2014/12/15

SUBMISSIONS BY CUTS INTERNATIONAL UNDER SUB-SECTION (3) OF SECTION 29 OF THE COMPETITION ACT, 2002 REGARDING THE PROPOSED MERGER BETWEEN LAFARGE AND HOLCHIM

I. BACKGROUND

1.1 On 22nd November, 2014, Competition Commission of India (CCI) had published a notice, inviting comments/objections/suggestions, from any person(s) adversely affected or likely to be affected by the combination. Consumer Unity & Trust Society (CUTS) through this submission intends to respond to the notice by raising certain relevant points that CCI might consider while assessing the proposed merger between Lafarge S.A (Lafarge) and Holchim Ltd (Holchim).

1.2 The submissions by CUTS are based on information available in public domain and Form IV submitted by the parties. Our altruistic objective is to aid and assist CCI in assessing the said merger in view of larger public interest, ensure promotion of healthy competition in the cement industry and to boost the economy.

1.3 As per the details submitted by the parties under Form IV to CCI, Holchim and Lafarge are active players at an international level in the production and supply of cement (grey and white), aggregates, Ready Mix Concrete (RMC), and to lesser extent additives, asphalt, mortar and pre-cast concrete products. Holcim and Lafarge, the world's two largest cement companies have combined annual sales of $44 billion. In India, Holchim through its operating companies i.e., ACC Limited (ACC) and Ambuja Cements Limited (ACL) is active in manufacturing of cement, RMC, Clinker, flyash, eco-sand and waste management services whereas Lafarge through its operating companies i.e., Lafarge India Private Limited (Lafarge India) and Lafarge

Aggregate & Concrete (Lafarge A&C) is active in manufacturing cement, RMC, aggregates and fly ash.

II. RELEVANT MARKET

India houses the second largest cement industry with a total capacity of over 360 metric tonnes (MT) in the financial year 2013-14. Apart from the merging parties i.e., Lafarge and Holchim, there are other major players in the cement industry such as Ultratech cement, Shree cement, Jaypee Cement and so on[1]. In order to understand the impact of the proposed transaction in India, it is important to analyse the appropriate relevant market. In the current application, the proposed relevant markets are grey cement and RMC [2], which have been elaborated below in further details:

2.1 Market Share in Grey Cement Industry

India has a highly competitive cement industry with near about 69 cement manufacturers across the country.[3] Cement being a homogeneous product has a short life span and therefore cannot be transported to long distances. Further, the transportation cost for cement distribution is quiet high. This was highlighted in the case of the merger of *Shree Cement Ltd/Jai Prakash Associates Ltd*.[4] As mentioned in paragraph 12 under Form IV, due to vast geographic expanse of India and cement consumption, the cement manufactured in one state is sold across state boundaries. Also, the inter-state distance in India is also quite long as compared to other parts of the world. Therefore, it is important to evaluate the appropriate relevant geographic market of the merging parties in the present merger application.

There are about 209 plants in the cement manufacturing industry in India where Holchim through their subsidiaries ACC and ACL owns 16 plants and Lafarge through their subsidiaries Lafarge India and Lafarge A&C owns 4 companies[5]. The chart mentioned below indicates the number of plants each of the parties have in various states in India.

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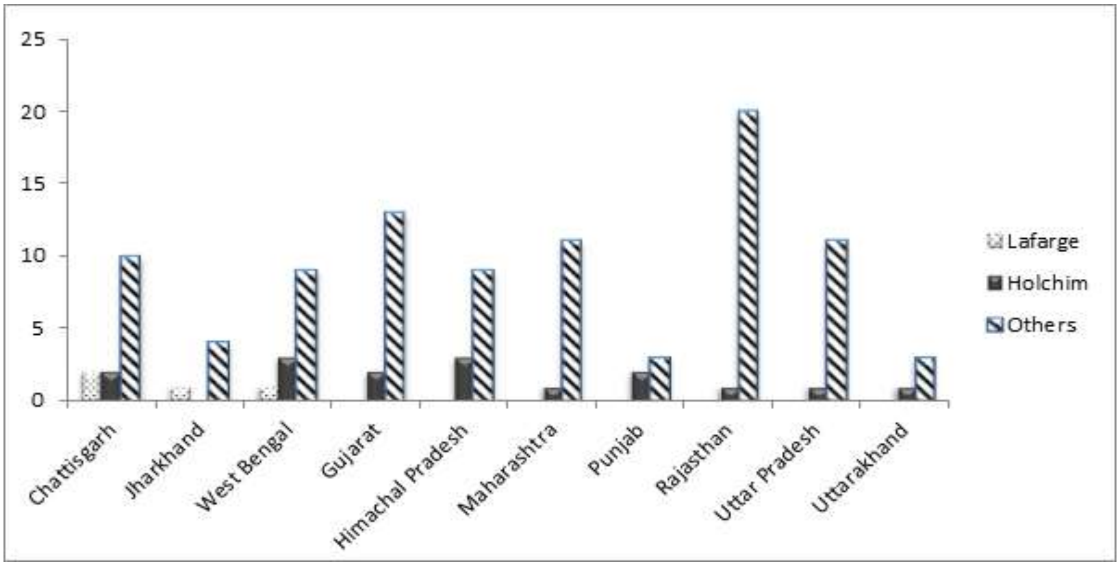
[1]Based on the total assets of the company; http://www.moneycontrol.com/stocks/marketinfo/totassets/bse/cement-major.html; last visited on 2014.11.30

[2] For the purpose of evaluation, grey cement has to be considered as a relevant market as Lafarge as well as Holchim subsidiaries manufacture grey cement.

[3]Cement Information System, Department of Industrial Policy & Promotion; http://eaindustry.nic.in/cement/report2.asp ; last visited on 2014.11.30

[4] C-2014/09/211; Shree Cements Ltd/ Jaiprakash Associates Ltd

[5] http://eaindustry.nic.in/cement/report2.asp ; visited on 2014.12.05



Source: Cement Information system; available at http://eaindustry.nic.in/cement/report2.asp ; visited on 2014.12.04

As mentioned in Form IV, the relevant geographic market of these two merging parties have been divided into three regions i.e., North + East India[6] , East + MP + East UP[7] and North/West + West UP[8] with a market share of 22.5 per cent, 29.0 per cent and 16.7 per cent respectively which is below 50per cent.

Also, as per 2014 report by India Brand Equity Foundation (IBEF), cement manufacturers such as Ultratech Cement, Jaypee Cement have total market share in terms of installed capacity of 15 per cent and 1.4 per cent respectively all over India as compared to ACC and Ambuja Cement which have a market share of 10 per cent and 7.5 per cent respectively.

With regards to the relevant cement market (grey cement) in India, Ultra-tech cement which is one of the major players accounts for 22 per cent, with ACC and ACL having 15 per cent and 13per cent shares in the market respectively. Post-merger, the market share would rise to 28 per cent. There are other top Indian players such as Jaiprakash Associates (10per cent), The India Cements Ltd (7 per

[6] Chhattisgarh, Jharkhand, Bihar, Assam, West Bengal, Odisha, Madhya Pradesh, Uttar Pradesh, Haryana , Delhi and Rajasthan; as mentioned in Form IV

[7] Chhattisgarh, West Bengal, Bihar, Jharkhand, Assam, Madhya Pradesh and East UP; as mentioned in Form IV

[8] Rajasthan, Haryana, West UP, Delhi and Gujarat; as mentioned in Form IV

cent), Shree Cements (6per cent), Century Textiles and Industries (5per cent), Madras Cements (5per cent), Lafarge (5per cent), Birla Cement (4per cent) and Binani Cement (4per cent)[9].

Thus, it is submitted that, CCI should undertake deeper investigation to identify the relevant market and also analyse, the market share of the merged entities in order to determine whether the parties would be in a dominant position or not. Looking into the huge market share of these two merging parties, it could be presumed that the dominance if not checked could eliminate other parties from the market.

2.2 Market Share in Ready Mix Concrete

RMC is a perishable product with a lifetime of few hours as it must be used in freshly-mixed condition. Thus, it has to be considered as a separate relevant market for the purpose of assessing the present merger application[10]. The RMC plants tend to be locally situated, close to the markets. Therefore, it is essential to define the appropriate relevant geographic market. As per Paragraph 15, Form IV, the parties have suggested overlapping of relevant geographic market for RMC in the following cities: Hyderabad, Chennai, Mohali, Panchkula and Baddi, Ludhiana, Raipur, Jaipur, National Capital Region, Ahmedabad, Vadodara, Surat, Kolkata, Bangalore and Mumbai. With the acquisition of L&T Concrete by Lafarge in 2008, Lafarge became the largest producer of RMC in India. As per IBEF report, Ultra Tech has around 101 plants in the country as compared to 55 plants by ACC Concrete.[11]

Paragraph 41 of Form IV enlists the data by an independent third party, name of which is not disclosed and hence, cannot be solely relied upon. Also, the data submitted by the merging parties through their internal estimates for the same cities vary in terms of figures. Therefore, it is submitted that CCI should undertake further investigation to probe into the market share of the players (post-merger scenario) in the overlapping cities. It is also submitted that, if required, CCI could appoint an independent third party, to inquire about the actual market share of these merging parties in the

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[9] Peter Edwards, Global Cement Magazine, February 15, 2013; http://www.globalcement.com/magazine/articles/752-the-incredible-indian-cement-industry ; last visited on 2014.12.01

[10] Also decided in the case of Case No COMP/M.3572 - CEMEX / RMC; http://ec.europa.eu/competition/mergers/cases/decisions/m35722004120820310en.pdf ; last visited on 2014.12.01

[11]http://www.indiancementreview.com/News.aspx?news=Ready-Mix-Concrete-India-Sector&nid=oQru6pPQGJYexnRHE+cMng == ; IBEF; ; last visited on 2014.12.02

relevant market. The data arrived at could be of assistance to CCI in arriving at a more informed decision.

<u>Vertical Integrated Market</u>

Vertical integration is an arrangement in which the supply chain of a company is owned by that company. The advantage of a vertically integrated market is that the cement manufacturer can produce their own clinker to manufacture cement and distribute it through private outlets. However, such vertical mergers through production, supply and distribution also integrate themselves to become dominant player in the market, thereby reducing potential of new entrants/ existing players. These vertical mergers create entry barriers into the market by heavily reducing price of products, thereby limiting competition in the relevant market.

As per information provided in Form IV, all major cement companies produce their own clinker for grinding cement. Limestone is the primary material used to produce cement. In the present merger application, Holchim operates throughout the country whereas Lafarge is restricted to one region but with a stronghold in markets of their respective operations[12]. Ambuja Cement is the second largest cement manufacturer in India, with nearly 10 per cent of the market share of total installed capacity.[13] It is the market leader in Northern part of India with 29 per cent share of the total installed capacity.

Being major players in the cement industry, Lafarge and Holchim could produce cement and other products including RMC, aggregates and so on in a large quantity and distribute the same through various channels comprising of wholesalers and retailers. As clearly mentioned in paragraph 33 of Form IV, the parties have suggested that it is an easy task to set up a distribution channel.

Given below are a few case laws of the Supreme Court of the United States and the European Commission that CCI could refer too while assessing the present merger application. In the case of *USA vs. Paramount Pictures, Inc,*[14] five corporations namely RKO Radio Pictures, Loew's, 20th Century-Fox Film Corporation, Columbia Pictures Corporation, Universal-International, Warner Bros were sued for violating provisions i.e., section 1 and section 2 of the Sherman Act. The mentioned 05 companies produced, distributed and exhibited their own motion pictures in their

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[12] http://www.iimidr.ac.in/iimi/images/IMJ/Volume4_Issue1/An%20Analytical%20Study%20of%20the%20Changing.pdf ; last visited on 2014.12.02

[13] http://www.ibef.org/download/Cement-August-2014.pdf ; last visited on 2014.12.01

[14] United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) ; https://supreme.justia.com/cases/federal/us/334/131/ visited on 2014.12.05

respective theaters. The companies held exclusive rights on their respective movies, thereby, forming a vertically integrated market, which provided them the advantage to abuse their dominant position in the film industry. The Supreme Court ordered the five vertically integrated studios to sell off their theater chains and thereby prohibited trade practices restricting competition. Also, in the merger of *Johnson & Johnson/Pfizer Consumer Healthcare*; investigation into the matter confirmed that the merger created vertical relationship raising competition issues at various levels. Therefore, the European Commission (EU) decided to allow the merger by asking Johnson & Johnson to divest part or all of ALZA Corporation and nicotine patch manufacturing business and restrict supply of Glaxo Smith Kline (GSK) in the European Economic Area.[15]

Many foreclosure models, as well as the FTC report on cement-concrete integration, imply that vertical mergers carry the potential to higher entry barriers[16]. Therefore, it could be presumed in the present case that in dominant geographic markets, these two merging parties could open up several outlets and sell their own products. With significant amount of outputs that these companies are able to produce, one can infer that in the post-merger scenario, bulk distribution of products at a lower rate could lead to foreclosure of cement business in various regions in India.

III. RECOMMENDATIONS BY CUTS

(i) **Divestment of assets:** As per the report by Aditya Birla cement Co. Ltd, the proposed merger in India would result in the merged companies having a sizeable market share in the eastern part of India which includes West Bengal, Jharkhand and part of northern Odisha. On the one hand, there is oversupply in southern part of India whereas, on the other hand, the eastern region has huge demand for cement.[17] Various reports suggest that post-merger, the parties would enjoy market share of around 29 per cent in the eastern part and Madhya Pradesh along with eastern Uttar Pradesh[18]. Given the combination of Lafarge and ACC in the east and combination of Ambuja and ACC in the north, CCI might, take into consideration divestment of assets of Lafarge and Holcim in order to ensure facilitation of competition in the Indian cement market.[19]

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[15] Case No COMP/M.4314 -Johnson & Johnson/ Pfizer Consumer Healthcare ,Paragraph 151, http://ec.europa.eu/competition/mergers/cases/decisions/m4314_20061211_20212_en.pdf visited on 2014.12.05

[16] Ali Hortaçsu, Chad Syverson, Cementing Relationships: Vertical Integration, Foreclosure, Productivity, and Prices; http://home.uchicago.edu/~syverson/virmcandcement3.pdf ; visited on 2014.12.05

[17] http://www.adityabirla.com/media/press-reports/Cement-king-in-making; May 21, 2014; ; last visited on 2014.12.02

[18] http://www.business-standard.com/article/companies/holcim-lafarge-say-global-merger-won-t-adversely-impact-competition-in-india-114112200523_1.html November22, 2014; ; last visited on 2014.12.01

[19] http://www.cmaindia.org/Marque.php?id=1195 ; last visited on 2014.12.02

(ii) **Role of Director General:** The CCI under Section 29-1(A) of the Act is authorised to call for a report from the Director General (DG) after the receipt of response of parties to the combination under section 29(1). Such report is required to be submitted by the DG within such time as directed by the CCI. This provision was introduced by an agreement to the Act in 2007 which CCI could have invoked after receiving the present combination application. It is therefore submitted that CCI may call for in-depth investigation by the DG for the present application as it might be helpful in the discovery of relevant data, thereby, determining relevant market and actual market share which is crucial in ascertaining the likely appreciable adverse effect on competition.

(iii) **Form-IV: Need for further information:** As per paragraph 31, Form IV, relevant information regarding the estimated market share of both the merging parties have not been clearly elaborated. The relevant geographic market mentioned by the merging parties under Form IV does not clearly mention the number of plants established by each merging party. Also, there has been no data provided regarding the kind of plants owned by both of them. Further, as the parties have suggested the inter-state distribution of cement and cement products, no disclosure has been made with regards to the capacity of distribution or states to which their products are being distributed. Therefore, it is submitted that CCI may direct the DG to enquire into the matter for further information from the parties regarding the above.

(iv) **Determination of relevant geographic market:** For the purpose of evaluating the present merger, determining the relevant geographic market would be quite a challenge. The merging parties have overlapping business in the activities of production of cement and RMC. As the cement industry in India is understood to be highly competitive, there are other players in the market that are active in this industry. However, the distribution of the cement and RMC produced is not clear through Form IV. Further, there is variation in the demand and supply of cement and cement products in different regions in India. Therefore, for the purpose of evaluating the merger, CCI may direct the DG to further investigate into the demand and supply chain in each of the relevant geographic market where the present merging parties have established their units.

(v) **Assessment by an Independent Committee:** As per paragraph 41of Form IV, the market share in relevant geographic market mentioned by the parties is different from the information gathered by independent third party. Also, the source of information has not been disclosed by the parties; hence, the data cannot be solely relied upon the information as submitted. It is, therefore, submitted to CCI to get the data assessed by a third party, preferably an independent organisation, that could independently gather information regarding the relevant geographic market. CCI could surely rely on this data to evaluate the impact of the Holchim-Lafarge merger in the relevant market.

(vi) **Decision taken by Competition Commission of Other Jurisdictions:** Globally, Lafarge and Holchim need approval from 15 jurisdictions all over the world. There are a few countries such as Russia, Turkey, Singapore and South Africa that have already approved this merger by imposing certain conditions[20]. For instance, in Singapore, the Competition Commission of Singapore (CCS) was of the opinion that there could be overlap in the manufacture and supply of ready-mix concrete and grey cement. However, after public consultation exercise and in-depth investigation, CCS issued its decision approving the merger with the condition of structural remedy i.e., divestiture of assets[21]. Further, the EC would be conditionally approving the proposed merger. The merging parties have proposed to sell around 12 per cent of their combined revenue to get approval. Even in Brazil, the Competition Authority has suggested structural remedy to approve the merger. The parties have submitted the deal that involves divestitures of 31% or 3.6 metric ton per year of Lafarge and Holcim's joint cement production capacity in Brazil.[22]

Given the above, it is submitted international experience should be considered by the Commission while assessing the present merger application.

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[20] http://www.reuters.com/article/2014/12/03/us-lafarge-m-a-holcim-eu-idUSKCN0JH1TC20141203 ; visited on 2014.12.05

[21] http://www.globalcement.com/news/itemlist/tag/LafargeHolcim?start=10 ; visited on 2014.12.05

[22] http://www.globalcement.com/news/itemlist/tag/LafargeHolcim ; visited on 2014.12.05