



COMPETITION COMMISSION OF INDIA

Case No. 60 of 2017

In Re:

**Industries and Commerce Association
I.C.O. Association Road
Dhanbad, Jharkhand – 826001**

Informant

And

- 1. Coal India Limited
Coal Bhawan, Premises No-04-MAR
Plot- AF-III, Action Area-1A
New Town Rajarhat
Kolkata, West Bengal -700156** **Opposite Party No. 1**
- 2. Bharat Coking Coal Limited
Koyla Bhawan
Koyla Nagar, Dhanbad
Jharkhand – 826005** **Opposite Party No. 2**
- 3. Ministry of Coal
Through Secretary
Shastri Bhawan
Dr. Rajendra Prasad Road
New Delhi – 110001** **Opposite Party No. 3**

CORAM

**Mr. Devender Kumar Sikri
Chairperson**

**Mr. Sudhir Mital
Member**

**Mr. Augustine Peter
Member**

**Mr. U. C. Nahta
Member**



Appearances: Shri Subodh Prasad Deo and Shri Tanveer Verma, Advocates alongwith Shri B. N. Singh, President - ICA and Shri Pradeep Chatterjee, General Secretary - ICA for the Informant.

Order under Section 26(2) of the Competition Act, 2002

1. The present information has been filed by Industries and Commerce Association ('the Informant') under Section 19(1) (a) of the Competition Act, 2002 ('the Act') against Coal India Limited ('the Opposite Party No. 1'/'OP-1'/'CIL'), Bharat Coking Coal Limited ('the Opposite Party-2'/'OP-2'/'BCCL') and Ministry of Coal ('the Opposite Party No. 3'/'OP-3'/'MoC) (collectively, 'the Opposite Parties'/'OPs) alleging *inter alia* contravention of the provisions of Section 4 of the Act.
2. The Informant - Industries and Commerce Association - is incorporated under the Companies Act, 1956 comprising of 72 small scale industries (SSIs) that are involved in the manufacture and sale of hard coke.
3. OP-1 *i.e.* CIL is a government company in terms of the provisions of Section 2(45) of the Companies Act, 2013. It enjoys the status of Maharatna company and controls almost the entire production, distribution, supply and sale of non-coking and coking coal in India.
4. OP-2 *i.e.* BCCL is a Miniratna public sector undertaking engaged in the mining of coal and allied activities. Being a wholly owned subsidiary of CIL, it is under the complete control of CIL. BCCL is stated to be the largest producer of coking coal in India.
5. OP-3 *i.e.* MoC is entrusted with the overall responsibility of determining policies and strategies in respect of exploration and development of coal



and lignite reserves, sanctioning of high important projects of high value and for deciding all related issues.

6. It is averred that members of the Informant were purchasing coking coal from OP-2 under the distribution system of “linkage” till introduction of National Coal Distribution Policy (“NCDP”) notified by Ministry of Coal on 18.10.2007. Under this Policy, they were required to receive 75% of their requirement of coal through Fuel Supply Agreements (‘FSAs’) at notified prices to be fixed/ declared by OP-1 and the balance 25% of their requirement was to be met through e-auction/ imports. The first FSA expired in 2013 and the second FSA is due to expire in 2018. It is alleged in the information that BCCL has not even supplied 75% quantity as required by the FSA and are only supplying 40-45% of the quantity agreed.
7. The Informant has challenged various clauses of FSAs pertaining to calculation of price of coking coal, unfair terms for lifting of coal, deemed delivered quantity, unfair renewal terms, security deposits in spite of 100% advance payments, terms that govern compensation *etc.* It is also stated in the information that FSAs also contain many unfair charges such as performance incentive, washery charges, selective loading charges and rapid loading charges, being levied by OP-2 that are to be paid by the purchasers.
8. Further, the Informant has challenged the forward e-auction/ spot e-auction conducted by the OPs which is used by them to meet the 25% requirement of coal that is not met through FSAs. It is alleged that not only are the prices of coal higher by 10% and 20% in forward e-auction and spot e-auction respectively, but also the participation under forward e-auction is unfair and discriminatory between those who are under FSA and those who are not.



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9. It has been further pointed out that after the 7th meeting of the Inter-Ministerial Committee (IMC) held on 24.09.2015, it was decided that coal shall henceforth be distributed through e-auction of linkages and no new FSAs in pursuance of NCDP shall be granted *inter alia* to coal consumers belonging to non-regulated sectors including the members of the Informant.
10. Thereafter, *vide* letter dated 15.02.2016, MoC issued guidelines to CIL regarding auction of linkages for non-regulated sectors. In pursuance thereof, CIL issued a document on 06.05.2017 titled “Scheme Document for Auction of Coal Linkages of Coking Coal in the Other Sub Sectors” with the purpose to provide interested parties with information that may be useful to them in making their bids pursuant to this Scheme Document. Further, CIL has also issued a copy of the Model Fuel Supply Agreement - Non Regulated Sector” (Version dated 09.05.2017) (Model FSA) which is proposed to be executed with the successful bidders in e-auction.
11. Apart from challenging the clauses in the existing FSA as detailed above, which is due to expire in 2018, the Informant has submitted that from 2018 onwards its members would be able to procure coal only if they successfully bid in the e-auction conducted by the parties under the ‘others’ category (under non-regulated sector) which is itself unfair as it would lead to excessive pricing of coal. Thus, the Informant has also challenged the proposed e-auction as the only method of sale of coking coal as being violative of the provisions of Section 4 of the Act. The various clauses of Model FSA, which is to be executed in pursuance of a successful bid in e-auction, have also been challenged by the Informant in the present information.
12. The Commission has perused the information and the documents filed therewith besides hearing Shri Subodh Prasad Deo, the learned counsel for the Informant.



13. The Informant Association comprising of 72 small scale industries that are involved in the manufacture and sale of hard coke, has filed the instant information against CIL and its subsidiary BCCL alleging contravention of the provisions of Section 4 of the Act.
14. By way of background, it may be pointed out that the plants of the members of the Informant Association are situated in and around the coalfields of Jharia (Jharkhand). After the nationalization of coal mines in the early 1970s, the control of the coal mines was taken over by the Government, the members of the Informant association (who were earlier colliery owners operating coal mines in and around Jharia region) set up hard coke production plants (cokeries) around Jharia coalfields. The members of the Informant Association have been procuring coking coal from BCCL for producing hard coke. Hard coke produced by the members of the Informant Association cater mostly to the needs of secondary steel sector *viz.* foundries, ferrous and non-ferrous metal industries, pig iron sector and also to chemical plants to some extent.
15. Post-nationalization of coal mines, the members of the Informant Association have been procuring coking coal under the linkage system from BCCL. BCCL had been supplying a fixed quantity of specified grade of coking coal to the members of the Informant Association from designated coal mines on monthly basis.
16. On 18.10.2007, the Ministry of Coal introduced the New Coal Distribution Policy (NCDP). Under the said NCDP, the members of the Informant Association are required to receive 75% of their requirement of coal through Fuel Supply Agreement (FSA) at notified prices to be fixed/declared by CIL and balance 25% of their requirement through e-auction/import. Before the introduction of NCDP, it is averred in the information that the members of the Informant Association were receiving assured,



prioritized and specified quantities, qualities (grade) and sources (mines) of coking coal from BCCL at notified prices.

17. Since the introduction of NCDP in 2008, the members of the Informant Association have entered into two consecutive FSAs with BCCL of five years each. The first FSA expired in 2013 and the second FSA is due to expire in 2018. As such, the Commission is of the opinion that the present information has been filed at a very belated stage when the FSAs are about to expire and no reasons whatsoever have been assigned for approaching the Commission at this stage. As would be pointed out below, the real trigger for filing the present information appears to be a paradigm change in the policy framework effected by the Government of India whereby and where under coal linkages are proposed to be auctioned for non-regulated sector through competitive bidding (after expiry of the existing FSAs in 2018) instead of granting the same through *extant* administrative dispensation method.
18. As pointed out earlier, the FSAs between the members of the Informant and BCCL are set to expire in 2018. In terms of the guidelines issued by the letter of Ministry of Coal dated 15.02.2016, addressed to CIL, the aforesaid FSAs would not be renewed and the members of the Informant would be able to procure coal only if they successfully bid in the e-auction conducted by OPs under the 'others' category for non-regulated sector. Pursuant to the issuance of the aforesaid letter, CIL has issued a document dated 06.05.2017, titled "Scheme Document For Auction of Coal Linkages of Coking Coal in the Others Sub-Sector" and also "Model Fuel Supply Agreement – Non-Regulated Sector (Version dated 09.05.2017)".
19. The Informant submits that the process of e-auction is in respect of a scarce and otherwise essential commodity, like coking coal, in the context where the price of the end product is not controlled. Accordingly, e-auction of such a commodity by a dominant enterprise, being monopolist,



can only yield the highest price, which has the effect of imposition of unfair and excessive prices upon the purchasers and the end consumers. Thus, it is alleged that such conduct of the dominant entity that results in imposition of unfair and excessive prices upon the purchasers and the end consumers is *ex-facie* exploitative in nature. Such conduct violates the provisions of Section 4(2)(a) (i) & (ii) of the Act.

20. The Informant has highlighted that its members run small scale plants to manufacture hard coke and have limited resources. Sourcing coking coal at premium rates in the iterative rounds of the e-bids would be particularly onerous and oppressive for their business. E-auction of coking coal will also lead to uncertainty and variability in the price of hard coke, which will adversely affect the ability of the members of the Informant to offer any specific rates to their customers. Accordingly, sale of coking coal only through e-auction will severely affect their ability and freedom to carry on their trade. One attendant grievance of the Informant on this count pertains to putting manufacturers of hard coke in the category of “Others” alongwith miscellaneous industries. It is alleged that without the said term (“Others”) being properly defined and comprising of miscellaneous industries of varying economic strength amounts to imposition of unfair and discriminatory condition that violate the provisions of Section 4(2)(a)(i) &(ii) of the Act.
21. To bring the aforesaid challenge within the framework of the Act, the Informant has sought to bring Ministry of Coal within the purview of the definition ‘enterprise’ by arguing that the e-auction method can only lead to generation of supra-normal revenue to itself / profits for the companies under its control.
22. Further, the Informant has argued that MoC, CIL and BCCL form ‘Group’ by arguing that BCCL is a fully owned subsidiary of CIL and under complete control of CIL, which itself is under the control of MoC. Hence,



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they together belong to the same 'Group' as defined under Explanation (b) to Section 5 of the Act.

23. The Commission is of opinion that the entire approach and reasoning adopted by the Informant is tenuous. While formulating policies, MoC is not engaged in any of the activities specified in Section 2(h) of the Act which defines 'enterprise'. Formulation of policies does not fall in the realm of commercial or economic activity as envisaged under the definition of the term 'enterprise' as given thereunder. Hence, it is unnecessary to examine as to whether MoC, CIL and BCCL constitute 'Group' for the purposes of Section 4 read with Explanation (b) to Section 5 of the Act.
24. The challenge by the Informant to model FSA is also highly premature. The auctions for grant of linkages are yet to be conducted. Thus, at this stage, any examination of the terms of Model FSA would be a speculative exercise until the FSAs are executed by the successful bidders in the e-auction and the final terms are concretized.
25. For the reasons given above, the Commission is of the opinion that the change in policy by Ministry of Coal for grant of linkages through e-auction is not amenable within the purview of the Act. Consequently, the challenge to model FSA proposed thereunder is also speculative and premature.
26. In view of the above, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against the Opposite Parties and the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.



27. The Secretary is directed to communicate to the Informant, accordingly.

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

**Sd/-
(Sudhir Mital)
Member**

**Sd/-
(Augustine Peter)
Member**

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

New Delhi
Date: 06/02/2018