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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 59 of 2013

In Re:

Shri Bijay Poddar

Informant

And

M/s Coal India Limited and its subsidiaries

Opposite Parties

CORAM

Mr. Ashok Chawla
Chairperson

Mr. M. L. Tayal
Member

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

Appearances: Shri Santosh Kumar, Advocate for the informant
alongwith the informant-in-person.

Shri Rajshekhar Rao, Ms. Gauri Puri, Shri Harman Singh
Sandhu, Shri Yaman Verma, Shri Prateek Bhattacharya,
Advocates for the opposite parties.



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Order under Section 27 of the Competition Act, 2002

1. The present information under section 19(1)(a) of the Competition Act, 2002 ('the Act') was filed by Shri Bijay Poddar ('the informant') against M/s Coal India Limited and its subsidiaries ('the opposite parties'/ OPs) alleging *inter alia* contravention of the provisions of section 4 of the Act.

Facts

2. Facts, as stated in the informations, may be briefly noticed.
3. The informant states that CIL introduced a scheme called Spot e-Auction Scheme in 2007 ('the Scheme'). According to the terms and conditions of the scheme, initially all the bidders who bid for coal through the spot e-Auction route had to furnish a non-interest bearing Earnest Money Deposit (EMD) at the rate of Rs.200/- per tonne. The informant further avers and alleges that for the past few years this amount of EMD has been enhanced to Rs.500/- per tonne from Rs. 200/- per tonne, without reflecting the increase in a transparent way.
4. It is further averred that as per clause 9.2 of the terms and conditions if the successful bidder does not lift the booked quantity within the stipulated validity period, the proportionate security deposit @ Rs. 200/- per tonne (as converted from the EMD amount) for the un-lifted quantity would be forfeited. The informant states that such forfeiture would not take place if the coal company has failed to offer full or part of the successful bid quantity within the validity period. In such cases again, no forfeiture would take place if the balance quantity is less than a truck load/ rake load.
5. The informant avers that it is wrong on the part of CIL and its subsidiaries to forfeit Rs. 500/- per tonne if the bidders/ buyers of coal



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cannot lift the coal while CIL and its subsidiaries do not pay any penalty if they fail to supply coal. It is alleged that they simply refund the coal value without paying any compensation to the buyer/bidder. The informant is aggrieved by the fact that refund of the money is a cumbersome procedure as it takes a long time *i.e.* about 30 to 60 days from date of expiry of delivery order.

6. The informant further laments that the forfeiture clause is arbitrary and illegal and in abuse of monopolistic power enjoyed by the opposite parties. It is further alleged that the scheme itself is illegal and one sided. It is the case of the informant that if the opposite parties fail to supply coal, bidder/ buyer incurs losses as detailed below:

(i) The opposite parties retain the money from the successful bidders for more than 112 days (break-up of the days is as follows: 7 days approximately for deposit of coal value; 60 days for lifting of coal and 30 to 60 days for refund after the expiry of the deliver order) and the amount works out to be Rs. 225/- to 300/- per tonne; as a result of this buyer/ bidder has to bear interest losses while opposite parties enjoy the credit without incurring any cost.

(ii) In the event of non-delivery, successful bidders/buyers do not get any compensation from the opposite parties.

(iii) Successful bidders/ buyers then end up buying coal at high prices from the open market.

(iv) It results in excessive financial strain for the successful bidders/ buyers.



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7. Based on these allegations and averments, the informant prays to the Commission to direct the opposite parties to pay penalty of Rs. 500/- per tonne + interest @ 15% from date of receipt of money till date of refund + compensation for non-supply of coal as bidders/buyers have to buy coal from the open market at high prices; to direct CIL to refund all penalties with interest and compensation; to impose penalty upon CIL for misguiding investors and; to declare the scheme illegal.

Directions to the DG

8. The Commission after considering the entire materials available on record *vide* its order dated 18.11.2013 passed under section 26(1) of the Act, directed the Director General (DG) to cause an investigation to be made into the matter and submit a report.
9. The DG, after receiving the directions from the Commission, investigated the matter and filed the investigation report dated 31.07.2014.

Investigation by the DG

10. The findings and conclusions of the DG are as under:

Relevant Market

11. The DG determined the relevant product market as “sale of non- coking coal to the bidders under Spot e-Auction”. Further, the relevant geographic market was taken as whole of India. Accordingly, the DG defined the relevant market as “sale of non-coking coal to the bidders under Spot e-Auction Scheme in India”.



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Dominance

12. After analyzing the factors mentioned in section 19(4) of the Act in light of the facts of the present case, the DG concluded that the opposite parties (CIL and its subsidiaries) are dominant in the said relevant market.

Abuse of dominant position

13. The investigation concluded that the OPs have violated the provisions of section 4(2)(a)(i) of the Act, by imposing unfair and/or discriminatory provisions in the sale of non-coking coal under spot e-auction, as detailed in the latter part of the order.

Consideration of the DG report by the Commission

14. The Commission in its ordinary meeting held on 12.08.2014 considered the investigation report submitted by the DG and decided to forward copies thereof to the parties for filing their replies/ objections thereto. The Commission also directed the parties to appear for oral hearing, if so desired. Subsequently, arguments of the parties were heard on various dates.

Replies/ Objections/ Submissions of the parties

15. On being noticed, the parties filed their respective replies/ objections/ submissions to the report of the DG besides making oral submissions.

Replies/ objections/ submissions of the opposite parties(CIL)

16. At the outset, CIL took a preliminary objection by submitting that the statements of the representative of CIL were recorded in the absence of CIL's advocates, whose participation was specifically prohibited at those



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proceedings. Subsequently, an application was stated to be filed with the Commission requesting for the deposition of the representative to be annulled. Given that this application is currently still pending before the Commission, and the issue is to be decided during the final hearing (as per the Commission's order dated 08 May 2014), it was submitted that any reliance by the DG on such statements must be held to be impermissible and ought to be expunged from the DG's report. A failure to do so would result in a violation of the principles of natural justice, submitted the counsel.

17. It was submitted that the allegations against CIL and its subsidiaries (all references to CIL henceforth include its subsidiaries) in relation to the alleged abuse of dominant position are unfounded and hence denied. CIL submitted that it has not engaged in any anti-competitive activities in violation of the provisions of the Act. CIL has always acted fairly and in the best interests of its customers and it is a law abiding corporate citizen. Further, being owned and controlled by the Government of India (GoI), it is not driven purely by a profit motive. CIL is fully aware of its social obligations/responsibilities and has always acted and continues to act in the larger national interest, sacrificing its own commercial interests which taken singly or together, would amply demonstrate that it cannot "operate independently of competitive forces prevailing in the relevant market". Further, the DG's finding that CIL has "power to affect its competitors or consumers or the relevant market in its favour" is completely misconceived and contrary to the existing reality where its actions are circumscribed by several other factors which take away any possibility of it acting in an 'independent' manner leave alone render it able to 'abuse' its alleged 'dominant position'.



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18. Additionally, it was submitted that the terms and conditions of the Spot e-Auction Scheme, 2007 have been set within the framework of the New Coal Distribution Policy 2007 (NCDP), with the objective of providing access to coal to consumers who would otherwise be unable to source coal through the available institutional mechanisms. As such, the Scheme provides for a simple and transparent system for consumers to source coal. Further, the Scheme is based on the NCDP and the directions of the Hon'ble Supreme Court of India in *Ashoka Smokless* case. As such, compliance of law could hardly tantamount to be illegal leave alone constituting an alleged abuse of CIL's alleged dominant position.
19. On the issue of assessment of relevant market, it was submitted that the DG has failed to conduct a full and comprehensive analysis of the case, and has mechanically relied on the conclusions reached in previous cases decided against CIL despite being specifically directed to investigate into the matter independently. The DG has failed to provide any analysis of the delineation of the relevant market, and has without any analysis in relation to the conditions of the market in relation to supply of coal through e-Auctions, arrived at a completely erroneous market definition.
20. It was pointed out that the DG has defined the market as "the market for sale of non-coking coal to the bidders under the Spot e-Auction Scheme in India", without providing any reasons/ explanation as to why the relevant product market constitutes only sale of coal from the Spot e-Auction Scheme, and not the Forward e-Auction Scheme. Further, it was argued that the DG has gone solely by the version offered by the informant without even applying its mind independently to the facts and/ or conducting any independent investigation into the issue of whether there is a feasible substitute for the non-coking coal consumed by small



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users of coal in India. It was also contended that while the DG has placed reliance on the e-Auction schemes of competitors to draw a comparison with CIL's scheme, he states that they are not part of the same market, which is clearly contradictory.

21. Finally, on the issue of relevant market, it was submitted that the DG has failed to consider the consistent increase of imports of non-coking coal into India in the past few years, and the increased reliance of consumers on such imported coal, which is clearly indicative of the relevant geographic market being global in nature and the obvious substitutability of imported coal with that supplied by CIL. E-Auction coal is sold at prices that are comparable to the prices of imported coal, traders of coal treat imported coal and e-Auction coal as equivalent, and consumers can also use both e-Auction coal and imported coal interchangeably. Thus, the DG's assessment of relevant market definition is incorrect and the correct market definition ought to have been "the market for the sale of non-coking coal except under Fuel Supply Agreements and under Memoranda of Understanding with power companies".
22. Adverting to the assessment of dominance conducted by the DG, it was canvassed before the Commission that the DG has merely relied on previous decisions of the Commission against CIL, rather than conducting an independent analysis of CIL's dominance in the context of the present case, especially given the fact that coal sold through e-Auction is part of a completely different market (which is basically driven by market prices) when compared with coal sold under notified prices (as was the case under the previous cases). The DG failed to appreciate the peculiar facts in the present case and the market conditions under which the coal is sold in as much as the market conditions in relation to coal sold through e-Auction are materially



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different from coal sold through fuel supply agreements which constitute an entirely different, and incomparable, class of transactions altogether. Further, it was argued that the DG failed to appreciate that, there is every possibility that with passage of time, an enterprise which may have been dominant in the past is no longer dominant because of the changed/ different market conditions which, in fact, was demonstrable in the instant case, particularly with the growing reliance on imported coal, the percentage of which was growing exponentially in the past few years, thereby clearly demonstrating the existence of a credible and viable alternative. This, it was submitted, clearly altered the ground realities and materially impacted the assessment of the 'relevant market' despite which the DG proceeded to mechanically restrict the same to "sale of non-coking coal to the bidders under the Spot e-Auction Scheme in India". It was submitted that the DG simply chose to ignore the fact that CIL's position is acquired as a result of legislation and its operations are also contingent on a variety of factors beyond its control. CIL is, therefore, mandated to fulfill certain social obligations and costs in the larger public interests. This includes the operation of loss making mines and the continued supply of coal to customers who have defaulted on their payment to CIL and/or supply of coal at considerable loss solely on account of directives issued to it by other statutory/government authorities. Further, it was submitted that the growth in CIL's profits does not imply any independence from market forces and statutory obligations. Even the Commission in its previous decisions has acknowledged the fact that CIL's behavior is constrained by various regulatory issues and constraints imposed by other stakeholders.

23. Referring to findings of the DG on abuse of dominance, it was argued that CIL has not abused its alleged dominant position. It was asserted that the DG has failed to recognize that an earnest money deposit (EMD)



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payable by a purchaser is an absolutely standard term in any contract leave alone a contract for auction, and no reciprocal clause is required for such a term to be considered fair or reasonable in as much as the principle underlying such imposition is to act as a deterrent for non-serious and/ or speculative participants from the auction process. Such a deterrent is obviously not required for CIL as it is a serious seller. Further, there is no question of any deliberate failure on the part of CIL to supply coal sold under e-Auction, as is clear from the minimal occurrence of non-supply on the part of CIL which too, has been erroneously interpreted by the DG. The DG has also failed to consider CIL's submissions in this regard and, where these are allegedly considered, CIL's responses have been completely misunderstood and/ or misconstrued. All these aspects demonstrate non-application of mind on DG's part and its conclusions ought, therefore, to be rejected outright.

24. Further, it was submitted that the DG has also incorrectly concluded that CIL is unfairly earning interest from EMD that is to be returned to the customers in case of non-supply of coal, without any evidence in relation to such unjust enrichment. In fact, CIL earns no interest from EMD as it is transferred into a current account. Further, instances of non-supply occur in less than 0.5% of all cases and that too for reasons beyond CIL's control. Therefore, the question of such a clause being abusive cannot even arise. The DG has incorrectly concluded that CIL has abused its dominant position by not providing some time period for customers to make payment of contested claims for additional payments due before such amounts are deducted from EMD. This conclusion displays a flawed understanding of how the e-Auction system works, as the bidder is aware of a claim as soon as the claim comes into existence, and is free to make payment at any point till one day before the e-Auction. Further,



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since the e- Auctions take place on a monthly basis, the customer can always participate in the next auction and receive coal.

25. Finally, it was submitted that the DG has provided no reasons for why 7 days is an unfair time period within which buyers are required to submit payment for the entire coal value. It was submitted that questions regarding whether 7 days or 15 days is more appropriate as a time period for submission of coal value by the customers do not, in any manner, concern the effective functioning of competition in the market and therefore should not even be considered by the Commission. In any event, CIL has explained that the time period is set at 7 days so as to ensure constant dispatches and prompt delivery of coal, to e-Auction customers as well as other customers. It is critical to appreciate that CIL's sales through e-Auction are a fraction of its total sales and dispatches. As a result, the Scheme, and dispatch schedules, have been created keeping in mind the needs of other customers of CIL, to create an overall supply situation which is as fair as possible. CIL cannot be required to cater to the specific demands of each individual customer of the Scheme, as this would make it impossible for it to supply coal to all other customers. CIL's conduct must be judged on the basis of whether it is fair overall as opposed to the manner in which the DG has proceeded in the instant case.

Replies/ objections/ submissions of the informant

26. The informant also filed brief objections/ suggestions to the report of the DG. It was submitted that clause 4.2 of the Terms and Conditions of the Spot e-Auction Scheme 2007 requires the bidders before participating in e-Auction to satisfy themselves with the quality of coal being offered from a source and the Commission in its order dated 18.11.2013 did not consider it to be qualifying for abuse of dominant position without



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appreciating the fact that coal offered under e-Auction was not readily/ physically available and would be mined and made available at a later date. Hence, to expect the bidder to satisfy himself about quality of coal was misleading and uncalled for.

27. Further, it was submitted on behalf of the informant that additional information needs to be provided by CIL as under:

- (i) When auction is declared, it should indicate against each colliery as to how much is the backlog pending for loading in that particular colliery, what is expected production per day/ per month, what is daily loading capacity per day and how it will be loaded – whether manually or by machine.
- (ii) Coal value should be collected only 7 days before the backlog is likely to be completed and supplies against related auction is likely to start.
- (iii) There should be a system of filing online complaints at the individual colliery with docket number and name of the person, telephone number and e-mail ID to whom complaint will be made should be provided in the auction offer itself.
- (iv) Colliery-wise truck loading schedule should be made available at the website of the respective companies with the details of delivery order, name of bidder.



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Analysis

28. In the present case the gravamen of the informant emanates out of the alleged abusive clauses of spot e-Auction scheme floated by OPs for sale of coal. The basic thrust of the grievance of the informant appears to be the unequal terms and conditions set out in the e-Auction scheme. The informant is aggrieved of the fact that if the successful bidder fails to lift the booked quantity within the stipulated period then a proportionate security deposit for the un-lifted quantity is forfeited as penalty, whereas if the opposite parties fail to deliver the booked quantity within the stipulated period, then no compensation is paid. Even the money paid by the bidder is refunded after a considerable delay and no interest is paid either.
29. On a careful perusal of the information, the report of the DG and the replies/ objections/ submissions filed by the parties and other materials available on record, the following issues arise for consideration and determination in the matter:
- (i) What is the relevant market in the present case?
 - (ii) Whether the opposite parties are dominant in the said relevant market?
 - (iii) If finding on the issue No.(ii) is in the affirmative, whether the opposite parties have abused their dominant position in the relevant market?

Issue No. (i): What is the relevant market in the present case?

30. As the allegations in the present case relate mainly to supply of non-coking coal to the successful bidders under Spot e-Auction Scheme in



India, the DG, after examining the feasibility of switching to other alternate fuels and sources of supply of non-coking coal, concluded that that there is no substitute for non-coking coal available for the bidders under Spot e-Auction. Therefore, the Relevant Product Market for the purpose of investigation in this case was considered by the DG as "sale of non- coking coal to the bidders under Spot e-Auction".

31. It was submitted by the opposite parties that the DG has failed to conduct a full and comprehensive analysis of the case, and has mechanically relied on the conclusions reached in previous cases decided against CIL despite being specifically directed to investigate into the matter independently. It was also submitted that the DG has failed to provide any analysis of the definition of the relevant market, and has without any analysis in relation to the conditions of the market in relation to supply of coal through e-Auctions, arrived at a completely erroneous market definition.
32. It was pointed out that the DG has defined the market as "the market for sale of non-coking coal to the bidders under the Spot e-Auction Scheme in India", without providing any reasons/ explanation as to why the relevant product market constitutes only sale of coal from the Spot e-Auction Scheme, and not the Forward e-Auction Scheme. Further, it was argued that the DG has gone solely by the version offered by the informant without even applying its mind independently to the facts and/ or conducting any independent investigation into the issue of whether there is a feasible substitute for the non-coking coal consumed by small users of coal in India. Finally, it was contended that the DG has failed to consider the consistent increase of imports of non-coking coal into India in the past few years, and the increased reliance of consumers on such imported coal, which is clearly indicative of the relevant geographic



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market being global in nature and the obvious substitutability of imported coal with that supplied by CIL. E-Auction coal is sold at prices that are comparable to the prices of imported coal, traders of coal treat imported coal and e-Auction coal as equivalent, and consumers can also use both e-Auction coal and imported coal interchangeably. Thus, it was canvassed that the DG's assessment of relevant market definition is incorrect and the correct market definition ought to have been "the market for the sale of non-coking coal except under Fuel Supply Agreements and under Memoranda of Understanding with power companies".

33. Relevant product market has been defined in section 2(t) of the Act as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. Furthermore, to determine the 'relevant product market', the Commission is to have due regard to all or any of the following factors viz. physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products, in terms of the provisions contained in section 19 (7) of the Act.
34. It has been pointed out by the informant that there is no other feasible substitute of non-coking coal consumed by the small users of coal in India. Further, it was argued that non-coking coal offered/ sold under e-auction by CIL and its subsidiaries is different from that of the imported non-coking coal with respect to size, quality, quantity and specifications. Moreover, it has been submitted by the informant that the imported coal is available in crushed form only which is not suitable for Indian



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industries operating in diverse sectors (Glass, Ceramics, Textiles Processing, Jute, Sugar Mills, Lime, Ginning, Carpet, Tea Gardens, Brick Industry, Re Rolling, Rolling, Paper, Aluminum, Cement, Sponge Iron *etc.*) due to the design specifications of boilers, furnace and burning equipments. Apart from highlighting the unsuitability of imported coals due to its crushed form, the informant has also sought to suggest that the quality required by Indian consumers are not present in the imported coal based on some technical parameters. Lastly, it was argued by the informant that under e-auction minimum quantity one can opt for is 50 MTs of non-coking coal whereas in case of imports, minimum quantity is one ship load varying from 50000 MTs to 150000 MTs and it is impossible for e-auction buyers to buy a ship of 50000 MTs for their small requirements.

35. The opposite parties, while contending imported coal as a substitute for the coal which is supplied under the scheme, have argued that prices of imported coal are comparable with the prices of coal supplied under the spot e-auction scheme. To buttress the point, it has been argued, based on a newspaper report, that the prices of imported thermal coal have fallen by 40%, and the amount of imported coal used in power generation has risen by 11%.
36. The Commission is of opinion that no fault can be found with the relevant product market delineated by the DG. The Commission notes that coal distribution through e-Auction was introduced with a view to provide access to coal for such buyers who are not able to source coal through the available institutional mechanism. The opposite parties have sought to suggest the substitutability of imported coal for the small buyers under the e-auction scheme, without even indicating the difference in price between the imported coal and the coal available



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under the e-auction scheme and without even dealing with the other issues raised by the informant in terms of quality, quantity *etc.* Neither has it been shown as to who are the buyers who are importing such coal and for what purposes.

37. Furthermore, the DG has categorically noted that if the bidders attempt to purchase coal from the open market or through imports, the same is costly as they entail spot purchases, shipping in smaller vessels and inland transportation in India and other attendant multiple handlings. It was also recorded by the DG that alternate fuels are neither easily available nor cost competitive with coal.
38. In view of the above, the Commission is of opinion that there does not exist any substitute for non-coking coal which is made available to the bidders under the spot e-auction and, as such, the Commission holds the relevant product market as "sale of non-coking coal to the bidders under Spot e- Auction". In this connection the Commission notes that the opposite parties have not produced any data or material to indicate any substitutability or interchangeability between the products bought under the different schemes. In the absence of any data in this regard and further considering the fact that the allegations in the present case pertain to the alleged abusive conduct of the opposite parties in the matter of supply of non-coking coal under spot e-auction scheme, it is unnecessary to dilate any further on this aspect.
39. Further, the investigation revealed that the condition for supply of coal in the entire country is uniform and homogeneous as there are no barriers within the territory of India in terms of geographic location for the consumers. Thus, the Relevant Geographic Market was taken as the whole of India by the DG.



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40. In this connection, it may be noted that "relevant geographic market" has been defined in section 2(s) of the Act meaning as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. To determine the 'relevant geographic market', the Commission is to have due regard to all or any of the following factors *viz.* regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services.
41. The opposite parties, however, argued that the markets for supply of coal are global and accordingly objected to the DG concluding that the relevant geographic market for supply of non-coking coal cannot be expanded beyond India.
42. The Commission notes that the contention of the opposite parties to argue that the relevant market for the present purposes has to be global and cannot be confined to India as was done by the DG, is legally untenable. From a plain reading of the Explanation to section 4 of the Act, 'dominant position' means a position of strength, enjoyed by an enterprise, in the relevant market, *in India*, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. Thus, the plea advanced by the opposite parties contending the relevant market to be global is *ex facie* contrary to the express provisions of the Act and has to be rejected.



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43. In view of the above, the Commission is of opinion that relevant market in the present case may be taken as “sale of non- coking coal to the bidders under Spot e-Auction Scheme in India”.

Issue No. (ii): Whether the opposite parties are dominant in the said relevant market?

44. On the issue of dominance, the DG concluded that OPs are dominant in the said relevant market.
45. It has been submitted by the opposite parties that CIL is not a dominant enterprise in the wider market (global) for supply of non-coking coal. It was submitted that CIL does not possess any economic power in the wider market. In this regard, it was pointed out, based on the statistics provided by World Coal Association in 2013, that India as a whole was expected to produce approximately 7.8% of the world's coal production (*i.e.* total estimated worldwide production of coal was 7823 million tonnes out of which India was estimated to produce 613 million tonnes, which represents a miniscule portion of the total global production). Therefore, it was argued that it cannot be said that CIL possesses any economic power leave alone enjoying a dominant position.
46. Further, it was argued that even if the market is narrowly construed and restricted to India, CIL is not dominant.
47. It was contended that CIL's current market position is because of the fact that coal mining in India was nationalized by the GoI in the early 1970's. Therefore, CIL's market position is a creation of statute, and not as a result of its market practices. Further, as a result of being created by statute and majority owned and controlled by the GoI, it has social



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obligations that it is required to fulfil. These social obligations of CIL, must also be kept in mind when assessing CIL's dominance and should not be ignored as mere corporate social responsibility obligations as has been done in the past by the DG.

48. Further, in accordance with the provisions of the New Coal Distribution Policy (NCDP), linkages for supply of coal are decided by the Standing Linkage Committee (Long Term) [SLC (LT)], which consists of various stakeholders including Ministry of Power, Central Electricity Authority (CEA), Ministry of Coal, Ministry of Railways (being the largest logistics provider), Ministry of Surface Transport, *etc.* Therefore, there is no question of CIL exerting any influence over the decision-making process in the supply of coal or refusing to negotiate at all.
49. At the outset, it may be noted that the Commission while determining the relevant market has already rejected the plea of the opposite parties whereby it was sought to be suggested that the market has to be global.
50. Further, it is also not in dispute that following the enactment of the Nationalization Acts, the coal industry was reorganized into two major public sector companies *viz.* Coal India Limited (CIL) which owns and manages all the old Government-owned mines of National Coal Development Corporation (NCDC) and the nationalized private mines and Singreni Colliery Company Limited (SCCL) which was in existence under the ownership and management of Andhra Pradesh State Government at the time of the nationalization.
51. Thus, it is evident that in view of the provisions of the Coal Mines (Nationalization) Act, 1973, production and distribution of coal is in the hands of the Central Government. As a result, CIL and its subsidiary companies have been vested with monopolistic power for production and



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distribution of coal in India. In view of the statutory and policy scheme, the coal companies have acquired a dominant position in relation to production and supply of coal. The dominant position of CIL is acquired as a result of the policy of Government of India by creating a public sector undertaking in the name of CIL and vesting the ownership of the private mines in it.

52. Thus, CIL and its subsidiaries face no competitive pressure in the market and there is no challenge at the horizontal level against the market power of the opposite parties.
53. The Commission has considered in detail the various submissions advanced by CIL based on social costs and obligations, lack of freedom in deciding the quantity of coal to be supplied to the customers *etc.* to negate its dominance in the relevant market. On a careful perusal of the submissions, the Commission, however, is of opinion that even within the overarching policy and regulatory environment, CIL has sufficient flexibility and functional independence in carrying out its commercial and contractual affairs. Such factors do not detract from CIL and its subsidiaries operating independently of market forces.
54. In the present case, the Commission, on perusal of market share (94.27% or 44.26 MTs) of CIL and its subsidiaries in the entire e-Auction quantity in India as recorded by the DG and after considering the market structure and size of market and in view of the analysis recorded above, is of opinion that the dominance of OPs in the relevant market is beyond any doubt. It may be pointed out that since the passing of the aforesaid orders by the Commission, nothing has been brought on record or is otherwise discernible to suggest that any change has been effected in the



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extant regulatory and legal architecture affecting the market construct and structure in any manner.

55. In view of the above, it is held that CIL and its subsidiaries enjoy undisputed dominance in the relevant market, as defined above.

Issue No.(iii): If finding on the issue No. (ii) is in the affirmative, whether the opposite parties have abused their dominant position in the relevant market?

56. The DG identified the following five issues to examine the alleged abuse by the opposite parties:

- (i) One sided penalty (in the form of forfeiture of EMD) for non-performance by the successful bidder under clause 9.2 of the scheme.
- (ii) Enhancement in amount of EMD without reflecting the enhancement in the terms and conditions on main page of CIL website.
- (iii) Earning income/ unduly enriching itself from the interest earned on the amounts collected under e-Auction.
- (iv) Modification of some existing clauses and inclusion of new clauses in terms and conditions of the scheme.
- (v) Stipulated validity period for forfeiture of EMD (*i.e.* for making payment of coal value) within 7 working days *i.e.* clause No.5.2 of the scheme.

57. The findings of the DG on the said identified issues are as under:



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- (i) The analysis of the terms and conditions of e-Auction have shown that the OPs have violated section 4(2)(a)(i) of the Act by imposing unfair or discriminatory conditions in the relevant market. It is, therefore, found that the conduct and the terms and conditions *i.e.* clause 9.2 of Spot e-Auction had been found to be unfair and/or discriminatory.
- (ii) Though the allegation (relating to enhancement of EMD without reflecting the enhancement in the terms and conditions on CIL website) neither raises any competition issue nor has been found to be unfair and or violative of any of the provisions of section 4(2)(a) (i) of the Act, but, under the present advanced technology regime, a company with "Maharatna" status is expected to be updated/ transparent enough in its working through its website as well. Therefore, it is found that as far as this allegation is concerned, the conduct of OPs has not been found to be violative of the provisions of section 4 of the Act.
- (iii) The conduct of OPs in earning income/ unduly enriching itself from the interest earned on the amounts collected/ EMD under e-Auction was found to be violative of the provisions of section 4 of the Act.
- (iv) The conduct of OPs in effecting modification of some existing clauses and inclusion of new clauses in terms and conditions of the scheme was considered as "one sided" in the absence of proper safeguards.
- (v) The period stipulated in clause 5.2 of the Scheme for depositing coal value by the successful bidders within a period of 7 working days was found to be short by the DG as the same does not give fair opportunity to the buyers to analyze/ enquire the quality of coal.



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58. As noted earlier, the thrust of the grievance of the informant emanates out of the alleged abusive clauses of Spot e-Auction Scheme 2007 floated by the opposite parties for sale of coal, which is stated to contain unequal terms and conditions. The informant is aggrieved of the fact that as per clause 9.2 of the scheme if the successful bidder fails to lift the booked quantity within the stipulated period, then a proportionate security deposit for the un-lifted quantity is forfeited as penalty, whereas if the opposite parties fail to deliver the booked quantity within the stipulated period then no compensation is paid. Even the money paid by the bidder is refunded after a considerable delay and no interest is paid either, alleges the informant.

59. For the felicity of reference, the clause 9.2 of the scheme is noted below:

9. Forfeiture of EMD: -

The EMD submitted by the successful Bidders will be liable for forfeiture in the following cases: -

9.1 If after completion of e-Auction, a successful bidder fails to make payment for the coal value including all other charges within the stipulated time, the proportionate EMD equivalent to the failed quantity shall be forfeited subject to the provisions at Clause 6.4 and/or Clause 6.5 of this document, and/or,

9.2 If the successful bidders does not lift the booked quantity within the stipulated validity period, the proportionate Security Deposit @ Rs. 200/- per Tonne (as converted from the EMD amount) for the unlifted quantity would be forfeited.



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Such forfeiture shall be made only if the balance Unlifted Quantity is equal or more than a Truck Load i.e.9 or 10 tonnes as applicable.

Such forfeiture, however, would not take place if the coal company has failed to offer full or part of the successful bid quantity within the validity period. In such cases again, no forfeiture would take place if the balance quantity is less than a truck load/rake load.

9.3 If the Buyer cancels the order/Rake after booking, the EMD @ Rs.200/- per tonne shall be forfeited for the rake cancelled.

60. The Commission notes that section 4(2) of the Act states that ‘there shall be an abuse of dominant position’ if an enterprise indulges in any of the activities listed in the sub-section, these being: imposing unfair or discriminatory condition or price including predatory pricing, limiting or restricting production or technical or scientific development, denying market access, imposing supplementary obligations having no connection with the subject of the contract, or using dominance in one market to enter into or protect another relevant market. The abuses in section 4(2) include exploitative abuses such as imposing unfair or discriminatory conditions or prices as well as exclusionary abuses such as denial of market access.
61. Thus, it can be seen that dominant undertakings have special obligations under the Act while formulating terms and conditions for purchase or sale of goods or services. In the instant case, it may be seen that the opposite parties while formulating the terms and conditions of Spot e-Auction Scheme have disturbed the normal contractual equilibrium in as much as uneven obligations are created thereunder. It is self-evident that



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clause 9.2 of the e-Auction Scheme whereby a buyer is saddled with penalty by way of forfeiture of EMD for non-lifting of coal after successful participation in the e-Auction, no corresponding penalty was provided thereunder, if despite acceptance of the bid the opposite parties failed to deliver the coal. Such stipulation in the Scheme is evidently result of market power exercised by the opposite parties and falls foul of the provisions of section 4(2)(a)(i) of the Act being *ex facie* unfair.

62. It may be observed from the DG report that CIL predominantly decides the quantities of e-Auction on the basis of projected monthly production as the NCDP mandates around 10% of the estimated annual production is to be offered through e-auction route. As the sales under the Scheme is based on projected monthly production and the stock indicated by the producing collieries and not on actual production, it was deduced by the DG that coal is not always physically available in advance and in case of production mismatch it might result in short supply of coal for e-auction. In other words, the available stock at site may be less than the quantities offered for e-Auction resulting in default by the CIL under the scheme. Any default of contractual obligations will have commercial ramifications for the parties involved and needs to have corresponding liability on the defaulter. It was noticed by the DG that so far, CIL and its subsidiaries have defaulted on 701 occasions during the last three financial years. This fact itself was noted by the DG to make a strong case for having liability obligations in clause 9.2 of the Scheme, corresponding to the obligations cast on the e-Auction bidder.
63. It was, however, argued by the opposite parties that the DG has failed to recognize that an EMD payable by a purchaser is an absolutely standard term in any contract leave alone a contract for auction, and no reciprocal clause is required for such a term to be considered fair or reasonable in



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as much as the principle underlying such imposition is to act as a deterrent for non-serious and/ or speculative participants from the auction process.

64. There can be no dispute with the stipulation of EMD *per se* in a contract. However, the issue presented before the Commission pertains to lack of mutuality and reciprocity in the contractual obligations which are alleged to arise out of the market power of the opposite parties in the relevant market.
65. An issue which was found not abusive by the DG related to non-reflection of enhanced EMD on the website of CIL. The Commission is also of opinion that this is purely an administrative issue and has no relation whatsoever with competition in the markets. The Commission agrees with the DG on this count.
66. On the issue of OPs earning income/ unduly enriching itself from the interest earned on the amounts collected under the policy/ e-Auction/ forfeiture, the DG concluded OPs has violated the provisions of section 4 of the Act.
67. It was contended by the opposite parties that EMDs are deposited into non-interest bearing current accounts and, therefore, the question of undue enrichment on the part of CIL as a result of interest accruing from the EMD does not arise. Further, it was argued that the DG has failed to provide any evidence in support of his allegations that there has been an interest earned on the EMD deposited. Therefore, the allegations made by the DG are purely speculative in nature and should be rejected by the Commission, as the investigation by the DG must contain more than just conjecture in order to find a violation of the Act.



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68. In this connection it is observed that if EMD is kept in Escrow account and refunded to the unsuccessful bidder from the same account, no violation is found to arise. However, when money is transferred from Escrow account (where EMD is kept) to CIL and its subsidiaries on conclusion of e-Auction and returned back to bidders subsequently in case of non-supply or short-supply upon default by OPs, then it may result in earning profit/ interest by CIL and its subsidiaries on such amount for a specified period, the portion of which must be transferred to the bidders also. Upon successful conclusion of e-auction, EMD of successful bidder is transferred immediately to the account of OPs.
69. It may be further seen from the report of the DG that OPs, after conclusion of e-Auction, get nearly 45 days to supply coal. If it fails to supply coal owing to any reason whatsoever, it simply refunds EMD back to the successful bidder without any interest. OPs would have benefitted and used these funds during the period the same was held by it. In contrast, it may be possible that sometimes the bidder would have used borrowed funds for depositing EMD incurring interest expenditures or foregoing the bank interest on fixed deposit if the funds were to remain invested in banks.
70. The Commission is of opinion that the *extant* practice as projected in the information appears to be skewed in favour of the opposite parties. However, considering the averments made by the opposite parties that EMDs are deposited into non-interest bearing current accounts, the Commission refrains from passing any finding as to unjust enrichment by OPs in abuse of its market power in this regard.



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71. The DG, during the course of investigation, noticed that certain clauses of the Scheme were modified by the opposite parties and proceeded to examine the same. However, after examining the issue of modification of existing clauses and inclusion of new clauses in the terms and conditions of the scheme, the DG, save and except describing the modifications and insertions as “one sided” and “offensive”, has not given any definite finding about the contravention of any specific provision of the Act. It appears that the DG has felt certain safeguards should have been included therein. In this view of the matter, no further findings or observations are required to be noted in this regard.
72. On the issue of stipulated validity period for forfeiture of EMD (*i.e.* for making payment of coal value) within 7 working days of e-auction (*i.e.* clause No. 5.2 of the Scheme), the DG found the clause as raising “competition issue” without any definite finding of contravention.
73. It may be noted that as per clause 5.2 of the Scheme, the successful bidders after the e-Auction, is required to deposit coal value with the concerned coal company, within a period of seven working days, after the date of closing of e-Auction.
74. In this regard, it was observed by the DG that as OPs are auctioning coal for the entire country, the time limit for making balance payment of coal value (net of EMD amount) of only 07 working days after the closure of e-Auction may be a short period to analyze/ enquire the quality of coal offered under that auction in case of a consumer participating from a distant/ remote area. As no finding of contravention has been recorded by the DG, it is unnecessary to dilate any further on this aspect. Suffice to note that the opposite parties may consider providing for a more



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reasonable period to make the balance payments to the bidders and no directions are required to be passed on this count.

Conclusion

75. In view of the above discussion, the Commission is of considered opinion that CIL through its subsidiaries operates independently of market forces and enjoys undisputed dominance in the relevant market of sale of non-coking coal to the bidders under the Spot e-Auction Scheme in India. The Commission also holds the opposite parties to be in contravention of the provisions of section 4(2)(a)(i) of the Act for imposing unfair conditions upon the bidders under the Scheme, as detailed in the order.

ORDER

76. In view of the findings recorded by the Commission, it is ordered as under:

(i) The opposite parties are directed to cease and desist from indulging in the conduct which has been found to be in contravention of the provisions of the Act, as detailed in this order.

(ii) The terms and conditions of Spot e-Auction Scheme 2007 are ordered to be modified in light of the findings recorded in the present order.

77. The opposite parties are further directed to modify the Scheme in terms of the directions contained above within a period of 60 days from the date of receipt of this order.



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78. While considering the issue of imposition of penalty, the Commission takes into account the peculiarity of facts and totality of circumstances involved. In this regard, the contention of CIL regarding social costs and obligations *etc.*, cannot be altogether ignored. Further, the Commission also notes that previously a penalty of Rs. 1773.05 crores was imposed in the recent past upon the opposite parties in matters involving the supply of the same product *i.e.* non-coking coal. In view of the above, the Commission refrains from imposing monetary penalty in the present case.
79. Lastly, it may be observed that counsel for CIL filed a request dated 25.04.2014 seeking annulment of deposition of Shri M.S Mukherjee, GM (S & M- Commercial) before the DG. It was urged that the statements were recorded in the absence of counsel of CIL. It was also submitted that any reliance by the DG upon such statements must be held to be impermissible and ought to be expunged from the DG's report. Failure to do so is stated to result in violation of principles of natural justice. In the application itself it is stated that the counsel of CIL were allowed to remain present in the premises, however, outside the room in which the deposition was recorded. It is also stated that the DG also informed CIL counsel/ legal representatives that in the event of Shri Mukherjee having any query regarding any point of law, he would be allowed to consult CIL's counsel/ legal representatives.
80. The Commission notes that the request is devoid of any merits and does not appear to be founded upon any legal basis. It may be pointed out that section 35 of the Act confers right of appearance through specified professionals upon a party before the Commission. The same has no manner of application to investigations before the DG. The opposite parties have singularly failed to plead and demonstrate any prejudice



much less any miscarriage of justice. In this view of the matter, the application is found to be frivolous and is dismissed as such.

81. The Secretary is directed to inform the parties accordingly.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(M. L. Tayal)
Member

Sd/-
(S. L. Bunker)
Member

Sd/-
(SudhirMital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U.C. Nahta)
Member

New Delhi
Date: 27/ 10 /2014