COMPETITION COMMISSION OF INDIA

Case No. 46 of 2018

***In Re*:**

Hindustan Zinc Limited
Yashad Bhawan
Udaipur
Rajasthan - 313004 **Informant**

And

1. **Western Coalfields Limited**
   Coal Estate, Civil Lines
   Nagpur, Maharashtra-440001 **Opposite Party No. 1**

2. **Coal India Limited**
   Coal Bhawan, Premises No. 04
   MAR, Plot No. AF-III
   Action Area-1 A, New Town
   Rajarhat, Kolkata
   West Bengal-700156 **Opposite Party No. 2**

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

ORDER

1. The present information has been filed by Hindustan Zinc Limited (**'the Informant'**) under Section 19(1)(a) of the Competition Act, 2002 ('**the Act**') against Western Coalfields Limited (**OP-1/ WCL**) and Coal India Limited (**OP-2/ CIL**) (**collectively, as 'OPs'**) alleging *inter alia* contravention of the provisions of Section 4 of the Act.

2. The Informant, a company incorporated in India under the Companies Act, 1956 with its registered office at Udaipur, Rajasthan, is in the business of producing zinc, lead and silver. For carrying out its production activities, the Informant has two thermal captive power plants having a combined capacity of 474 MW.

3. OP-1, a company incorporated in India under the Companies Act, 1956, is one of the eight subsidiary companies of OP-2. It has mining operations spread over the States of Maharashtra and Madhya Pradesh and is a major supplier of coal to industries located in the States of Western and Southern India including Maharashtra, Madhya Pradesh, Gujarat, Andhra Pradesh, Tamil Nadu, Karnataka and Kerala.

4. OP-2 is a company registered under the Companies Act, 1956 and came into being in November 1975. As stated in the Information, OP-2 is the largest coal producer in the world and has been conferred the status of a Maharatna Company by the Government of India. OP-2 has 7 wholly owned coal producing subsidiaries (including OP-1) and a mine planning and consultancy company and is responsible for the entire tendering process conducted for sale of coal by its subsidiaries. It is also entrusted with the requisite powers to formulate policies and carry out the entire e-tendering process.

5. The Informant, for operation of its captive power plants, had entered into three Fuel Supply Agreements (FSAs) with OP-1 all dated 01.08.2017. It is stated that the Informant requires a supply of approximately 27 Lakh MT of linkage coal with GCV of 4000 Kcal/ kg on an annual basis. It is averred that upon entering into FSAs, the Informant has become dependent on OP-1 for supply of coal to operate its captive power plant. However, the supply of coal is at the whims and fancy of OP-1, which has not only failed to supply the required quantity of coal but has also not been able to supply the requisite quality of coal, as laid down under the FSA. The failure on part of OP-1 to meet its obligations under the FSA is causing tremendous hardship to the Informant and resulting in incurring of heavy losses. Due to shortage of supply of coal as well as the poor quality of the coal being supplied by OP-1, the direct and indirect losses accruing to the Informant are in the region of approximately INR 264 crores in less than a year from the operation of the FSA. Moreover, OP-1 has inserted a lock-in period of 2 years in the FSA, thereby forcing the Informant to accept low quantities of inferior coal for at least one more year and therefore the Informant would continue to suffer or be impacted by similar huge losses for the remainder of the Lock-in period.

6. In sum, the Informant has alleged that OP-1 has abused its dominant position by imposing unilateral and unfair conditions in the FSAs and acted in a discriminatory manner during supply of coal to the Informant, which constitute illegal purchase/ sale conditions under Section 4(2)(a) of the Act. It has been pointed out that a glance at the FSAs goes to show how the FSAs as well as the subsequent conduct of OP-1 is unilateral, oppressive and unfair, thereby enabling OP-1 to abuse its dominance.

7. Based on the above averments and allegations, the Informant has filed the instant information against CIL and its subsidiary WCL alleging abuse of dominant position in violation of the provisions of Section 4 of the Act.

8. The Commission has perused the Information and the documents filed therewith.

9. It is observed that the Informant has two captive thermal power plants to carry out its production activities with a combined capacity of 474 MWs. The Informant is stated to require a supply of 27 Lac MTs of linkage coal on an annual basis. The Informant, in 2017, participated in an electronic auction for grant of the coal linkages, pursuant to which it qualified as a successful bidder for Umrer Siding and Ghugus Old Siding operated by OP-1 for a total allocated quantity of 5,52,300/- tons of coal in accordance with the 2017 Scheme for auction of coal linkage in the Captive Power Plant Subsector. The Informant thereafter had been issued Letters of Intent ('LOI') dated 23.06.2017 by OP-1 in terms of which *inter alia* the Informant became entitled to enter into a Fuel Supply Agreement. The Informant, before entering into the three distinct FSAs, also submitted three unconditional and irrevocable bank guarantees each dated 12.07.2017 for a cumulative amount equal to Rs. 4,43,09,520/-. Thereafter, the Informant entered into three separate FSAs with OP-1, all dated 01.08. 2017, each of the agreements being valid for a period of 5 years. It is the case of the Informant that it had no negotiating power in regard to the terms and conditions of the FSAs. Further, it is stated that the Informant was in no position to seek alteration of the otherwise wholly onerous and one-sided clauses of the FSAs. Based on these allegations, the Informant has impugned various clauses of the FSAs and conduct of the OPs arising therefrom, which are alleged to be in contravention of the provisions of Section 4(2)(a) of the Act.

10. Before examining the allegations made by the Informant, it would be appropriate to determine the relevant market. In this regard, it is observed that the Informant requires supply of non-coking coal to operate its captive thermal power plants for carrying out its production activities *i.e.*

production of zinc. Hence, based on the delineation of relevant market in earlier coal cases *i.e.* Case Nos.03, 11 & 59 of 2012 and more particularly Case No. 08 of 2014 where the consumer of non-coking coal was a soda ash manufacturer who required coal for its captive power plant, the Commission is of the view that the relevant market in the instant case would be '*production and sale of non-coking coal to thermal power producers including captive power plants in India*'.

11. In the aforesaid relevant market, the Commission in the previous coal cases, as detailed in the preceding paragraph, has found CIL and its subsidiaries to be in a dominant position. Hence, it is not necessary to dilate any further on this aspect particularly in the light of the statutory architecture governing mining, production and supply of non-coking coal in India.

12. On abusive conduct, the Informant has raised various issues emanating out of FSAs executed with the OPs, which are alleged to be in contravention of the provisions of the Act. Specifically, the Informant has alleged the following abusive conducts:-

    i. Short supply of coal by WCL *i.e.* supply of coal below 30% of the contracted quantity and diversion of coal supply to Independent Power Producers as also non-payment of compensation therefor. As per clause 5.5 of the FSA, if for a year, the level of delivery by the seller or the level of lifting by the purchaser falls below 75%, then the defaulting party shall be liable to pay compensation to the other party for such short fall as prescribed under the said clause. Under clause 17.2 of the FSA, certain termination events are laid down and on happening of any of such events as mentioned under the said clause, the FSA can be terminated by the parties in the manner as specified thereunder. In the termination events, if the

delivery or lifting falls below 30% then parties can terminate the agreement subject to lock-in period. Further, delivery by OP-1 has fallen below the prescribed limit and OP-1 is neither paying the compensation as prescribed in the FSA nor the Informant has option to terminate the FSA before the lock-in period of 2 years, as detailed in the succeeding paragraphs.

ii. Unilateral revision of contracted grade of coal from G-9 to G-10. In fact, it is alleged that the Informant is being supplied coal that is 3-4 grades lower than the contracted grade of coal.

iii. Lock-in period of 2 years to terminate the contract. Under clause 17.2 of the FSA, certain termination events are laid down and on happening of any of such events as mentioned under the said clause, the FSA can be terminated by the parties in the manner as specified thereunder. Such termination events cannot be triggered by the Informant for the first two years after signing the FSA on account of the Lock-in period provided in clause 17.1. This bar on termination of the FSAs is applicable even if the coal being provided is of extremely inferior quality or the quantity of coal being supplied falls well below the contracted quantity.

iv. Unilateral appointment of a third party agency by OP-1 for sampling at the time of delivery of coal. The FSA provides for the Informant to avail the facilities of a third-party agency as provided under the procedure laid down in Annexure VII of the FSA for sampling of the quality/ grade of coal and determine if the same is at variance with the Contracted Grade of Coal. As per Annexure VII of the FSA, if the coal is being supplied by Rail, the Informant has a right to appoint the Third Party Agency and only in case of

supply being made by Road, would appointment of Third Party Agency be at the sole discretion of OP-1.

v. Failure of OP-1 to adjust the excess Royalty and contributions to District Mineral Foundation ("DMF") and National Mineral Exploration Trust ("NMET") paid by the Informant. Under the FSA, OP-1 charges royalty, DMF, NMET *etc*. on the coal supplied. FSA mandates that the royalty, DMF, NMET *etc*. will be charged on the Contracted Grade of Coal. The OP-1, therefore, has failed to refund the Informant excess Royalty, DMF and NMET on account of inferior coal being provided.

13. On a careful perusal of the information and the averments/ allegations made therein, the Commission notes that in the previous coal cases [Case Nos. 03, 11 & 59 of 2012 decided on 24.03.2017; Case Nos. 05, 07, 37 & 44 of 2013 decided on 21.04.2017 and Case No. 08 of 2014 decided on 21.04.2017], the issues highlighted by the Informant (sampling procedure, grade slippage/ mis-declaration of grades, etc.) have been substantially addressed by issuing appropriate directions to CIL and its subsidiaries. The Informant has also admitted this position in the Information by stating "It is pertinent to note that this Hon'ble Commission have in earlier Informations filed before it, dealt with similar issues regarding, quality of coal, sampling, quantity of coal being supplied, compensation, and termination". As such, no further or other orders are required to be passed in this information and the same may be disposed of in light thereof.

14. So far as the grievance of the Informant pertaining to Lock-in period as provided in clause 17 in the FSAs is concerned, the Commission notes that on a holistic reading of the provisions contained therein, it is apparent that clause 17.1 of the FSAs categorically provides that in the event the purchaser terminates the agreement prior to expiry of the Lock-in period of

2 years *for reasons other than on account of the sellers default*, the seller shall be entitled to invoke the performance security in its entirety and the purchaser shall be disqualified from participating in the immediately subsequent tranche of any auction for the non-regulated sector conducted by CIL. Thus, no prohibition is found in the said provision and the purchaser is entitled to terminate the agreement without being bound by the Lock-in period if such termination is occasioned due to the default at the seller's end. The issues pertaining to adjustment of extra royalty charged by OP-1 are in the realm of revenue besides being contractual in nature, and hence, do not raise any competition issue.

15. It may also be pointed out that previously, the Commission had disposed of an Information (Case No. 11 of 2017 decided on 16.03.2018) against CIL and its subsidiaries where similar allegations were found to be made.

16. Before parting with this order, it is observed that the role of the Commission as envisaged under the Act is to eliminate market practices and distortions which may affect competition in markets. Such role is clearly in the nature of inquisitorial process in contradistinction to the adversarial proceedings before the ordinary courts under common law system. Resultantly, the orders issued by the Commission are *in rem* and not *in personam*; as such once an order is issued by the Commission to address market failure, the Commission need not order investigations based on successive Informations which may be brought before it by different parties agitating the same issues. To order investigations upon such repeated Informations would strain the limited resources of the Commission as well as the DG, without achieving any tangible public good.

17. In view of the above discussion, the Commission is of the considered opinion that no further/ other order is required to be passed in respect of

present Information and the same stands disposed of in terms of the directions issued by the Commission in the previous cases decided against CIL and its subsidiaries and would abide by the orders of the Higher Judicial Forums in the appeals preferred thereagainst.

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

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Augustine Peter)
Member

Sd/-
(U.C. Nahta)
Member

New Delhi
Date: 03/12/2018