



COMPETITION COMMISSION OF INDIA

Case No. 29 of 2010

In Re:

Builders Association of India

Informant

And

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|---|----------------------|
| 1. Cement Manufacturers' Association | Opposite Party No. 1 |
| 2. ACC Limited
(formerly, Associated Cement
Companies Limited) | Opposite Party No. 2 |
| 3. Ambuja Cements Limited
(formerly, Gujarat Ambuja
Cement Limited) | Opposite Party No. 3 |
| 4. Grasim Cement (merged with
UltraTech Cement Limited) | Opposite Party No. 4 |
| 5. UltraTech Cement Ltd. | Opposite Party No. 5 |
| 6. Jaiprakash Associates Ltd. | Opposite Party No. 6 |
| 7. The India Cements Ltd. | Opposite Party No. 7 |
| 8. J. K. Cement Ltd. | Opposite Party No. 8 |
| 9. Century Textiles and Industries Limited | Opposite Party No. 9 |



**10. The Ramco Cements Limited
(formerly, Madras Cements Ltd.)**

Opposite Party No. 10

11. Binani Cement Limited

Opposite Party No.11

12. Lafarge India Private Limited

Opposite Party No. 12

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 Vasanth Rajasekaran and Shri Ankush Walia, Advocates
alongwith Shri Raju John (Executive Secretary) for Builders
Association of India.

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

Shri Ramji Srinivasan, Senior Advocate alongwith Mrs.
Pallavi S. Shroff, Shri Harman Singh Sandhu, Shri Prateek



Bhattacharya and Ms. Nitika Dwivedi, Advocates and Shri Raju Mehra (Head-Legal) for ACC Limited.

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 Sameer Parekh, Shri Abhinay Sharma and Ms. S. Lakshmi Iyer, Advocates for UltraTech Cement 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 C S Vaidyanatha, Senior Advocate alongwith Shri Aditya Verma, Ms. Arti Goyal and Shri K Harishankar, Advocates for The India Cements Ltd.

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

Shri Pramod B. Agarwala and Prashant Mehra, Advocates alongwith Shri P. K. Dave (Chief Executive) and Shri R. S. Doshi (Sr. Ex. President) for Century Textiles & Industry Limited.

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

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

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

Order under Section 27 of the Competition Act, 2002

1. An information was filed under Section 19(1)(a) of the Competition Act, 2002 ('the Act') by the Builders' Association of India ('the Informant'/ BAI) against Cement Manufacturers' Association ('the Opposite Party No.1'/ OP-1/CMA) and 11 cement manufacturing companies (collectively, to be referred to hereinafter as "the Opposite Parties"/ "OPs") as detailed in the cause title hereinabove for alleged violation of the provisions of Sections 3 and 4 of the Act. The Commission *vide* its order dated 20.06.2012 passed under Section 27 of the Act found the Opposite Parties in contravention of the provisions of Section 3(3)(a) and 3(3)(b) read with Section 3(1) thereof.
2. Apart from imposing monetary penalty upon the Opposite Parties, the Commission directed the Opposite Parties 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. The Commission further ordered CMA to disengage and disassociate itself from collecting wholesale and retail prices through its member cement companies and from circulating details on production and dispatches of cement companies to its members.

3. Subsequently, the aforesaid order of the Commission was appealed before the Hon'ble Competition Appellate Tribunal which, by its order dated 11.12.2015, set aside the same with the following directions:

“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 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.”

4. Pursuant to the aforesaid directions of the Hon'ble Competition Appellate Tribunal, the matter was heard at length on 19-22.01.2016 when the counsel appearing for the parties made elaborate submissions.

Facts

5. Facts, as stated in the information, may be briefly noted:

- 5.1. The Informant - a society registered under the Societies Registration Act, 1860 - is an association of builders and other entities involved in the business of construction.



- 5.2. OP-1 is an association of cement manufacturers of India in which both public and private sector cement units are members. As per the Informant, the total strength of OP-1, as on 31.03.2009, stood at 46 in number and it comprised of most of the big cement manufacturers.
- 5.3. The Informant has stated that the cement manufacturers viz. Associated Cement Co. Ltd. (OP-2/ ACC), Gujarat Ambuja Cement Ltd. (OP-3/ ACL), Grasim Cement (OP-4/ Grasim), UltraTech Cement Ltd. (OP-5/ UltraTech), Jaypee Cement (OP-6/ Jaypee), The India Cements Ltd. (OP-7/ India Cements), J. K. Cement (OP-8/ JK Cement), Century Cement (OP-9/ Century), Madras Cements Ltd. (OP-10/ Madras Cements/ Ramco), Binani Cement Ltd. (OP- 11/ Binani) and Lafarge India Pvt. Ltd. (OP-12/ Lafarge) are also members of OP-1 and are the leading manufacturers, distributors and sellers of cement in India.
- 5.4. As per the Informant, the Opposite Party cement manufacturers under the umbrella of OP-1 indulge directly and indirectly in monopolistic and restrictive trade practices, in an effort to control the price of cement by limiting and restricting the production and supply of cement as against the available capacity of production. The cement manufacturers, in connivance with OP-1, have also been indulging in 'collusive price fixing'. They have divided the territory of India into five (5) zones so as to enable themselves to control the supply and determine or fix exorbitantly high prices of cement by forming a cartel in contravention of the provisions of Section 3 of the Act.
- 5.5. Further, OP-2 to OP-9, by virtue of the fact that they collectively hold more than 57.23% of the market share in India, enjoy a position of dominance and arbitrarily increase the price of cement. As per the Informant, the acts of these cement manufacturers, under the aegis of OP-1, tantamount to abuse of dominance under Section 4 of the Act.

5.6. The Informant has further stated that OP-2 and OP-3 are the leading cement manufacturers, collectively having approximately 21% of the market in India. It has been alleged that although with effect from 01.11.2009, OP-2 and OP-3 are no longer the members of OP-1, resignation from CMA membership is only to keep their activities of cartelisation under a veil, since they are still actively participating in the "benchmarking exercise" of OP-1. As per the Informant, despite having resigned from the membership, OP-2 and OP-3 have been successful in keeping their prices per bag similar to the prices per bag of other cement manufacturers, who continue to be members of OP-1. The Informant has also alleged that the reasons stated by OP-2 and OP-3 for discontinuing their association from OP-1 is an admission of cartelisation amongst the dominant players as is evident from the following portion of news release:

“There is widespread feeling in the industry that CMA indulges in cartelization and holds up cement prices artificially high. Holcim feels that being associated with CMA would get them in trouble with competition commission in the EU and therefore they have withdrawn from the body.”

5.7. As per the Informant, OP-2 and OP-3, by virtue of being the members of OP-1 in the past, have not only been active participants in the cartel but are also leading the acts of 'cartelisation' by the cement manufacturers over the past couple decades, which is evident from various inquiries caused into the functioning of their holding company, Holcim, by various Courts and Commissions. Action has been taken against the Holcim Group and it has been penalised and held guilty of acts of anti-competitive activities all over the world. The Informant has further brought out that OP-12, "Lafarge India", a subsidiary of the French building materials major 'Lafarge', has already been fined in 1994, 2002 and 2008, for committing irregularities in different jurisdictions, which shows that it is a habitual offender under the provisions of competition laws.

- 5.8. The Informant has stated that due to their large market share in the Indian market, OP-2 and OP-3 are in a position to fix price and also curtail competition by controlling the supply of cement in the market. Relying upon certain newspaper reports, it has been alleged by the Informant that OP-2 and OP-3, in collusion with OP-1, have sought to cartelise, limit the production/ supply of cement in the market and fix the price of cement thereby eliminating competition in the market.
- 5.9. The Informant has further alleged that in addition to OP-2 and OP-3, the Opposite Parties listed as OP-4 to OP-12 have also indulged in various anti-competitive activities and have collectively sought to control the supply of cement. According to the Informant, despite having large capacities, the Opposite Parties, with the sole intention to control the supply, produce less cement and increase the market price of cement deliberately.
- 5.10. The Informant has also alleged that, in addition to limiting production in order to create artificial scarcity, the Opposite Parties through their concerted actions also resort to the practice of restricting the supply of cement to builders and consumers, causing artificial increases in the price of cement. According to the Informant, irrespective of areas and regions and irrespective of availability of cement or artificial scarcity thereof in the market, cement prices have been increasing continuously. The acts of cement manufactures, in the past as well as in the present, have had an adverse effect on the competition in the real estate sector and affect interest of consumers at large.
- 5.11. As per the Informant, the cement manufacturers under OP- 1 are continuing with their ill-intended acts of price increase through the act of cartelisation, despite a 'cease and desist order' continuing under the directions of the Hon'ble Supreme Court of India. The Apex Court had only relieved the cement manufacturers held guilty of cartelisation and restrictive trade practices under RTPE 99/1990 and RTPE 21/ 2001 from filing Affidavits

of compliance and therefore the 'cease and desist' notices passed thereunder continue in full force. The acts of omission and commission by all the Opposite Parties are, therefore, in violation of the above mentioned 'cease and desist' order of the Apex Court.

5.12. Giving details of the contravention of the provisions of the Act committed by the Opposite Parties, the Informant has stated that the cement manufacturers, including OP-2 to OP-9, have set up their cement manufacturing units at different places in India, keeping in view the availability of raw materials, power, coal *etc.* and accordingly, they have different costs of production. As per the Informant, in spite of the aforesaid and despite the fact that the manufacturing units of the Opposite Parties are geographically dispersed having different costs of production and transportation, the Opposite Parties have, in a concerted action, uniformly and simultaneously increased their prices at the same time. The price of cement has been increased in all the five zones (North, East, West, South and Central) in which they are operating, without any direct link or correlation with the increase in input costs in these respective zones.

5.13. In order to put forth the acts of cartelisation and undue increase in price of cement due to anti-competitive behaviour on the part of the Opposite Parties, the Informant has submitted the following:

- (i) The construction and housing sectors are the sole consumers of cement. The growth in the construction sector decreased from 10.10% in 2007-08 to 7.25% in 2008-09, and was further projected at 6.5% for the year 2009-10. Similarly, the growth in real estate sector came down from 8.52% in 2007-08 to 7.77% in 2008-09, and was projected at 8.10% in 2009-10 as per the data published by National Account of Statistics, 2009 and press reports for 2009-10. Due to slowdown in the growth of both the construction and real estate sectors, growth in the cement sector also witnessed a downward trend

from 9.76% in 2006-07 to 8.13% in 2007-08, and a further decline to 7.90% in 2008-09. As a result of this slowdown, utilisation of installed capacity also came down to 85.55% in 2008-09 from 94% in 2006-08. The growth in cement sector increased to 11.68% in the year 2009-10, due to revival in the housing segment of real estate sector from April 2009 onwards. However, despite the growth in the production of cement, the utilisation of installed capacity was reduced to 82.46% in 2009-10.

(ii) In spite of slowdown as discussed above, the cement industry, during the year 2008, earned an Operating Profit Margin (OPM) of 26% on turnover of Rs. 45, 717 crore, the highest OPM amongst 16 major industries, save and except mining as reported by the Capital Market, dated 02.11.2009.

(iii) Cement manufacturing units had deliberately reduced their production and produced much less than their installed capacity to create an artificial scarcity and raise the prices of cement in order to earn abnormal profits.

(iv) Despite various concessions and stimulus packages announced by the Government in the wake of the financial crisis of 2008 (in the form of reduction in excise duties, reduction in the price of coal, petrol and diesel), instead of reducing the price of cement as was anticipated and expected by the Government and consuming industries (such as construction and real estate), the cement industry, through an agreement, caused an increase in the price per bag by Rs. 5/- between December, 2008 and February, 2009. In addition, the cement manufacturers increased the price from a minimum of Rs. 10/- to a maximum of Rs. 27/- per bag between January-March, 2009 and April-June, 2009 as reported in Business Line dated 18.11.2009.

- (v) Having increased the price of cement per bag by Rs. 10 to Rs. 27 in the first six months of 2009, the cement industry further increased the prices by Rs. 5 to Rs. 15 per bag between December, 2009 and January, 2010, as reported by Financial Express on 08.02.2010. To make artificial and unjust profits at the cost of consumers, after the announcement of the budget of 2010-11, the Opposite Parties further increased the price between Rs. 5 to Rs. 15 per bag on a plea that excise duty on cement had increased by 2% and that the price of coking coal, being one of the raw materials, had also increased by 2%.
- (vi) The cement manufacturers have been continuously increasing the production of Portland Pozzolana Cement (PPC) and reaping benefits available to them by using 'fly-ash' in production, which meant that the quantity of production of cement increased manifold without any increase in the cost of production or input costs. 'Fly-ash' is provided to the cement manufactures by thermal power plants, which are primarily owned or controlled by the government or semi-government undertakings, at zero cost. The cement manufactures use around 15-20% fly-ash as raw material to produce cement, amounting to direct reduction of 15-20% in the cost of raw material used for production of cement. However, the cement manufacturers have not passed on the price benefits being enjoyed by them to the construction and real estate sectors and consumers thereof.
- (vii) Notwithstanding the slowdown in the real estate and construction sector, the installed capacity of the cement industry, which was 219.00 million tonnes as on 31.03.2009 increased to 246 million tonnes by 31.03.2010. In spite of the increased installed capacities, the capacity utilisation which was 88% in 2008-09, came down to 82.46% in March, 2010.

(viii) The cement manufacturers, during April-June 2009, increased their respective installed capacity from 219.17 million tonnes (as on 31.03.2009) to 229.20 million tonnes (by 30.06.2009) and produced 50.24 million tonnes of cement. Prior to the onset of monsoon season, the demand for cement increases in the first quarter of April-June of any financial year. Due to the higher consumption in this quarter of the year, the cement manufacturers increase the production of cement.

(ix) According to this trend, the cement manufacturers ought to have increased the utilisation of their installed capacity from 88% in 2008-09. However, the capacity utilisation declined to 83.33% in April, 2009 and to 72.51% by June, 2009. On the contrary, the OPM, which was 26% in 2008-09, increased to 33.40% i.e. 7.40% more as compared to 2008-09. The average profit margin of six lead players of the cement industry in India was 35.10%, approx. 1.70% more than average industry as reported by Capital Market, dated 19.10.2009 – 01.11.2009.

(x) From the aforesaid, it is clear that the cement industry, despite increased demand and increased capacity, continuously utilised less capacity with the intention and motive of increasing sale price of cement through prior arrangement while wrongly defending the said act of increase in price due to reduced demand.

(xi) The trend with respect to the installed capacity and utilisation of installed capacity for the period between July–September, 2009 was different than the trend in the previous quarter. During July-September 2009, due to the monsoon period, major construction activities experienced a slowdown, and as a result, the cement production went down from 50.24 million tonnes in the first quarter to 48.32 million tonnes, and utilisation of installed capacity also came down from an average 76.54% in the first quarter to an average of

69.69%.

(xii) However, the cement price per bag (during the lean period), instead of coming down, actually climbed up from an average of Rs. 255 per bag (in April-June, 2009) to an average of Rs. 258.50 per bag (in July-September, 2009). As per the Informant, despite the slowdown in construction activities and lower utilisation of installed capacity, the average operating profit of six leading players (OP- 2 to 7) was higher by 6.50%, compared to industry's average of 27.15% i.e. 33.65% as reported by Capital Market dated 30.11.2009.

(xiii) The construction activities gained momentum during October-December, 2009 and cement production went up marginally to 49.55 million tonnes, compared to 48.32 million tonnes in the previous quarter of July- September. The utilisation of installed capacity also increased from 69.69% to 70.73%. However, the OPM reduced substantially from 27.14% to 16.69%, due to the reduced turnover of Rs. 12,129 crore against the turnover of Rs. 12,634 crore of the previous quarter as also reported in the Capital Market dated 05.04.2010. The lower OPM was due to the fall in the average price of a cement bag from Rs. 258.50 per bag in the lean period to Rs. 241 per bag in the busy quarter of October-December, 2009. Despite the industry's OPM falling to a meagre 16.90%, the average profit margin of the six dominant players remained at 25.18%.

(xiv) The cement industry picked up momentum in January-March, 2010 wherein the industry added 14 million tonnes to its installed capacity and produced 54.73 million tonnes compared to 49.55 million tonnes of Oct-Dec., 2009. With the increase in production, the capacity utilisation also increased from 70.73% to 74.80%, thereby leading to an increase in the turnover to Rs. 12,609 crore in Jan-Mar, 2010 as against Rs. 12,129 crore. The OPM also increased to 17.68%

compared to the 16.90% in the third quarter of year.

(xv) The average profit margin within the industry of the big six dominant players was 27.33% as against the 17.68% of the industry on the whole. The fact that price increased due to cartelisation becomes evident from the higher prices of cement per bag during the period. The price of cement per bag was made to escalate by a minimum of Rs. 5 to a maximum of Rs. 39 per bag across the entire country during January – March, 2010.

(xvi) In view of aforesaid, the reasons advanced by OP-1 and all other Opposite Parties that higher prices were due to higher demand do not hold good. The arbitrary increase in prices by the Opposite Parties were not determined by the forces of demand and supply. The demand and supply economics cannot remain same for all the five zones and would vary due to climatic, territorial and various other reasons. Therefore, change in price of cement in all the zones (across India) cannot be directly attributed to increase/decrease in demand. The acts of the Opposite Parties to unreasonably increase price of cement are solely determined by their intention of profiteering by means of indulging in anti-competitive practices.

(xvii) If it is assumed that there has been an increase in price of cement due to higher demand particularly from April 2008 onwards, then the decrease in capacity utilisation from 94% during 2006-08 to 85% in 2008-09, and further to 82.46% in 2009-10 seems nothing but an intentional act on the part of the Opposite Parties to gain by arbitrarily fixing and escalating/inflating price of cement per bag.

(xviii) In case of higher demand, all the Opposite Parties would have worked at more than 93% of their capacity. Instead, the Opposite Parties working as a cartel chose to intentionally underutilise their plants and

continuously produce less than the demand for cement, as is clear from the fact that the capacity utilisation shows a continuous downward trend from 83.33% in April, 2009 to 79.63% in March, 2010.

(xix) The cement industry has added 78 million tonnes between 2006-07 and 2009-10 to its installed capacity and the fact of this capacity addition being much more than demand was also admitted by Shri N. Srinivasan, Managing Director of India Cement Limited, the fourth largest cement producer in the country in his interview to Business Line as reported on 13.02.2010. Despite this, the price of cement rose by Rs. 10/- per bag to Rs. 27/- per bag between January-March 2009 and April-June, 2009. The price of cement per bag further rose by Rs. 5/- to 15/- per bag between December, 2009 and January, 2010 as stated in Financial Express dated 08.02.2010.

(xx) In light of the above facts and circumstances, it is alleged that the price increase in cement was not due to higher demand but as a result of cartelisation by all the Opposite Parties in collusion with and under the guidance of OP-1.

(xxi) In order to buttress its arguments further, it is brought out that OP-1 by its memorandum bearing no. 181/863/2006 dated 15.11.2006 addressed to the Finance Minister, Union of India, had mentioned per bag cost of cement to be Rs. 160.60. By taking Rs. 160.60 as the base rate including profit of cement companies, rate per bag during 2009-10 should have been Rs. 198.10. However, the cement industry and the lead players raised the price upto Rs. 350/- per bag which shows that the prices were increased by them under an agreement.

(xxii) The production of cement substantially increased during 2009 in comparison to 2008 and with the increase in production, the unit cost

of production substantially reduced. Despite the fact that the cost of production had reduced, the unit sales price of cement went up by upto 8.55% in comparison to the last year. As a result, the gap between cost of production and the sale price widened. Due to this, there had been steep rise in gross profits of the Opposite Parties. In case of ACC Ltd., while gross profit rose from 34% in 2008 to 60% in 2009, in the case of Gujarat Ambuja Cement Ltd., the gross profit increased from 58% to 80%.

(xxiii) In the normal course, in an unregulated market, if the demand is constant, and the production of the goods increases, then, the price of the products should reduce, particularly when the cost of production also reduces. However, in the present case, despite the fact that the production of cement increased and the cost of production substantially reduced, the average sales price during the year 2009 increased upto 8.55% in comparison to the average sales price during FY 2008. This demonstrates that the market prices were not determined by demand and supply, but were regulated by the Opposite Parties and they had been able to book high profits, by regulating the price despite reduction in cost and increase in production.

(xxiv) Another conclusive fact evidencing collusion amongst the Opposite Parties is the fact that all of them acting in concert collectively decided to increase the price per bag in all the zones. The advance knowledge of uniform increase in price is evident from various reports which appeared in the newspapers as is seen from news item appearing in 'Economic Times' dated 28.11.2009 which forecasted the increase in prices of cement in future. As was published in the said newspaper report, all cement manufacturers increased prices per bag uniformly in December 2009. This act of uniform increase in prices of cement per bag was also reported by Business Standard in its



issue dated 03.12.2009.

(xxv) Periodical price increase fixed in advance is unequivocal proof that all the Opposite Parties are acting in concert and are indulging in collusive price fixing.

(xxvi) It is averred that the Informant has taken the cause of its members/affiliates and the consumers at large and has complained on several occasions before the concerned authorities against the artificial control/limit on production/supply chains of cement by the manufacturing units as a means to control the markets and inflate the prices of cement to unreasonable levels only to unjustly enrich themselves. Several leaders representing the cause of consumers in the Parliament and State Legislatures have also shown concerns and raised their voice in support of the cause of the builders and the end-consumers who are being victimised due to anti-competitive acts of the cement manufactures.

(xxvii) Pursuant to the persistent complaints by the builders, various comments in the press by the Ministers of concerned Ministries as well as the Leaders of the Opposition, a Standing Committee was appointed by the Ministry of Commerce and Industry on the issue of suspected acts of deliberate reduction in production of cement caused due to suspected cartelisation. The representatives of the Informant were called on 11.01.2010 to make a representation before the Standing Committee wherein details were submitted by them.

5.14. According to the Informant, combined with the deliberate withholding of production, OP-1 along with the Opposite Parties has been reviewing the price, production and dispatch of cement periodically thereby maintaining and controlling the price of cement and maintaining high profits. The representatives from these Opposite Parties have at one occasion or another

come forward to report an expected hike in price of cement per bag in the near future. The prior knowledge of trends in price hikes only goes on to show that the prices of cement have been artificially determined amongst the Opposite Parties themselves in order to make abnormal profits.

5.15. The Informant has further submitted that the Opposite Parties, due to their past records of having found to be indulging in cartelisation activities, have become vigilant, thereby making it difficult to establish and/or prove their acts of cartelisation and price-fixing. According to the Informant, however, facts of the case as above show that Opposite Parties agree on fixing prices, apart from determining total industry output, market shares and also allocating territories amongst themselves.

5.16. In light of the aforesaid, the Informant has prayed that the Commission may institute an inquiry against the Opposite Parties for alleged cartelisation and anti-competitive trade practices under Sections 3 and 4 of the Act.

Directions to the DG

6. The Commission after considering the entire material available on record *vide* its order dated 15.09.2010 passed under Section 26(1) of the Act directed the Director General (DG) to cause an investigation to be made into the matter. The DG, after receiving the directions from the Commission, investigated the matter and submitted the investigation report to the Commission on 31.05.2011.

Investigation by the DG

7. The findings of DG, in brief, are noted below:

- (i) Giving details of profile of cement industry, the DG has submitted that in India, there are 49 companies operating with more than 173

large cement plants. In addition, there are many mini plants located around limestone clusters.

- (ii) The position of the installed and utilised capacity as regards cement production, in different years is as under:

Year	Installed capacity in MMT	Production in MMT	Capacity utilisation in %
2005-06	157.35	141.81	90
2006-07	165.64	155.64	94
2007-08	179.1	168.31	94
2008-09	205.96	181.61	88
2009-10	246.75	205	83
2010-11	286.38	210.85	73

- (iii) As regards the prevailing market structure in the cement industry, the DG has submitted that there are two groups comprising of three companies who have pan-India presence. The Holcim Group which controls ACC Ltd. and Ambuja Cements Ltd. and the Birla Group which controls UltraTech Cements Ltd.. The top three companies viz. ACC Ltd., Ambuja Cements Ltd. and UltraTech Cement Ltd. have about 40% of the total market share. During the year 2010-11, their combined production was about 81 million tonnes which was about 39 % of the total production of about 210 million tonnes by all the cement companies. The share of Holcim Group alone is more than 20% and of UltraTech Cement Ltd. is about 18% during 2010-11.
- (iv) There are other big major players whose presence is not pan India but who have a strong presence in one or two regions of the country. In this second category, Jaiprakash Associates Ltd. has the largest capacity of about 20 MMT, whereas The India Cements Ltd. with

about 15 MMT, Shree Cements Ltd. (“Shree Cement”) with about 13 MMT, Madras Cements Ltd. with about 12.5 MMT and JK Group with about 12 MMT are the major players. This category comprises of about 18 players who control more than 50% of the market share of cement industry.

- (v) The DG has also reported that the above two categories comprising of 21 players control about 90% of the market of the cement industry with ACC Ltd., ACL, UltraTech Cement Ltd. controlling about 50% and 18 others in the second category controlling about 40% of the total production capacity. The third category of cement manufacturers is of various small and mini cement plants with 1 to 2 MMT capacities which normally operate in a limited territory.
- (vi) As per the DG, top 12 companies, ACC Ltd., Ambuja Cements Ltd, UltraTech Cement Ltd, Jaiprakash Associates Ltd., The India Cements Ltd., Shree Cement Ltd., Madras Cements Ltd., Century Textiles and Industries Ltd., J.K. Cement, JK Lakshmi Cement Ltd., Binani Cement Ltd. and Lafarge India Pvt. Ltd. control about 75% market share of cement in India. Therefore, the DG focussed his investigation primarily on these top companies to investigate whether the cement manufacturing companies have indulged in anti-competitive practices.
- (vii) In the course of investigation, the DG gathered that for the purpose of marketing, the cement industry has been divided in 5 regions/zones. All the companies follow this geographical division and prepare their marketing strategies on the basis of these zones. According to the DG, the five regions and the distribution of the top companies in such regions having the maximum market share are as under:

North	J&K, Himachal Pradesh, Punjab, Chandigarh, Haryana, Uttarakhand, Delhi, Rajasthan	ACC, ACL, Shree, Binani, UltraTech, Jaypee, JK, Century, JK Lakshmi
East	Chhatisgarh, Orissa, Bihar, Assam, Sikkim, Jharkhand, West Bengal, Tripura, Mizoram, Arunachal Pradesh, Manipur, Nagaland, Meghalaya	ACL, Lafarge, ACC, UltraTech, Century, Jaypee
West	Gujarat, Maharashtra	ACL, ACC, Binani, UltraTech, India Cement, JK, Century, JK Lakshmi, Jaypee
South	Goa, Daman & Diu, Kerala, Karnataka, Tamil Nadu, Pondicherry, Andhra Pradesh, Andaman and Nicobar Islands	India Cement, Madras Cement, UltraTech, Dalmia, Kesoram, ACC, ACL, Chetnad
Central	Uttar Pradesh, Madhya Pradesh	ACC, UltraTech, Jaypee, Century, Birla Corp, Shree, JK Lakshmi, ACL

(viii) The DG has also submitted that the maximum production capacity is in South followed by the Northern region. Andhra Pradesh is the biggest cement manufacturing State with a share of 20% of the total production, followed by Rajasthan with about 17%. The demand of cement is derived primarily from housing, infrastructure, commercial construction and industrial segments.

(ix) The DG has brought out that the primary ingredient for cement is lime stone, which makes it necessary to install the plant near the mines of lime stone only. The transportation of cement being a low value high volume product, over a long distance is uneconomical which makes the transportation of cement an important cost component. The high transportation cost has created fragmented markets, which are catered by the plants located in the vicinity, making the cement industry largely regional in nature. Accordingly, the factors of demand and supply vary from region to region.

- (x) As regards the market characteristics, the DG has submitted that cement industry in India is oligopolistic in nature. Cement as a product has only 2 or 3 categories; viz. Ordinary Portland Cement (OPC), Portland Pozzolana Cement (PPC) and Portland Blast Furnace Slag Cement (PBFSC) though white cement is also produced by some plants. The nature of product being almost homogeneous in nature facilitates oligopolistic pricing. Further, the cement industry has witnessed a lot of consolidation and concentration of market in the last decade. However, in terms of market power, none of the companies has the strength to operate independently. The DG has submitted that the price of cement charged by all the companies is not at competitive levels and the cement manufacturers have been operating at a profit margin of more than 25%.
- (xi) The DG found out that after the closure of the Office of Development Commissioner of Cement Industry (DCCI) in 1989, the Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce and Industry, Government of India had directed the Cement Manufacturers' Association (CMA) to collect and submit data which was earlier being collected by the DCCI. CMA, under the instructions from DIPP, has been collecting indicative retail and wholesale prices of cement from across the country.
- (xii) According to the DG, the analysis of price data for cement has revealed that there has been a continuous positive growth in the cement prices over the last 5-6 years. Further, there has been a continuous divergence between the cement price index and the index price of various inputs like coal, electricity and crude petroleum and the gap has widened since 2000-01. The price of cement is rising faster than input prices.

- (xiii) It has been noted by the DG that the price of cement has been on rise since 2004-05 from about Rs.150/- per bag to close to Rs.300/- in March 2011, whereas during the same period, the cost of sales has only increased about 30%. As such, the price of cement has been independent of the cost of sales. The price of cement is changed frequently by all the companies. Sometimes, the price changes are made twice a week.
- (xiv) For making an analysis of the reasons behind continuous rise in prices of cement, the DG conducted inquiries from the cement companies including the Opposite Parties. It was gathered that prices of cement depend on its demand in the market and the decisions relating to change in price are taken on the basis of the market feedback. It was gathered that although 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 once the basic price is set, these factors do not have any impact on the regular price movements.
- (xv) Based upon the submissions of the Opposite Parties, it was also gathered that although their decisions of price changes are taken independently, but the prices of the competitors are regularly monitored to respond to any price changes made by them. The cost of production does not play an important role in the decision of pricing of cement except when there is a substantial change in taxes or the cost of raw materials. The frequency of price changes of cement by all the companies also indicates that the decisions relating to price are not based on the change in cost of production.
- (xvi) Further, the price is also affected by the price changes made by the market leaders and the prices of other players are also regularly observed. It was also found that the prices move in a band width due

to which similar trends are observed in the price movement of the Opposite Parties in a geographical area.

(xvii) The DG has found in the course of investigation that change in prices is mainly effected by external factors and not by internal factors like cost, production *etc.* The investigation by the DG reveals that although it has been claimed by almost all the parties that price is decided on the market feedback, no formal or systematic mechanism or documentation system was found to be maintained by any of the parties to substantiate their arguments of reliance on market feedback for effecting price changes. The analysis of the procedure adopted by cement manufactures shows that all the companies are having centralised decisions making system. The communications between the companies and the dealers reflect merely the prices to be charged and not the reason or any data to show that there is more demand. According to the DG, this shows that the prices are fixed and changed in a discretionary manner.

(xviii) The DG has further reported that since as per the submissions of the Opposite Parties, the prices move primarily on the basis of demand, it was examined whether there was some authentic and reliable data regarding demand of cement in the market. However, it has been gathered that there is no formal system or mechanism of collection of data in place in case of any of the companies to ascertain demand of cement in a particular market to make the decision relating to change in price. The companies were unable to explain as to how the demand of cement was measured at a particular point of time. The companies have only stated that whatever quantity they produce is sold in the market and their dispatches reflect both demand and supplies.

(xix) In such circumstances, when there is no evidence of companies having reliable or authentic source of data as regards the demand of

cement in market and when the changes in price are made at short intervals, the DG has concluded that the contention of the companies that the price is solely dependent upon the assessment of market feedback is not tenable. It cannot also be concluded that the movement of price of cement in India is solely dependent upon the market forces.

- (xx) Since it was found that the price was not determined by the market forces, the DG made further investigation to examine whether there were any other factors which were behind the rise in the price of cement, in the light of allegations made by the Informant that the Opposite Parties were manipulating prices through their anti-competitive acts and conduct.
- (xxi) The DG has noted that the Tariff Commission, which is working under DIPP in its report submitted in September, 2010 to the Department related Parliamentary Standing Committee on Commerce, has indicated that the prices charged by the cement companies are unreasonably high and there is a lot of scope for correction in their prices.
- (xxii) The DG has submitted that the analysis of the profit margin of these companies including the Opposite Parties also shows that they are operating with unreasonably high profit margin. After conducting analysis of Cost Audit Report of these companies, the DG has submitted that the cost of sales which also includes the cost of production varies from unit to unit within a group and also between companies. However, the data shows that the cement industry has been able to post consistently good performance and has been able to realise good margins during last 3-4 years. On analysis of the data, the DG has found that on an average, the margin per bag of cement is

Rs.38/- to Rs.45/- which shows that the Opposite Parties are able to charge prices which are quite high and above the competitive level.

- (xxiii) On the basis of aforesaid, the DG has submitted that the cement companies have enough scope to reduce the price of cement. The companies have been trying to utilize the demand pull to improve their profit margins rather than to supply at a competitive price. The companies have been taking advantage of the demand to earn better margins on sales rather than meeting out the demand by producing and dispatching cement by utilising their capacity at an optimum level.
- (xxiv) In order to find out whether there is an agreement and concerted action among the cement manufacturers to raise prices in a consistent manner, in the absence of no direct evidence, circumstantial evidences including behavioural indicators were analysed by the DG.
- (xxv) In this regard, it was found by the DG that the data on prices gathered during investigation shows that the prices of all the companies move in the same manner, towards similar direction. The economic analysis of the data confirms that the coefficient of correlation of change in prices or the movement of prices of all the companies is positive and are very close to each other (more than 0.5%) giving a strong indication of price parallelism. Price of cement of the Opposite Parties has moved in a particular direction in the entire country in a given period of time. The range of price movement has also been found same for all these companies. According to the DG, this price parallelism is indicative of prior consultation among the Opposite Parties.

- (xxvi) The DG has further found that the prices are also affected by the price changes made by market leaders. The examination of small players revealed that they simply follow the trend of major players.
- (xxvii) According to the DG, no specific reason for price parallelism has been given by the companies. Since the cost of production, transportation charges *etc.* varies from company to company, the prices of individual companies must also vary. Therefore, the movement of price of all the companies in the same range and in the same direction is not possible unless there is some prior consultation and discussion about the prices among them.
- (xxviii) Based on analysis of correlations of absolute price, price change and percentage price change, it has been concluded by the DG that the prices of the Opposite Parties show a positive correlation in every State of operation. According to the DG, price parallelism among the Opposite Parties stands established which is indicative of their collusive behaviour.
- (xxix) The DG has further found that the production capacity of cement has increased from 157 MMT in 2005-06 to 287 MMT by the end of March 2011. However, the capacity utilisation is on a continuous downward trend from 2008-09. During the F.Y.2010-11, the capacity utilisation came down to 73%. The Opposite Parties were not able to substantiate reasons for low capacity utilisation even during the period when the demand was high.
- (xxx) According to the DG, reduction in capacity utilisation is not in line with the overall growth of Indian Economy. Further, as far as consumption is concerned, whatever is produced by the cement manufacturers is consumed in the market. Therefore, the argument of

cement manufacturers that the capacity utilisation has been lower in recent years on account of low demand is not tenable.

- (xxxix) The DG has submitted that data relating to capacity utilisation of UltraTech Cement Ltd., ACC Ltd., Ambuja Cement Ltd., JAL, The India Cements Cement, Shree Cement and Madras Cements Ltd. reveal that utilisation of capacity by them has been below the optimum level despite the fact that no major addition in the capacity was made by them during FY 2010-11.
- (xxxix) The DG also considered the arguments of the cement manufacturers that reduction in demand resulted in reduction of production as it created problem of storage and piling of stock and found that the same was not supported by any data and documents.
- (xxxix) According to the DG, the aforesaid facts establish that there was a conscious decision to maintain low level of capacity utilisation by the Opposite Parties so that higher prices can be charged and abnormal profits can be earned.
- (xxxix) The data furnished by the Opposite Parties in respect of plant wise monthly production was analysed by the DG to examine as to whether there is any correlation in the change in production output among the cement manufacturers. The analysis carried out by the DG has revealed that there is a positive correlation in the production output among all the leading players operating in a particular region/state. The analysis of dispatch data for the period of two years from January 2009 to December 2010 shows that the changes in dispatches of cement by the top companies were identical.
- (xxxix) According to the DG, the correlation coefficient of the dispatch data shows a very strong correlation among the top companies. The

decisions relating to increase or decrease in dispatches are so close that it is indicative of some kind of meeting of mind.

(xxxvi) The DG has further stated that ever since 2006-07, the capacity utilisation and cement price index are moving in opposite directions. While the capacity utilisation has been declining, the price index has been increasing. This, according to the DG, is result of a deliberate attempt to reduce supply by not utilising full capacity and thereby increasing the price of cement in the market.

(xxxvii) According to the DG, the Opposite Parties were given sufficient opportunity to justify the reason for reduced capacity utilisation but except general reply, no specific reason alongwith relevant records/documents was furnished during investigation. Hence, the DG has concluded that the reduction in capacity utilisation during 2009-10 and 2010-11 was deliberate in order to limit the supply of cement in a concerted manner to charge a higher price.

(xxxviii) The analysis carried out by the DG also confirmed that there was a production parallelism among the Opposite Parties which strongly indicates their coordinated behaviour.

(xxxix) The DG has also concluded that the Opposite Parties are charging unreasonable and higher than competitive prices. The last quarter of F.Y. 2010-11 witnessed a price increase of 20-50% throughout the country in comparison to prices in 3rd quarter of 2010-11 which was a result of reduction in capacity utilisation and controlling the supply in the market.

(xl) According to the DG, the cement industry in India is geographically scattered and there is no single dominant company which has the market power to become a leader in all the markets. The cement

manufactures have divided the market in five regions and share of each company varies from market to market. It was noted by the DG during investigation that the top companies have market leadership in one or more market. This, according to the DG, allows them to coordinate their strategy to maximise the profit by charging unreasonable prices and facilitates the collusive price leadership in the market.

- (xli) The DG has submitted that the demand of cement is inelastic. In such conditions, any one firm can increase its share of the total by cutting its price but this is likely to cause a counter response by other firms also. Such competition will not increase total sales but will cut profits of all the firms. Under these conditions, all the firms can increase their profits by reaching a tacit agreement as to the optimal, or near optimal price level. Price leadership is one way of signaling the appropriate price level.
- (xlii) The DG found from the statements recorded during the course of investigation that the prices are changed by cement manufacturers on the basis of prices of market leaders. The big players holding the maximum share normally trigger the price increase which is followed by the other manufacturers. The collusive price leadership is thus playing a great deal of role in the concerted action of cement manufacturers.
- (xliii) The DG also found that the cement companies are using the press and media for signalling the price increase. The big players announce in press or TV channels that there is a probability of cement price hike in coming days which serves the purpose of price signals to the competitors.

- (xliv) According to the DG, although the Opposite Parties and CMA have denied that the prices and production related issues are discussed/exchanged or covered under the activities of CMA, there exists a system of exchange of price information among the members of CMA on a weekly basis across the country. CMA has nominated different companies in 34 different centers to collect and disseminate the retail as well as wholesale price to CMA. This information is either collected on phone or through e-mails.
- (xlv) On being asked by the DG as to why this activity of collection and dissemination of price data should not be treated as a violation of the provisions of Competition Act, it was stated by CMA that they were doing it under the instructions of DIPP. The DG, however, has found the practice of collecting weekly information on prices by the member companies as raising serious concerns under the provisions of the Act. According to the DG, the common platform of CMA is used for collection and dissemination of the information on prices of different companies. Based on this information the different companies come to know about the prices of all the companies prevalent in the different zones of the country. This price information helps them to take collective decisions about future price changes.
- (xlvi) During investigation it was also gathered by the DG that CMA has formed a High Power Committee (HPC) of its members. The prices of cement are discussed in the meetings of this Committee. For instance, meetings of HPC were held on 03.01.2011, 24.02.2011 and 04.03.2011, after which prices of cement of all the top companies who were present in these meetings had increased. The meetings dated 24.02.2011 and 04.03.2011 held in Hotel Orchid, Mumbai were also attended by ACC Ltd. and ACL, although they have resigned from the membership of CMA which establishes that ACC Ltd. and ACL are still working in coordination with CMA to achieve the

ulterior motive of profiteering by way of fixing price and controlling the production of cement in the market.

- (xlvi) The DG has concluded that in the guise of the meetings of HPC, the cement manufacturers are entering into some arrangements and understanding to manipulate the price of cement in violation of the Act. Further CMA's publications which are in internal circulation meant only for members, contain details of production in respect of each plant of the member companies. The publications in the form of 'Executive Summary – Cement Industry' and 'Cement Statistics – Inter-Regional Movement of Cement' released every month for circulation among the members provide minute details of production and dispatch of each company which facilitates the member companies in exchange of production related information and decide production strategy in line with other member companies.
- (xlviii) According to the DG, it is clear that CMA is providing a platform to the member cement manufacturers as well as ACC Ltd. and ACL to act in a coordinated manner and decide the pricing and production strategies in contravention of the provisions of the Act.
8. Based upon the findings of his investigation as noted above and after conducting analysis of the factors mentioned in Section 19(3) of the Act, the DG concluded that it was established that the Opposite Parties were controlling the supply of cement in the market by way of some tacit agreement. It was also concluded that the Opposite Parties have indulged in collusive price fixing.
9. Accordingly, the DG concluded that the allegations against the Opposite Parties that they have entered into anti-competitive agreement among themselves to manipulate the supply and price of cement were found to be substantiated. The act and conduct of the Opposite Parties were noted by

the DG as anti-competitive in contravention of the provisions of Section 3(1), 3(3)(a), 3(3)(b) of the Act.

Consideration of the DG Report by the Commission

10. The Commission considered the investigation report submitted by the DG and decided to forward copies thereof to the parties for filing their respective replies/ objections thereto, if any.

Replies/ Objections/ Submissions of the Parties

11. The parties filed their respective replies/ objections/ submissions to the report of the DG besides making oral submissions and filing gist of oral arguments.

Replies/ objections/ submissions of the Opposite Parties

Replies/ objections/ submissions of CMA (OP-1)

12. CMA in its submissions raised some preliminary issues. It was submitted that the DG was bound to follow the principles of natural justice while conducting his investigation. Failure to provide cross examination is a gross violation of the said principle. Referring to the decision of the Hon'ble Competition Appellate Tribunal in *Schott Glass v. CCI*, Appeal No. 91 of 2012 decided on 02.04.2014, it was argued that the Hon'ble Competition Appellate Tribunal had specifically held that the Commission should not insist on a separate application for cross-examination once the question is raised in the pleadings of the parties. It was prayed that the Commission provide an opportunity for cross-examination of the witnesses relied upon in the DG Report in terms of the averments made by OP-1 in its reply to the DG Report.
13. Further, it was submitted that the DG has failed to supply all the documents collected by him as well as the studies conducted/acquired and the same do

not form part of the record of the Report of DG. The failure to provide this information seriously impairs the ability of the Opposite Parties to meet the allegations made against them as well as denies them the opportunity to obtain exculpatory evidence/ information which may be in the possession of the DG and does not form part of the DG Report. The un-redacted copy of the DG Report has not been provided to the parties and therefore, the reply thereto would necessarily be impaired. The Opposite Parties are therefore, unable to put forth a proper and full defence to the allegations made against them in the Report of the DG.

14. On merits, it was submitted that when Sections 3(1) and 3(3) of the Act are read together with Sections 2(b) and 2(c) thereof, 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) read with Section 3(1) of the Act 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 of the Act, this still does not amount to the association itself being guilty of the prohibited conduct.
15. It was submitted that CMA is a registered society of cement manufacturers and may fall within the meaning of a "person" in Section 2(l) of the Act. Even if CMA were considered to be an "artificial juridical person" independent of its members, it is not engaged in any trade in goods such as cement. Further, even assuming that CMA as a legal entity were engaged in the provision of services, the services provided by it to its members are not "identical" or "similar" to those engaged in by any of the cement manufacturers who are its members or third party cement manufacturing cement companies such as ACC Ltd. or ACL that are not its members.

16. Accordingly, it was submitted that in order to find CMA guilty of having violated either Section 3(1) or 3(3) by entering into an agreement with third parties such as ACC Ltd. or ACL, the basic legal requirement is that *all* its members should have acted as a cartel either by reaching an agreement amongst themselves with respect to the production, distribution, sale or trade in goods, or, after having reached such an agreement amongst themselves, by entering into an agreement with the third parties.
17. In the present case, it was pointed out that the DG has not reached any finding that *all* the members of CMA have formed a cartel by entering into an “agreement”. In fact, it was argued that CMA had 42 members at the relevant time out of which the DG has chosen to proceed against only eight (8) members. Therefore, CMA has clearly not entered into a “cartel” within the meaning of Section 2(c) and has not violated the provisions of Sections 3(1) or 3(3) of the Act. Accordingly, there is no basis to proceed against CMA. Thus, it was sought to be suggested that even assuming (without admitting) that CMA unwittingly provided a platform to some cement manufacturers, as found by the DG, to enter into an agreement prohibited by Section 3 of the Act (which is strongly denied), CMA cannot be held to have violated Section 3 on this count.
18. Criticism was also made of the fact that the DG cherry-picked the alleged members of the alleged cartel for the purposes of the investigation. The DG was bound to establish through evidence as to who the members of the alleged cartel were. Rather than going by the evidence, which was his statutory obligation under the Act, the DG appears to have decided who the members of the alleged cartel were based solely upon the cement manufacturers picked by the Informant.
19. It was submitted that the fact that it was difficult to establish the existence of an “agreement” within the meaning of Section 2(b) of the Act or the existence of a “cartel” within the meaning of Section 2(c) of the Act by

direct evidence and therefore, it was necessary to establish its existence through circumstantial evidence, did not mean that it was not necessary to establish who were parties to the alleged agreement or cartel.

20. Adverting to the evidentiary basis for inferring an agreement amongst Opposite Party Nos. 2 to 12, it was submitted that there was no clear evidence in the DG Report for concluding that Opposite Party Nos. 2 to 12 ever entered into an "agreement", which was the *sine qua non* under Sections 3(1) and 3(3) of the Act read with either Section 2(b) or 2(c) of the Act for concluding that a price-fixing cartel had been formed by Opposite Party Nos. 2 to 12.
21. It was further submitted that although CMA is shown as OP No. 1, the DG has not suggested anywhere in the DG Report that all the 42 members of the CMA were party to price-fixing or collusive behaviour. Rather the DG has variously suggested that it is the top 5, 8 or 10 cement manufacturers while actually naming 11 manufacturers, not all of whom are the largest in the country. In fact, two of the top three manufacturers in India, ACC Ltd. and ACL, are not even members of CMA.
22. It was argued that in order to rope in ACC Ltd. and ACL and establish some kind of agreement amongst OP Nos. 2 to 12, the DG has also relied heavily on meetings of the HPC as a platform where ACC Ltd. and ACL arrived at a collusive price-fixing agreement. Even here, however, the DG has not included all the 15 members of HPC. Instead, he has roped in only 8 out of the 15 as having joined with ACC Ltd. and ACL in a price-fixing agreement.
23. In fact, even according to the DG, ACC and ACL allegedly attended only two meetings of HPC, which fact was denied by ACC Ltd. and ACL. Neither the agenda nor the minutes of the meeting reflected their

attendance. Further, the minutes did not record that there was any discussion on cement prices.

24. Referring to the heavy reliance placed by the DG on the alleged increases in the prices of cement after 03.01.2011, 24.02.2011 and 04.03.2011 meetings, it was submitted that ACC Ltd. and ACL were alleged to have attended only two out of the three meetings and the price rise after one out of the two meetings was not significant and the dates on which the data was collected as to the rise in prices was also not given. It was vital to note that some of the cement manufacturers who were included in the list of OP Nos. 2 to 12 such as Binani Cement Ltd. and Grasim Cement did not even attend the three HPC meetings. On the other hand, J.K. Lakshmi Cement Ltd., Shree Cement, Dalmia Cements, OCL and Kesoram Industries Ltd. attended some or all meetings but were not included in Opposite Party Nos. 2 to 12.
25. Referring to the role of CMA, it was submitted that it is an association of the cement manufacturers of India and both public and private cement units (small and large) including Opposite Party Nos. 4 to 12 are its members. CMA is an important instrumentality of communication amongst the cement manufacturing companies between the cement industry and the various government bodies/agencies, *etc.* The data collected by CMA was earlier collected by DCCI. After decontrol of cement in 1989, DIPP requested CMA to collect the data earlier collected by DCCI. It was stated that CMA collects and submits data regarding production, capacity addition, *etc.*, as required by DIPP, and the same is collected at the specific request of DIPP. In the DG Report, there is a bald allegation against CMA and its members that there exists a system of exchange of price information amongst the members of CMA on weekly basis across the country. In this regard, attention was invited to the DG Report to contend that admittedly, not only was the data collected at the instance of DIPP but even collecting agencies were nominated and/ or were approved by DIPP.

26. After coming into force of the Act, CMA had specifically inquired *vide* letter dated 05.06.2008 from DIPP whether, in view of the Act, it should continue to collect prices. DIPP responded *vide* its letter dated 28.07.2008 that CMA should continue to do so. CMA had also taken the opinions of two retired Chief Justices of India *i.e.* Justice Bhagwati and Justice Lahoti, on whether the functions carried out by CMA could be construed as a violation of the Act.
27. It was further contended that the information collected by CMA about prices and production is not confidential as the same is available in the public domain and is widely published in newspapers, financial dailies, *etc.* including Indian Cement Review, Construction World, *etc.*
28. Moreover, the data collected and disseminated by CMA was stale and not individual prices of individual companies but band of highest and lowest prices of cement as they prevailed in the market on a relevant date. The DG and all concerned authorities were fully aware of the same. No questions were put to any of the cement manufacturers, who were examined, on this, and as such, no occasion of their volunteering this information arose inasmuch as while examining the witnesses, only specific questions were put to them which were accordingly answered by the witnesses. Neither CMA nor any of the cement manufacturers can be blamed for the non-disclosure of this information for this reason. It was also denied that the said information helps the members of CMA to take collective decisions about the future price changes since they were made fully aware about the prices throughout the major market centers of the country which helped them to move the prices of cement in a particular direction.
29. Further, it was argued that it was now well established that price parallelism in an oligopolistic industry cannot be a basis to infer the existence of a cartel. (See *Union of India v. Hindustan Development Corpn.*, (1993) 3 SCC 499, para 16; *Ahlstrom Osaakeytio v. Commission*, [(1993) ECR 1-1307] {European Court of Justice}, para 71; CCI in *Shri*

Ram Niwas Gupta v. M/s Omaxe Ltd., Case No: 74 of 2011, para 3.4.4 has held that parallel conduct *ipso facto* is not a prohibited conduct).

30. Moreover, it was submitted that the DG has not even annexed the minutes of the meetings handed over to him by CMA and no explanation of this omission has been given by the DG in his Report. Unless the said minutes are disclosed and it is pointed out as to how from the said minutes, a conclusion of the existence of a cartel to fix prices can be formed, reference to the minutes and inferences drawn from them is *ex facie* fallacious. In fact, none of the said minutes discloses any price fixation or discussion on price fixation or have anything to do with the price of cement. The agenda items discussed in the said meetings are a matter of record. Nonetheless, the DG Report alleges that, after three meetings dated 03.01.2011, 24.02.2011 and 04.03.2011 out of which two (dated 24.02.2011 and 04.03.2011) were also attended by ACC Ltd. and ACL, the prices of cement had increased. The DG has cherry picked certain data given in tabulated form to justify the said allegation.
31. The conclusion that HPC meetings provide an opportunity for discussion to top cement companies and give rise to informal meetings to fix prices to conclude against CMA is extremely vague. The DG has examined various cement manufacturers. In the available statements on record, none of the manufacturers has stated that either CMA has assisted in fixing prices or that CMA's HPC meetings were used as a platform to fix the price of cement. No material has been placed on record to show that the depositions of the said witnesses are false. In fact, no question has been put by the DG to any of the said witnesses as to whether HPC meetings or any other meetings of CMA were used as a platform to fix prices. If specific questions were asked and witnesses gave false responses, the DG could have moved against them for perjury. In fact, the DG purposely did not put any such questions to any of the witnesses, including the President of CMA, as these witnesses would have denied any such suggestion or would

have explained the object of the said meetings. If the cement manufacturers want to meet informally to discuss and decide on prices, they do not need the platform of CMA as they even otherwise have several occasions to meet, as was known to the DG.

32. The DG had alleged that ACC Ltd. and ACL were still attending the meetings of CMA in the guise of some academic or technical matters. The DG has not explained as to what he meant by the word 'guise'. In academic or technical meetings, there is no bar that non-members of CMA cannot attend as the said meetings are held for overall development of the cement industry. No question was asked to CMA either to admit or deny this fact. In fact, though the witness of ACC Ltd. was examined on 28.03.2011 (page 572 of the DG Report) and witnesses of ACL were examined on 29.03.2011 (page 587 of the DG Report), despite their specific answers, no question was put to the President of CMA who was examined as late as on 13.04.2011 (page 666 of the DG Report). Answers to the questions which were put by the DG to ACC Ltd. and ACL indicate that ACC Ltd. and ACL had not attended the actual HPC meetings but only met a few members for a limited time to discuss the proposal for concrete roads or tax implication aspects after the budget. In the absence of specific questions to ACC Ltd. and ACL with regard to whether they were specifically invited by CMA to attend the HPC meetings or, specific questions to CMA whether they had invited ACC Ltd. and ACL to attend HPC meetings, adverse inferences against them could not be drawn. This further establishes the need for cross-examination of these witnesses.

33. Otherwise also, it was submitted that the record discloses that out of seven meetings of HPC, ACC Ltd. and ACL speak of attending only two meetings that too not for the entire duration of the meeting but only a few manufacturers for the specific purpose of discussing about concrete roads or tax implications post-budget. To a specific question to ACL, the response was that it had attended 23 meetings not connected with CMA,

during the period after it withdrew as member of CMA, with other manufacturers. Thus, the inference that CMA provides a platform to discuss prices is wholly unsustainable. The cement manufacturers have several other forums to meet beyond the CMA. Therefore, the finding that CMA provided a platform to its members to indulge in anti-competitive acts is misconceived and not borne out by the record. That the HPC meetings had nothing to do with price-fixing or cartelisation, is also clear from the fact that here also, the DG has either cherry picked the parties or has implicated the parties without application of mind. HPC comprises of 15 member companies. Many of the members who attended the meetings have not been implicated whereas members who did not attend any of the meetings have been implicated.

34. On economic analysis, it was submitted that no conclusion based on economic analysis and examination of witnesses with regard to collusive behaviour for determination of price and supply of cement amongst the top cement companies is noticeable *vis-a-vis* CMA. In fact, none of the economic data or the evidence of witnesses indicates that CMA has played any role or has provided a platform to its members to hold meetings to collusively fix prices of cement.
35. Lastly, it was submitted that no inference can be drawn against CMA on market allocations through creation of different regions to facilitate collusive price leadership as there was no material on record either in the DG Report or in the statement of any of the witnesses that suggested that CMA had created the different regions.

Replies/ objections/ submissions of ACC Ltd. (OP-2)

36. ACC Limited, in its oral and written arguments before the Commission, has submitted that the findings in the DG Report are inconclusive and indicate lack of application of mind. ACC Limited has submitted that the DG Report lacks proper empirical analysis and that the results contained

therein, fall short of the standard of proof required to establish the existence of an anti-competitive agreement under Section 3 of the Act.

37. According to ACC Limited, the DG has only found the existence of “*some kind of cartel in the cement industry*” and the analysis of the DG reflects an insufficient understanding of the cement market in India. ACC Limited has submitted that the finding of existence of a “tacit agreement” by the DG is based purely on conjectures and suppositions and the DG Report lacks any specific reference or evidence against ACC Ltd., of a contravention of Section 3 of the Act. ACC has also stated that there is no clearly established timeframe within which the alleged cartelisation took place.
38. ACC Limited has stated that the Indian cement industry is seasonal, with volatility of prices. It is stated that the cement industry is highly fragmented, with a large number of players in various segments and the industry itself has been increasing capacity to meet demand. It has been submitted that the Indian cement industry has one of the lowest concentration levels in the world, with new market entrants and increased capacity additions and utilisation. It is stated that the demand for cement is seasonal, causing significant pressure on prices during the low demand season which impacts capacity utilisation of the cement plants. ACC Limited has submitted that since cement is a commoditised product, there is little difference in the raw material used as well as the product across producers and consumers and thus, prices and production and supply of cement are impacted by similar demand and supply conditions.
39. It was further submitted that the DG has failed to analyse the operations, monitoring and punishment mechanisms of the alleged cartel and the DG has adopted a generalised cost benchmark without appreciating the different cost structures across producers.

40. In relation to the findings on price parallelism, it was submitted that mere price parallelism is not sufficient to establish cartelisation, without the existence of “plus factors”. ACC Limited has further submitted that mere parallel behaviour is insufficient to establish a violation. More specifically, it was stated that the DG has compared incomparable prices, applied arbitrary benchmarks for correlation analysis, compared different time periods and failed to analyse prices on an all-India level. It was also stated that using the benchmark of 0.5 as the cut-off for correlation, is arbitrary and not supported by any economic literature and that finding of a cartel cannot be made merely on the basis of price correlation, which only demonstrates that the market is oligopolistic, the product is commoditised, and only quantifies the degree to which prices and price changes are related. ACC Limited has submitted that it would be more appropriate to analyse correlation in percentage changes in price and that correlations in percentage changes in price reported by the DG are significantly lower.
41. Further, it was argued that the Commission in *All India Tyre Dealers Federation v. Tyre Manufacturers* (RTPE No. 20 of 2008) decided on 16.01.2013 found that in case of a homogenous product, a price differential of over 6% implies that prices were dissimilar and there was no price parallelism. OP-2 has compared changes in prices across various Opposite Parties in 12 States in India from January 2008 to February 2011, to submit that in this case also, the price change between the cement manufacturers is more than 6%.
42. ACC Limited has submitted that a report titled *Economic Analysis of Cement Data* which was part of the DG Record and made available only during the course of the appeal proceedings before the Hon’ble Competition Appellate Tribunal in 2015, shows a state-wise correlation analysis in relation to major cement players between 2008 and 2011. ACC Ltd. has submitted that as per the said report, in various States in India,

ACC's price change and percentage price changes are independent to that of the other Opposite Parties.

43. It is further submitted that the following conclusions from the *Economic Analysis of Cement Data* have been ignored by the DG: that prices are target driven; movement of prices depend on sales targets and high demand seasons; that desired and actual prices are based on market feedback; that there is no known market leader, as all top companies take independent price decisions; that price change data reveals that the price movements are sequential and not simultaneous; and that Opposite Parties have taken independent price decisions at various points in time.
44. ACC Limited has further stated that cement demand grew about 10% from 2005 to 2009 and that the industry, from 2010-2012, added approximately 85 million tonnes of capacity. It has been further submitted that ACC Limited made significant capacity additions since 2007, and its capacity in 2012 was approximately 19.55% higher than it was in 2007. Further, ACC Limited has argued that its capacity utilisation was 81%, which is admitted by the DG, and which is 8% above the industry average.
45. In relation to dispatch parallelism, ACC Limited has submitted that cement dispatches are dependent on availability of railway rakes, labour shortages, availability of trucks, etc., and that such external factors can lead to piling up of stocks in warehouses. ACC Limited has further argued that mere perusal of cement dispatch information indicates that in 2009 and 2010, there are numerous occasions where ACC Ltd.'s dispatches were increasing whereas the same were decreasing for other companies and *vice versa* and as such, ACC's dispatches do not correlate to the dispatches of the other Opposite Parties.
46. In relation to production parallelism, ACC Limited has stated that while the DG has noted a positive correlation between the leading players, the DG

has failed to apply his own standard cut off of 0.5% percent. It is submitted that ACC Ltd.'s production shows a very weak correlation with that of the other Opposite Parties and in the absence of any plus factors, the same should be disregarded.

47. ACC Limited has submitted that it has not attended any HPC meeting and the minutes of the meeting are the most authoritative source of this assertion. It was argued that it ceased to be a member of CMA after November 2009. According to ACC Limited, it was not a part of the CMA and did not have access to the data compiled by CMA and that as of July 2009, it had also stopped providing any data to CMA. It is stated that any data shared was pursuant to the specific instructions of DIPP issued to CMA, despite the fact that ACC Limited was no longer a party to CMA. It has been further submitted that ACC's membership and participation in the CMA was limited to representing its interests by Shri Dattagupta (Chief Commercial Officer) as deposed by him during his examination by the DG and ACC Ltd. did not participate in any HPC meeting of CMA in January, 2011. ACC Ltd. has stated that while Shri Dattagupta attended two meetings on 24.02.2011 (for promotion of concrete roads) and 04.03.2011 (complexities in relation to application of excise duties post union budget), he had left prior to the start of the HPC meeting.
48. Finally, ACC Limited has stated that the price of cement is at competitive levels, and the general increase is because of increase in cost of raw materials and production costs. ACC Limited has stated that there has been no undue profiteering, no collusive price leadership by any one member of the Opposite Parties and that (despite its capacity additions), it has been facing a declining revenue share in the market.

Replies/ objections/ submissions of ACL (OP-3)

49. Ambuja Cements Limited in its oral and written submissions before the Commission, has *inter alia* highlighted the following discrepancies in the DG Report:

(a) Profiteering/ Supernormal profits:

While the DG Report finds that all Opposite Parties have made good net profits, the net profits of ACL from 2008 to 2010 have declined from approx. 22.4% to 17.1%.

(b) Attendance at CMA meetings and price increase after meetings:

ACL did not attend the CMA meeting on 03.01.2011 and was only present at the sidelines of HPC meetings held on 24.02.2011 and 04.03.2011 for the purpose of discussing industry issues. ACL has further submitted that the DG has failed to examine prices in all States/ cities where the Opposite Parties are present and there have been contrary price movements from December, 2010 to February, 2011 when comparing the prices of ACL in different cities to that of its competitors in the same cities. It was also pointed out that ACL withdrew from CMA in November 2009 and has not attended any HPC meeting after exiting CMA.

(c) Capacity Utilisation:

The DG Report finds that capacity utilisation has significantly decreased from 2008-09 and was still lowered in 2010-11. However, ACL's capacity utilisation is 83% whereas industry average of the same is 73%.

(d) Highly concentrated industry:

ACL has stated that the Herfindahl-Hirschman Index (HHI) for the Indian cement industry has decreased from 738 to 683 over the last

five years, demonstrating that the industry has become fragmented and more competitive.

(e) Price Parallelism:

The DG has compared only 15 States and prices analysed for correlation were of different time periods. Further, the DG's correlation analysis compares different price parameters for different companies (such as gross price for ACC Limited, sale price of ACL, depot prices of JK Cements, etc.).

50. ACL has relied on the Commission's order dated 02.12.2010 in *Neeraj Malhotra v. Deutsche Post Bank & Ors.* (Case No. 05 of 2009) to submit that the standard of proof required to be met for establishing an agreement is that "*the existence of such an 'agreement' is unequivocally established...*". ACC Ltd. has further quoted the Commission's decision in *In re: Sugar Mills (Suo Motu Case No. 01 of 2010)* wherein the Commission found that there was no evidence on record that certain enterprises decided to take concerted action to maintain prices and implemented the same and certain alleged decisions to maintain prices were never implemented. Finally, ACL has submitted that in *All India Tyre Dealers Federation v. Tyre Manufacturers* (RTPE No. 20 of 2008), the Commission has held that particular actions of competitors could be evidence of a concerted practice where there is no plausible alternative explanation.

51. ACL has also relied on various decision of the US and European Courts to state that there must be direct or circumstantial evidence to provide a conscious commitment to a common scheme designed to achieve an unlawful objective, that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct, that evidence relied upon must contain all information in order to assess a complex situation and that the Commission

must show precise, sufficient, consistent and coherent evidence in order to establish an infringement.

52. ACL has lastly submitted that as per the jurisprudence of the Hon'ble Supreme Court and other Tribunals, the standard of proof in cases wherein only circumstantial evidence is relied upon is that every circumstance should be proved beyond reasonable doubt and that evidence proving a fact on the basis of preponderance of probability would be insufficient to hold an infringement under the Act.

Replies/ objections/ submissions of UltraTech Cement Ltd./ Grasim Industries Ltd. (OP-4 & OP-5)

53. UltraTech Cement Limited ("UltraTech"), in its oral and written arguments before the Commission, at the outset, raised the issue of observance of principles of natural justice. It was submitted that denial of cross-examination amounted to violation of the principles of natural justice. UltraTech has stated that the testimonies of various parties/ witnesses have been relied upon without affording UltraTech Cement Ltd. the right to cross-examine such witnesses and that this amounted to a violation of Regulation 41(5) of the Competition Commission of India (General) Regulations, 2009 ("General Regulations"), which provides for the right to cross-examine, both before the DG as well as the Commission.
54. Further, as preface to its submissions on merits, the issue of public interest was raised. It was submitted that perusal of the Report of the DG shows that during the period he has considered (2007-08 to 2010-11), the installed capacity of cement has gone up by over 50%. Ten (10) new players have entered the market while ten (10) existing players have doubled their capacity. It was submitted that clearly production of cement is a dynamic market and all macro indicators available show that there is simply no possibility of cartelisation. The cement manufacturers are investing their profits in increasing cement capacity. In next 5 years, a further addition of

capacity of about 200 MMT is contemplated, which is almost 67% of the current capacity. Further, UltraTech Cement Ltd. has ploughed back its profits in setting up new capacities and has a plan to invest about Rs 11,000 crore in next few years.

55. In these circumstances, it was submitted that the market dynamics should be permitted to operate so that there is adequate capacity build up. If the increase in capacity is stifled, and the cement manufacturers are not permitted to earn the meagre profits they are earning presently, (UltraTech Cement Ltd. is stated to earn 10% Profit After Tax), it would be against the public interest.
56. It was, therefore, submitted that the findings of the DG are contrary to the real facts which, in fact, can be demonstrated even by considering only the figures mentioned in the Report of the DG. The detailed facts given in the replies of the Opposite Parties including UltraTech Cement Ltd. show that, in fact, cement is a highly competitive market where the companies are increasing capacity and fighting a cut -throat battle by adjusting price as often as twice in a single day. In such a market, it was submitted that no finding of cartelisation can be reached even at the lowest threshold of proof. In view of severe penal consequences prescribed under the Act, the threshold should be beyond any reasonable doubt, contended UltraTech Cement Ltd.
57. It is further claimed that the production of cement has also increased considerably (almost 60% increase) during the period in question which has eventually resulted in increased supply of cement in the market. UltraTech has stated that it is currently considering a similar increase in its capacity.
58. UltraTech Cement Ltd. has further submitted that the DG's findings of unreasonably high prices of cement and high profit margins are incorrect. The DG's findings, which are based on the Tariff Commission Report, compares the actual price with the normative price. UltraTech Cement Ltd.

has stated that calculating an average normative price for the whole country despite different cost structures and transport costs, especially when conditions of competition are regional, cannot be the basis for determining the profit margin of the Opposite Parties. It is further claimed that profits margins from non-cement businesses of certain Opposite Parties have also been analysed, which is illogical and irrational. It is further stated that the Tariff Commission Report was not provided to the parties despite repeated requests and was not even made available pursuant to the Hon'ble Competition Appellate Tribunal's directions.

59. It was further submitted that there are total 173 cement manufacturers in India, where no single firm or group is in dominant position, or in a position to operate independent of competitive forces. UltraTech Cement Ltd. has further claimed that there are no entry barriers in the cement market and 10 large players have entered the market recently. Further, HHI has decreased from 738 to 638 over the last five years. This shows that there is frequent change in the market share of cement manufacturers, which also demonstrates that there is no cartel.
60. UltraTech Cement Ltd. has stated that price volatility is contra-indicative of a cartel and there is significant variation in prices of cement from region to region - this has been ignored by the DG. UltraTech Cement Ltd. has further submitted that since cement is a homogeneous commodity, the product is standardised with BIS markings, and the companies operate in the same industry/ markets, using same or similar raw material inputs, prices would obviously move in a similar fashion. This, as per the submissions of UltraTech Cement Ltd., cannot be used to state that price parallelism is indicative of cartelisation or concertation. UltraTech Cement Ltd. has relied on the Commission's decision in *In Re: Float Glass Manufacturers* to state that parallelism alone is insufficient to form the conclusion of anti-competitive behaviour. UltraTech Cement Ltd. has further pointed out that the high retail price of cement can be attributed to: (i) high cost of raw material; (ii) high power cost; (iii) high transportation

cost; (iv) dependence upon road transport for movement of clinker to cement; and (v) profit motive of cement companies.

61. It is stated that parallel pricing behaviour by firms in a price sensitive market need not indicate an actual agreement to fix prices; the firms may instead simply be responding unilaterally to the price changes of their competitors. The DG has himself acknowledged that prices change as frequently as twice a week. The phenomenon of frequent price change further demonstrates that the cement market is a price-responsive market and the prices are largely determined by supply-demand forces.
62. UltraTech Cement Ltd. has also stated that there is no methodology followed in selecting which company's data is to be selected for which State and the DG has also relied on the wrong prices. It is claimed that there are vast differences between minimum and maximum prices at a given point of time in a given market, and price differences as per trade and non-trade segments. UltraTech Cement Ltd. has claimed that the prices of UltraTech Cement Ltd. submitted by the company to the DG have not been used in the DG's analysis.
63. UltraTech Cement Ltd. has further stated that the DG's benchmark of using correlation coefficient of 0.5 is incorrect - this would be the case in many commodities. Further, Pearson's correlation coefficient should be at least more than 0.8 to show a close relationship. Given the number of cement players, 44 major plants and around 350 mid and mini size plants, it is submitted that the cement market in India is highly competitive as there are as many as 25 brands in every market. Further, UltraTech Cement Ltd. has stated that the Commission has not made any allegations or findings of cartelisation against Cement Corporation of India, which is a Public Sector Undertaking, although their prices move along with the prices of the other Opposite Parties.

64. UltraTech Cement Ltd. has stated that no opportunity was provided to it to explain the drop in production during two specific months. The reason for low production, as per the submissions of UltraTech Cement Ltd., during the month of October, November and December, was due to reduction in demand of cement owing to political and seasonal issues, causing a lack of demand. Temporary reduction was also due to certain other factors namely - power cuts, wagon, sand and metal availability *etc.* Further, cement being a hydrophilic product, has short shelf life and cannot be stored; therefore, the production and dispatch has to be commensurate with the demand. UltraTech Cement Ltd. has stated that parallelism caused by such factors cannot be the basis for holding a cartel.
65. In relation to the DG's findings on price leadership, UltraTech Cement Ltd. has stated that since cement is a homogenous product, there ought to be big players who set the market trend and small players who follow the same, but this cannot be held to be the basis of any collusive action.
66. In relation to the DG's findings on capacity under-utilisation, UltraTech Cement Ltd. has stated that a new plant takes time to operate at an optimum level and issues relating to mines development, quality consistency of limestone reserves, coal and other additives as well as mechanical stability of the plant equipment, and process optimisation are prominent in relation to functioning capacity. However, the same has not been considered by the DG. Finally, it is submitted that though UltraTech Cement Ltd. had created capacity which was created in line with its prospective plan for growth, the growth achieved was lower than that projected and hence, the demand of cement too was lower than what was anticipated. Accordingly, the additional capacity was reflected in lower utilisation. It is stated that the DG has failed to *inter alia* account for such factors and accordingly, the DG's analysis that there was conscious decision to maintain low capacity utilisation by the top cement manufacturers is not justified. Similarly, in relation to dispatch parallelism, it is argued that the data used is highly selective and fails to account for the slumps in production and demand of

cement caused by the nature of the product and the seasonal nature of industry demand.

67. UltraTech Cement Ltd. has lastly submitted that the data relied upon by the DG was obtained from CMA and is not the correct figures. In fact, it was pointed out that UltraTech Cement Ltd. has filed the correct figures. However, the same were not considered. It was stated that CMA is an industry association for discussing issues of common concerns. CMA assists the industry in solving problems faced by them collectively, such as, taxes, linkages, allocation of coal/ railways, environment issues, *etc.* It is further submitted that the collection of historical price of retail / wholesale price was at the instance / direction of the Government of India/ DIPP, and the same cannot be held to be the basis of a cartel under Section 3(3) of the Act.

Replies/ objections/ submissions of Jaiprakash Associates Ltd. (OP-6)

68. In its preliminary submissions, OP-6 submitted that the DG has failed to implead or examine Cement Corporation of India, which is a public sector undertaking, having an installed capacity of 3.8 MT per year and a production level of approximately 1.0 MT per year. Moreover, Cement Corporation of India is also a member of CMA. In order to discharge the burden of establishing cartelisation, it was a mandatory requirement for the DG to have gathered information from the Cement Corporation of India and examined its price movement *vis-a-vis* that of all the other cement manufacturers who are members of CMA. Such an examination would show that the price charged by Cement Corporation of India also move in the same band as that of other cement manufacturers.
69. It was also contended that all the economic analysis and various sector specific studies that have been considered and relied upon by the DG while preparing the Report have not been annexed, which makes the authenticity of data and the accuracy with which it has been applied, questionable. It

was argued that the said Reports were never provided to JAL when applied for inspection before the Commission but were provided only at the stage of hearing before the Hon'ble Competition Appellate Tribunal. Also, it was stated that the DG in the Report has failed to provide any direct evidence to prove the existence of any cartel in the cement market in India.

70. OP-6 has further suggested a situation of bias in the instant matter. It was submitted that Ld. Member, Smt. Geeta Gouri who was the then Head of Economic Division of the Commission should have ordinarily not taken part in assisting the DG's Office in its investigation. It was stated that the manner of internal communications and the Report creates a real danger of institutional bias. To emphasise further, OP-6 made reference to *Narinder Singh Arora v. State*, (2012) 1 SCC 561 and *State of Punjab v. Davinder Pal Singh Bhullar*, AIR 2012 SC 364 wherein it was stated that no one can act in a judicial capacity if his previous conduct gives ground for believing that he cannot act with an open mind or impartially.
71. Apart from the preliminary submissions, OP-6 has laid down aspects which allegedly have either been misconstrued or missed out completely. It was stated that the DG made no attempt to analyse the functioning in the institutional sales market that account for approximately 35% of the sales. The sales through this route are not susceptible to cartelisation, being negotiated on an individual basis and with buyers with considerable market power. This neglect alone showed the bias with which the DG Report has been prepared as the allegation of cartelisation would have necessarily failed in this regard. OP-6 also refuted the claim of the DG that it was one of the top cement manufacturers since OP-6 has no presence in the southern region. It was pointed out that the DG failed to take into account the market shares provided by JAL (approximately 5.23%), calculated on the basis of actual sales and rather the DG concocted market shares on the basis of production capacities without providing any source for arriving at such erroneous and misconceived findings. The DG has failed to acknowledge

that JAL, with a miniscule market share of 5.23% cannot be treated as a 'market leader'. It was submitted that JAL has no market power or dominance in any regions demarcated and was, amongst other factors, merely following the price trends of perceived leaders in different regions of its operations. It was submitted that this fact was corroborated by the graphs in the DG report under economic analysis of price parallelism, depicting JAL's price to be below the perceived market leaders.

72. It was stated that OP-6's price movement was based on market demand. It was further stated that a request for reducing prices is made whenever there is difficulty in achieving sales target for a sustained period. Also, whenever there is a rise in demand and it is unlikely that the company would be able to fulfill it, then an attempt to increase the prices is made. Referring to the statement given by Shri Rahul Kumar, CFO of JAL to the DG, OP-6 stated that the pricing decision for JAL is taken on the basis of market feedback of its zonal heads, taking into account the demand dynamics and the actual sales for a particular period in a given region. It was pointed out that the DG has proceeded on its preset notion without analysing the documents given by OP-6 on this aspect.
73. It was also submitted that JAL does not publish the prices on its website or maintain any records of its list prices. The prices gathered and shared by CMA are indicative and not real prices. Thus, the alleged price fixing cartel was not feasible in the absence of appropriate sharing of relevant pricing information.
74. On the issue of price parallelism, it was contended that the data comparison in the report was flawed. It was submitted that the DG did not clearly demarcate the time period of investigation. In such conditions, there is no apparent justification for the DG to restrict its pricing analysis to a shorter period. The monthly prices taken by the DG across manufacturers do not refer to the same set of prices. It was stated that JAL had submitted before

the DG, the trade prices prevailing in a particular town or a city on the 1st and 15th of every month. However, the descriptions provided by some other cement manufacturers seemed to differ with respect to their submissions before the DG. For instance, Ambuja Cements Ltd. submitted average monthly prices for one or two cities in each State, UltraTech Cement Ltd. an average monthly billing rate for major markets in each State, Madras Cements Ltd. for Free on Road or ex-godown prices and Lafarge India Private Ltd. its invoice prices. Thus, it was clear that the prices used in the DG's analysis were not comparable across manufactures and any price correlation done using this data was meaningless.

75. It was also contended that the DG has made gross errors in collating the data for JAL viz.: (a) Prices for Madhya Pradesh were lagged by a month. For example, April, 2009 price taken by the DG actually referred to the price prevailing in May, 2009; and (b) Prices for Punjab in the DG's data in the Report referred to prices prevailing in Bhatinda for April-December, 2009 and Amritsar for April-August, 2010. For rest of the months (March 2008-March 2009 and January-March 2010), the DG's prices did not match any of the prices submitted by JAL. Furthermore, it was submitted that the DG in the Report stated that JAL was one of the dominant players in the west region comprising of Gujarat and Maharashtra; however, at the same time the DG excluded it from the comparison of prices in the State of Maharashtra. OP-6 stated that in the case of Gujarat, JAL entered the market in September 2009 and since then, shows a price range lower than the other players in the said region. JAL is merely a price follower and not a dominant player in the west or any other region as stated in the Report.
76. It was argued that OP-6's capacity utilisation was wrongly calculated. It was stated that the DG calculated the capacity utilisation of OP-6 in 2010-11 as 75.27%. This figure was not at all indicative of the actual capacity utilisation by OP-6. It was argued that instead of using pro-rated capacity, the DG has taken the figures for the installed capacity of the whole year. If

calculated correctly, the actual capacity utilisation for 2009- 2010 would be 81.7%, which is much higher than the DG's calculation. It was further argued that the DG's analysis has not differentiated between capacity at old and new plants of JAL. It was stated that old plants were operated at close to full capacity and newer plants are at various stages of ramp-up and stabilisation and were more likely to experience teething troubles in comparison to the established plants. Hence, OP-6 stated that it was not correct to expect the new plants to be operating at full capacity. OP-6 has explained in detail the factors that led to new plants resulting in low capacity utilisation and also other factors for calculation of capacity utilisation that the DG has apparently ignored in its report.

77. With regard to JAL's growth rate in production, it was submitted that the increase in JAL's production in 2010-11 over 2009-10 has been 38%. In the case of JAL, the maximum increase in capacity has come in the last couple of years and it was only due to the gestation periods that the plants require for stabilisation that the capacity utilisation has not been the maximum possible.
78. On the issue of alleged price increase, it was submitted that the manner in which the DG has arrived at a conclusion was unclear. Citing an example, it was stated that the data contained in the Report submitted by the DG showed that in many months, the price in 2010-2011 has in fact fallen in a particular State or region when compared to the same month in the year 2009-2010. Further, upon comparison of prices charged by JAL in 2009-10 to the prices charged by it in 2010-11, it was seen that in regions where JAL was allegedly dominant, the prices charged in 2010-11 have in fact decreased. For instance, the prices charged by JAL for a bag of cement in Lucknow in January, 2010 was Rs.224, however, the price charged in January, 2011 was Rs. 199, *etc.* It was argued that it could be seen from the data contained in the Report that this was true for most months and hence, the DG's analysis cannot be relied upon by this Commission.

79. With regard to dispatch parallelism, it was submitted that OP-6 JAL has the largest increase in dispatches, more than any other cement manufacturer for the given period January 2009 to December 2009. Moreover, from the table shown in the Report, it was clear that JAL, UltraTech Cement Ltd. and Ambuja Cement Ltd. are the only cement manufacturers who have increased their dispatches for the period January 2010 to December 2010 while the rest have shown a decline rebutting the claim of positive correlation put forth by the DG. The index for JAL's dispatches has almost doubled between January 2009 and March 2011 while the index for the other manufacturers has changed minimally. Therefore, the strong growth in dispatches ruled out any possibility of supply suppression by JAL.
80. On the allegation from the third parties that cement supply to the non-trade segment was reduced to zero as cement companies shifted their supply to the trade segment to get higher sales realisations, it was contended that JAL's capacity utilisation is in line with the expectations in a cartel-free cement industry. In addition, there was no suppression of cement supply to the non-trade segment.
81. OP-6 argued that the DG's conclusion on profit margin being high was without providing a benchmark. It was stated that the margins need to be compared with the margins in competitive cement market. A table on net profit margins in OP-6's cement division has been enclosed which showed the same as 28.22%, 24.60%, 15.92% and 5.79% for the years 2007-08, 2008-09, 2009-10 and 2010-11 respectively. It was pointed out that the net profit margins had been declining over the period 2007-08 to 2010-11, instead of increasing or being stable, as reported by the DG. Further, it was stated that comparison of return on capital and cost of capital would provide a better indication of the financial health of a company rather than the analysis of margins carried out by the DG. Also, a review of the cost audit reports and annual reports of JAL clearly showed that average Return on Capital Employed (ROCE) for JAL, both nominal pre-tax and post-tax

estimates was far less than that of JAL's cost of capital (pre and post-tax). A table on calculation of pre-tax and post-tax ROCE for JAL was also enclosed to highlight the same. It was also submitted that a review of the DG's net profit figures for JAL showed that those figures indicated the net profitability of the entire company instead of the cement division. It was stated that JAL consists of a number of other divisions such as construction, hotel/ hospitality *etc.*

82. OP-6 provided the prices of Faizabad and Bhopal for the purposes of providing price related data to CMA. It was stated that it reports a perception of the prevailing wholesale and retail prices as a whole *i.e.* indicative prices. It was mentioned that the prices reported to CMA are not the actual prices charged by JAL. Further, it clarified certain facts in relation to the HPC meetings which the DG has relied on, particularly the three meetings of CMA held on 03.01.2011, 24.02.2011 and 04.03.2011, after which prices of cement saw an increase. It was submitted that the DG failed to note that January-March were the months when cement prices saw a rise every year due to its seasonal nature. Thus, the inference drawn was mere speculation. Further, JAL submitted that the DG has not taken into consideration other such meetings of CMA where the prices of cement remained stable or, in fact, saw a decrease. Also, the DG has not taken into consideration the HPC meeting which was held on 28.02.2011. From the data provided by JAL on price changes in Lucknow and Delhi region, it was clear that the DG's claim that the prices increased after the two HPC meetings was wrong. After the meeting on 28.02.2011, there was no immediate change in prices in Lucknow. Further, even post the meeting on which the DG has placed reliance which was held on 04.03.2011, there was a decline in prices in Lucknow which seemed to have been conveniently ignored. Similarly, there was no effect on the prices of JAL in Delhi after the meeting of 28.02.2011. JAL submitted that the DG has without any logic or reasoning ignored the other HPC meetings such as the one held on 28.06.2010 whereafter the prices actually decreased.

83. Regarding the advertising expenditure, OP-6 stated that it has spent huge amount of money on the same and it showed that there was vigorous competition on the part of OP-6. Such expenditure would not be necessary if JAL had been assured of its sales and returns by operation of a cartel.
84. Without prejudice, it was also submitted that if penalty is levied on OP-6, it should be calculated on the basis of relevant turnover/ profits *i.e.* cement trade segment since OP-6 has various business operations. It was further submitted that while calculating the penalty amount, the Commission may consider the mitigating circumstance wherein OP-6 would be paying the penalty amount by selling some of its business assets.

Replies/ objections/ submissions of India Cements Ltd. (OP-7)

85. OP-7 submitted that its all India market share in 2010-11 was 5.5% which was less than that of 6.55% in 2009-10. This was a strong indicator that ICL has not been involved in any cartel, as one of the basic purposes of a cartel was to ensure that its participants, at the very least, retain their respective market shares. It was also submitted that during the period 2007-2011, the business performance of ICL suffered severe deterioration. OP-7 stated that the net profit (as percentage of sales and other income) of ICL fell dramatically from 23.4% in 2007-08 to 2.2% in 2010-11 which immediately rebuts any allegation of ICL being able to earn supernormal profits. It was pointed out that the DG confirmed the steep decline in the net profit of ICL from 2007 to 2010 but somehow omitted the starkest figure of all *i.e.* 2.2% in 2010-11 - which was the period in relation to which the allegations of violation of Section 3 of the Act have been made against ICL.
86. It was stated that the severe deterioration in its business performance was a result of adverse economic conditions in the southern region generally, particularly in 2010-11. This peculiar feature of the market in the southern region has been acknowledged by the DG in its Report although that has

not been taken into account in his conclusions. This being the case, companies whose business is mainly in the southern region (such as ICL) ought to be judged by a more lenient standard on facts than what may be applicable to others.

87. It was also pointed out that the methodology of economic analysis followed by the DG was inherently tautological. The DG's basis of identifying the Opposite Parties was their nationwide share in the cement industry, with the 'top 12 companies' being included. However, at the same time, the DG Report purported to classify the cement industry in 'five regions for the purpose of marketing and analysis of statistical data' which was further divided into States. That the DG Report did not include a state-wise or region-wise break-up of the market shares of the Opposite Parties was a serious lacuna in the investigation. State-wise figures have been taken for companies selected on the basis of national market share, and movement in state-wise prices was used to substantiate a finding of a nationwide cartel comprising of those 'top companies' which had been pre-selected on the basis of national market share in the first place.
88. It was contended that the analysis on price parallelism was riddled with startling flaws. To substantiate further, OP-7 stated that while the DG identified the 'top companies' on a regional basis, ICL was included only in the Western and Southern regions. However, the analysis of State wise data for price parallelism included ICL's data for a number of States where it was not a major player or where its market share was negligible. This was a patent methodological self-contradiction in the DG Report. Furthermore, out of the fifteen States which have been analysed for price parallelism, there were eleven States (out of a total of fifteen States) for which ICL's data has been included without it being a 'top company' in those States. It was stated that there are only four States (out of a total of fifteen States) for which ICL data has been included in respect of regions where it is stated by

the DG to be a ‘top company’ (*i.e.* in the western and southern regions) - Gujarat, Maharashtra, Andhra Pradesh and Kerala.

89. Referring to the DG’s economic analysis on price parallelism with respect to Bihar in the graph, it was pointed out that apart from the fact that Bihar was not the State where ICL has any significant presence, there was a patent error in the tables accompanying the graph. While the graph clearly showed that ICL’s prices were not the highest, the ‘absolute price’ table and the ‘% price change’ table erroneously indicated that ICL was the price leader. Thus, it was submitted that it exemplified the glaring lack of attention to detail that has characterised the preparation of the DG Report.
90. To elaborate further on the alleged lacuna in the investigation report, OP-7 referred to the graphs for a couple of States. With respect to Andhra Pradesh, it was submitted that the DG has suppressed the fact that the price data for the compilation of average retail prices of cement in 34 consumption centres was actually Vishakhapatnam’s price data. There was no actual ‘state-wise’ price data for ICL relied upon by the DG in respect of Andhra Pradesh. The compilation of average retail prices contained data regarding two consumption centres in Andhra Pradesh - Vishakhapatnam and Hyderabad. It was stated that Hyderabad prices are, in general, lower than Vishakhapatnam prices, especially so in 2010-11. Instead of taking a price representative of the State as a whole, the DG has simply chosen the higher of the two (*i.e.* Vishakhapatnam) and misrepresented that as the Andhra Pradesh price. With regard to the State of Kerala, it was submitted that the graph falsely suggested that the price indicated for ICL was that of Kerala when, in fact, it was only the Calicut price. It was contended that Calicut price has been chosen over the Trivandrum price, for the clear reason that in 2010-11, the former was higher than the latter in general. The higher price series (*i.e.* Calicut) has been chosen and misrepresented as the Kerala price. In case of Maharashtra and Gujarat, it was stated that the

prices that have been shown to be attributable to ICL are actually those that are attributable to UltraTech Cement Ltd.

91. It was argued that while analysing ‘price parallelism’ in respect of ICL’s prices, the DG has totally ignored the direction of movement of those prices, especially in 2010 as compared with 2009. It was submitted that the allegation of price parallelism is not about identical or similar prices, but only with respect to the movement of prices. This also meant that, in the analysis of State-wise data, the coefficient for ‘absolute prices’ was of no consequence. The only relevant coefficient was that of ‘% price change’. As far as ICL is concerned, the assertion that the coefficient of price change across the country was ‘very high’ or ‘close to 1’ is plainly false. The approach was arbitrary and smacks of a tendency to reach a broad-brush conclusion without any justification.
92. Explaining furthermore, it was stated that out of all the inter-company coefficients mentioned in the tables of ‘Absolute Prices’ for the fifteen States, there were only three in which the coefficient was less than 0.5 *i.e.* (a) Gujarat (JK - ICL: 0.472) (b) Assam (ICL ACC: 0.403) and (c) Assam (ICL - Century: 0.445). It was submitted that adopting 0.5 as the standard would appear to provide an artificial justification to the DG to ‘catch’ almost all the parties that have been mentioned in its data. It was also stated that as the absolute price coefficient was irrelevant, even using the incorrect prices in the Western region, the % price change for ICL was below the ‘0.5%’ benchmark. In the Southern region, absolute prices have actually become lower on a year-on-year basis - therefore, there was no basis for attributing price parallelism to cartelisation and in 12 out of the 15 States, the ‘% price change’ for ICL has been well below the ‘0.5’ benchmark set by the DG. Therefore, there was no basis to include ICL in a sweeping generalisation 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”.

93. OP-7 contended that it was not party to any cartel at or pursuant to any CMA meetings. It was also stated that the prices shown in the table in the report were only for two cities - Pune and Hyderabad. Therefore, no allegation can be inferred against ICL other than in relation to prices in Pune and Hyderabad. Further, the table showed that the prices in the cement industry were determined regionally/ city-wise. However, for Pune and Hyderabad, no other manufacturers' prices have been included. This meant that the allegation of price-fixing against ICL was stillborn, because it was illogical to talk of price-fixing by ICL on its own without any comparison with other manufacturers. Also, it was pointed out that the selective and erroneous nature of the comparisons sought to be made by the DG was corroborated by the fact that it ignored the data provided by ICL for six cities other than Pune and Hyderabad. There was no justification provided for picking only Pune and Hyderabad for the period December, 2010 – February, 2011, while ignoring the rest.
94. Refuting the DG's observation that when the price went up, the production went down, OP-7 submitted that from 10.494 MMT in 2009-10, the production of cement by ICL fell only marginally to 9.98 MMT in 2010-11. Hence, the DG included ICL in its allegation of supply fixing without any justification. It was stated that marginal reduction in production was due to price fall.
95. Regarding dispatch parallelism, it was stated that the dispatch data appeared to be based on national figures - which was completely irrelevant in gauging dispatch parallelism for a market that was accepted by the DG to be fragmented state-wise/ region wise. Also, regarding capacity utilisation, the figure of 64.98% taken in the DG Report as the capacity utilisation of ICL was alleged to be false. It was averred that it was misleadingly suggested that ICL's available capacity in 2010-11 was 15.85 MT whereas the correct figure was 14.05 MT.

Replies/ objections/ submissions of J. K. Cement (OP-8)

96. It was argued that the DG and the Commission have simply included JK Cement even though there was no allegation mentioned against it in the information or in the DG Report. It was also submitted that the DG and the Commission have erred by 'cherry picking' the Opposite Parties from out of 49 members of CMA. It was stated that there has been no objective criteria in selecting the eleven parties which have been arrayed as Opposite Parties in the present proceedings and excluding many other bigger players with higher installed capacity and market share than that of JK Cement from being arrayed as Opposite Party. Thus, the inclusion of JK Cement is highly arbitrary and discriminatory.
97. It was averred that the DG has wrongfully clubbed the data of another unrelated company operating under the name and style of JK Lakshmi Cement Ltd. with OP-8 and treating the two companies namely JK Cement Ltd. and JK Lakshmi Cement Ltd. as 'JK Group'. It was submitted that there was no such thing as 'JK Group'. OP-8 is an entirely independent legal entity incorporated under the erstwhile Companies Act, 1956 with about One Lac shareholders. Furthermore, referring to the meaning of 'Group' as defined in the Act, OP-8 submitted that neither JK Cement nor JK Lakshmi Cement Ltd. satisfied any of the conditions mentioned in the Act. It was also explained that the promoters of these two companies are entirely different even though they belong to the same clan. JK Cement has been promoted by Dr. Gaurhad Singhania and his family whereas JK Lakshmi Cement Limited has been promoted by Dr. Hari Shanker Singhania and his family. Promoters of JK Cement hold more than 65% shares of JK Cement whereas promoters of JK Lakshmi Cement hold more than 45% of the shares of JK Lakshmi. Rest of the shareholding in both companies is held by Financial Institutions/Mutual Funds and the general public. Both the companies are independently listed on Bombay and National Stock Exchanges. It was emphasised that there is absolutely no cross-shareholding of either company by the promoters of the other

company and neither of these companies is in any position to exercise any voting rights in the other company. There are no common directors, both the companies have different, separate and independent manufacturing facilities located at different locations, separate sales offices and sales staff and separate marketing organisation. These two companies are completely independent legal entities.

98. It was also pointed out that the DG has committed further grave error by selectively using data of either one company alone or both companies together at various places in its Report to suit its convenience for showing JK Cement as large enough to be arrayed as an Opposite Party in the instant matter. The DG has considered combined data of the two companies while depicting the 'Concentration Ratio of Top 8 firms' with installed capacity of over 10 Million and 'Concentration Ratio of Top 10 firms' market share of largest cement companies. It was submitted that if the production capacity and the market share of JK Lakshmi Cement was excluded from consideration for the purposes of these considerations, then JK Cement would not figure in either top 8 firms or one of the largest cement company which have been arrayed as 'Opposite Parties'. Similarly, while considering the net profits of all the top companies, the data of JK Lakshmi Cement Ltd. alone was considered and JK Cement was not mentioned at all whereas in case of data for the 'price' or 'dispatch' parallelism, combined data of both the companies had been considered.

99. OP-8 stated that its installed capacity for grey cement is only 7.47 MMT which is much less than 10 MMT capacity as considered by the DG for categorising a party as a 'large cement plant' to be included in the inquiry. However, by including the installed capacity of JK Lakshmi Cement Ltd., which according to the DG's own report is 4.74 MMT, the installed capacity of OP-8 was shown to be about 12 MMT and thus, it was included as a large player with over 10 MMT installed capacity which was patently wrong. The uncontroverted installed capacity of JK Cement for grey

cement is 7.47 MMT which constituted only about 2.6% of the total installed capacity for grey cement in the country at that time. It was further stated that JK Cement was essentially a regional player with presence in North India and marginally in Western India only during the period of inquiry and had about 1.7% of the total market share of cement market in India. Given the significantly small production capacity and the marginal market share, there was absolutely no warrant to include JK Cement as an Opposite Party for the present inquiry. OP-8 also mentioned that out of the installed capacity of 7.47 MMT, 3.0 MMT capacity was added only in October, 2009 in the form of a new plant in Karnataka. The DG has committed an error by considering such new capacity, which was commissioned during the middle of the year, as the capacity available for the whole of the year despite its own conclusion recorded in its report that *‘there are definitely some initial teething problems in newly installed plants and normally the capacity utilization in the first year of installation may be as low as 50% of the capacity.’*

100. It was argued that the DG’s conclusion that capacity utilisation of the industry during the year 2010-11 had come down to 73% was not correct *qua* OP-8. It was submitted that in Karnataka, it had been around 90% except in the year 2010-11 when it was 82% due to maintenance activity, change in blending ratio from PPC to OPC and due to new capacity addition which resulted into loss of some market share. It was stated that the capacity utilisation in the new Karnataka plant had also increased significantly from 10.46% in 2009-10 to 49.14% in 2010-11. These figures conclusively proved the credentials of OP-8 that it has been operating its plants at optimum capacity utilisation which was significantly higher than the average capacity utilisation of 73% computed by the DG for the entire cement industry.

101. OP-8 also explained that capacity utilisation is also a function of demand of cement in the market. It is an admitted position that cement industry is a

cyclical industry and cement is a perishable commodity with a shelf-life of not more than 3 to 4 months which cannot be stored for long periods of time. In the months of lower demand, the manufacturers would normally reduce the production as it is not prudent to keep producing when it is known that the market would not be able to absorb higher quantities. This peculiar circumstance inevitably results into lower capacity utilisation which by no stretch of imagination is *mala fide*. Moreover, the members of the Informant who have initiated this information buy their cement requirement from OP-8 and other cement manufacturers after thoroughly ascertaining the market position and intense price negotiations. In such a situation, where the buyer has ascertained the market conditions and demand and supply conditions, there cannot be any question of ‘cartelisation’ as alleged or at all.

102. It was contended that the allegation of high profit margins by cement companies does not hold good *qua* OP-8. It was submitted that OP-8 is a multi-product company engaged in the manufacture of grey cement, which is the subject matter of the present inquiry, white cement which is entirely a different product with different manufacturing process, ingredients and application, wall putty which is again a building beautification product used to enhance the life of paint and other similar products. While the sales volume of the grey cement manufactured by OP-8 is the highest, the profitability from this business is the lowest in over-all profits of the company. It was further submitted that almost 50% of the sale from grey cement segment had come from non-trade category which was not subject matter of the present inquiry for cartelisation.

103. In view of the above submissions, OP-8 stated that it deserved to be removed from the list of arrayed Opposite Parties and discharged from the present proceedings.

Replies/ objections/ submissions of Century Textiles and Industries Ltd.
(OP-9)

104. Century Textiles and Industries Ltd. ("Century Cement"), in its oral and written submissions before the Commission, has stated the DG has referred to major players having pan-India presence, such as ACC Ltd., ACL and UltraTech Cement Ltd. which have about 40% of the total market share and combined capacity of more than 100 MMT. Further, the DG report notes that Jaiprakash Associates Ltd. has a capacity of 20 MMT, The India Cement Ltd. has a capacity of 15 MMT, Shree Cement has a capacity of 13 MMT, The Ramco Cement Ltd. has a capacity of about 12.5 MMT and JK Cement has a capacity of about 12 MMT. In comparison, Century Cement has only about 8 MMT capacity and has a market share of less than 3.7%. Accordingly, Century Cement has submitted that it is not in a position to influence the market or sell cement at any price in the market.
105. Century Cement has further submitted that the basis for selecting prices used by the DG for correlation analysis is not known. It is not known from which city or market the prices have been adopted and whether the prices for all the cement manufacturers were considered from the same market at the same time or not. Such data being unreliable, no case of price parallelism can be made out. Century Cement has further contended that cement manufacturing companies are selling the product in hundreds of markets throughout the country and prices are competitive. In such a fragmented market, Century Cement has stated that it is not possible to impose a high non-competitive price.
106. Century Cement has further stated that while the average margin of top cement companies was approx. 26% in 2006-07, 27% in 2007-08 and 22.9% in 2008-09, Century Cement's profit in 2008 was 7.2%, in 2009 was 5% and in 2010 was 7%. Further, its profit margins in 2007-08 was 15.42%, in 2008-09 was 12.70%, in 2009-10 was 19.41% and in 2010-11 was 10.63%. It is the case of Century Cement that the DG has selectively considered the data to arrive at certain conclusions, without analysing the

inapplicability of Century Cement's case to the present allegations. Similarly, it can be seen that in the data of installed capacity and production of cement as tabulated by the DG, the data of Century Cement was not considered. In relation to capacity under-utilisation, Century Cement has stated that it has utilised its capacity to almost 98% and has dispatched its entire production cement at market price. In relation to the increase in cement prices, Century Cement has stated that its price in the year 2010-11 fell by Rs.5 to Rs.239 as compared to its average price in 2009-10 which was Rs.244/-.

107. In view of the above, Century Cement has submitted that no case has been made out against it and the Commission's proceedings against it are liable to be dropped.

Replies/ objections/ submissions of The Ramco Cements Ltd. (formerly, Madras Cements (OP-10)

108. The Ramco Cements Limited ("Ramco"/ "RCL"), in its oral and written submissions before the Commission, has submitted that the entire case rests solely on circumstantial evidence arising from certain economic indicators to infer a cartel and that the DG has found the infringement of the provisions of the Act based solely on broad brush conclusions. RCL has further claimed that there has been a pick and choose of (i) periods of investigation; (ii) parameters of investigation; and (iii) companies whose data has been considered.

109. In relation to the DG's finding on price parallelism, RCL has stated that prices of cement vary from one State to another and from one region to another and it was therefore, essential to compare price movements of companies operating in a particular State/ region. However, the DG's analysis is on a pan-India basis. RCL has stated that the primary ingredient for cement is limestone, which makes it necessary to install the plant near the mines of limestone only. The transportation of cement being a low-

value high-volume product, over a long distance, is uneconomical, which makes the transportation of cement an important cost component. Accordingly, the cement industry is largely regional in nature due to differing transportation costs, causing fragmented markets as per plants located in the vicinity. Thus, as per RCL, factors of demand and supply situation would vary from region to region and therefore, such price-competition would be on a regional basis. The DG's finding that there exists a national cartel, as per the submissions of RCL, is untenable.

110. RCL has stated that it primarily operates in Tamil Nadu, Karnataka, Andhra Pradesh and Kerala, but price movements for Tamil Nadu and Karnataka have not been not plotted by the DG. Prices of cement in Andhra Pradesh have been analysed, however, RCL's prices were omitted (even though these were submitted to the DG). In relation to Kerala, of the 35 months of period investigated, data is plotted only for 14 months for all the four companies considered and for 4 months only, RCL's data has been analysed. RCL has further stated that even in the 14 months where data of all the four companies is considered, there is a significant variance in the prices. According to RCL, the same cannot be used to state that there exists price parallelism in the cement industry in each State of operation analysed or used to arrive at a finding that RCL is a part of concerted action.

111. RCL has further submitted that prices in different regions have moved in a cyclical manner. In 2009-2010, there is actually a price drop when the prevailing price on 01.04.2009 is compared to the price prevailing price on 01.04.2010/ 31.03.2010. Further, when the former is compared to the price on 01.04.2011, only an increase of 10-12% is determined. Accordingly, RCL has stated that there is no evidence of any 'huge increase' in prices in the two years considered by the DG. Finally, though the DG has examined the margins of competitors to state that the Opposite Parties have made super normal profits, the profits of RCL were not considered.

112. RCL has claimed that the DG's analysis that minimum expected capacity utilisation by the industry is 80% is merely an assumption, with no explanation provided as to how such a bench mark was arrived at. Further, though the DG has stated that gestation period for a new plant is 2 to 5 years and in the first year of installation, capacity utilisation is as low as 50%, the same was not considered by the DG in its analysis. Further, RCL had expanded its capacity in Tamil Nadu in March, 2009 by setting up a new plant and in July 2009 by upgrading the 1150 TPD Kiln to 1350 TPD and by further erecting a new 1600 TPD kiln in November 2009. It is claimed that the DG has ignored these facts. Further, RCL's average capacity utilisation for Tamil Nadu (where a significant portion of its production capacity exists) was 96.25%. Finally, it is stated that the capacity figure of 12.72MT (used to declare that there was 56.05% capacity utilisation by the DG) is an incorrect figure. In addition to the above, RCL has stated that there exists *inter alia* various reasons for less capacity utilisation in plants in Karnataka and Andhra Pradesh, including certain political events and reduction of construction activity in the said period.

113. RCL has stated that the DG has not attempted to study transportation costs in different seasons and occasions and the impact thereof on cement prices. The DG has jumped to conclusions that scarcity of cement is created by lesser output by manufacturers by ignoring the reality in the cement market that prices are greatly influenced by (i) holding capacity of cement dealers being much lesser than the actual demand in peak seasons; and (ii) the availability or non-availability of transport.

114. RCL has claimed that the DG failed to appreciate that there may be reasons why it may be necessary to under-utilise production capacity from time to time given the temporal nature of the product (low shelf life), limited storage capacity, limited go-down capacity, shortages in availability of key raw material; power scarcity, break-down of machinery or stoppage of plant, high inventory level of clinker, logistic constraints such as non-availability of rakes provided by the Railways, seasonal factors, *etc.*

115. In relation to the findings on dispatch parallelism, RCL has stated that in 2009-2010, RCL shows a different trend from most of the other competitors. RCL has stated that the difference between the sale price and cost of sales from 2008-2010 shows a declining trend, but this has not been considered by the DG. RCL has further stated that the alleged 100% increase in cement prices over a period of six years is only in relation to the trade segment is concerned – if the non-trade segment is considered, price increase is only approx. 32%. RCL's prices have been showing a downwards trends in several months in 2009 and 2010.

116. RCL has finally submitted that the presumption of appreciable adverse effect on competition (AAEC) within India is clearly rebutted in this case, as none of the factors set out in Section 19(3)(a) to 19(3)(c) of the Act is attracted. Prices of cement are not fixed by concerted action but by governmental policy, environmental issues and the inherent nature of the cement industry itself. RCL has lastly claimed that there has been no creation of barriers to new entrants, no foreclosure caused to the market and that existing competitors have not been driven out of the market.

117. While RCL is a member of CMA, it has stated that it has not attended the meetings of CMA during the period of investigation; it also did not attend the meetings of HPC and it did not receive or disclose price information to CMA.

118. RCL has also stated that the DG has arbitrarily picked up certain large cement companies, on the basis of their market share in terms of production and capacity. This range is submitted as being arbitrary, inconsistent and irrational.

119. In the result, it was stated that the DG Report suffers from grave and irreparable infirmities and deserves to be rejected in totality. The material on hand rules out any apprehension of the so called cartel among cement manufacturers, as alleged or at all.

Replies/ objections/ submissions of Binani Cement Ltd. (OP-11)

120. Binani Cement Ltd. (BCL) argued that though there is no direct evidence of cartel available on record, the DG has sought to rely on the platform of CMA used for sharing sensitive information, price parallelism, under-utilisation of the installed capacity, *etc.* to infer the existence of the cartel between the cement companies. Such inference is misplaced. Furthermore, it was submitted that the DG failed to prove the alleged participation of BCL in any of those activities and thus, failed to prove the existence of any of the aforementioned circumstances in relation to BCL. The DG has specifically excluded the name and data relating to BCL in most parts of his analysis including collusive price leadership. It was also stated that the DG could not find any oral evidence on record against BCL.
121. It was stated that in the absence of direct evidence, the circumstantial evidence has to be examined *vis-a-vis* each alleged member of the cartel to establish whether the circumstances establish that the manufacturer against whom the allegation is being made was indeed a member of the alleged cartel. Even if the circumstances exist that may suggest the existence of a cartel, it cannot then be presumed that every manufacturer of the product is a member of such cartel.
122. BCL further submitted that it has a small share *i.e.* 2.59% in the Indian cement market. It was contended that considering its small market share and its restricted regional market presence, it is impossible for BCL to influence the prices and supply in the Indian market and play any role in a pan India cartel as alleged by the DG.
123. With regard to price parallelism, BCL submitted that its name has not been mentioned in any of the charts pertaining to price parallelism. Even in the States of Haryana, Delhi, Rajasthan and Gujarat, where BCL has a significant presence, there was absolutely no mention of BCL in the DG Report.

124. It was further submitted that no case of limiting and controlling the production and supply of cement has been established against BCL. The DG has excluded BCL from the chart indicating under-utilisation of installed capacity. It was contended that BCL has high capacity utilisation of 84.48%. 100% capacity utilisation in the cement industry is not the accepted norm. BCL also explained that there are two segments of cement manufacture *i.e.* the manufacture of clinker and the grinding of clinker. It was stated that where the clinker capacity utilisation is near 100%, the allegation of suppressing production is displaced. The installed clinker capacity is the limiting factor for the capacity utilisation of the cement grinding unit. Therefore, BCL submitted that the DG has erroneously compared only the grinding capacity *vis-à-vis* the cement production without taking into account the corresponding clinker production capacity and its utilisation. BCL has utilised almost 100% of its available clinker at the relevant time and hence, in no manner it could be said to have underutilised its installed capacity.

125. Referring to the DG's analysis on the dispatch data of the cement manufactures for the years 2009 and 2010, BCL argued that a bare perusal of the charts for the year 2009 and 2010 would indicate that the dispatch of the cement decreases in the months of July, August, September and October and for the rest of the months, the dispatches are at a higher level. It was submitted that it was a matter of common knowledge that in India, during the months of July to October every year, the construction activity is reduced because of the rains. Hence, there was nothing suspicious or concerted if the dispatches of the cement companies dipped during the rainy seasons and picked up during the winter and summer seasons. This factor in no manner indicated that BCL has deliberately reduced the supply of cement in the market.

126. It was denied that BCL was a member of the HPC of CMA or has attended any of the meetings of HPC. OP-11 was not involved in either collection or

distribution of data. It was submitted that in the age of transparency, the availability of data regarding prices and production etc. was hardly a factor that suggests formation of a cartel. Manufacturing associations gather such data for commercial reasons - in fact, working of cartels is hardly evidenced by open activities such as this. It was also stated that BCL was not involved in previous conviction of cement companies by the MRTP Commission.

127. It was argued that the DG was not able to establish the profit motive as alleged in the report. Furthermore, from the data collected by the DG, it can be seen that the profits of BCL had a sharp fall from 15.2% in the year 2008 to 6.7% in the year 2009. This sharp decline in the net profits of BCL is completely contrary to the basic idea of a cartel, which is primarily aimed at increasing the profits of the members of the cartel. The very fact that the profits of BCL dropped sharply in the year 2009 clearly indicates that BCL was not part of any cartel.

128. In view of the above submissions, BCL contended that mere parallel behaviour of the companies in terms of pricing or production/ output is not sufficient evidence to establish cartelisation. In the present matter, even the circumstances of price parallelism, production parallelism and dispatch parallelism have not been proved against BCL. Thus, it was submitted that the case of cartelisation or violation of any other provision of the Act has not been established against BCL.

Replies/ objections/ submissions of Lafarge India Pvt. Ltd. (OP-12)

129. OP-12, in its written submissions contended that the DG has made reference to 'top players', 'major players', 'all companies', etc., in the report without clarifying the specific cement manufacturer against whom the investigation and observations are made. It was further contended that though the DG mentioned that detailed questionnaire was sent to all the cement manufacturing companies, the Report does not contain all the

replies. OP-12 has questioned as to why the DG has only analysed the replies of only the Opposite Parties and not of the other cement manufacturers. OP-12 has also stated that it is one of the smallest cement manufacturing companies in India and sells its cement primarily in eastern regions. It has pan-India market share of only 3%. That even comparing with major players having regional presence, OP-12 is a smaller player with only 6 MMT capacity unlike others which have more than 10 MMT capacities.

130. It was pointed out that while the DG acknowledged the regional nature of cement industry, the region wise existence of anti-competitive agreements were not investigated. It was argued that the DG failed to consider the fact that OP-12 being a regional player with 95% market share in the eastern region has no incentive to cartelise with the other players. The DG has failed to delineate the relevant market and demonstrate the rationale behind regional players coordinating with pan-India players or players from other regions. OP-12 further pointed out that there were several other players of comparable size with that of OP-12 like Dalmia Cement, Chettinad Cement, Birla Corp., etc. which were not investigated by the DG. Therefore, it showed bias against OP-12. It also added that the JNU Report and PSC Report which had listed out major players did not mention OP-12 in their lists.

131. With regard to capacity utilisation, OP-12 pointed out that the DG has stated that the optimum utilisation will be 90% and above. OP-12's utilisation for the past three years has been 92-96% which is well above the said benchmark. As such, there was no case against OP-12 in controlling or restricting the production or supply of cement. The DG, by not identifying this and clubbing OP-12 with the rest of the Opposite Parties has prejudiced OP-12.

132. OP-12 stated that its expansion in output has significantly exceeded the industry levels. For instance, Indian cement industry increased output by

6% in the year 2010 while at the same time OP-12's output increased by 9%. With regard to the evidence relied upon by the DG to suggest a steady increase in capacity and production over the years, OP-12 submitted that given how expensive it is to add capacity, capacity expansion is inconsistent with an allegation of output restriction.

133. On the issue of price increase, OP-12 submitted that the increase in retail prices between January, 2008 to February, 2011 was less than the increase in WPI, which meant that the price increase in the cement was less than the increase in inflation. Referring to the DG report, it was stated that OP-12's prices increased in West Bengal and Bihar while they dropped in Orissa. It was further argued that the DG's assertion that the prices have increased every time the production has gone down was completely baseless, particularly in relation to OP-12. It was submitted that in the month of November, 2010, while OP-12's cement production in all plants except Sonadih decreased, the prices of cement also witnessed a downward trend in most of the States where OP-12 operates.

134. It was stated that the cement industry comprises of nearly 49 large and small cement manufacturers across India. It is one of the fragmented cement industries in the world. It was further stated that the HHI for the Indian cement industry was approximately 610 on a national basis and approximately 1059 in the eastern region. These HHI levels are considered to be 'unconcentrated' by DOJ - FTC 2010 Horizontal Merger Guidelines. In addition, it was stated that the European Commission's Merger Guidelines would not consider a market as 'highly concentrated' unless the HHI exceeded internationally or nationally recognised definitions. Therefore, it was questioned if the Indian cement industry could be described as highly oligopolistic. Further, even if the cement industry could reasonably be described as a highly oligopolistic market, it would not imply collusion. It was also argued that since the cement industry is highly fragmented and asymmetric, it would be extremely difficult for the cement suppliers to coordinate with each other's actions and to reach an agreement.

135. It was also submitted that based on the data on industry dispatches as provided by OP-12, it was evident that in the Indian cement market, the distribution of market shares amongst the firms are asymmetric and volatile. Further, based on dispatch data in 2010 in the Eastern region, while some companies such as OP-12 and UltraTech Cement Ltd. had shares of 18% and 14% respectively, there were numerous smaller producers that have market shares of around 3-5% such as Jaiprakash Associates Ltd., Birla Corp. Ltd., Grasim Industries Ltd. and Cement Manufacturing Company Ltd. There was also another group of players that had market share below 1%. It was therefore, submitted that given this imbalanced distribution of market shares, the market share is considerably asymmetric.

136. OP-12 argued that the demand of cement is highly seasonal which makes collusion difficult to sustain. Demand peaks typically in the first half of the year and slows down in the second half and festive seasons. It was also pointed out that the DG has failed to establish the existence of a cartel in a market in which prices are subject to frequent changes and after acknowledging that volatility of prices of cement is a permanent character of pricing of cement.

137. It was contended that in order to establish that two or more persons, enterprises or association of enterprises have entered into an agreement, it must be demonstrated with the help of clear and concrete evidence, that there was concurrence of will or the meeting of minds between parties to the agreement. It was submitted that the same cannot be based merely on conjecture. The DG cannot rely purely on circumstantial speculation. It was not sufficient for the DG to vaguely refer to cement manufacturers entering into some arrangements and understandings. To emphasise further, reference was made to the case of *Neeraj Malhotra v. Deutsche Post Bank Home Finance* (Case No. 05 of 2009) decided on 02.12.2010 by the Commission wherein it was held that the DG must adduce precise and

coherent proof which unequivocally establishes such agreement. OP-12 also submitted that mere speculation cannot replace the need to provide conclusive evidence of the existence of an agreement as defined in the Act. It was not appropriate for the DG to simply base its report on mere conjectures and surmises.

138. It was also pointed out that while the DG identified that there were 49 cement manufacturers, it had limited its investigation to top cement manufacturers. Furthermore, OP-12 has been incorrectly identified as a top cement manufacturer. The DG has also not explained why the other members of CMA and HPC meetings were not named as part of the alleged cartel. The yardstick of 0.5 correlation coefficient applied by the DG was arbitrary and not based on any economic principle.

139. On the issue of price parallelism, OP-12 submitted that Shri Uday Khanna, CEO of OP-12, clarified in his statement that the changes in cement prices of OP-12 were not dependent upon the cement prices of OP-12's competitors. OP-12's cement prices have not matched those of its competitors because OP-12's products are of premium quality and highly reliable. Accordingly, its premium position is an asymmetry which makes collusion more difficult. It was also stated that OP-12 has never relied on CMA data to determine its competitive pricing conduct. It was contended that mere price parallelism was not sufficient to establish cartel. It was submitted that the Monopolies and Restrictive Trade Practices Commission ("MRTPC") has held that in situations where parallel business conduct could be explained by the nature of the market, mere price parallelism is not sufficient to sustain a charge of concert [*Alkali and Chemical Corporation of India Ltd. And Bayer Limited, RTP Enquiry No. 21/1981, Order dated 03.07.1984*]. The MRTPC relied on the decision of the Hon'ble Supreme Court of India in the case of *Hanuman v. State of Madhya Pradesh*, AIR 1952 SC 343 to observe that to prove the existence of a cartel on the basis of indirect evidence, the circumstances should be of a 'conclusive nature and tendency' and they should be such as to "exclude

every hypothesis but the one proposed to be proved” or shall “show that within all human probability” the Respondents must have acted in concert. Accordingly, the MRTPC dismissed the case of concerted action between Alkali and Chemical Corporation of India Ltd. and Bayer Limited by stating that: *“in the absence of any direct evidence of cartel and the circumstantial evidence not going beyond price parallelism, without there being even a shred of evidence in proof of any plus to bolster the circumstances of price parallelism, we find it unsafe to conclude that the respondents engaged in any cartel for raising prices.”*

140. It was further submitted that in a market characterised by seasonal increases and decreases in demand, one would expect to observe prices charged by OP-12 and its competitors to rise and fall together based on fluctuations in demand. Under perfect competition, market price is established where the demand curve and the supply curve intersect. Thus, other things being equal: (1) an increase in demand drives up the market price; and (2) an increase in production costs reduces supply and thereby drives up the price. In other words, the prices of all market participants thus, move together due to common demand and cost “shocks”. In sum, price parallelism is entirely consistent with competitive behaviour. Furthermore, it was averred that the DG has failed to take account of the fact that the main costs associated with cement production and distribution (*i.e.* coal prices, oil prices, local taxes and regulatory changes to the maximum pay load of lorries) were common to all suppliers. As such, cost shocks would result in simultaneous price movement absent any co-ordinate behaviour. It was also mentioned that the DG has placed reliance on a study conducted by Economic Division of the Commission. In this regard, it was stated that in response to the Joint DG’s request to the Commission for the services of Shri Hariprasad (dated 22.02.2011), Member Geeta Gouri had noted that the services of Shri Hariprasad could be used for *“furthering the case on cartels in cement”*. OP-12 submitted that this indicated a pre-determined mind of the existence of the cartel.

141. On production and dispatch parallelism, it was stated that it was clear that there was no basis at all to presume production parallelism from the evidence put forward by the DG. Correlation coefficients calculated during the period March, 2008 to February, 2011 did not indicate that manufacturers' production volumes moved in a similar way. Further, correlation coefficients across manufacturers' dispatches that were calculated during the period analysed by the DG (i.e. January, 2009 to March, 2010) indicated considerable differences in dispatch trends across the manufacturers, particularly in relation to OP-12. OP-12 has increased production proportionally more than the rest of the industry, which was inconsistent with an agreement to restrict output. For instance, while production at industry level increased by 11% between 2008 and 2009 and by 6% between 2009 and 2010, the respective figures for OP-12 were 18% and 9% in the relevant period. It was also stated that OP-12 increased its dispatches by 9.1% in 2010 as compared to 2009.

142. OP-12 stated that there was a close relationship between OP-12's sales prices and its costs. Given that costs have been experiencing positive growth over time, increase in the prices of cement was not surprising and perfectly consistent with normal competition. It was pointed out that though the DG referred to an analysis by the Tariff Commission where a "fair and realistic" price for cement had been estimated and which indicated that cement prices in India were unusually high, no details on the calculation of "fair and realistic" prices have been given. Further, there was no evidence that the prices are higher than they would otherwise have been.

143. It was further pointed out that the DG had identified the profit margins for the Opposite Parties but the table in the report did not show a consistent increasing trend in profit margins of all the Opposite Parties. Further, the DG noted that all the companies have been making "very good net profit" but the test however, according to the DG himself, was that of supra normal profits. It was submitted that the profits made by OP-12 could not be deemed to be 'supra-normal' as indicated by the DG, especially in light of

the fact that OP-12 did not have major interest payments for capacity addition (one of the major reasons, according to the DG, for cement companies not to have supra normal profits).

144. With regard to the issue of collusive price leadership, OP-12 submitted that the DG has to provide compelling evidence that there had been an agreement to share markets, that there had been an agreement to follow a particular price leader in any region and that the agreed price leader was indeed followed systematically by the remaining of the alleged collusive group. However, the DG has been unable to demonstrate that one firm systematically followed another. It was also contended that the answers of various cement parties on which the DG has based its conclusions, were in response to often ambiguous questions. The DG cannot infer that a market leader in terms of market share is a price-leader. Additionally, the DG relied on newspaper reports which do not hold any evidentiary value.

145. It was argued that CMA was not a platform for cartelisation. Cartel agreement cannot be inferred from the mere formation of an association of enterprises. Trade association will attract scrutiny under Section 3 of the Act only when it acts as a vehicle for anti-competitive conduct under Section 3 of the Act. In this instance, the DG has failed to show that CMA members met to arrive at a common decision to limit the production/ supply of cement and fix the prices and that CMA meetings have facilitated the conclusion of a cartel agreement. It was further argued that information was collected by CMA under a Government directive. The Government of India has always closely monitored the performance of the cement industry and the CMA has been providing information on production, supply, capacity utilisation, indicative prices, *etc.*, since the closure of the office of DCCI in 1989.

146. Furthermore, the data collection activities of CMA are mandated by a legislation, namely the Cement Cess Rules, 1993 (“CCR”) and the Cement Control Order, 1967 (“CCO”) framed under the Industries (Development

and Regulation) Act, 1951 (“IDRA”). The CCR requires every manufacturer to submit returns to a “Collecting Agency” appointed by the Government of India on stocks of cement manufactured or produced in and removed from an undertaking in the previous month. In this case, CMA and/ or certain parties have been nominated as Collecting Agents. Similarly, under the CCO, cement manufacturers are required to maintain records relating to the production, sale, removal and transport of cement and make them available for the government from time to time. Non-compliance with the provisions of the CCO carries significant consequences, namely imprisonment or fine, or both.

147. OP-12 submitted that the DG did not analyse whether the information collected by CMA was competitively sensitive or not and the DG simply assumed that the mere exchange of any data by CMA was anti-competitive. It was explained that CMA collects, under the instructions of DIPP, indicative retail price ranges in 34 centers across India on a weekly basis and wholesale price index from 10 centers. Specifically, minimum and maximum prices at retails level are collected. Price collected is retail prices - the price at which consumers can purchase cement in retail establishments and not the price at which cement manufacturers sell to their customers. Further, out of the 34 centers, only 4 centers are in the Eastern region where OP-12 is present. Such information could be gathered easily from other public sources, for example, cement manufactures are required to display their maximum retail price on the bags of cement and it is easy for competitors to gather this information. Further, the price collected also refers to historical prices.

148. It was contended that the increase in cement price in the first quarter of 2011 was not linked to HPC meetings but was due to other factors such as good weather conditions for construction, government spending on construction *etc.* The DG has restricted his analysis of the link between HPC meetings and price to three instances only. A chart was enclosed to show that it depicts OP-12’s prices around the dates of the HPC meetings,

which indicated that prices in many instance dropped after HPC meeting. For instance, cement price dropped significantly in the third quarter of 2011 even though the HPC met on 01.06.2011. It was averred that the DG had no justifiable reason to highlight only two of the HPC meetings. Further, it was argued that other player with comparable market shares, such as Dalmia Cement, Birla Corp, OCL and Kesoram Industries who were also members of HPC meetings were neither investigated nor considered. Therefore, it was submitted that the veracity of the DG Report and findings were questionable in this light.

149. With regard to penalty, it was submitted that assuming the Commission decides that there was a cartel in the cement industry and OP-12 was a part of it, the quantum of penalty should be based on the role played by each party in the cartel. Further, there should be separate penalty proceedings prior to determining the penalty amount.

Replies/ objections/ submissions of the Informant

150. Builders Association of India supported the findings of the DG and in the reply reiterated its allegations stating that being among the largest group of consumers of cement in India, its members bear the biggest setback due to the acts of cartelisation leading to increased prices and stalled supply and production of cement. Its submissions, in brief, are as under:

- (i) The Informant has pointed out that it is clear from the report of the DG that the Opposite Parties have been involved in anti-competitive practices including cartelisation and have been found guilty by the Monopolies and Restrictive Trade Practices (MRTP) Commission under RTPE 99 of 1990 and RTPE 21 of 2001. The cement manufacturers have been found in violation of competition laws (cartelisation, resale price maintenance, controlling production *etc.*) across the globe. The cement manufactures are habitual offenders and have been penalised in several jurisdictions.

- (ii) It was further submitted that some of these international cement manufacturing companies, owing to high demand and heavy profits, have also acquired controlling stake in several Indian cement companies. Holcim Group has acquired stake in ACC Ltd. and ACL. Lafarge India Pvt. Ltd. has acquired cement business of Tatas and Raymonds. Other notable entrants in India are Italcementi, Heidelberg, Cimpor, CRH plc and Vicat. Holcim, Lafarge, Italcementi and Heidelberg among others have been involved in anti-competitive activities including cartelisation and price fixing and have been penalised millions of dollars on several occasions.
- (iii) Most Opposite Parties (whether members of CMA or not) have admitted participation in CMA's meetings and/ or exchanging commercially sensitive information (including prices) over phones. The meetings organised by CMA influence the market behaviour of the competitors and, in fact, they act in concert to increase the prices as well as regulate the production and supply of cement in the market. Apart from identity of prices, Opposite Parties have also participated in curtailing production in order to demand higher prices.
- (iv) It was pointed out that ACC Ltd. and ACL have claimed that they were non-members of CMA and therefore, could not be part of any agreement for fixing of prices, resale price maintenance, cartelisation and abuse of dominant position. However, both ACC Ltd. and ACL have admitted participation in several meetings of CMA including those held in February and March 2011. Further, both ACC Ltd. and ACL have been exchanging commercially sensitive data/ information with CMA without raising confidentiality concerns, which have been raised before the Commission.

- (v) The Informant has contended that the findings of the DG thus, establish that the Opposite Parties are acting like a cartel and therefore, they must be proceeded against as per the provisions of the Act.

Analysis

151. As noted in the beginning of this order, the Hon'ble Competition Appellate Tribunal while remanding the matter back to the Commission issued the following directions its order dated 11.12.2015:

“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 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.”

152. As a result thereof, some of the parties raised the pleas seeking cross-examination and challenging the jurisdiction of the Commission.

153. In this connection, the Commission notes that CMA has 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 has 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 has contravened the principles of natural justice rendering the report and the findings arrived by it as untenable and bad in law. Similarly, Ramco 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 guilty under the provisions of the Act 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 the DG and the report prepared on the basis of such investigation are without 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 relatable 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 The 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.

154. 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.*

155. 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 dealers and also made reference to various statements made by small cement manufactures who were not the members of CMA and highway contractors. As such, it was prayed that UltraTech Cement Ltd. be permitted to cross-examine the witnesses.

156. Century Cement 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.

157. 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.

158. 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 General Regulations framed thereunder.

159. 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 relevant part of the same is quoted below:

“Taking of Evidence

Regulation 41(1)...

(2)...

(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)..."

160. 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 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 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 this 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.

161. Viewed in this backdrop, none of the Opposite Parties has been able to justify the prayer seeking cross-examination. They 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 otherwise be responded to through replies/ Affidavits. In the present case, the parties

were allowed to respond to the DG Report through filing of their respective replies. Having availed of such opportunity by filing detailed replies, the Commission is of the considered opinion that there is no merit in the pleas seeking cross-examination. Further, the parties were granted full opportunity by way of oral submissions before the Commission and were heard at length. Thus, the Commission finds no merit in the pleas of the Opposite Parties alleging contravention of the principles of natural justice.

162. Next, jurisdictional challenge laid by the Opposite Parties, based on the plea that the DG could not have investigated into allegations and looked into data pertaining to a period prior to 20.05.2009 *i.e.* the date from which the provisions of Section 3 of the Act were brought into force, is also not well founded. No doubt, the DG has referred to the data of the cement industry relating to the installed capacity, production, utilisation, dispatch, prices and profit margins for a period prior to 20.05.2009, yet the DG has relied upon such data only to appreciate the dynamics of the industry. Hence, the same cannot be construed as giving retrospective effect to the provisions of the Act. The DG has used such data only to conduct an analysis which appears to be necessary for delineating the market construct and structure of cement industry. Thus, for examining contravention of the provisions of Section 3 of the Act, the Commission has the necessary jurisdiction to rely upon data in respect of the period prior to the date of notification of the relevant provisions of the Act and no infirmity can be imputed on this basis either to the investigation conducted by the DG or to the proceedings before the Commission.

163. So far as the anti-competitive conduct taking place prior to 20.05.2009 is concerned, needless to add that if the effects of such act/ conduct continue post-notification of the provisions relating to anti-competitive agreements, 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.

164. Another objection has been raised by the Opposite Parties arguing that certain reports relied upon by the DG such as Report of the Tariff Commission on the Performance of Cement Industry and Report of the Department Related Parliamentary Standing Committee on the Performance of Cement Industry have not been supplied to them fully. In this connection, 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. Moreover, the entire records including the documents/ information which were granted confidential treatment were available to the parties for inspection during the pendency of the appeals before the Hon'ble Competition Appellate Tribunal. This is also evident from the order of the Hon'ble Competition Appellate Tribunal dated 11.10.2012 passed in the appeals arising out of the original order dated 20.06.2012 of the Commission. Hence, the Commission finds no substance in the plea raised by the Opposite Parties on this count as well.

165. Next, it was contended by the Opposite Parties that their names have not been properly reported. In this regard, 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.

166. JK Cement (OP-8) has raised a specific 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.

167. The Commission observes that the DG had issued notices to JK Cement a part of JK Group but a separate notice to JK Lakshmi Cement Ltd. was not issued. The Informant has also mentioned JK Cement of JK Group as the Opposite Party. The Commission also sought replies from JK Cement only. Thus, while ascertaining the contraventions of the Act, details/ data of JK Cement alone have been considered.

168. The Opposite Parties have also raised an objection that the information filed by BAI is motivated.

169. It is no doubt true that if an information provider comes with incorrect facts or suppresses some information, the action may be taken against such Informant. However, under the scheme of the Act, it has to be understood that the role of the Informant is only that of an information provider and the proceedings before the DG or the Commission are not adversarial in nature. The Commission independently assesses the information and the material available on record before reaching any final conclusion. Thus, even if an information is motivated or actuated by ulterior motives, it cannot influence the final outcome in any manner, though, as noted earlier, appropriate action may be taken against an Informant providing false information or for suppressing the information.

170. Before concluding discussion on the preliminary issues, the Commission may also refer to a plea raised by the parties contending that the finding of the DG of a pan-India or national cartel is legally untenable in light of the nature of cement industry. It was argued that the cement industry is largely regional in nature due to differing transportation costs causing fragmented markets as per plants located in the vicinity. Thus, it was canvassed that factors of demand and supply situation would vary from region to region and therefore, such price-competition would be on a regional basis.

171. The Commission has carefully examined the plea. The allegation made by the Informant is that the cartel is orchestrated by CMA, which is a pan-

India body. In such a case, while the decisions may be implemented at regional levels or in even narrower geographical units, such decisions may be taken at the national level thereby prompting a pan-India focus of the investigation. The structural features of the market *i.e.* nature of competition, nature of product, low buyer power, high entry barriers *etc.* do not change if the framework is altered from pan-India to regional or *vice-versa*. If regional markets were to be taken separately, the number of players may be lesser and concentration levels may be higher in each region thereby making the markets structurally more conducive for forming and sustaining cartels. It must be noted that there is no specific threshold for a concentration level above which collusion becomes likely. Concertation, in conjunction with other characteristics of the market concerned, creates conditions conducive for collusion. Thus, the Commission finds no merit in the plea that the DG could not have taken India as a whole for the purposes of investigation when the cement industry is regional in character.

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

Points for determination

173. On a careful perusal of the information, the report of the DG, replies/objections filed and submissions made by the parties and other materials available on record, the following points arise for consideration and determination in the matter:

- (i) Whether the Opposite Parties have contravened the provisions of Section 4 of the Act?
- (ii) Whether the Opposite Parties have contravened the provisions of Section 3 of the Act?

**Whether the Opposite Parties have contravened the provisions of
Section 4 of the Act?**

174. To examine the allegations relating to abuse of dominant position, it is necessary to understand the market structure of the industry. In this connection, the Commission observes that the DG in the investigation report brought out that there are 49 companies operating with more than 173 large cement plants in India besides many mini plants scattered around limestone clusters.

175. The Commission also notes that as per the report of the DG, ACC Ltd., ACL, UltraTech Cement Ltd., JAL, The India Cements Ltd., Shree Cement, Ramco, Century Cement, JK Cement, J K Lakshmi Cement Ltd., Binani and Lafarge India Pvt. Ltd. control about 75% market share of cement in India. Birla Group and Holcim Group together command a major share in the cement market in India while other players like Shree Cement, Lafarge India Pvt. Ltd., Binani Cement, The India Cement Ltd. and Madras Cement among others, have market presence in one or two regions in the country.

176. The market share of cement manufacturing companies present a picture of the market structure in which no single firm can be said to be dominant in India. In fact, the two major groups-Birla and Holcim have more or less comparable market share. No single firm or a group is in position to operate independent of competitive forces or affect its competitors or consumers in its favour to make it dominant within the meaning of Explanation (a) to Section 4 of the Act.

177. Further, there is no concept of “collective dominance” or “joint dominance” in the Act.

178. As the market construct suggests that no single firm or group is dominant, a detailed determination of relevant market for the purposes of establishing

any abusive conduct on the part of any of the Opposite Parties is not necessary.

179. In view of the above, the Commission is of the opinion that no contravention of the provisions of Section 4 of the Act is made out in the present matter.

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

180. 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 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.

181. 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.

182. 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.

183. 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.

184. 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.

185. 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 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)

186. 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.

187. 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

188. 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.

189. 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 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.

190. 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.

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

192. 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.

193. 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.

194. 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.

195. 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 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.

196. 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
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. Niranjana Singh
Bareilly	Prism Cement	Phone	Mr. M.K. Singh

197. 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.

198. 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).

199. 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

200. 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
	Howrah	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
	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

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

202. 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.

203. 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 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.

204. 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 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 were 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 Respondent 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 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.

205. 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 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.

206. 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.

207. 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 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 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)

208. 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)

209. 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 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)

210. 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.

211. 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.

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.

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.

212. 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

213. 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 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 local and central authorities on any matter connected with the trade, commerce and manufactures of its members.	Substituted clause: “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

Rule No.	Existing provisions	Amendment as per December 2010 Memorandum of Association and Rules
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.

214. 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 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

215. 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.

216. 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.

217. 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.

218. 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.

219. 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.

220. 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.

221. 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.

222. 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

223. 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.

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

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

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

224. 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.

225. 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:

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

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

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

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

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

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

226. 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.

227. 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.

228. 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 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.

229. 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.

230. 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	
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

231. 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.

232. 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

233. 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 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.
234. 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.
235. 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.
236. 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.

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

238. 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

239. 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.

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

241. 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 %.

242. 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.

243. 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, 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.

244. 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.

245. 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

246. 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%.

247. 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.

248. 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 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.

249. 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%

250. 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 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.

251. 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.

252. 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.

253. 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% 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.

254. 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

255. 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

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

Production parallelism

257. 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

258. 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.

259. 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

260. 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

(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													

261. 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.

262. 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

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

264. 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.

265. 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

266. 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

267. 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.

268. 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

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

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

(in Rs)

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

269. 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.

270. 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.

271. 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 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

272. 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%

273. 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.

274. 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, 2010-11, the growth rate in cement production and dispatches was very low.

275. 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.

276. 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 269 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

277. 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 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.

278. 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.

279. 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

280. 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

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

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

281. 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 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.

282. 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

283. 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

284. 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.

285. 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.

286. 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.

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

288. 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.

289. 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 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.

290. 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.

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

ORDER

292. Opposite Parties are 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. CMA is directed to disengage and disassociate itself from collecting wholesale and retail prices through the member cement companies or otherwise. It is also restrained from collecting and circulating the details relating to production and dispatch by the cement companies.

293. The Commission, for the reasons recorded below also, finds the present case fit for imposition of penalty as under. Under the provisions contained in Section 27(b) of the Act, the Commission may 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.

294. 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 penalty 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.

295. 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 upon prices, production and supplies. Such conduct deprives not only the consumers but the economy also from exploiting the optimal capacity utilisation and thereby reducing 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.

296. 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 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 as well 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 Case Nos. RTPE 21 of 2001 and RTPE 99 of 1990.

297. Opposite Parties have 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.

298. 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 the consumers, the Commission is of considered opinion that this is a fit case to invoke the *proviso* to Section 27(b) of the Act.

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

(in Rs. crore)

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	10% of Turnover as calculated in column 2	Gross Turnover for 2010-11	10% of Turnover as calculated in column 4	Total
ACC Ltd.	7416.17	741.61	10478.39	1047.83	1789.44
Ambuja Cements Ltd.	7150.58	715.05	9588.33	958.33	1673.38
Binani Cement Ltd.	1790.10	179.01	1978.93	197.89	376.90
Century Textiles and Industries Limited	4213.46	421.34	5158.80	515.88	937.22
India Cements Ltd.	3551.20	355.12	3888.07	388.80	743.92
J K Cements	1605.44	160.54	2130.21	213.02	373.56
Lafarge India Pvt. Ltd.	2945.36	294.53	2970.07	297.00	591.53
Madras Cements Ltd.	2573.59	257.35	2835.17	283.51	540.86
UltraTech Cement Ltd.	6693.42	669.34	14858.60	1485.86	2155.20
Jaiprakash Associates Limited	10107.76	1010.77	13831.87	1383.18	2393.95

300. The calculation of penalty limit based on net profit in terms of Section 27(b) is as under:

(in Rs. crore)

Name	Net Profit 2009-10 taking into account period of contravention post-notification i.e. 20.05.2009 on pro-rata basis	3 Times of Net Profit as calculated in column 2	Net Profit 2010-11	3 Times of Net Profit as calculated in column 4	Total
ACC Ltd.	969.92	2909.76	1,325.26	3975.78	6885.54
Ambuja Cements Ltd.	1064.19	3192.57	1,263.61	3790.83	6983.40
Binani Cement Ltd.	244.13	732.39	90.50	271.50	1003.89
Century Textiles and Industries Limited	308.43	925.29	239.60	718.80	1644.09
India Cements Ltd.	306.85	920.55	68.10	204.30	1124.85
J K Cements	194.46	583.38	62.62	187.86	771.24
Lafarge India Pvt. Ltd.	566.61	1699.83	413.40	1240.20	2940.03
Madras Cements Ltd.	306.27	918.81	210.97	632.91	1551.72
UltraTech Cement Ltd.	946.74	2840.22	1404.23	4212.69	7052.91
Jaiprakash Associates Limited	1479.43	4438.29	1167.78	3503.34	7941.63

301. It is evident that the amount of three times of net profit calculated as above is higher than 10% of average turnover. As per the *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 the net profits for 2009-10 (from 20.05.2009) and 2010-11 in case of each cement manufacturers named as Opposite Parties in this case as follows:

(in Rs. crore)

Name	Net Profit 2009-10 taking into account period of contravention post-notification i.e. 20.05.2009 on pro-rata basis	0.5 Times of Net Profit as calculated in column 2	Net Profit 2010-11 (in	0.5 Times of Net Profit as calculated in column 4	Total
ACC Ltd.	969.92	484.96	1,325.26	662.63	1147.59
Ambuja Cements Ltd.	1064.19	532.10	1,263.61	631.81	1163.91
Binani Cement Ltd.	244.13	122.07	90.50	45.25	167.32
Century Textiles and Industries Limited	308.43	154.22	239.60	119.80	274.02
India Cements Ltd.	306.85	153.43	68.10	34.05	187.48
J K Cements	194.46	97.23	62.62	31.31	128.54
Lafarge India Pvt. Ltd.	566.61	283.31	413.40	206.70	490.01
Madras Cements Ltd.	306.27	153.14	210.97	105.49	258.63
UltraTech Cement Ltd.	946.74	473.37	1404.23	702.12	1175.49
Jaiprakash Associates Limited	1479.43	739.71	1167.78	583.89	1323.60

302. A penalty at the rate of 10% of total receipts for the two years in terms of Section 27(b) is also hereby imposed upon CMA:

(in Rs. crore)

Name	Gross turnover for 2008-09	Gross turnover for 2009-10	Gross turnover for 2010-11	Average Turnover for three years	Penalty at rate of 10% on average turnover
Cement Manufactures Association	9.27	6.65	5.99	7.30	0.73

303. 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 memorandum of parties as

noted in the beginning of this order and the directions issued by the Commission are to relate to such names only.

304. Further, only one version of this 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 order 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.”

305. 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.

306. Before parting with this order, the Commission wishes to bring it on record that the Hon'ble Competition Appellate Tribunal while remanding the matter back to the Commission expressed hope that the fresh order shall be passed by the Commission as early as possible but within a period of 3 months from the date, which may be notified after receipt of the order. The remand order was passed by the Hon'ble Competition Appellate Tribunal on 11.12.2015 which was received in the Commission on 21.12.2015. The Commission thereafter heard the matters at length during the hearings which were conducted from 19.01.2016 to 22.01.2016. Looking at the complexities of issues involved, the Commission took time to deliberate on the matter in detail. Despite that, and the voluminous details submitted by the Opposite Parties, the Commission made every effort to dispose of the matter expeditiously in deference to the observations made by the Hon'ble Competition Appellate Tribunal.



307. The Commission directs the above Opposite Parties to deposit the penalty amount within 60 days of receipt of this order.

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

309. It is ordered accordingly.

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

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

**Sd/
(Sudhir Mital)
Member**

**Sd/
(Augustine Peter)
Member**

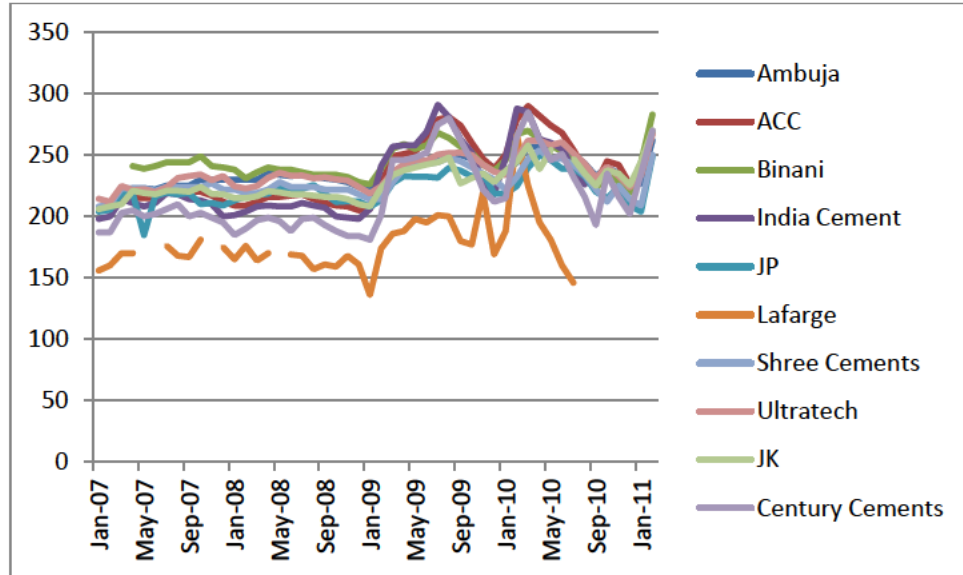
**Sd/
(U.C. Nahta)
Member**

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

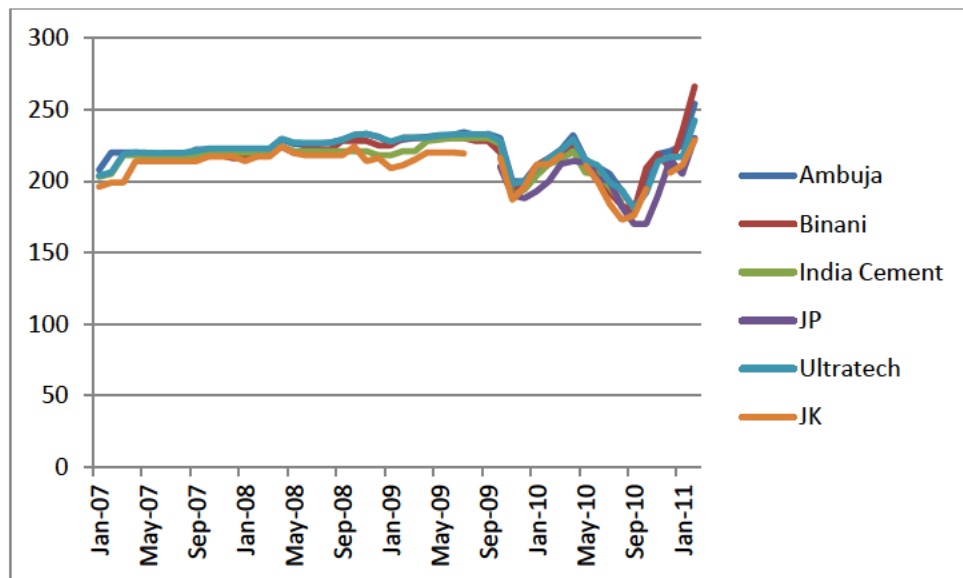
New Delhi
Date: 31/08/2016

Annexure-I

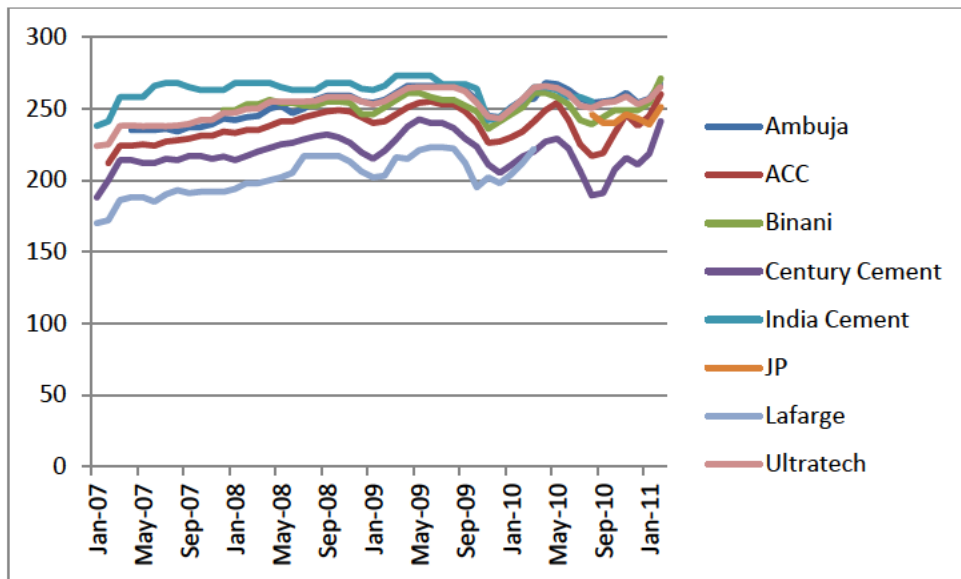
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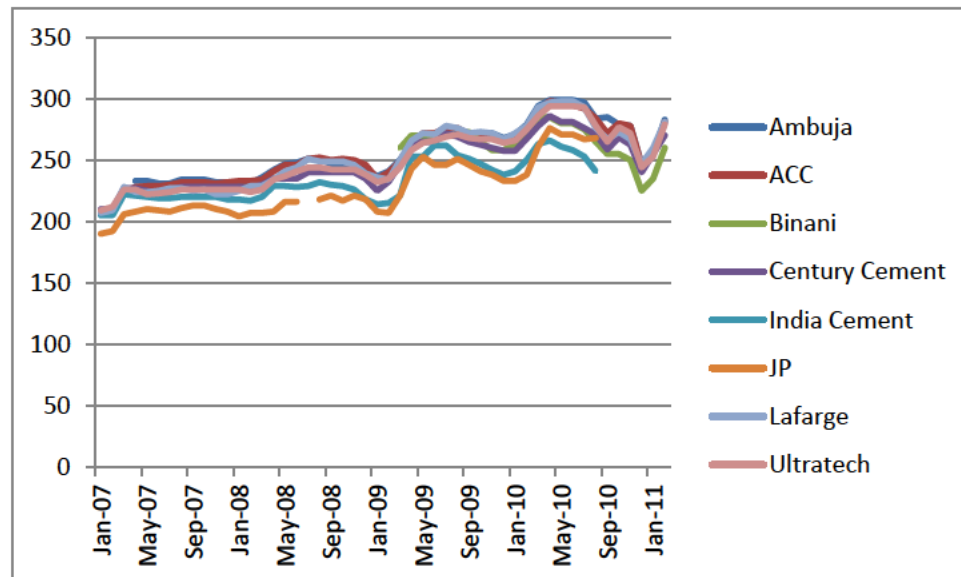
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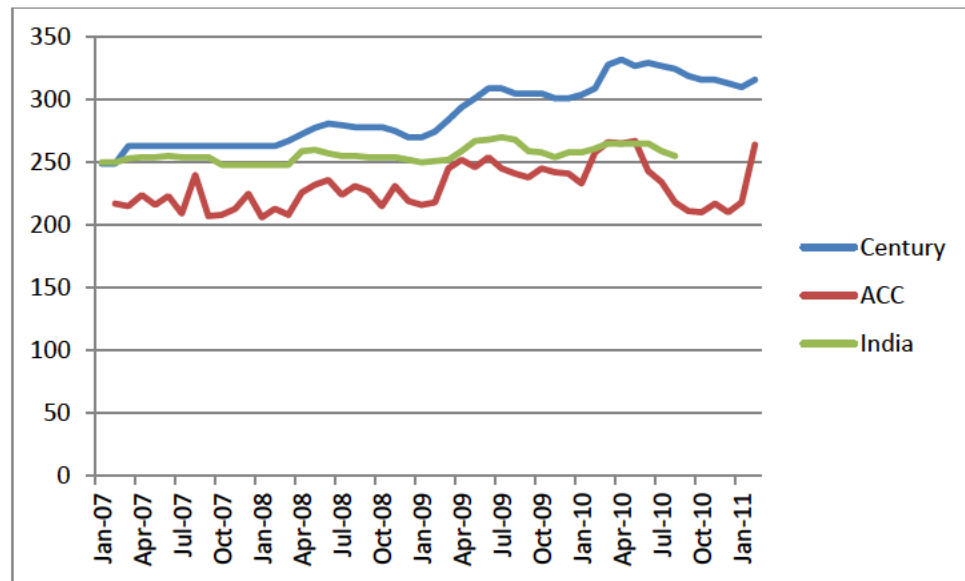
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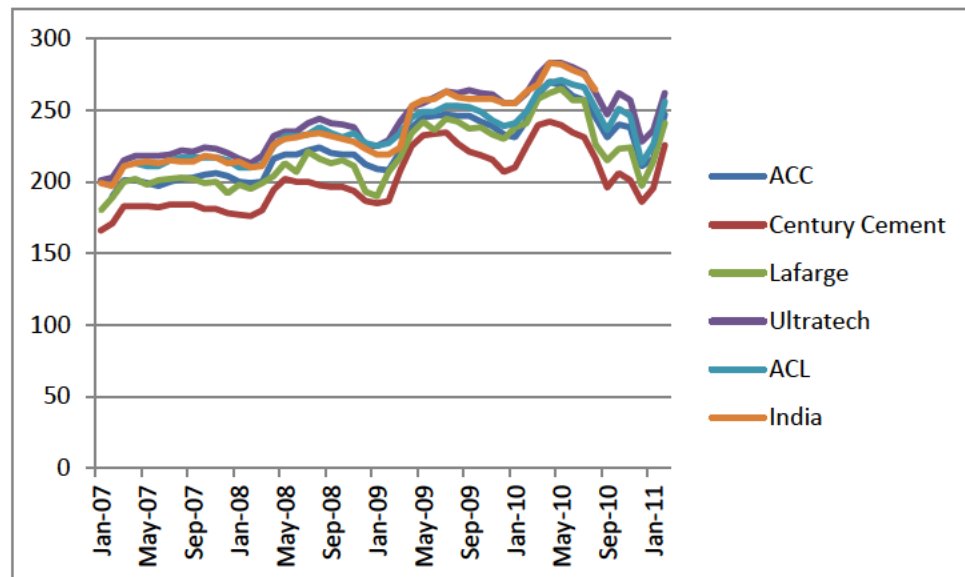
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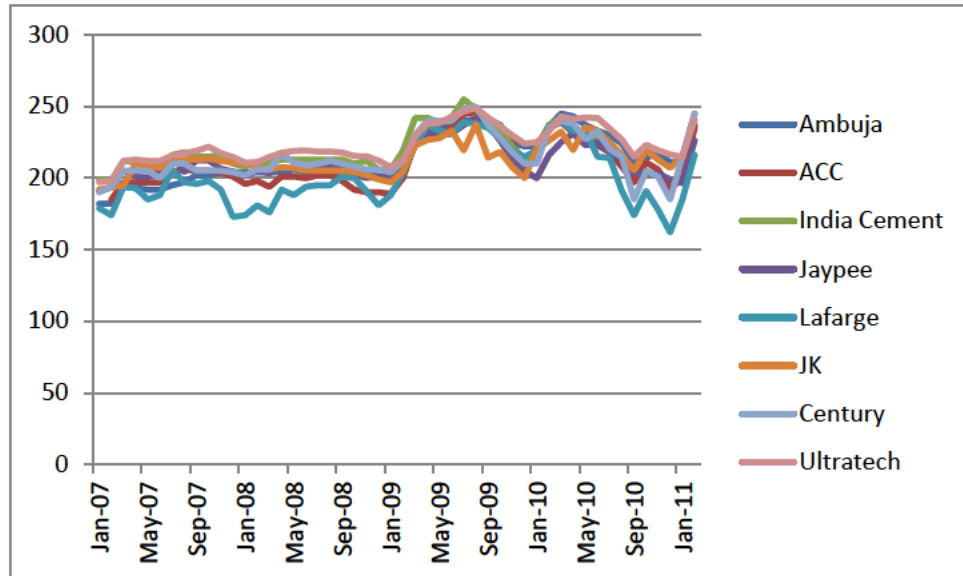
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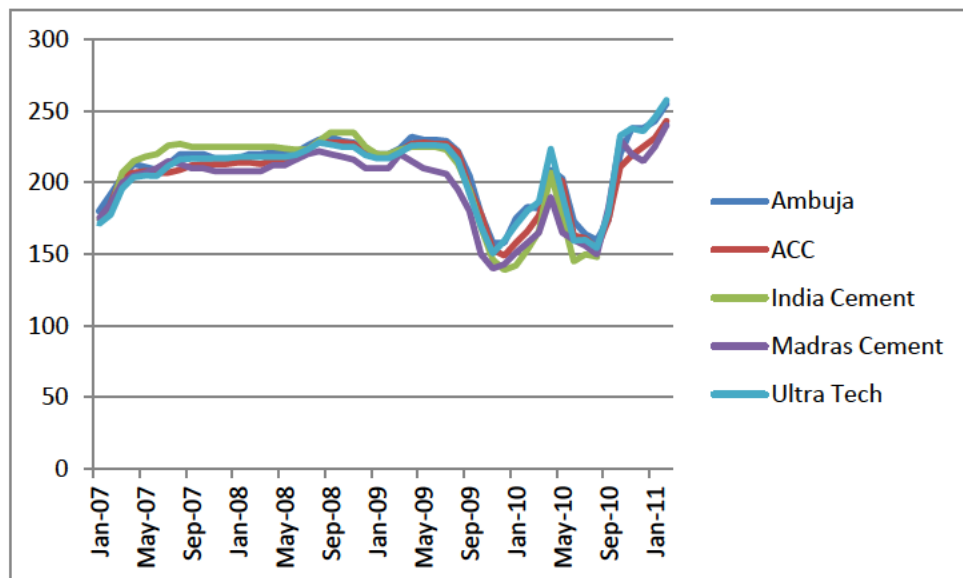
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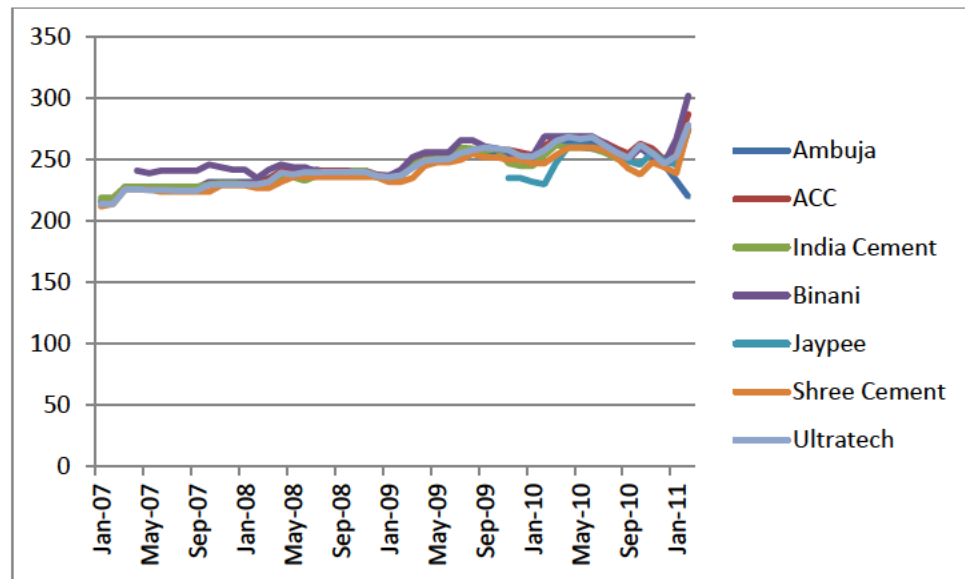
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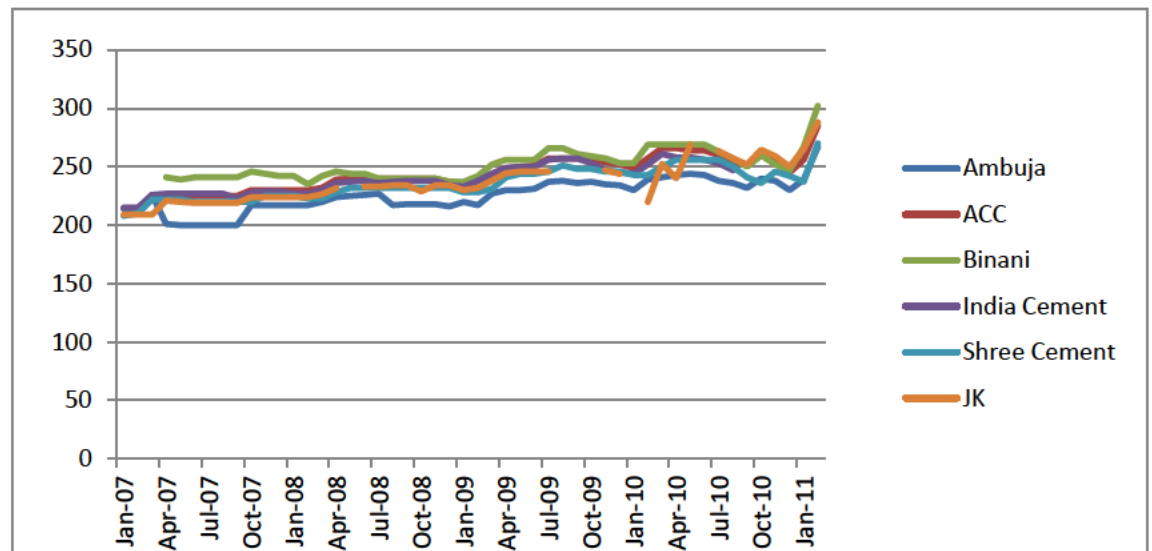
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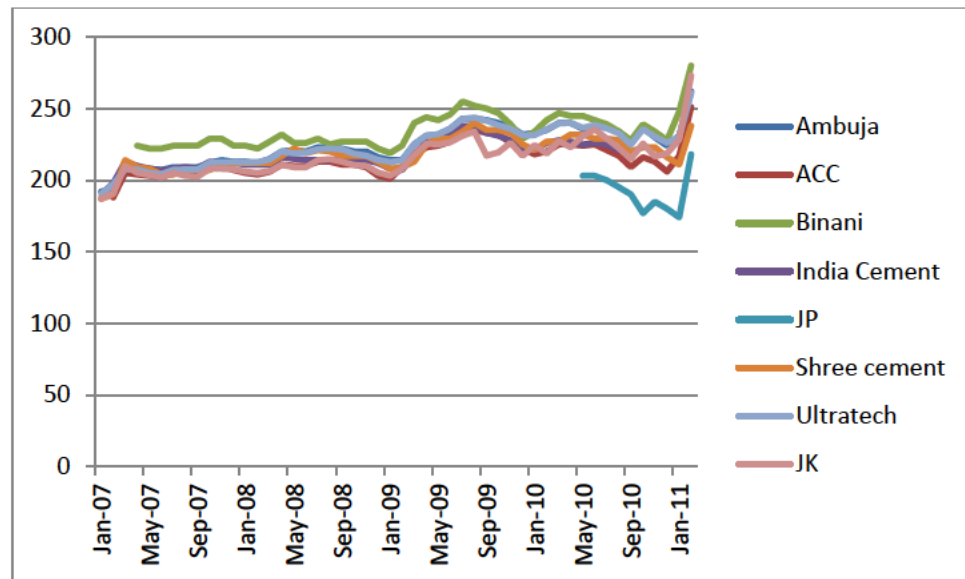
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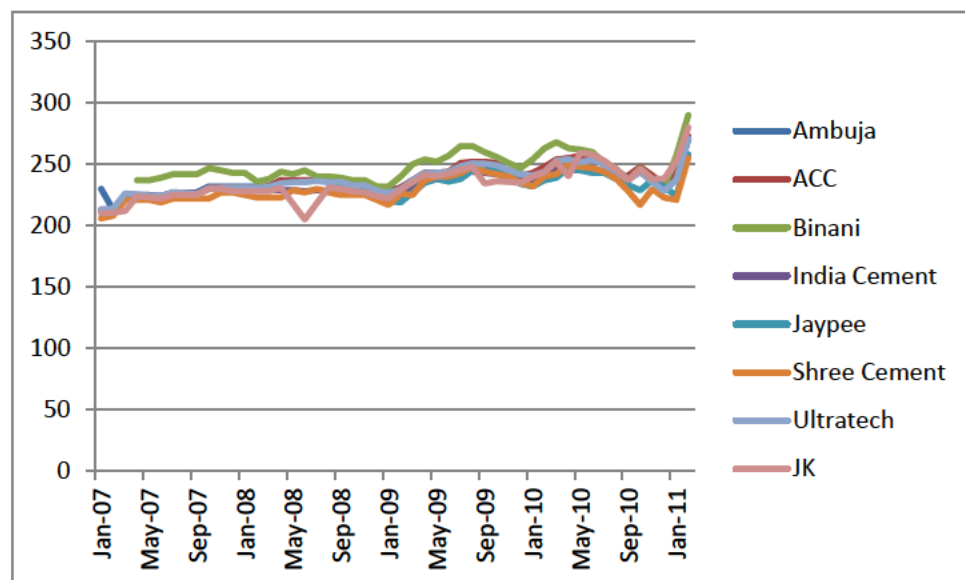
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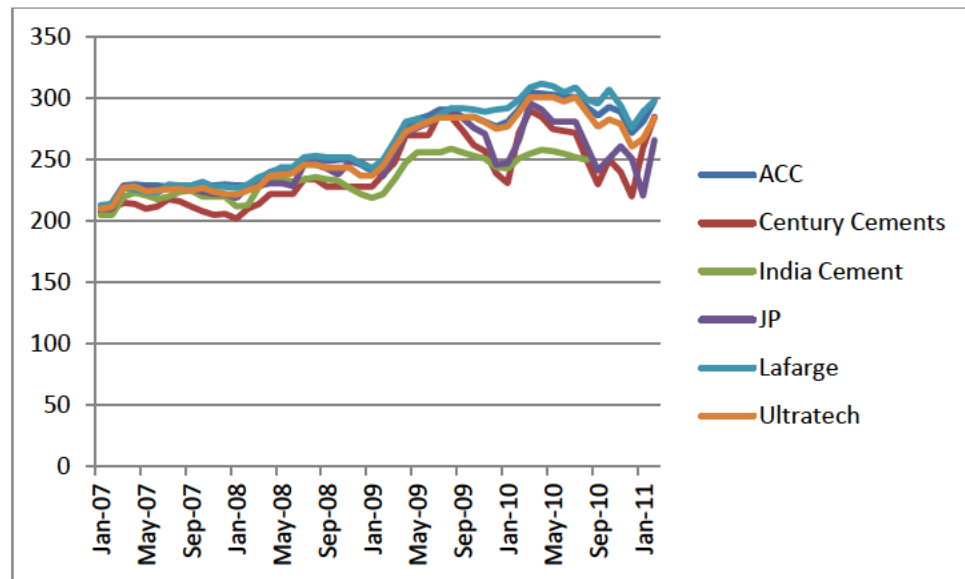
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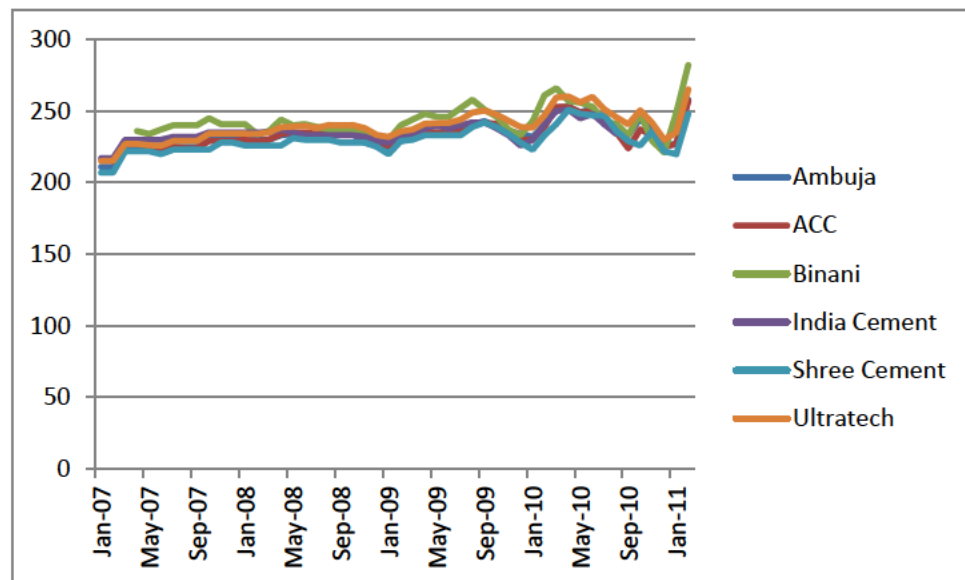
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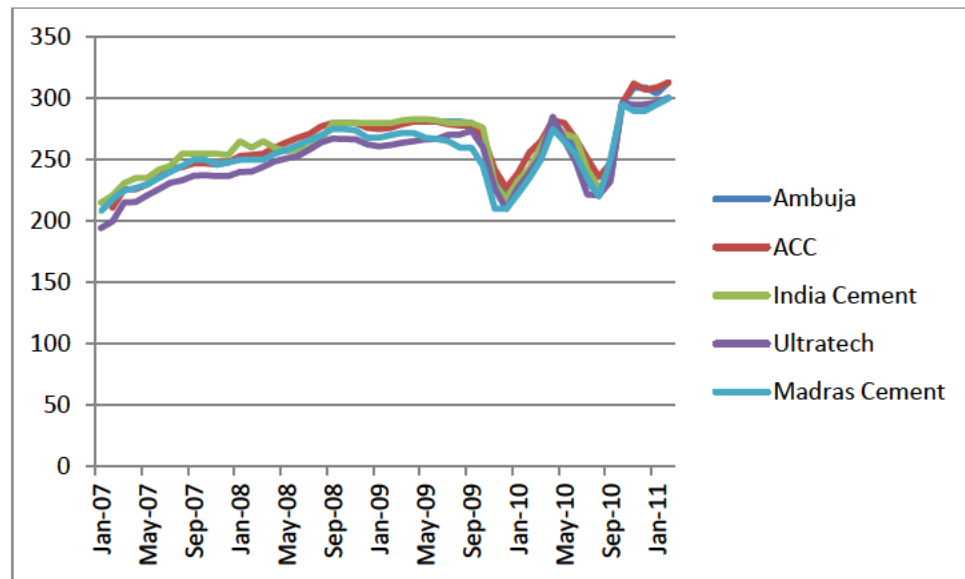
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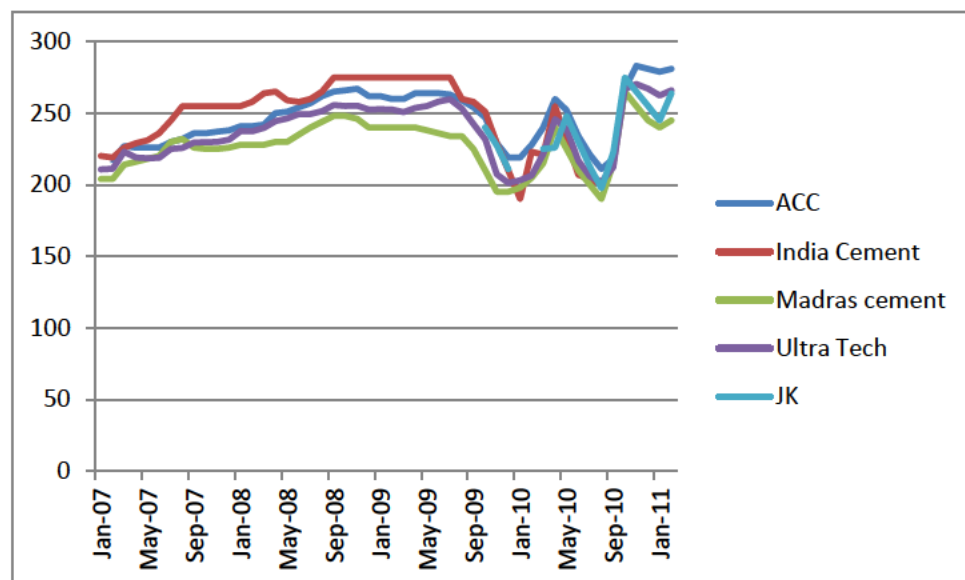
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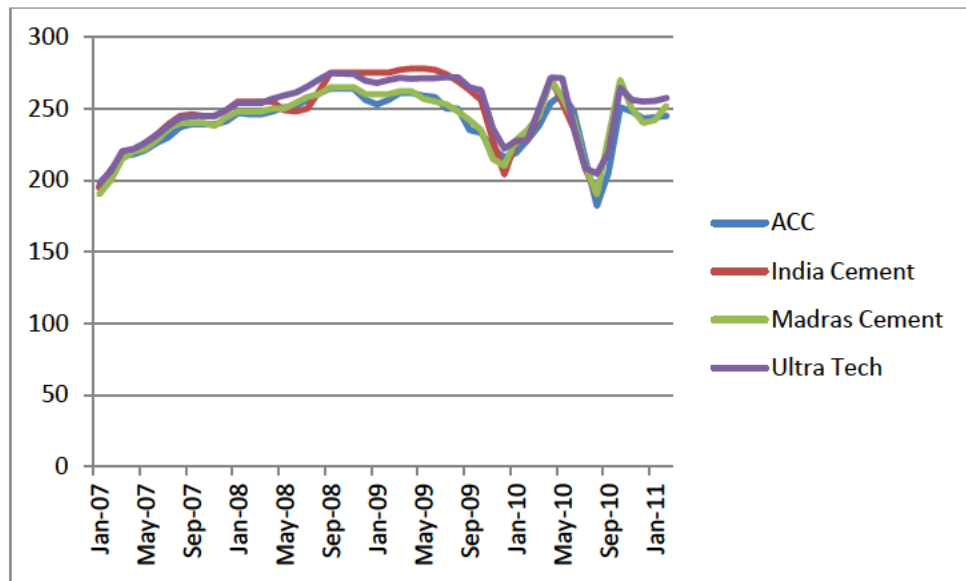
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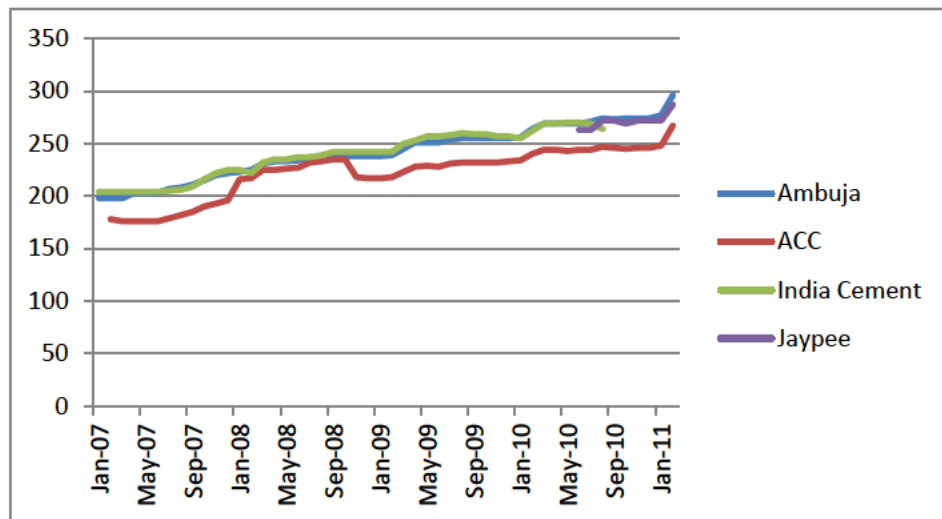
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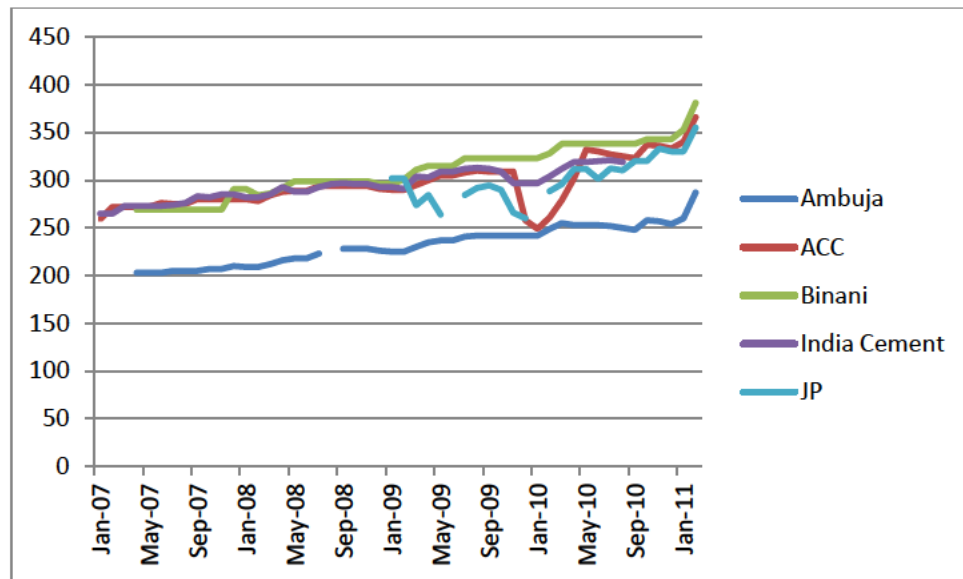
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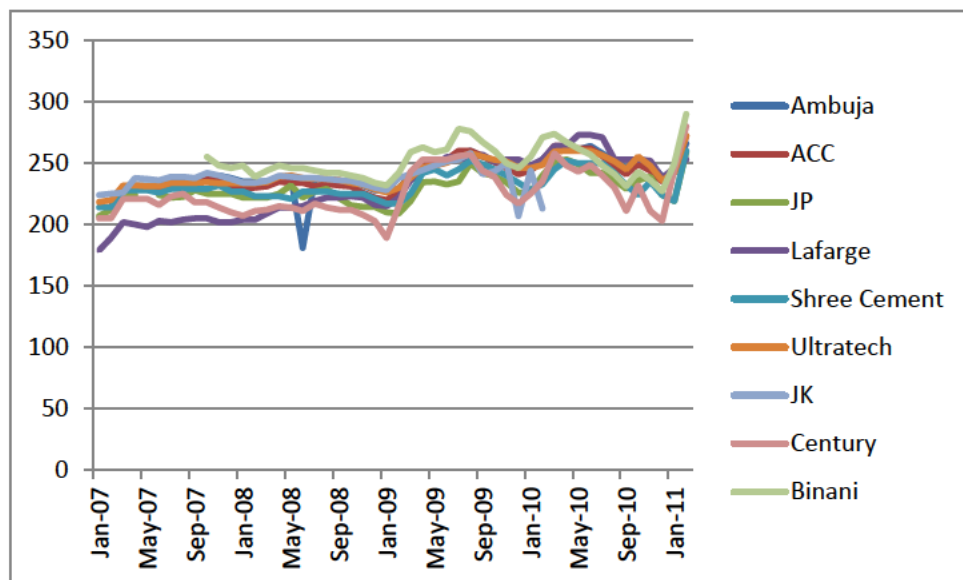
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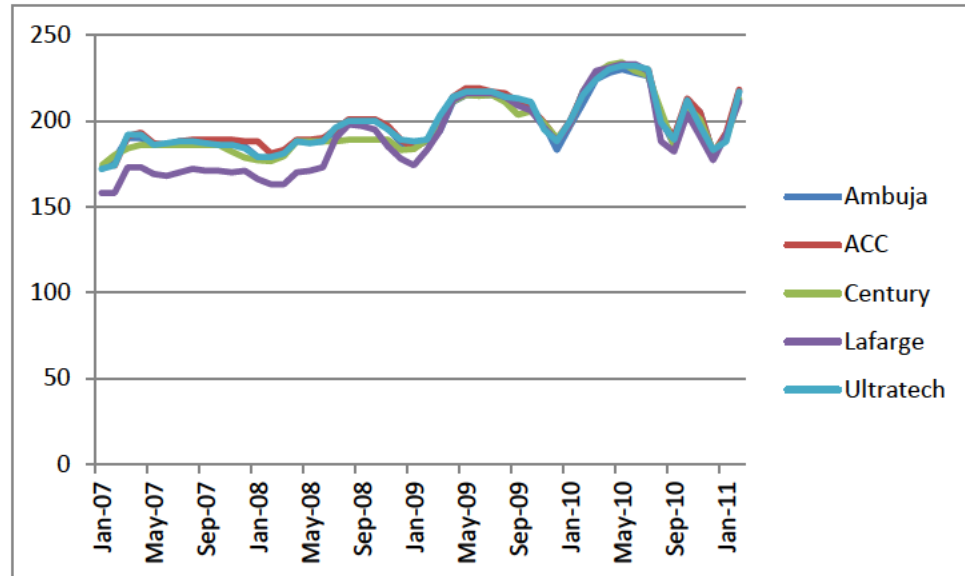
J&K



Uttrakhand



Chhattisgarh



Jharkhand

