	13.01	1.69	13.30	12.73	4.48
August	12.85	12.51	2.72	12.81	12.39	3.39
September	12.67	11.83	7.10	12.68	11.74	8.01

October	14.87	12.39	20.02	14.58	12.22	19.31
November	11.84	12.52	-5.43	11.69	12.48	-6.33
December	13.59	14.07	-3.41	13.60	14.30	-4.90
January	14.70	14.65	0.34	14.61	14.59	0.14
February	14.78	13.93	6.10	14.73	13.75	7.13
March	16.82	15.97	5.32	16.72	16.00	4.50
Overall			4.74%			4.75%

161. The Commission notes that cement is primarily consumed by the construction industry. Based on the data collected from the publications of CMA and the website of Ministry of Statistics and Programme Implementation (as given above), the Commission observes that the construction industry grew at 7% in the year 2009-10 and at a higher rate of 8.1% in 2010-11 at factor cost and at the rate of 11.1% in 2009-10 and 18% in 2010-11 at current prices. The robust and accelerated growth in the construction industry in 2010-11 which is the main demand driver for cement would mean strong demand for cement during this period. However, the growth in cement production and dispatches had been to the tune of only 4.74% and 4.75% respectively. This indicates that the growth in cement production was not commensurate to the growth observed in the construction industry.

162. The Commission further observes that the third and fourth quarter of 2010-11 witnessed a GDP growth rate of 8.3% and 7.8% at factor cost respectively and the construction industry witnessed a growth of 9.7% and 8.2% in Q3 and Q4 of 2010-11 respectively. However, the cement industry registered a negative growth rate of 5.43% and 3.41% in cement production in November and December of 2010-11, respectively. Even in case of cement dispatches, a negative growth rate of 6.33% and 4.90% was observed in the months of November and December 2010, respectively, over the corresponding months in the previous year. Even in January,



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2010-11, the growth rate in cement production and dispatches was very low.

163. As discussed earlier, the capacity utilisation fell significantly in 2010-11 even though certain Opposite Parties including Lafarge India Pvt. Ltd. and Century Cements have stated that some of their plants were working with a capacity utilisation of 98-100%. The growth in construction sector coupled with high capacity utilisation witnessed by Opposite Parties in certain plants indicates that there was no evident demand constraint which could have caused a negative growth in production and dispatches as well as low levels of overall capacity utilisation. Based on the above, the Commission observes that the companies were deliberately reducing capacity utilisation to manipulate and control the supply in the market and raise prices.

164. Thus, the Commission observes that the cement companies reduced production and dispatches of cement in a period when the demand from the construction sector was positive during November and December, 2010 and thereafter raised prices in the months of January and February, 2011, as discussed earlier in para 157 of this order. Thus, it is evident that the cement companies have been limiting and controlling supply in periods just before the peak demand season to create artificial scarcity in the market in order to sell cement at higher prices in the peak season.

Company-wise trend in Profit Margins and Net Profits

165. The Commission notes that the findings of the DG suggest that cement companies have been making huge profits over the years by limiting and controlling supplies and by charging higher than competitive prices. Opposite Parties in their replies have rebutted these claims by stating that the profit margins have not been abnormal and rather have been falling over the years. It has been stated by the Opposite Parties that the DG has incorrectly considered cost of sales to measure profit margins. It has further been stated by the Opposite Parties that it is not the Commission's mandate



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to look into whether the prices being charged by the parties are correct prices or not as long as the prices are being determined using market forces.

166. The Commission has carefully perused the findings of the DG and the contentions of the parties on the issue. There can be no dispute that the Commission is not to look into and determine the measure and degree of profitability of a sector/ commodity/firm as long as it is an outcome of interplay of normal market forces for determining demand, supply and prices. But, in a scenario where competitive forces are impeded in any manner, it is the duty of the Commission to take suitable actions and suggest measures to promote competition.

167. The Commission has perused the information relating to profit margins of all Opposite Parties. It has been observed that in case of ACC Ltd., Ambuja Cements Ltd., Jaiprakash Associates Ltd. and UltraTech Cement Ltd. the Earnings before Depreciation, Interest, Tax and Amortisation (EBDITA) increased in 2010-11 in comparison to 2009-10. Further, the ROCE for ACC Ltd., ACL and UltraTech Cement Ltd. has also been at a high level of around 20% for the period 2008-09 to 2010-11.

Earnings Before Depreciation, Interest, Tax and Amortization

Company Name	2008-09	2009-10	2010-11
ACC Ltd	2644.00	1822.00	1921.00
Ambuja Cements Ltd	1971.00	1951.00	1994.00
Jaiprakash Associates		2891.00	3242.00
UltraTech Cement	1810.00	2094.00	2829.00

168. The DG has analysed the data in respect of cost of sales, sales realisation and margins of Opposite Parties in respect of PPC for the years 2007, 2008 and 2009. The same is noted as under:

ACC

Name of Company	Year	Cost of sales in rs.	Sales realization	Margin	Margin per bag of cement	Margin as % of sales realization
ACC	2009	2503	3706	1203	60	32
ACC	2008	2466	3415	949	47	27
ACC	2007	2303	3360	1057	52	31

ACL-2009

Unit	Year	Cost of sales	Sales realization	Margin	Margin per bag of cement	Margin as % of sales realization
Ambuja	2009	3221	3523	302	15	8
Gaj Ambuja	2009	3110	3580	470	23	13
Darla Ghat	2009	1509	2176	667	33	30
Bhatinda	2009	2796	4150	1354	67	32
Rabriyawas	2009	2436	3416	980	49	28
Sankrail	2009	3073	4076	1003	35	17
Farrakka	2009	3744	4562	818	41	18
Roorkee	2009	3239	3992	753	37	18.8
Average		2891	3684	793	39	21.52

ACL- 2008

Unit	Year	Cost of sales	Sales realization	Margin	Margin per bag of cement	Margin as % of sales realization
Ambuja	2008	2733	3488	754	37	21
Gaj Ambuja	2008	2926	3485	559	28	16
Darla Ghat	2008	1982	2804	1822	91	65
Bhatinda	2008	2519	3825	1306	65	34



Rabriyawas	2008	2360	3054	694	34	22
Sankrail	2008	3074	3969	894	44	22
Farrakka	2008	3738	3981	242	12	6
Roorkee	2008	3173	3782	609	30	16
Maratha	2008	2447	3788	1341	67	35
Bhatpara	2008	2346	2953	607	30	20
Average		2730	3513	783	43	22

ACL- 2007

Unit	Year	Cost of sales	Sales realization	Margin	Margin per bag of cement	Margin as % of sales realization
Ambuja	2007	2912	3318	406	20	12
Gaj Ambuja	2007	2569	3463	894	44	25
Darla Ghat	2007	2471	3607	1136	57	31
Bhatinda	2007	2230	2762	1532	76	55
Rabriyawas	2007	2142	3091	949	47	30
Sankrail	2007	2613	3970	1357	67	34
Farrakka	2007	3823	3922	99	5	2.5
Roorkee	2007	3172	4069	897	44	22
Average		2741	3525	784	45	22

UltraTech (Grasim) Average for 2009

Unit	Year	Cost of sales	Sales realization	Margin	Margin as % of sales realization
South	2009	2425	3921	1496	75 (38.1)
Aditya	2009	2756	3029	272	13 (9)
Panipat	2009	3302	3524	222	11 (6.3)
Rajshree	2009	2607	3619	1012	50 (28)
Dadri	2009	3103	3795	692	34 (18.2)
Samruddi (Dadri)	2009	3103	3795	691	34 (18.2)
Bhatinda	2009	2872	3586	713	35 (19.8)
Rawan (Raipur)	2009	2661	3379	717	35 (21)
Average		2853	3581	728	20



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**UltraTech (Grasim) Average for 2008**

Unit	Year	Cost of sales	Sales realization	Margin	Margin as % of sales realization
South	2008	2277	3523	1247	35.3
South unit ii	2008	2670	3595	925	25.7
Aditya	2008	2132	3086	954	30.9
Rajshree	2008	2202	3266	1064	32.5
Bhatinda	2008	2511	3505	993	28.3
Rawan	2008	2480	3074	594	19.3
Average		2378	3341	963	28

UltraTech (Grasim) Average for 2007

Unit	Year	Cost of sales	Sales realization	Margin	Margin as % of sales realization
South	2007	1783	2706	923	34
Aditya	2007	1737	2691	953	24
Rajashree	2007	1962	2973	1011	34
Bhatinda	2007	2371	3501	1130	32
Rawan	2007	2360	2884	524	18
Average		2042	2951	908	30

India Cements 2009

Unit	Year	Cost of sales	Sales realization	Margin	Margin per bag of cement	Margin as % of sales realization
Dalavoi	2008-09	2609	3812	1203	60	31
Malkapur	2008-09	2705	3030	325	16	10
Vishupuram	2008-09	2757	3324	567	28	17
Yemagentha	2008-09	2362	3141	778	39	24
Shankarnagar	2008-09	2731	3901	1170	58	30
Sankaridurg	2008-09	3086	3855	769	38	20
Chilamkur	2008-09	2759	3642	883	44	24
Average	2008-09	2716	3529	814	40	23



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India Cements 2008

Unit	Year	Cost of sales	Sales realization	Margin	Margin per bag of cement	Margin as % of sales realization
Dalavoi	2007-08	2246	3484	1238	69	35
Malkapur	2007-08	2115	2837	722	36	25
Vishupuram	2007-08	2277	3055	778	39	25
Yemagentha	2007-08	2116	2938	821	41	28
Shankarnagar	2007-08	2360	3498	1138	57	32
Sankaridurg	2007-08	2822	3427	605	30	17
Chilamkur	2007-08	2361	3202	841	42	26
Average		2328	3207	879	43	27

India Cements 2007

Unit	Year	Cost of sales	Sales realization	Margin	Margin per bag of cement	Margin as % of sales realization
Dalavoi	2006-07	2014	2686	671	33	25
Malkapur	2006-07	1897	2540	643	32	25
Vishupuram	2006-07	2058	2514	455	22	18
Yemagentha	2006-07	1924	2474	551	27	22
Shankarnagar	2006-07	2071	2831	760	38	26
Sankaridurg	2006-07	2322	2801	479	24	17
Average	2006-07	2047	2641	594	29	22

Jaypee Cements

Unit	Year	Cost of sales	Sales realization	Margin	Margin as % of sales realization
Bela plant	2008-09	1999	3087	1088	35
Rewa Plant	2008-09	2622	3217	955	29
Chunar	2008-09	3035	3142	106	3
Average		2432	3149	716	22

Unit	Year	Cost of sales	Sales realization	Margin	Margin as % of sales realization
Bela plant	2007-08	1996	3137	1141	36
Rewa Plant	2007-08	2160	3161	1001	31
Blending Unit	2007-08	1958	2927	969	33
Average		2038	3075	1037	33

Shree Cement

Company	Unit	Year	Cost of Sales	Sales Realization	Margin	Margin as % of Sales realization
Shree Cement	Bangur Nagar	2008-09	2128	3071	943	30
Shree Cement	Bangur City	2008-09	2253	3058	804	26
Shree Cement	Khushkhera	2008-09	2354	3361	1007	29
Average			2245	3163	918	29

Company	Unit	Year	Cost of Sales	Sales Realization	Margin	Margin as % Sales realization
Shree Cement	Bangur Nagar	2007-08	1987	3068	1081	35
Shree Cement	Bangur City	2007-08	2420	3110	690	22
Shree Cement	Khushkhera	2007-08	2299	3278	979	29
Average			2235	3152	917	29

Company	Unit	Year	Cost of Sales	Sales Realization	Margin	Margin as % Sales realization
Shree Cement	Bangur Nagar	2006-07	1652	2806	1153	41
Shree Cement	Bangur City	2006-07	2560	2790	230	8
Average			2106	2798	691.5	24

Binani Cements

Unit	Year	Cost of sales	Sales realization	Margin	Margin as % of sales realization
Binanigram	2008-09	2570	3082	512	16
Neemka thana	2008-09	3108	3261	152	4
Binanigram	2007-08	2271	3065	793	25
Binanigram	2006-07	2062	2835	773	27
Average		2839	3172	332	10

Lafarge Cements

Unit	Year	Cost of sales	Sales realization	Margin	Margin as % of sales realization
Sonadih	2008	2432	3022	589	19
Arsmeta	2008	2762	3466	704	20
Jojobera	2008	2949	3897	948	24
Average		2714	3462	747	21

Unit	Year	Cost of sales	Sales realization	Margin	Margin as % of sales realization
Sonadih	2007	2220	2732	511	18
Arsmeta	2007	2495	3195	700	21
Jojobera	2007	2593	3394	801	23
Average	2007	2536	3106	570	21

169. The Commission notes that the analysis of the margins indicates that the Opposite Parties have been able to charge high profit margins in spite of



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capacity additions over the years and this counters the claims made by the Opposite Parties that they have been earning below the reinvestment levels and incurring losses.

170. A chart showing net profit of all the top cement companies is prepared to show the profit earned by the cement manufacturers as given below:

Name of the Company	2010			2009			2008		
	Sales (In cr.)	Net Profit (in cr.)	Net profit as % of Sales	Sales (In cr.)	Net Profit (in cr.)	Net profit as % of Sales	Sales (In cr.)	Net Profit (in cr.)	Net profit as % of Sales
ACC	7717	1120	14.5	8027	1606	20	7308	1212	16.5
Ambuja Cement	7390	1264	17.1	7077	1218	17.2	6235	1402	22.4
UltraTech	7854	1096	13.9	7340	979	13.3	5509	1007	18.2
Jai Prakash Associates	10088	1708	16.9	5764	897	15.5	3984	609	15.2
Shree Cement	4014	676	16.8	3091	577	18.6	2517	260	10.3
India Cement	4221	531	12.5	3954	648	16.3	3605	844	23.4
Lafarge Cement	3401	654	19.2	1991	356	17.8	1625	251	15.4
Madras Cement	2800	353	12.6	2456	363	14.7	2011	408	20
Binani Cement	2067	281	13.5	2185	148	6.7	1148	175	15.2

171. Based on the above table, the Commission notes that the companies have been making high net profits. In this regard, the Commission further notes that most of the companies have carried out capacity expansion programme during the above period. Despite the cost of huge investments and interest burden, the cement industry has remained most rewarding for all the players as all of the companies have earned a consistent positive net profit. This trend coupled with the other circumstantial evidences confirms that the



cement manufacturers have generated huge profits by eliminating competition and charging unreasonable prices.

Conclusion

172. In view of the discussion in the preceding paras, it is evident that the opposite party cement companies were interacting using the platform made available by the trade association (CMA). Such interactions transgressed the limits in sharing of information and extended to the discussions on cost, prices, production and capacities, thereby, facilitating the enterprises in determining prices and production in a concerted and collusive manner than in a competitive manner. No doubt, trade associations have an important role in promoting the interests of their members and the industry they serve. However, it is imperative that all those who participate in association activities through meetings or otherwise, whether as a member or an executive or manager or employee, have to be sensitive to the discussions not transgressing advertently or otherwise into anti-trust behaviour or practices. In other words, they must stay within the limits and follow standards within the safeguards laid down to avoid such a risk. The anti-trust laws are not in themselves an impediment to undertaking association activities. Yet, trade associations and their members must be fully aware of the conducts which these laws proscribe while carrying out various activities under the aegis of the associations.

173. In an oligopolistic market, interdependence between firms may lead to collusive conduct resulting in anti-competitive outcomes. In the present case, there is not only evidence available by way of minutes and meetings of CMA to indicate that the cement companies abused the forum of trade association and instead of espousing the legitimate cause of their trade, colluded with each other in indulging in anti-competitive conduct, there is also the parallel conduct exhibited by the parties in determining prices.



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174. In view of the economic and other circumstantial evidence available on record, the Commission is of the opinion that the OP cement companies used the platform provided by CMA and shared details relating to prices, capacity utilisation, production and dispatch and thereby restricted production and supplies in the market contravening the provisions of Section 3(1) read with Section 3(3)(b) of the Act. Further, the conduct of the OP cement companies not only exhibited mere price parallelism as the evidence on record establishes that they were acting in concert to fix prices of cement in contravention of the provisions of Section 3(1) read with Section 3(3)(a) of the Act resulting in high prices for consumers and high profit margins for producers.

175. In terms of the provisions contained in Section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void. Further, by virtue of the presumption contained in subsection (3), any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-(a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive



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bidding, shall be presumed to have an appreciable adverse effect on competition.

176. It can therefore be seen that in case of agreements as listed in Section 3(3) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition within India; the onus to rebut this presumption would lie upon the Opposite Parties. The parties may rebut the said presumption in light of the factors enumerated in Section 19(3) of the Act. It may be pointed out that by virtue of the provisions contained in Section 19(3) of the Act, the Commission, while determining whether an agreement has an appreciable adverse effect on competition within India under Section 3, shall have due regard to all or any of the following factors, namely: (a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; (c) foreclosure of competition by hindering entry into the market; (d) accrual of benefits to consumers; (e) improvements in production or distribution of goods or provision of services; (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services. Thus, while clauses (a)-(c) deal with factors which restrict the competitive process in the markets where the agreements operate (negative factors), clauses (d)-(f) deal with factors which enhance the efficiency of the distribution process and contribute to consumer welfare (positive factors). An agreement which creates barriers to entry may also induce improvements in promotion or distribution of goods or *vice-versa*. Hence, whether an agreement restricts the competitive process is always an analysis of a balance between the positive and negative factors listed in Section 19(3) of the Act.

177. In the present case, the Opposite Parties could not rebut the said presumption. It has not been shown by the Opposite Parties as to how the impugned conduct resulted into accrual of benefits to consumers or made



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improvements in production or distribution of goods or provision of services. Opposite Parties could not show how the concerted act promoted technical, scientific or economic development by means of production or distribution of goods or provision of services. On the contrary, the analysis on capacity utilisation indicates that capacity utilisation had significantly declined in 2009-10 and 2010-11 over the last few years. This indicates that there has been no efficiency improvement in market. Furthermore, the concerted action has led to a rise in cement prices which acts as a detriment to the consumers in the market.

178. Based on the above discussion, the Commission is of opinion that the Opposite Parties by acting in concert and fixing cement prices and limiting and controlling the production and supply in the market have contravened the provisions of Section 3(1) read with Section 3(3)(a) and 3(3)(b) of the Act.

179. In view of the above, the Commission passes the following:

ORDER

180. *Vide* a separate order passed by the Commission in Case No. 29 of 2010, the Opposite Parties (except Shree Cement Limited) have been directed to cease and desist from indulging in any activity relating to agreement, understanding or arrangement on prices, production or supply of cement in the market. Besides, monetary penalties have also been imposed upon such parties. As such, the Commission does not deem it appropriate to issue these remedies again against such parties.

181. However, so far as Shree Cement Ltd. is concerned, the Commission, for the reasons recorded below, finds it fit to impose penalty as well. Under the provisions contained in Section 27(b) of the Act, the Commission may



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impose such penalty upon the contravening parties, as it may deem fit, which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse. Further, in cases of cartelisation, the Commission may impose upon each such cartel participant, a penalty of upto three times of its profit for each year of continuance of the anti-competitive agreement or ten per cent of its turnover for each year of continuance of such agreement, whichever is higher.

182. It is evident that the legislature has conferred wide discretion upon the Commission in the matter of imposition of penalty. It may be noted that the twin objectives behind imposition of penalties are: (a) to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and (b) to ensure that the threat of penalties will deter the infringing undertakings. Therefore, the quantum of penalty imposed must correspond with the gravity of the offence and the same must be determined after having due regard to the mitigating and aggravating circumstances of the case.

183. The Commission notes that the impugned action of the Opposite Parties was not only detrimental to the interests of the consumers but the Opposite Parties also earned huge profit margins by acting in concert and co-ordination on prices, production and supplies. Such conduct deprives not only the consumers but the economy also from exploiting the optimal capacity utilisation and thereby the reduced prices. Further, the act of the Opposite Parties is also detrimental to the whole economy since cement is a critical input in construction and infrastructure industry - vital for economic development of the country.

184. As per the provisions of Section 2 (c) of the Act, 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. The impugned act of the Opposite Parties unequivocally establishes that they were acting as a cartel. The Commission also notes that the cement companies have been penalised in other jurisdictions also for their anti-competitive acts. Besides, CMA and some of Opposite Parties have also been found to be engaged in restrictive trade practices in the past by the erstwhile MRTP Commission in RTPE 21 of 2001 and RTPE No. 99 of 1990.

185. The Opposite Parties 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, it may be noted that the present inquiry is limited to the Opposite Parties named in the information. As regards the period of contravention, it may be observed that since the DG has examined the conduct of the parties involved in the cartel only upto March 2011, this order is also confined to the period from the date of enforcement of the relevant provisions of the Act *i.e.* 20.05.2009 to 31.03.2011.

186. The Commission has given a thoughtful consideration to the issue of imposition of penalty. After carefully examining the pernicious effect emanating out of the cartel and its impact on the economy and consumers, the Commission is of considered opinion that this is a fit case to invoke the proviso to Section 27(b) of the Act.

187. The calculation of penalty limit based on turnover in terms of Section 27(b) is as under:



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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)
Shree Cement	3475.20	347.52	3937.78	393.77	741.29

188. 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)
Shree Cement	585.33	1755.99	209.70	629.10	2385.09

189. It is evident that the amount of three times of net profit calculated as above is higher than 10% of the turnover. As per the provisions of proviso to Section 27(b) of the Act, the penalty may be determined on the basis of net profit or turnover whichever is higher. In the present case, the Commission takes into account the net profits for computing penalties. For the reasons adumbrated earlier, the Commission hereby imposes a penalty of 0.5 times of net profit for 2009-10 (from 20.05.2009) and 2010-11 in case of Shree Cement in this case as follows:



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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)
Shree Cement	585.33	292.66	209.70	104.85	397.51

190. Further, Shree Cement is directed 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.

191. Lastly, it is clarified that in this order parties have been mentioned by their names/ abbreviated names/ acronyms as used by the DG in the Report for sake of easy reference and convenience. The exact names of the parties as obtaining as on date have been specified in the cause title as noted in the beginning of this order and the directions issued by the Commission are to relate to such names only.

192. Moreover, only one version of the order is issued in view of the order passed by the Hon'ble Competition Appellate Tribunal on 11.10.2012 in the batch of appeals arising out of the original orders of the Commission passed in the matter. For ready reference, the same is noted below:

Mr. Balbir Singh, Learned Counsel for the CCI says that all the copies maintained under Sub Regulation 13 of Regulation 35 of the Competition Commission of India (General) Regulations, 2009 shall be supplied to the concerned Appellants within one week from today. The Appellants have no objection to this.

193. Even otherwise, the data used in the order are historical in nature by now and therefore, it would be enough if only one order is issued.



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194. The Commission directs Shree Cement Limited to deposit the penalty amount within 60 days of receipt of this order.

195. The Secretary is directed to communicate a copy of this order to the parties.

196. It is ordered accordingly.

**Sd/
(Devender Kumar Sikri)
Chairperson**

**Sd/
(S. L. Bunker)
Member**

**Sd/
(Sudhir Mital)
Member**

**Sd/
(Augustine Peter)
Member**

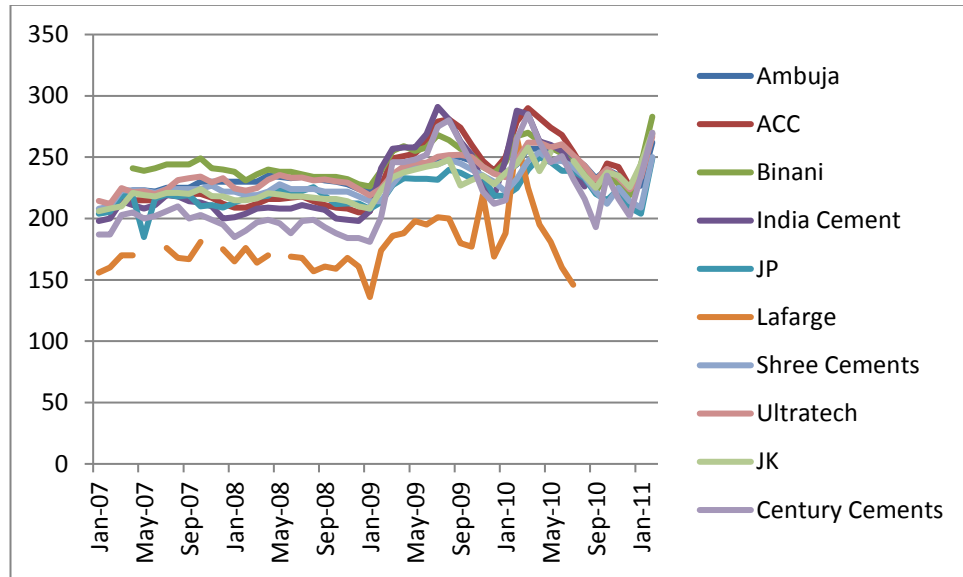
**Sd/
(U.C. Nahta)
Member**

**Sd/
(Justice G. P. Mittal)
Member**

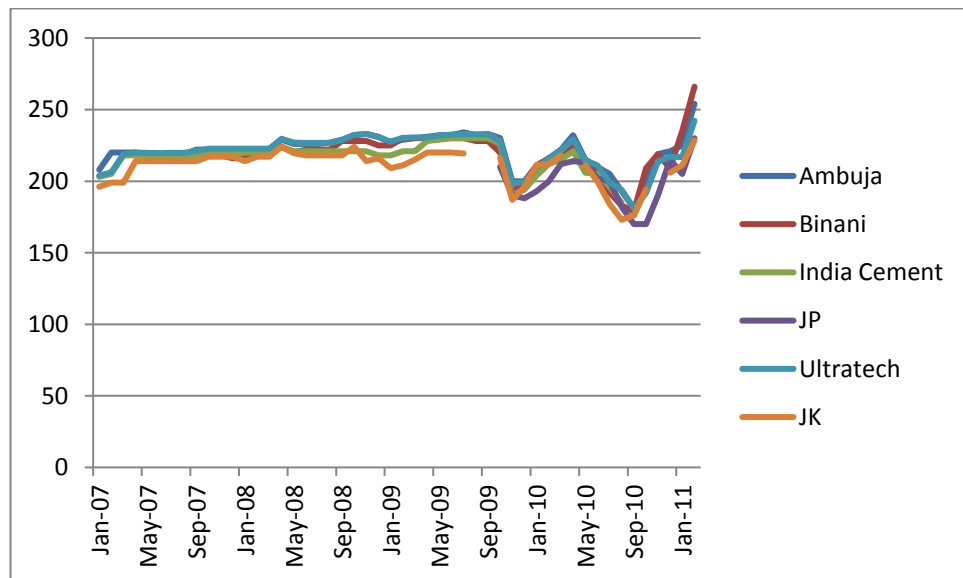
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Date: 31/08/2016

Annexure-I

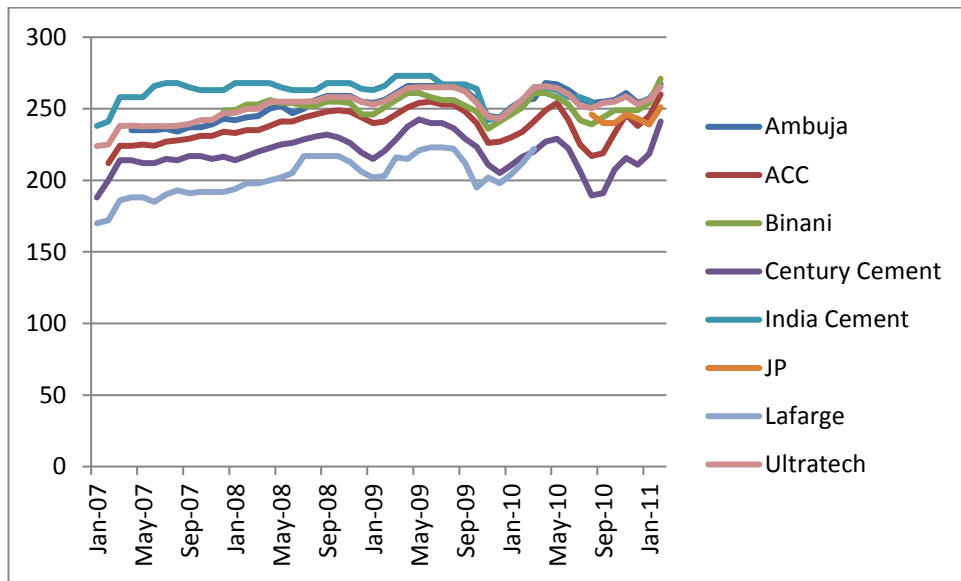
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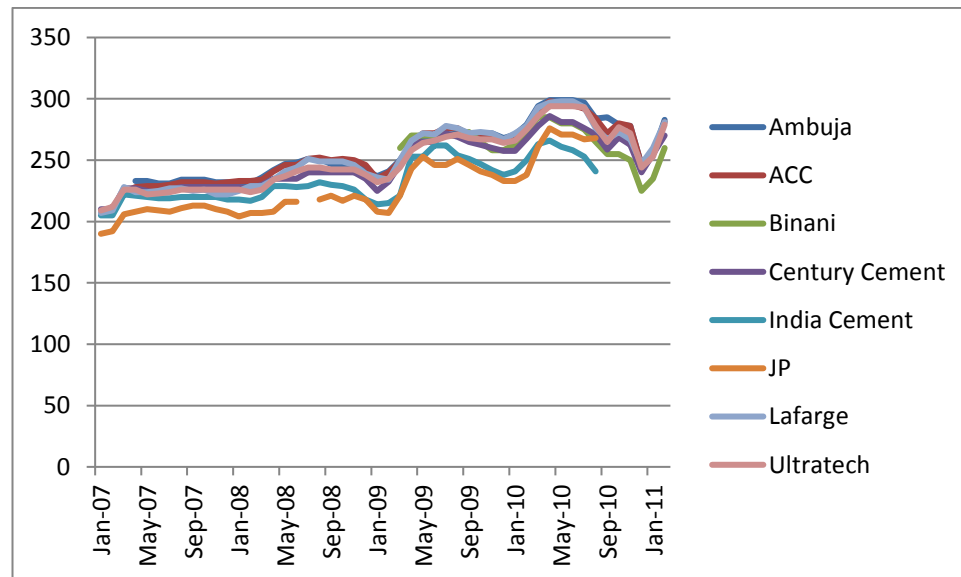
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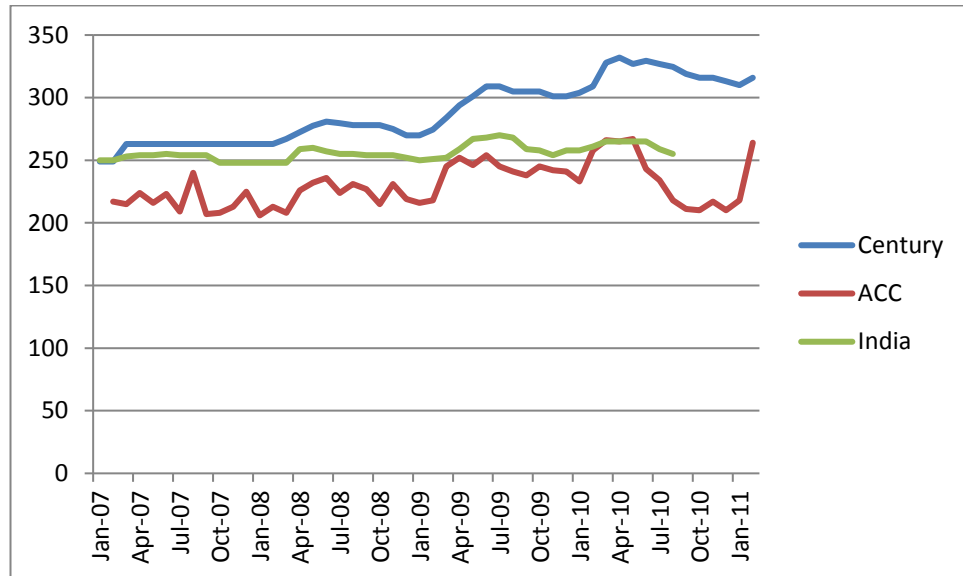
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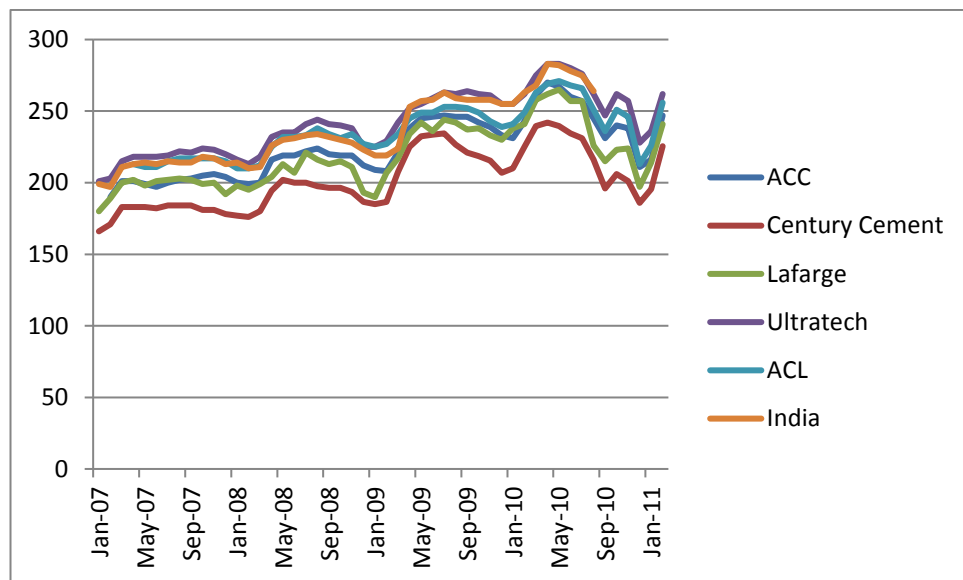
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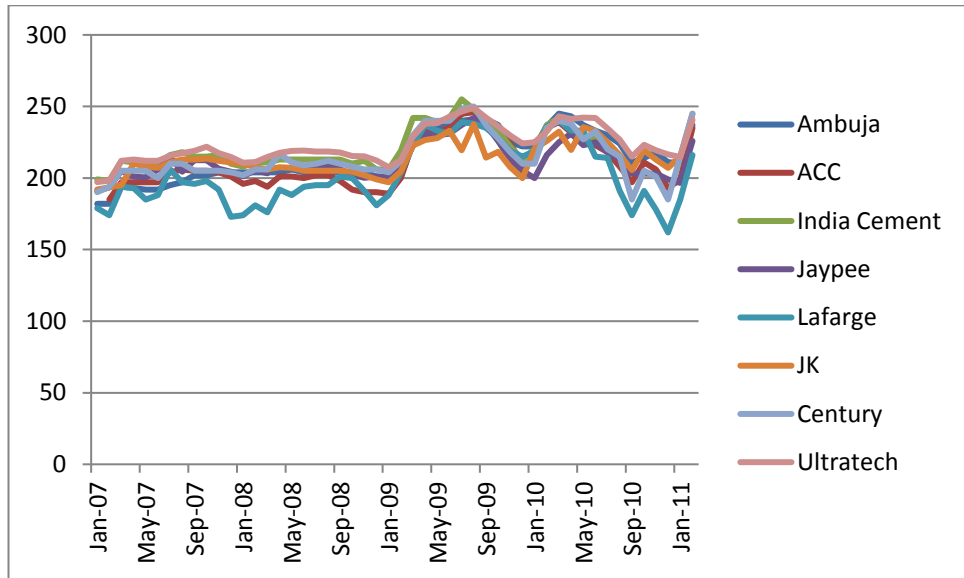
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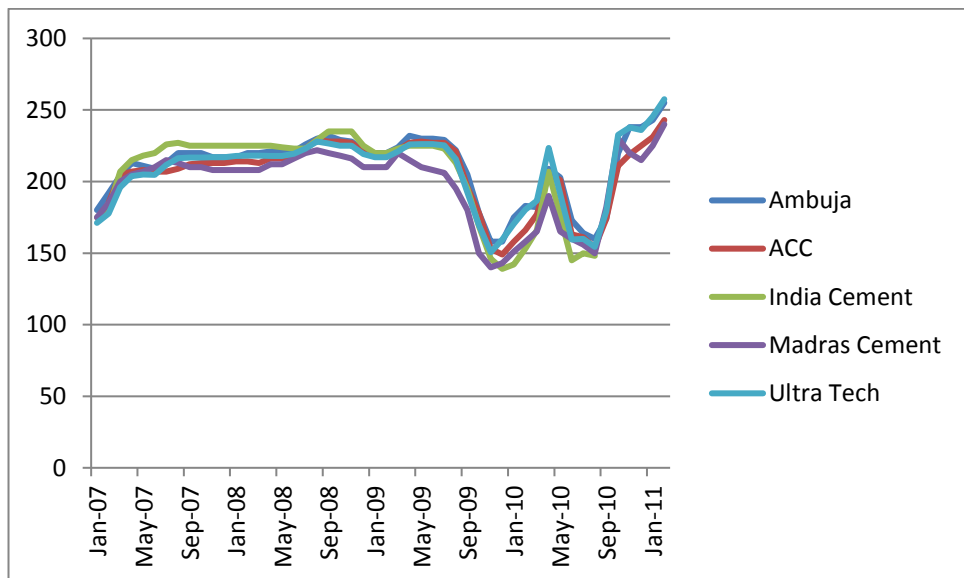
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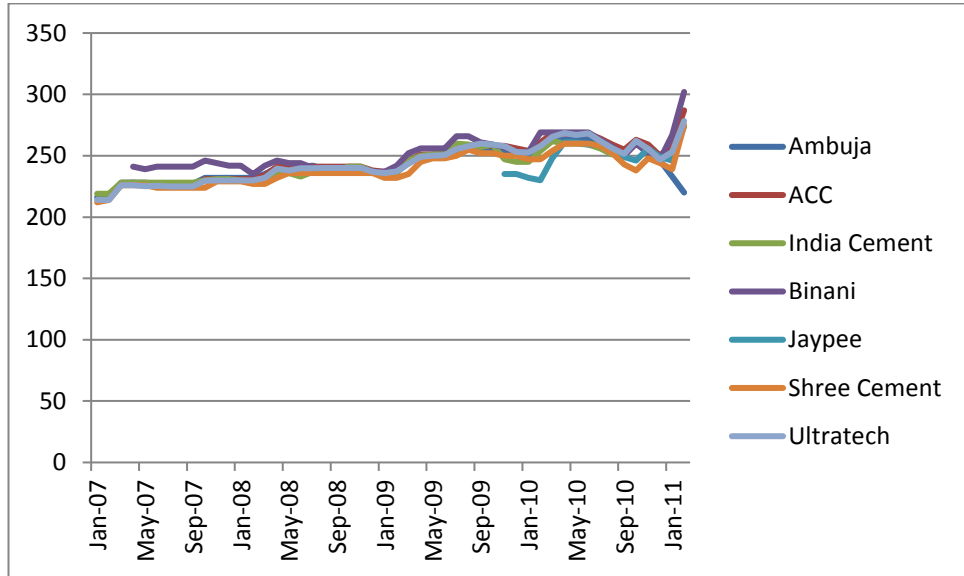
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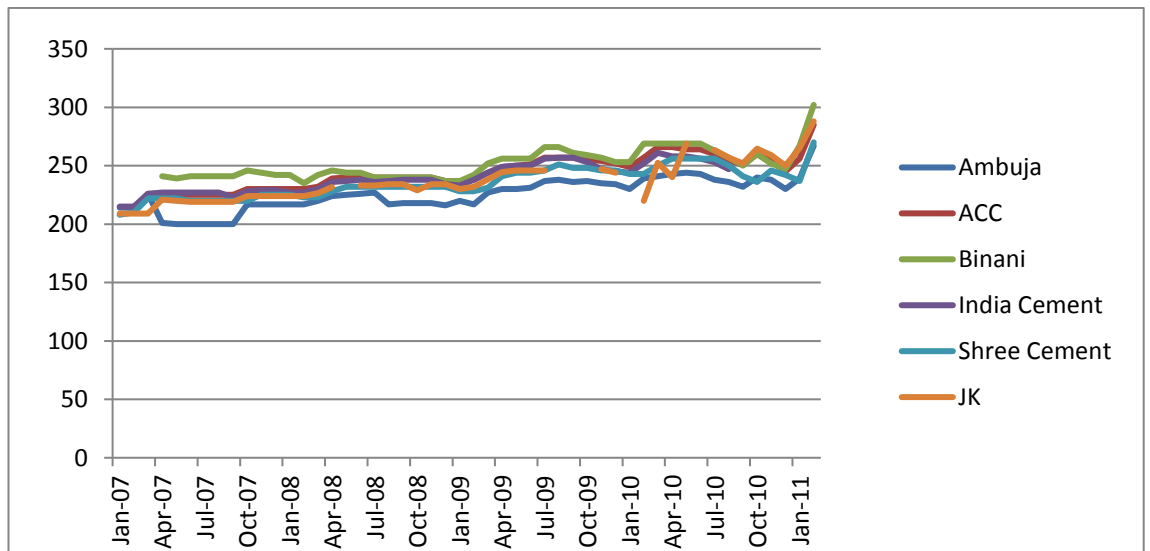
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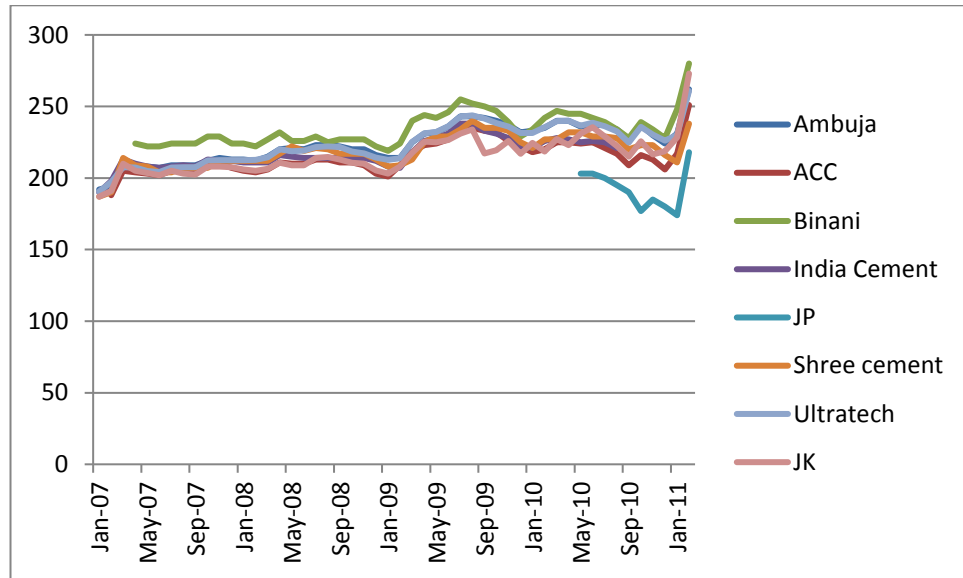
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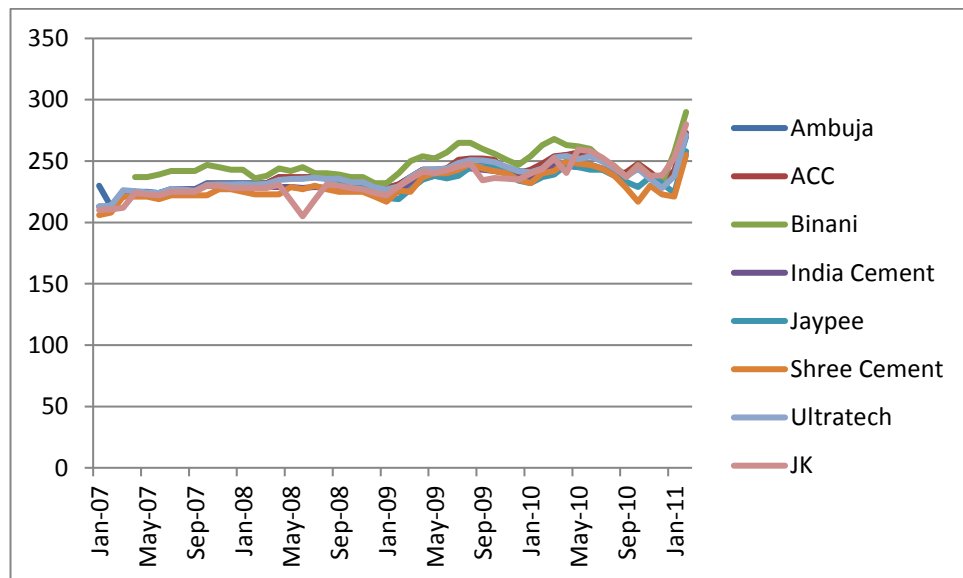
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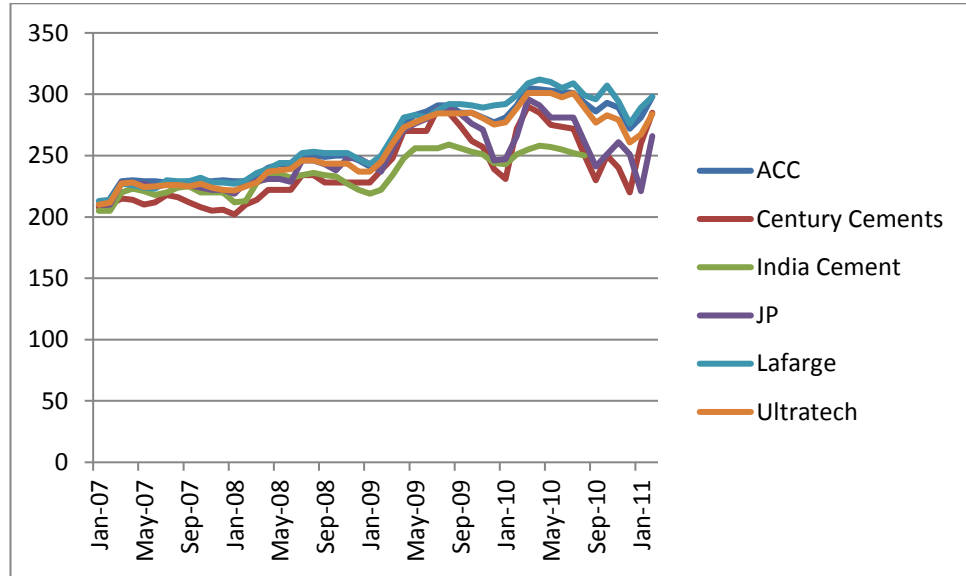
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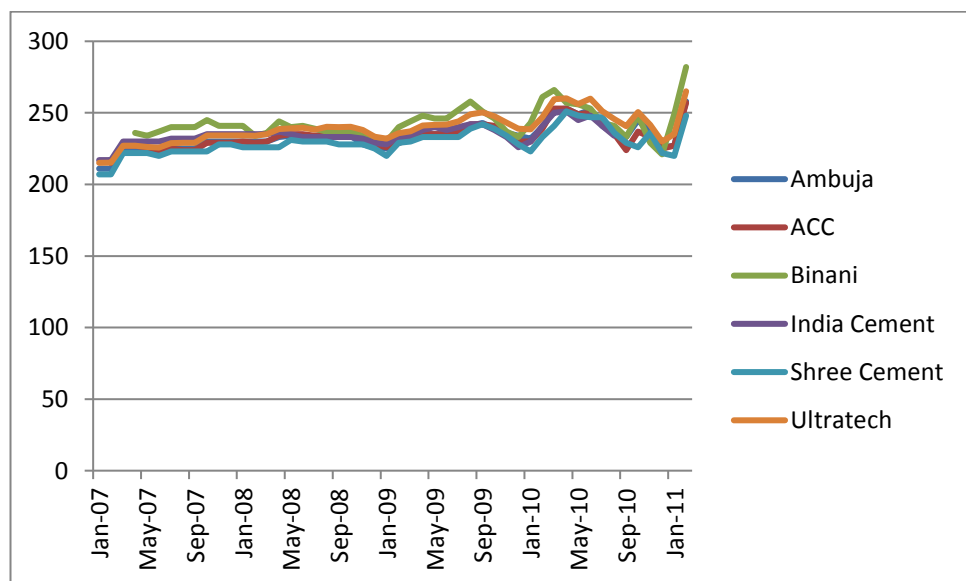
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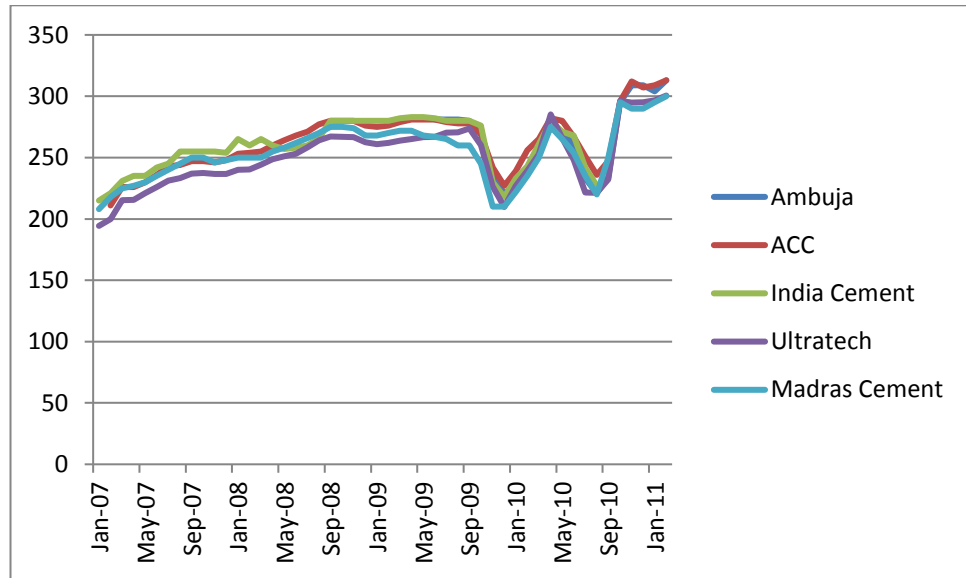
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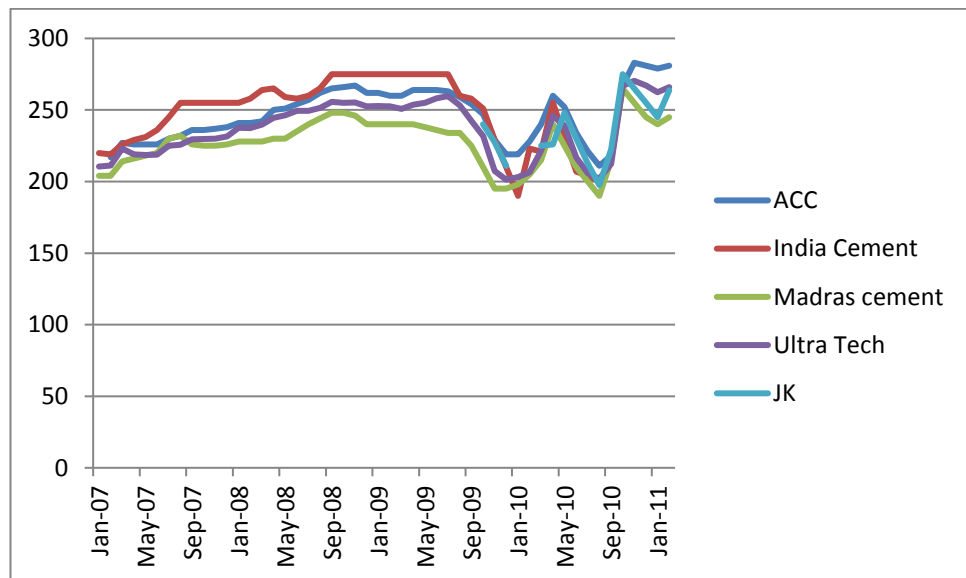
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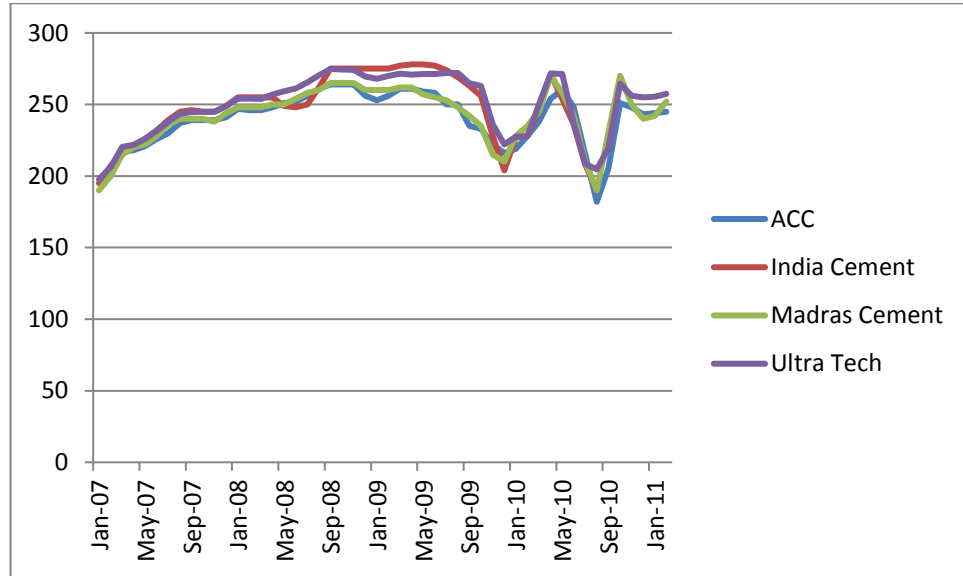
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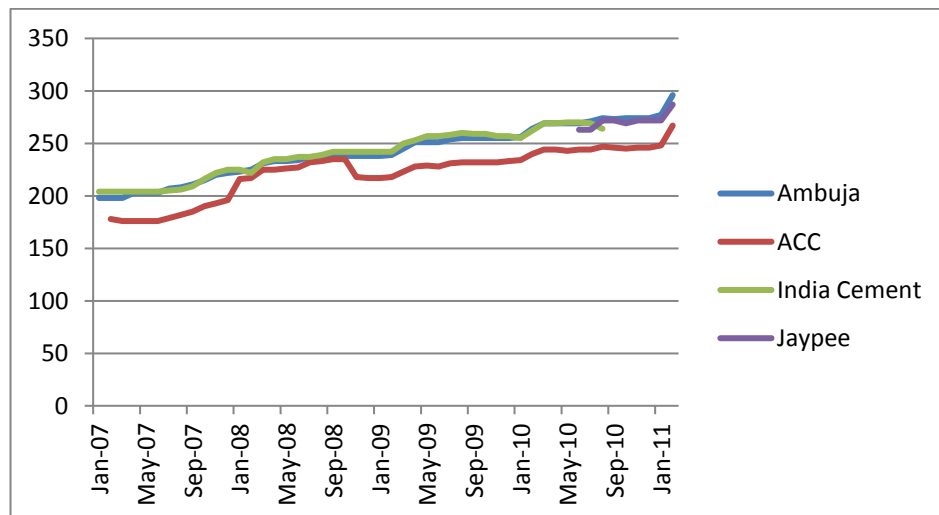
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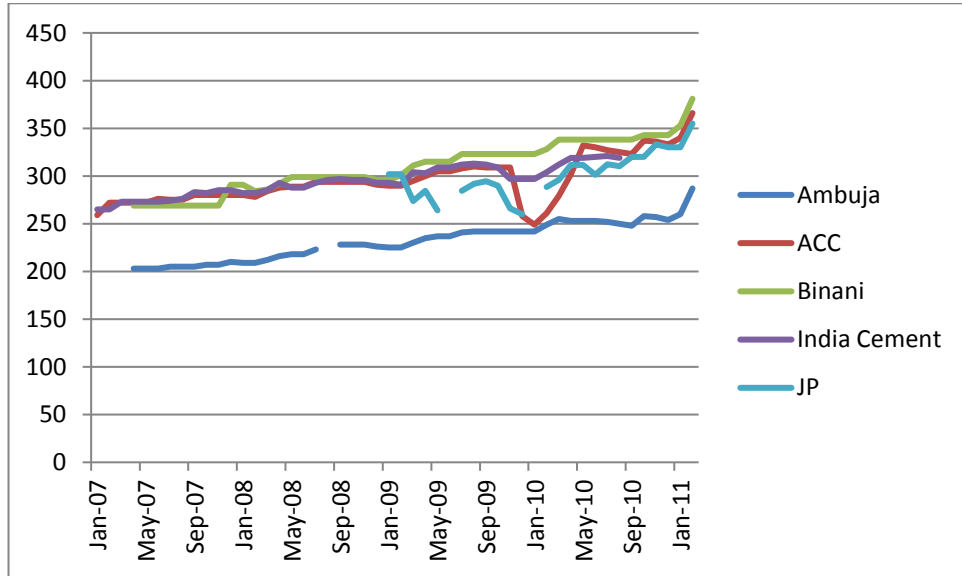
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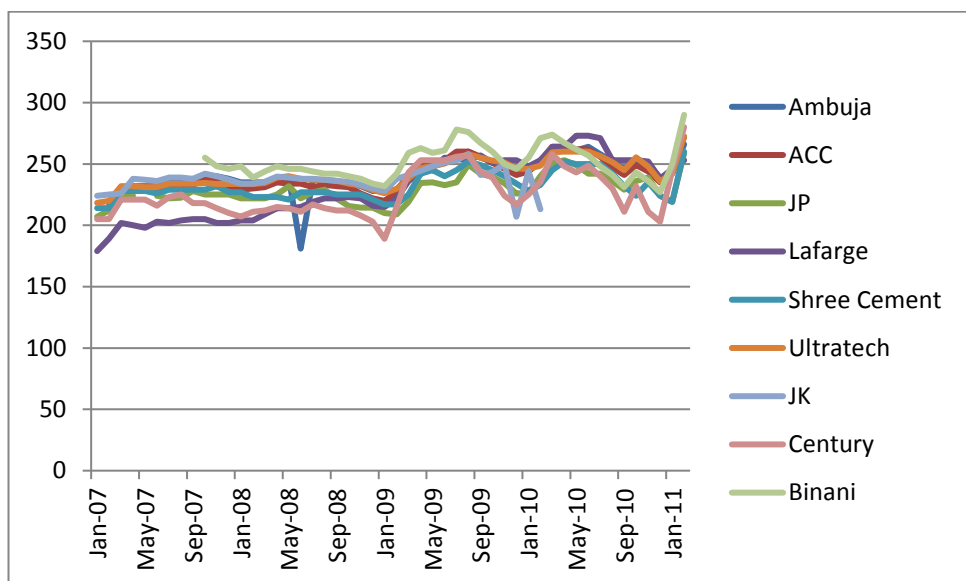
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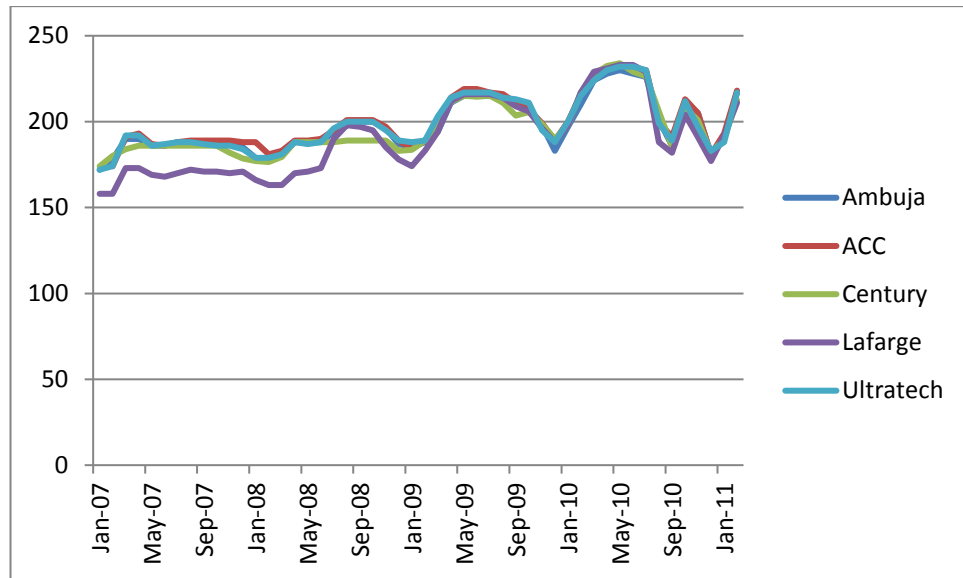
J&K



Uttarakhand



Chhattisgarh



Jharkhand

