

CCI's Jurisdictional Conflict with the Proposed Cement Industry Regulator: An Analysis

Pariekh Pandey¹

Abstract

Controversial activities by manufacturers in the Indian cement industry have repeatedly invited investigations by the Competition Commission of India (CCI) for allegations of anti-competitive cartelising agreements. These manufacturing firms have created an artificial scarcity of production and supply in the market, using their association meetings as a front for illegal collusive activities. In spite of CCI having penalised the firms for their activities, the continued cartelisation in the cement market has led the Indian government to propose the establishment of a cement and steel industry regulator for proper governance. Along these lines, this paper aims to achieve a middle ground for removing conflict and ensuring cooperation between CCI and the proposed regulator. The author takes the initiative to study the nature of the cartelising activities of Indian cement manufacturers and the action taken by CCI through analysing the stance of the Supreme Court on the primacy of institutions in competition law matters relating to the cement industry. The paper additionally discusses competition enforcement against cement cartels in China and South Africa—two developing nations competing with the growing Indian economy and facing the same issues of deep-rooted cartelisation in the cement industry.

Keywords: cement industry, regulator, competition, cartel, anti-competitive

1. Introduction

The cement industry in India is one of the most flourishing and popular manufacturing industries globally, with significant development and expansion potential. India is the second largest producer of cement

¹Senior Associate, EY Global Delivery Services (GDS) India LLP;
pariekh.pandey@gmail.com

worldwide, accounting for around 8% of the global installed capacity in 2019, with production capacity nearing 545 million tonnes (IBEF, 2021). Within India, the southern states of Andhra Pradesh, Karnataka, and Tamil Nadu collectively have the highest production capacities, nominal import costs for raw material owing to Indian self-sufficiency, and maximum consumption, of up to 65% in the expanding housing and real-estate sectors (Research and Markets, 2020). However, the COVID-19 outbreak resulted in a 10–12% downfall in growth rate in the industry, attributed mainly to the cessation of all construction activities during and after the lockdown (PTI, 2021b).

1.1. Research Problem

Despite numerous studies revealing a positive correlation between cement consumption and economic growth rates, global cement industries face several challenges from both the supply and demand sides of the market (Salwan & Sharma, 2020). The present paper attempts to analyse the competitive aspect of the production and supply aspects of the oligopolistic Indian cement market. The author analyses the need for a cement and steel industry regulator as proposed by the Indian government to ensure proper market supply conditions for cement manufacturing. The author also presents a comparison with the enforcement measures adopted in China and South Africa, both rapidly developing economies.

1.2. Research Questions

In light of the research problem, the paper aims to address the following questions:

- What is the prevalent position of the Competition Commission of India (CCI) on the alleged cartel operating in the cement market?
- Why has the Indian government resorted to introducing a cement and steel industry regulator in India?
- Is the institutional primacy of CCI over other institutional regulators viable enough, and if so, to what extent?
- What are the restrictive measures adopted for unearthing cement cartels in other developing economic jurisdictions comparable to India?

2. Literature Review

The harmonisation of different Indian financial sectors as well as sectoral guidelines and compliance requirements has led to the state acting as a watchdog through the confluence of individual sectoral regulators, inevitably resulting in jurisdictional conflicts. Raj (2005) established that there is no solid case for an intersectoral super-regulator being introduced in the Indian financial arena and that the major financial mishaps in India's history were unavoidable in any financial structure and level of regulation.

While recognising the contribution of the Financial Services Legislative Reforms Commission (FSLRC) in suggesting the conceptual development of a financial super-regulator, Raj (2005) expressed the legitimacy of the concept being applied to the competition law scenario. According to him, one of the major advantages of this is the reduction in conflict between individual sectoral regulators because of the necessary powers of priority and repugnancy being accorded to super-regulators in such cases. His emphasis on the possibility of conflict between the financial super-regulator and other regulatory bodies operating in the same sector highlight the same cause of concern as that introduced by the probable advent of the cement industry regulator in the Indian cement market. Similar to the financial super-regulator, the introduction of specialised regulatory bodies creates greater scope for ambiguity with existing regulators, which may not be as effective in maintaining healthy competition amongst industrial entities.

Patil (2001) recognised that, while mutual cooperation and consultation are expected from individual sectoral bodies in cases spanning multiple sectors, practical experience shows the emergence of jurisdictional conflicts, necessitating judicial intervention. He argues that a single regulator supervising all other regulators cannot be expected to consider the individual peculiarities and complexities of any problem arising for its adjudication. An instance he references is that of the UK legally establishing an umbrella super-regulator, with specialised wings operating as individual sectoral regulators. As Patil (2001) identified, market players amongst different prominent sectors have criticised the decisions of the super-regulator as "unwieldy" and experiencing "fatigue from bigness". He further discussed the possibility of this umbrella super-regulator ultimately censoring the decisions of individual regulators, amongst

other emergent problems, ultimately creating no proper value addition. He argued for the need to ensure a mandated framework of coordination and consultation between individual regulators to effectively address the possible friction between them. His study on financial sector regulation also holds true for the competition sector, since the introduction of a cement and steel industry regulator to monitor cement production and sale would require a clear and detailed delineation of its jurisdiction and powers in order to avoid conflicts with CCI in cases of anti-competitive practices in the cement market.

One of the conclusions that Patil (2001) arrived at is that, if different bodies governing the same sector engage in proper consultations with each other, the requirement for a structured institutional mechanism for such consultations may be overstepped. Additionally, he called for setting in place a “designated forum” that conducts regular meetings for all regulatory bodies to exchange perspectives, share important information, as well as review and resolve any areas of conflict. If the Indian government opts for the establishment of a cement industry regulator, additional resources will need to be invested, as Patil (2001) prescribed, to provide all regulatory bodies in the sector the opportunity to come together and resolve any multi-jurisdictional issues in case of any ambiguity in the demarcation of jurisdictional boundaries by the legislature.

The cement industry is one of the most prolific industries in India, with major GDP contributions to the Indian economy, driving the economy out of the repercussions of the COVID-19 pandemic. Salwan and Sharma (2020) examined various studies to establish a positive relationship between infrastructural investment and GDP growth, inadvertently building a direct connection between economic growth and cement consumption. However, in order to effectively achieve economic prosperity, the shortage of key inputs such as limestone in the cement manufacturing process must be tackled, requiring cement manufacturers to indulge in capacity-addition policies to push their financial prospects beyond the effects of the pandemic. While Salwan and Sharma (2020) consider the growth of the cement industry to be a prominent and crucial indicator of economic growth, they did not address the requirement of the cement industry to abstain from cartel-like conduct simply to escalate their economic status through higher profit margins across the industry.

Barros and Hoernig (2018) examined the establishment of the Portuguese Competition Authority (CA) and discussed the interplay between CA and individual Sectoral Regulatory Authorities (SRAs) as regulatory agencies with overlapping competencies. While recognising the dichotomy accompanying the existence of both a sectoral regulator and a competition authority, their analysis does not address the incentive for each body to intervene in matters under their overlapping jurisdictions but the relationship between the bodies, prioritising their intervention in such matters. While recognising the ambiguous delineation of powers among both regulatory agencies, Barros and Hoernig (2018) recommended independent decisions by the agencies as opposed to joint decision-making to achieve optimum decisional strength and remove any biases exhibited by either authority. They argued that this would eliminate the likelihood of administrative lobbying while also achieving the resolution of a higher number of cases due to increasing manpower. While this fresh perspective holds true in case of a greater number of authorities overseeing the same sector, Barros and Hoernig (2018) did not provide a lasting solution to the discrepancies and differences arising from the individual opinions of the regulatory bodies. In cases such as the Indian cement industry, which have been repeatedly exposed to cartels, the need for a finalised adjudication holds greater relevance than appreciating the individuality of each body, since, without any enforceable and binding action on the same, no deterrent effect can be seemingly created to avoid further cartelisation amongst big cement manufacturers.

3. Methodology

The author has employed a doctrinal methodology to conduct this study, adopting a non-empirical analysis of the Indian government's decision to establish a regulator in the Indian cement and steel industries, and the specific repercussions of this decision on existing competition in the cement market. The study relies mainly on primary sources of information such as the bare texts of the relevant statutes and judgements by different Indian courts, as well as secondary sources such as scholarly articles and research papers. The recent nature of the decision to establish a cement and steel industry regulator makes it ineffective to consult tertiary sources of law such as digests and commentaries, although there have

been substantial references in digests on existing aspects of competition jurisprudence.

4. Discussion

4.1. The Case of the Cement Cartel

Since 2012, CCI has frequently intervened in market operations of the Indian cement industry, which has allegedly experienced advanced collusive dominance and capacity manipulation by big cement manufacturers seeking profit maximisation through parallel pricing and low-capacity utilisations. The decisions by both CCI and the erstwhile Competition Appellate Tribunal (COMPAT) indicate how different authorities adjudicating the same issue present contradictory findings despite falling under the same umbrella legislation of the Competition Act, 2002. Each adjudicatory body presented different arguments to tackle the alleged cartelisation in the cement industry, leading to an inevitable delay in effectively addressing the cartel-like conduct of big cement manufacturers.

4.2. Initiation of Proceedings and Investigation by the Director General

CCI instituted primary proceedings based on the information filed by the Builders' Association of India (BAI) against the Cement Manufacturers' Association (CMA) and its 11 member cement manufacturers. BAI claimed that, under the guise of CMA meetings, the enlisted manufacturers indulged in monopolistic and restrictive trade practices by restricting the production and supply of manufactured cement and dabbling in collusive price fixing by setting exorbitant rates of cement through cartel formation. The informant also claimed a position of collective dominance of around 57.23% of the market, evident from the arbitrary increase in cement prices. BAI alleged that, in spite of availing a varied range of government-sanctioned concessions and stimulus packages, the cement manufacturers did not follow the price-reduction trend seen in the coal and petroleum industries and instead increased the per-bag price for making undue profits at the cost of consumers. This is aggravated by the frequent use of fly ash from thermal power plants to mark a rise in production quantity without impacting the costs of inputs incurred by them. Despite the portrayal of high demand, the cement industry was found to have

inadequately utilised their increased capacity, which led the informant to approach CCI to institute an inquiry against CMA and its individual members for alleged cartelisation and resorting to anti-competitive trade practices as per Sections 3 and 4 of the Competition Act, 2002.

The investigation by the Director General (DG) revealed that around 50% of the market share was being held by the then-top three companies – ACC, Ambuja Cement, and Ultratech—and confirmed that the Indian cement market was divided into five zones that were distributed amongst the bigger cement manufacturing entities. It was also noted that limestone, being the primary ingredient in cement, entailed high transportation costs for the “low value high volume” nature of cement which, in turn, led to market fragmentation. The investigation revealed not only that the price bandwidth was similar in a particular geographical area but also that the manufacturers had been operating at a profit margin of 25% through anti-competitive pricing.

Although CMA claimed no connection to the pricing and production-related discussions amongst individual members, it collected and disseminated information under the garb of instructions from the Department of Industrial Policy and Promotion (DIPP) and additionally formed a High Power Committee as an alleged front for pricing discussions and manipulative arrangements. The DG concluded that the conduct of the opposite parties was anti-competitive, in contravention of Sections 3(1), 3(3)(a), and 3(3)(b) of the Competition Act, 2002.

4.3. 2012 Order of CCI and Subsequent COMPAT Decision

CCI gave separate and specific directions for the eight different issues formulated by it based on available information from both the informant and the DG's investigation, subsumed under the following broad heads (*BAI v. CMA*, 2012):

- Abuse of dominant position by CMA and individual manufacturers;
- Existence of cartel in the cement industry under an anti-competitive agreement;
- Price parallelism;
- Low-capacity utilisation;

- Production and dispatch parallelism;
- Price leadership and high profit margins.

CCI held CMA and its member entities to be liable for violation of Section 3 of the Competition Act, indulging in price parallelism and illegal cartelisation through the manipulation of demand and supply by spurious data and misleading statistics. It translated the intention of CMA and its members to be of controlling the production and sale of cement under a collusive agreement and using CMA meetings as a platform for the exchange and dissemination of confidential information on market pricing of cement along with production and dispatch details of other manufacturers.

CCI relied on Section 19 of the Competition Act to establish appreciable adverse effect on competition in the cement market, while recognising the fact that the firms had already been made liable for restrictive trade practices under the erstwhile MRTP Act, which became an aggravating factor for imposing penalties as provided for under the Competition Act. It must be noted, however, that the 2012 order of CCI was set aside by COMPAT in 2015 on grounds of the order having violated the legal principle of “only one who hears can decide” (*Shree Cement v. BAI*, 2015).

4.4. 2016 Order of CCI and Subsequent COMPAT Decision

Shree Cement Limited, one of the cement manufacturing firms not included as a party to the 2012 CCI order, challenged a subsequent order by CCI imposing a penalty of INR 397.15 crores, before COMPAT, which had set aside the 2012 order by CCI in 2015 and remitted the matter back to CCI for fresh adjudication. In the subsequent 2016 order, CCI revisited the DG’s investigation report and held Shree Cement to be additionally liable for engaging in the alleged cartelisation with CMA and its members, while recording the following broad observations (*In re: Alleged cartelisation*, 2006):

- Dismissal of its claim of “cherry-picking” certain members only for the investigation, and recognition of concerted action with an anti-competitive object through CMA meetings;
- Analysis of economic evidence to stipulate an oligopolistic presence in the cement market through collusive pricing between sellers, coupled

with an alarmingly low level of capacity utilisation not in line with the rise in cement production;

- Existence of production and dispatch parallelism by imitation of the pricing regimen of perceived market leaders and the creation of artificial scarcity to maintain high profit margins in spite of huge capacity additions.

The aforementioned CCI order also imposed a cease-and-desist order on the cement manufacturers to avoid further involvement in “any activity relating to agreement, understanding or arrangement on prices, production or supply of cement in the market”, along with the monetary penalties imposed on them. Aggrieved by the above CCI order, the cement manufacturers filed an appeal before the National Company Law Appellate Tribunal (NCLAT) which, in 2018, upheld the penalty imposed by CCI and resulted in an appeal pendente lite before the Supreme Court (SC) (Hindu Bureau, 2020).

4.5. Madras High Court Proceedings Against the Indian Cement Cartel

In March 2021, the Madras High Court was approached for adjudicating criminal petitions filed by two different welfare associations, representing a group of civic body contractors seeking directions for the Central Bureau of Investigation (CBI) to investigate alleged cartelisation in the cement and steel industries. As per the allegations, the cartel of private companies had driven up cement prices in the market, which hampered smooth execution of government projects, particularly in Tamil Nadu. The court, in July 2021, directed both the Tamil Nadu Director General of Police as well as DG, CCI, to individually investigate similar allegations against the cement manufacturers.

5. Cement Industry Regulator – Primacy Over CCI Under Indian Jurisdiction

The Union Minister for Road Transport and Highways, Nitin Gadkari, pitched the idea for the establishment of a regulator for cement and steel industries, citing the aim of the Indian government to achieve Prime Minister Narendra Modi’s ultimate goal of making India a USD5 trillion economy by controlling steel and cement prices (PTI, 2021a). This came after BAI made their demand for curbing rampant cartelisation in the

cement market, along with a working mechanism for early release of bills against government contracts and streamlined implementation of GST compliances. The proposal to establish a regulatory authority comparable to the Real Estate Regulatory Authority (RERA), which governs the real-estate sector, also followed another raid by CCI in the offices of top-ranking cement manufacturers based on repeated allegations of coordinated pricing and collusive nature of the supply of cement, including ACC, Ambuja Cement, Shree Cement, Dalmia Cement, and others (FPJ Web Desk, 2021). However, one month after Gadkari's assurance, it was reported that no such proposal had yet been tabled for consideration before the Lok Sabha, although the Minister of State had confirmed that they had received seven complaints each against the players in the cement and steel industries (Raje, 2021).

Meanwhile, BAI maintained its emphasis on the constant need for regulation of the cement industry, proposing a Unified Standard Contract Document for all work authorities, including administrative bodies and corporations, to maintain a uniform benchmark to gauge the widening gap between installed capacity and production volume of the big cement industry players. The document would not only suggest the reimbursement mechanism for the rising cost of inputs but would also recognise a dispute resolution structure with suitable arbitration clauses incorporated with time-bound decisions being expected for contractual disputes.

5.1. Standing of the Supreme Court on Institutional Primacy – Case Study of the Indian Telecom Industry

CCI has long been exposed to conflicts of jurisdiction with individual sectoral regulators, mainly attributable to one of three causes – legislative ambiguity on delineating the ambit of individual authorities, overlapping jurisdiction of CCI and other sectoral regulators, or an omission by the legislature to properly demarcate the jurisdiction of sectoral regulators. This interface holds importance mainly due to the objective of ensuring that both businesses and consumers derive the promised benefits from the market, albeit through healthy competition or regulatory mechanisms (Walia, 2019). In this regard, the SC has, in numerous judgements, addressed the introduction of individual sectoral regulation in the Indian economy to tackle the tremendous and rapid global economic development. Economists and legal jurists argue for a paradigm shift –

from a liberal laissez-faire economy to a mixed economy with substantial government regulation. Self-regulation by market forces may indicate a threat to consumer welfare, justifying intervention by regulatory bodies in such instances (*Modern Dental College v. M.P.*, 2016).

In *CCI v. Bharti Airtel* (2019), a landmark judgement on jurisdictional conflict between CCI and the Telecom Regulatory Authority of India (TRAI), the SC took the initiative to demarcate their functions by adequately empowering TRAI to first find any default being committed by the Incumbent Dominant Operators (IDOs) before proceeding with any allegations against them. The SC upheld the High Court's (HC) conclusion that, since TRAI had already been statutorily entrusted with ensuring non-discrimination and fair competition in the market, CCI could examine the chances of any concerted agreement between the IDOs and the Cellular Operators Association of India (COAI) only when TRAI obtained the chance to clarify its jurisdiction on the IDOs. In other words, TRAI, being a specialised regulator, primarily possesses the expertise to ascertain the jurisdiction for such cases so as to prevent CCI and TRAI from stipulating conflicting or contradictory views on the same matter. The same rationale was adopted in subsequent decisions by CCI as well as various HCs, such as the Delhi High Court in *Monsanto v. CCI* (2020).

The SC additionally postulated in *Haridas Exports v. All India Float Glass Manufacturers* (2002) that, if two statutes were considered to be operating in different fields with different purposes, it cannot be said that one of the statutes has impliedly repealed the other. The court rejected the contention of the IDOs with regard to their complete exclusion from the purview of CCI, since CCI is the foremost authority with the requisite statutory powers to determine the existence of an agreement depicting appreciable adverse effect on the market, including cartelising agreements, or to ascertain whether any IDO or group of IDOs enjoy a dominant market position in violation of the Competition Act, 2002.

5.2. Recommendations of the Financial Services Legislative Reforms Commission (FSLRC)

One of the foremost recommendations for an umbrella industrial regulatory body came with the Financial Services Legislative Reforms Commission (FSLRC) proposing the model of a super-regulator for the

Indian financial sector, comprising seven constituent agencies intended to cover all transactions and activities that escape the intricate web of overlapping jurisdictional powers (Raj, 2005). It recognised the role of healthy competition as a valuable tool for furthering the objective of consumer welfare in tandem with a sound framework for consumer protection. However, the FSLRC did not subsume CCI under the said financial regulator, emphasising only the coordination between both in addressing matters related to ensuring fair competition in the financial sector.

Apart from recommending an organised interface for communication between CCI and the sectoral agencies under the proposed super-regulator, the FSLRC also placed the following responsibilities on CCI pertaining to such interactions:

- Review of the draft regulations issued by such regulator, for potential implications and threats to competition;
- Reports on the detriment to fair competition caused by any regulatory action;
- Reference to the financial super-regulator for any proceedings against any financial service provider;
- Entertaining any reference by the financial regulator regarding any financial service provider violating the provisions of the Competition Act, 2002;
- Memorandum of Understanding (MoU) between CCI and the regulator for establishing procedures for cooperation.

Studies on the proposed singular financial regulator emphasise the fact that the absence of comprehensive examination of the sectoral player can very easily translate into the subtle peculiarities and innovative spirits of the companies engaging in the business activities being overlooked. A singular body may omit analysing the emergent problems against different dimensions as well as against the varied perspectives of other competitors (Patil, 2001). Another possible issue is that the addition to the hierarchy of regulatory bodies will be a revenue burden in terms of logistics and administrative powers for the government rather than ensuring cooperation amongst individual regulators (Rathod, 2020). Yet

another major reason in favour of a cooperative regulator is the rise in forum shopping, wherein sectoral players take advantage of the ambiguity resulting from conflicts between regulators and play to their good side, favouring their motives, leading to the ultimate goal of consumer welfare being sidelined (Singh & Francis, 2018).

A possible solution to such a precarious situation is if the singular regulatory body works in tandem with individual authorities, involving proper consultations as and when required to present a sector-specific perspective to a problem in the area of financial business. Another proposed solution is to materialise an institutionalised forum of all the financial regulators heading individual sectors, such as the RBI and Securities and Exchange Board of India (SEBI) (Patil, 2001). A common thread between studies on the requirement of a financial super-regulator is the need for regulatory convergence, so that any decisional conflicts between individual regulators can be addressed without resorting to legal recourse before the courts.

6. Antitrust Enforcement in Cement Industries in Other Developing Nations

6.1. The Chinese Government's Crackdown on Rampant Cartelisation in the Cement Industry

The competition law regime in China entails the coordinated working of a big group of administrative bodies entrusted with the responsibility of enforcing the competition mandate stipulated by the Antimonopoly Law of 2007, alongside the pre-existing Price Law of 1998 and Anti-Unfair Competition Law of 1993. Earlier, the enforcement regime involved the simultaneous shared operations of the following government organisations:

- The Antimonopoly Commission, the umbrella body ensuring proper coordination of enforcement;
- The Price Supervision and Antimonopoly Bureau of the National Development and Reform Commission (NDRC), enforcing rules of conduct and prohibiting abuse of administrative power only in price-related matters;

- The Antimonopoly and Unfair Competition Enforcement Bureau of the State Administration for Industry and Commerce (SAIC), having the same responsibilities as the NDRC Price Bureau in non-price related matters; and
- The Antimonopoly Bureau of the Ministry of Commerce (MOFCOM), overseeing the enforcement of rules and regulations pertaining to merger control.

However, since 2018, China has revamped the administrative enforcement structure through sweeping amendments in the competition law arena, including increased fines and broadened definition of a company's control of a market. This includes the emergence of the State Administration for Market Regulation (SAMR), which subsumes several sectoral regulatory bodies such as SAIC and consolidates their varied market supervision responsibilities (Reuters, 2021). SAMR is now considered a market regulator for different public areas such as fair market competition, drug inspection, monopolies, and protection of intellectual property (Chen, 2021).

SAMR was recently reported to have had a major crackdown on a cement cartel of eight companies exhibiting anti-competitive behaviour in Shandong province in East China after a detailed 22-month-long investigation conducted by the provincial market supervision administrative structure (McConnell, 2021). The situation involved seven big cement manufacturers meticulously drafting a scheme of pricing coordination and monitoring input and output volumes, to the extent of creating a new company named Zibo United Cement Enterprise Management Co. Ltd. in 2017 to oversee their "monopoly agreement". The perpetrating companies had gone so far as organising a well-structured and formally established price management committee to regulate market pricing for cement (Perilli, 2021). After completing its investigation and finding evidence against the eight cement companies regarding their collusive practices, the Anti-Monopoly Bureau of SAMR imposed a record fine of CNY 228 million for violation of the Anti-Monopoly Law, equivalent to USD 35 million, and the largest sum ever imposed in a Chinese industry for anti-competitive behaviour. This was levied in keeping with the scale of the anti-competitive practices by the companies, reflecting the planning and illegal coordination amongst the

eight market players. This is one of the forerunning punitive measures imposed on Chinese cement manufacturers alleged to have developed a knack for price fixing since the first fine of CNY 200,000 imposed by the erstwhile SAIC in 2011 against the cement cartel in the Jiangsu province in East China (Murphy & Zuwang, 2021).

SAMR is appreciated for setting precedents in terms of cracking down on anti-competitive practices in various industries, streamlining the limited resources of the Chinese government to obstruct pricing-related monopoly agreements and “exclusive dealing” clauses alongside failure-to-notify cases pertaining to social welfare matters (Jiang et al., 2022). In a developing country such as China, comparable to India, the bullish presence of SAMR as a replacement for country-wide regulatory bodies has set an example of how laws can empower even a single organisation to alleviate anti-competitive practices with precedential value, eliminating the need for multiple administrative bodies. With the special IP tribunal of the Supreme People’s Court (SPC) assuming jurisdiction over appeals in antitrust cases, SAMR is now functioning as the ultimate body to handle high-profile cases spanning industry-wide matters of manufacturers causing adverse effects on market competition.

6.2. South African Settlement Agreements with Cement Manufacturers

In 2007, the Department of Trade and Industry (dti), responsible, inter alia, for maintaining fair market competition in sectors such as the cement industry, delegated its sectoral responsibility to the South African Bureau of Standards (SABS) for regulating ongoing activities in the cement industry. The Director of Legal Support and Prosecutions under the dti admitted to struggling to regulate practices in the cement industry, giving rise to specific regulations by lawmakers that require manufacturers and importers of different types of cement to apply for the approval of the SABS Regulatory Chemicals, Mechanical and Materials Department (CMM).

Studies conducted in the South African cement and fertiliser industries found collusive actions by industrial associations intending to distort governmental laws and policies for private benefit through exchange of information, secret agreements, and lobbying. Transnational corporations operating in the cement market have attempted to leverage widespread

control on infrastructure and input materials through favourable regulations while portraying themselves as “development partners” (Vilakazi & Roberts, 2018). As early as 1994, one of the most popular research studies on the alleged cement cartel investigated the justifications into claims of prevailing monopolistic market conditions for building materials, achieved by companies through raising the prices of building materials and obstructing their supply (Fourie & Smith, 1994).

These studies resulted in the Competition Commission of South Africa launching an investigation probe into allegations of cartel-like behaviour in the South African cement industry between 1995 and 2009 exhibited by major cement manufacturers such as Pretoria Portland Cement Company Ltd. (PPC), Natal Portland Cement Cimpor (Pty.) Ltd. (NPC), Lafarge Industries South Africa, and AfriSam Consortium (Pty.) Ltd., whose offices were raided in June 2009 (de Gouveia, 2020). These companies had allegedly divided the individual cement markets of South Africa, Lesotho, Swaziland, Botswana, and Namibia amongst themselves in 1995 as per the market shares they held during the apartheid period, when South Africa was permitted to have a lawful cement cartel, and later engaged in more collusive agreements between 1998 and 1999 after a price war. The testimony by a former Lafarge employee claimed its responsibility for presenting “global rules” to other competitors, followed by the colluding companies artificially raising cement prices by adding margins to every construction project in South Africa (Gedye, 2019).

While Lafarge and AfriSam paid major penalties in 2011 and 2012, respectively, the Competition Tribunal dismissed the case against NPC in 2019 for lack of substantial evidence. On the other hand, PPC reached a settlement with the Commission in 2020 by admitting to the existence of a cartel and implicating its three competing participants. The Commission granted PPC immunity against prosecution for agreeing to assist in prosecuting the other three companies in the cement cartel case. This is in accordance with the Corporate Leniency Policy initiated by South African lawmakers since 2008 and revised in 2012, which is arguably touted as the Commission’s most successful enforcement mechanism for uncovering the operation of cartels in various markets.

The treatment of the existing South African cement cartel by the competition authorities has invited negative criticism for the absence of

any deterrent effect in spite of SABS being a cement industry regulator in consonance with competition authorities. Recent research shows that the higher prices of cement in African nations are attributed to the ineffectiveness of the antitrust policy, with strict entry barriers and high costs of introducing a new entrant into the cement market (Reed, 2022). It can be inferred that having a sectoral regulator in consonance with competition enforcement authorities cannot directly result in lower industrial competition, since the introduction of newer enforcement bodies cannot replace the efficacy of legal incorporation of effective cartel detection mechanisms within competition law, such as the Corporate Leniency Policy.

7. Observations and Recommendations – Bearing of the Cement Regulator on CCI

7.1. Institutional Primacy for the Indian Cement Industry as per Adjudicative Jurisprudence

In its 2012 order against CMA and its 11 member organisations, CCI painstakingly provided details of their cartel-like conduct, for which evidence was unearthed during its elaborate and in-depth investigation into the allegations levelled by BAI. In the 191-page order, CCI addressed each allegation against the impugned cement cartel in detail, referencing the structure of the Indian cement industry facilitating the collusive conduct exhibited by larger cement manufacturing firms. While the extent of operation of the cement cartel in the industry has been comprehensively portrayed and analysed by CCI, the orders by the erstwhile COMPAT undoing the work done by CCI is an adequate portrayal of the challenges of multiple regulatory bodies entering the picture, although CCI and COMPAT had a somewhat distinct difference of jurisdiction, with COMPAT being the appellate authority against impugned orders of CCI.

Going by the principle given by the Supreme Court of India, the proposed cement industry regulator would be given primacy with regard to specific proceedings against any cement manufacturer, and its determination will be the initial step, subsequent to which only would CCI be permitted to intervene and analyse the allegations of any anti-competitive practice. This is in consonance with the Latin maxim *generalia specialibus non derogant*, which axiomatises the primacy of special or

specific laws over general rules. In other words, since the Competition Act, 2002 is a broader legislation penalising the violation of fair competition standards in all sectors, CCI does not hold primacy over any industry-specific regulator established by a subsequent legislation.

If we take a look at the bare provisions of Indian competition law involving repugnancy against other laws, Section 60 of the Competition Act, 2002 provides for the legislation having an overriding effect over all other inconsistent provisions contained in any other law for the time being in force. However, Section 62 of the Act also states that its application is in addition to and not a substitution of the provisions of other laws in force. It is safe to infer that, while one provision seems to impose the primacy of the Competition Act on other laws, the other provision helps competition authorities act in consonance with the Act as much as other laws. In this regard, observing the position of the Delhi High Court in landmark cases involving the tussle between CCI and patent authorities, including the Patent Controller, the court has clearly stipulated in *Telefonaktiebolaget LM Ericsson v. CCI* that, while Section 60 of the existing Indian Competition Act, 2002 does have a non-obstante clause, it still does not “whittle down the provisions of the Patents Act”, as Section 62 of the Competition Act makes the Act operate in conjunction with and not in derogation to any other statute in force at that time.

The differences in the outcomes of different cases involving the same debate of jurisdictions between CCI and individual sectoral regulators not only exposes the inefficiencies of existing laws and rules in this regard but also leaves the question open to repeated adjudications, with the courts entertaining different grounds in each case to prioritise the decisions of different bodies. If the cement regulator is established with a lack of clarity as to the primacy of the powers in matters involving overlapping jurisdictions of enforcement bodies, it will inevitably result in an unnecessary waste of resources simply to determine the priority of decisions taken by the regulator as well as CCI.

An additional possible level of competition enforcement may also be envisioned if CCI is given the coveted status of being a competition super-regulatory body, similar to the current status it enjoys on all competition-related matters. According to Raj (2005), the powers of priority and repugnancy accorded to CCI as a super-regulator will certainly reduce

friction with different sectoral regulators, including the proposed cement regulator. While this seems like the optimum solution for achieving finality in decisions on restricting anti-competitive practices, Patil's (2001) perspective regarding a greater number of conflicts with the rise in the number of regulators in an industry is one of the foremost causes of concern with the introduction of the cement regulator. Additionally, the possibility of the cement regulator losing its independence and freedom – one of the possible situations foreseen by Patil (2001) – cannot be neglected, since this would defeat the purpose of establishing the cement regulator in an industry which requires a strong regulatory body to effectively deter the formation of future cartels.

Thus, the clash of jurisdictions between CCI and the sectoral regulator may not be easily avoidable simply by introducing legislative constraints on the powers and jurisdiction of the varied bodies governing the cement industry, since even detailed legislations have had loopholes that large-scale producers and manufacturers have manipulated for their own benefit. The introduction of another regulator into the mix invites a similar apprehension, albeit with an administrative oversight in the cement industry, considering that the recommendation has been made in the context of prevailing unfair competitive practices by BAI, which also raised the cartel allegations against cement manufacturers before CCI.

7.2. Comparisons with Competition Enforcement Structures in Other Jurisdictions

The preceding paragraphs have discussed the possible impact of the proposed cement and steel industry regulator on the Indian cement industry, with insight into how other developing nations have addressed this issue. As Barros and Hoernig (2018) observed, many European nations, such as France, Germany, and the UK, have also shown a range of relationships between competition authorities and individual sectoral regulators, depending on the competition enforcement mechanism envisioned by the respective governments. The specific vulnerability of the Indian cement market towards cartels is evident from its consistent exposure to investigation and scrutiny by Indian competition authorities, with no concrete or even persuasive proof as to whether the cement regulator would have any positive impact on tackling anti-competitive practices in the cement market.

The Chinese and South African instances only affirm the need for adequately strengthening the legislative arm since, without stringent legal sanctions and uncontested powers, even a newly established administrative authority would be unable to achieve the very purpose for which it has come into existence. On the one hand, in its nascent stages, the Chinese SAMR displayed the kind of ideal aggressive regimen sought from competition enforcement authorities to clamp down on anti-competitive practices in the cement industry, which is infamous for having cartels in almost every major economy around the globe. This may arguably be attributable to a reduction in the number of regulatory entities working in the same industry. On the other hand, while the competition authorities of South Africa have enviable legislative tools at their disposal, such as the Corporate Leniency Policy, the actual enforcement in their hands leaves much to be desired in terms of deterring other cement manufacturers to refrain from engaging in future cartels.

In this regard, the British model of recognising concurrent competition powers, involving the Competition and Markets Authority (CMA) entering into MoUs with individual sectoral regulators for delineating the terms of their cooperation in dealing with competition law matters, is one of the practical solutions currently being practised in developed nations (Gopalakrishnan & Gauri, 2021). Ranging from the financial sector and the consumer protection field to the civil aviation industry, these widespread MoUs depict the extent of resources available with the CMA to ensure the protection of its interests while adjudicating on sectoral matters pertaining to unfair trade practices.

However, because of the high number of sectoral regulators in India, the British model may be slightly modified by the Indian Parliament by incorporating a statutory list of rules and regulations within the Competition Act itself, to be observed by sectoral regulators when entertaining allegations of violation of competition law provisions in individual sectors. This is because of the undeniable contribution of the parliament in setting the legislative boundaries for each regulatory body to operate in, although its exclusive effectiveness may be up for debate. To save the unnecessary employment of resources by creating avenues for CCI to enter into MoUs with every single sectoral regulator, a more efficient solution would be to set up legislative guidelines and rules

for general interactions with CCI in sectoral matters pertaining to fair competition.

8. Conclusion

Since CCI holds sufficient expertise to single-handedly deal with anti-competitive trade practices, the focus of the parliament must be on drafting rules that clearly demarcate the individual jurisdictions of CCI and the cement industry regulator, specifically on matters relating to fair competition in the cement market. This would not only remove scope for ambiguity in ensuring compliance with statutorily stipulated standards and build a coordinated approach between CCI and the proposed regulator, it will also provide the necessary force of law to CCI to freely adjudicate on the rights and liabilities of the impugned parties under the pretext of competition law enforcement. The increased emphasis on the legislative rather than the administrative sector will be a welcome step for effectively handling the rampant cartelisation in the Indian cement industry, resulting in the enforcement powers of both CCI as well as the proposed cement and steel industry regulator being complementary, instead of one body posing an obstruction to the other.

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