

BEFORE THE

COMPETITION COMMISSION OF INDIA

Case No. 04 of 2010

Information filed on 05.02.2010

Date of Order: 26.07.2011

Informant : Explosive Manufacturers Welfare Association

Through : Chirag Jamwal , Advocate

Opposite Parties : Coal India Limited and its Officers

Through : Pallavi Shroff, Shweta Shroff, Harman Singh Sandhu,  
Advocates, Amarchand & Mangal Das & Suresh A.  
Shroff &Co



## Order

### 1. Background

The case under consideration relates to allegations of certain anti-competitive acts on the part of Coal India Limited. It has been alleged that in violation of provisions of Section 3 and 4 of the Competition Act, 2002 (Act), Coal India Limited has engaged itself in unfair and discriminatory practices, has denied market access and has entered into anti-competitive agreement with supplier(s).

### **Profile of Parties in the Case**

1.1 Before going into the details of allegations, proceedings before the office of the DG and Commission and response of different parties, a brief profile of different parties involved in the case is discussed first.

#### **A) The Informant**

1.1.1 The informant in this case is Explosive Manufacturers Welfare Association. It is a society registered under the West Bengal Societies Registration Act, 1961 comprising of various manufacturers who are engaged in the business of manufacture and sale of industrial explosives. The association is having registered at Kolkata, West Bengal.



## **B) Respondent**

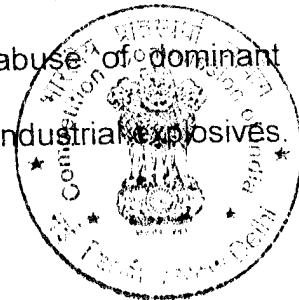
### **Coal India Limited**

1.1.2 Coal India Limited, the Opposite Party (OP) is a Schedule 'A' Maharatna Public Sector Undertaking under Ministry of Coal, Government of India. It has its headquarters in Kolkata, West Bengal. CIL produces coking and non-coking coal of various grades for a number of applications. As of March 31, 2010, it operated 471 mines in 21 major coalfields across eight states in India, including 163 open cast mines, 273 underground mines and 35 mixed mines (which include both open cast and underground mines). It also operated 17 coal beneficiation facilities with an aggregate designed feedstock capacity of 39.40 million tons per annum. CIL has nine direct Subsidiaries and two indirect Subsidiaries, namely, Bharat Coking Coal Limited, Central Coalfields Limited, Central Mine Planning and Design Institute Limited, Eastern Coalfields Limited, Mahanadi Coalfields Limited, Northern Coalfields Limited, South Eastern Coalfields Limited, Western Coalfields Limited, Coal India Africana Limitada, MJSJ Coal Limited and MNH Shakti Limited.

## **2. Information**

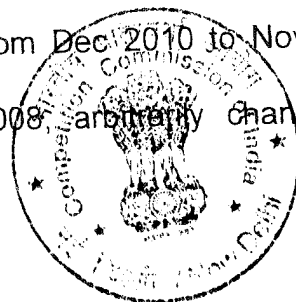
2.1. The facts and allegations in the matter, in brief, are as under:

2.1.1 The Informant <sup>has</sup> provider (IP) has alleged that the OP has acted in violation of the provisions of the Act regarding anti-competitive agreements (Section 3 of the Act) and abuse of dominant position (Section 4 of the Act) in the procurement of industrial explosives.



2.1.2 The Informant has submitted that OP, a dominant consumer of explosives consuming more than 60% of total explosives, as part of its requirement for the purpose of its mining activities invites open tenders for procurement of Industrial explosives on regular basis. The existence of members of IP, being small scale undertakings is largely dependent upon OP, as they have no other prospective consumers other than the OP. However, for the past few years, OP has been arbitrarily pressurizing the members of the Informant association into entering agreements and contracts for procurement of the explosives, by incorporating unrealistic and unfair conditions in the tender documents, making it mandatory and unconditional for acceptance by the participants.

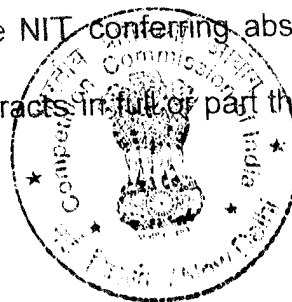
2.1.3 According to the informant association, against NIT dated 04.07.2008 for the supply of Bulk Loading and Cartridge explosives, its members participated in the tender for a period of three years, viz; 2008-09, 2009-10, 2010-2011 and on the basis of vendor qualification (evaluated by OP), the qualified and eligible bidders entered into Running Contracts with the OP for a period of three years. The agreements executed by OP in connection with these contracts were unfair and discriminatory. As per the agreement, the first term of the Running Contract started from Dec. 2008 to Nov. 2009. The second term was to initiate from Dec. 2009 to Nov. 2010 and third and the final term from Dec. 2010 to Nov. 2011. However, OP vide letter dated 28.11.2008, arbitrarily changed the



duration of contract from three years to one year and vide letter dated 28.10.2009, terminated all Running Contracts including Reserve Running Contracts pertaining to Cartridge Explosives and Accessories and also Bulk Loading explosives with effect from 01.12.2009. OP further directed members of IP to continue supplies beyond 01.12.2009 as per the provisions of the Running Contract till 30.4.2010 or till the finalization of new contracts, even when on termination of any contract, the terms and conditions of the contract cease and are treated as null and void.

2.1.4 The IP has further submitted that OP vide letters dated 11.12.2009 intimated it to review the price payable for extended contract (w.e.f. 01.12.2009) pertaining to Bulk Explosives and also for Cartridges Explosives and Accessories. OP also pressurized its members to lower their pre-fixed prices for the extended contract. Since after the execution of the contracts, various members of the IP had invested large capital on manufacturing and supply of the explosives to the OP, abrupt and arbitrary termination of the contract resulted in huge debts which were leading to closure of their numerous facilities and units.

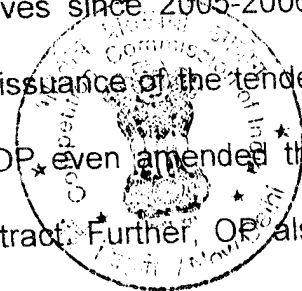
2.1.5 It has further been alleged in the Information that OP has included clauses 23, 25 and 26, amongst others, in the NIT conferring absolute powers on itself to alter or to terminate the contracts in full or part thereof without assigning any reason(s).



2.1.6 The IP has also submitted that OP has also entered into a long term 05 (five) year private agreement with IOCL-IBP (a large scale PSU functioning under Ministry of Petroleum) for supply of explosives, without inviting any tender. IOCL-IBP combine has been given a quantity preference of 20% of the total yearly requirement and 10% price preference over the members of IP. In addition to the above, the IOCL-IBP has also been assured of increased order quantities at the rate of 20% of the total tendered quantity for every subsequent year. IP has alleged that the above action of OP eliminates the spirit of competition by enhancing the purchasing power of the preferred contractor and virtually kills the competition.

2.1.7 It has further been alleged that the quantity variation clause in the NIT, mandates allocation of a minimum of 80% and maximum of 120% of the order at the same terms, conditions and price. However, the acceptance level by the subsidiary companies of the OP from the members of the IP did not exceed 60% of the awarded quantity. The said deviation in procurement by the subsidiaries of OP was not due to the fall in actual requirement, but because the remaining quantity was procured by giving undue preference to IOCL-IBP.

2.1.8 IP has also stated that OP wrongly treated the Powder Factor as a yardstick to evaluate the performance of explosives since 2005-2006, discriminatorily amended the Rate Contract after issuance of the tender and its final negotiations and in one case, the OP even amended the Rate Contract even after issue of the Rate Contract. Further, OP also



delays refund of security deposits and security deposits running into crore of rupees are retained by it even after the expiry of the contracts.

2.1.9 The informant has further submitted that OP has also introduced the price bid reverse auction process as per which the eligible bidders are made to contest the offered prices to the lowest extent in order to retain the market position. These phenomena directly and substantially lead to the introduction of forced predatory prices. OP, in its recent NIT dated 09.10.2009, has incorporated a clause on price ceiling, which unfairly makes the price ruling on the day of reverse auction as a bench mark price.

2.1.10 The IP has alleged that due to its actions and conduct, OP has grossly misused its position as a dominant buyer by adopting unfair practices which can be classified as an abuse of dominant position as per Section 4 of the Act. IP has also alleged that the OP has entered into anti-competitive agreements and therefore violated Sections 3(1), 3(3)(a) & 3(3)(b) of the Act.

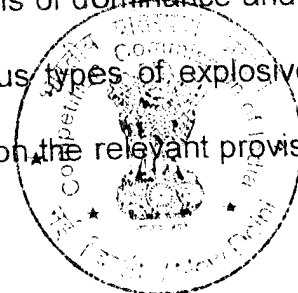
3. After examining the allegations raised by the Informant and the available material on record, the Commission having formed an opinion that there exists a *prima facie* case in the matter, vide order dated 11.03.2010 referred the matter to the Director General (DG) under Section 26(1) for investigation into the alleged violations of the Act.



4. Pursuant to the order passed by the Commission, the DG conducted the investigations and submitted his investigation report dated 07.03.2011 to the Commission.

### **5. Findings of the DG investigation report**

- 5.1 Keeping in view the allegations in the information, the DG identified following broad issues for investigation:
- i. Whether the Opposite Party is a dominant player in the relevant market and whether this position of dominance is being abused by it in any manner in violation of provisions of Section 4 of the Act;
  - ii. Whether the terms and conditions prescribed by OP in its NIT (Notice Inviting Tender) and the changes in the procurement policy are unfair and discriminatory and;
  - iii. Whether the agreement with IOCL-IBP is anti-competitive causing any appreciable adverse effect on competition within India;
- 5.2 In order to analyse the issues involved in the matter, the DG, called for information from the OP and Information provider, recorded statements of certain persons and considered other relevant material in course of proceedings.
- 5.3 DG in the context of examination of allegations of dominance and abuse thereof on part of OP, after analysing various types of explosives and their usages and after taking into consideration the relevant provisions of

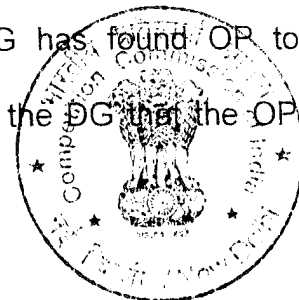




the Act has defined the relevant product and relevant geographic market as *the market for "consumption of bulk and cartridge explosives within the national boundaries of India"*.

5.4 The DG has noted that in this case OP is a buyer and therefore it should be looked into whether it has monopsony power. Analysing the factors in Section 19(4) of the Act, DG has arrived at the conclusion that OP consumes about 65% of total industrial explosives consumed in the country. Thus, based upon its market share as a consumer of industrial explosives, DG has found OP to be a dominant player in the market of consumption of industrial explosives. In size and resources, it has been observed by DG that during 2009-10, OP produced 431.26 million tonnes of coal. The other companies like TISCO, IISCO, DVC and Singareni Coal Company Limited produced smaller quantities compared to the OP. Based on the size of the operations, DG has found that the OP is the largest producer of coal having sales of Rs.52187.79 crore and net profit of Rs.9622.45 crore during the year 2009-10.

5.5 It has also been observed by DG that about 90% of the industrial explosives are used in the mining sector out of which OP consumes about 65% for its operations and remaining 25% are used by others. Therefore, based on the size and importance of the competitors so far as it relates to consumption of explosives, DG has found OP to be a dominant player. It has also been noted by the DG that the OP has 9

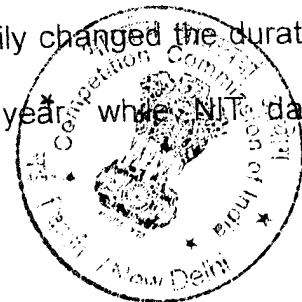


direct subsidiaries and 2 indirect subsidiaries and is completely integrated in terms of its operations, having major commercial advantage, which helps it in maintaining position of dominance. According to DG, the OP remains the only developer in coal mines in India for non-captive purposes besides Singareni Coal Company Limited and other State Government controlled companies. The Coal Mines owners in Steel, Cement, Power sectors have been allotted coal mines based on a captive requirement only. The entry barriers due to Coal Mines (Nationalisation) Act, 1973 prevent the entry of other players in the coal mining industry which is the main consumer of industrial grade explosives in India.

5.6 Based on the market share in consumption of industrial explosives, size and resources, comparative position of the other consumers, existing policies of the Government, DG has held OP to be a dominant player (consumer) in the relevant market of consumption of industrial explosives, wherein suppliers of explosives have no countervailing power.

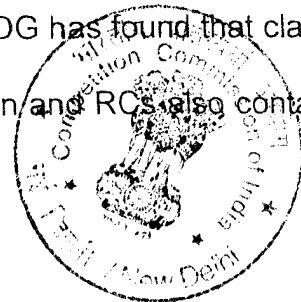
5.7 DG after determining the position of dominance of OP has proceeded to examine the allegations in the information.

5.7.1 As regards the allegation that OP arbitrarily changed the duration of contract from three years to one year, while NIT dated



04.07.2008 invited tenders for supply of explosives for a period of three years from 2008-09 to 2010-11, after analysing various clauses of the NIT, the terms of Running Contracts and the decision of the Board, DG has arrived at the conclusion that it is incorrect to say that OP has reduced the duration of the contract from three years to one year period arbitrarily. DG has concluded that only the NIT had indicated three years duration and the Running Contracts which were the actual agreement between OP and its various suppliers were entered only for a period of one year in terms of conditions set out in NIT dated 04.07.2008 and as approved by the Board of OP. DG has also concluded that the clauses relating to reduction in contract period in the NIT and RCs are normal business contractual clauses and there appears to be no abuse or arbitrariness on the part of OP on this account.

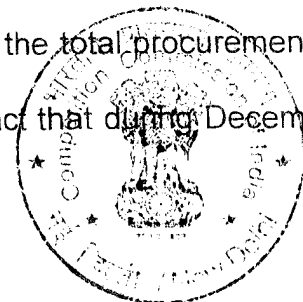
5.7.2 DG has also rejected the allegations of the Informant that OP terminated the Running Contracts in unjust and abrupt manner considering that whole process of thinking was involved in it and decisions were carried out in terms of the conditions set out in NIT and in Running Contracts. DG has also concluded that OP in order to get continued supplies of explosives rightly extended the period of RCs by another five months. As regards lowering of prices below the pre-negotiated prices, DG has found that clauses of the Tender provided for price variation and RCs also contained



provisions for quarterly price revision. OP had revised the prices based on a reworked formula to protect and safeguard its interest. The Informant also had offered to discuss the pricing issue as per mutual comfort of both the parties and had written a letter dated 13.10.2009 to OP to this effect in response to which OP had indicated in its letter dated 11.12.2009 about possible variation in prices. Thus, according to DG, there is no merit in the allegation of Informant that OP pressurized it to lower the prefixed prices of the explosives for the extended period of contract.

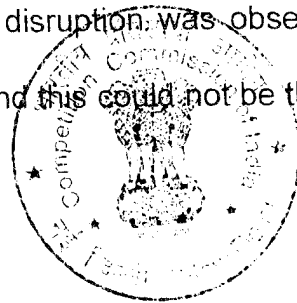
5.7.3 DG in course of investigation has also found that price variation formula in the IOCL agreement is applicable within a +/-10% limit of the price finalized in Running Contracts concluded pursuant to the open tender by OP. As a result, the price payable to IOCL may either exceed or may be lower than the price paid under other Running Contracts by upto 10%, which is fair and beneficial to both the parties. DG has therefore, not found any merit in the allegations of IP that IOCL has been given 10% price preference over the members of IP.

5.7.4 DG has also found that allegations that OP has procured more than 20% of the quantity from IOCL at the cost of other suppliers is not substantiated since the agreement with IOCL itself restricts the supplies to the extent of 20% only of the total procurement of OP. It also gets substantiated from the fact that during December



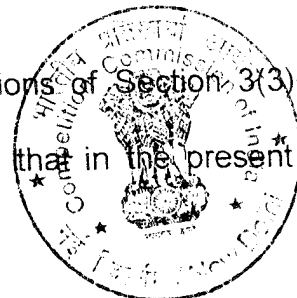
2008 to March 2010, procurement from IOCL was not more than 14.5% of the total quantity procured by the OP.

- 5.7.5 DG in this regard has also submitted that OP as a commercial undertaking needs to maximize its performance and is, therefore, within its right to prescribe the quality aspects of the raw material it procures for carrying out its operations. Therefore, there is no merit in the allegation of the IP that the powder factor benchmark is an irrational benchmark for evaluating the performance of the explosives. Further, DG has also stated that issue of refund of security deposit is a commercial issue and does not merit any attention from the competition angle.
- 5.7.6 As regards, reverse auction process and e-procurement, DG has found that it has brought transparency in the auction system and therefore there is no merit in the allegation of IP on this issue.
- 5.7.7 DG, however, has found merit in the allegations that OP has finalized agreement with IOCL-IBP and entered into contract for five years as against Running Contracts for one year, which OP generally enters into with other explosive suppliers. DG has noted that reasons advanced by the OP that long term contract with IOCL-IBP was necessary in the wake of disruption in supplies by the informant were not valid, since disruption was observed only on 2-3 occasions in last 6-7 years and this could not be the reason



for sourcing 20% of the requirements of explosives from only one supplier.

- 5.7.8 DG has submitted that the exclusivity in the agreement granted to IOCL has the affect of limiting and restricting the market for production of explosives by other suppliers as they are unable to compete for that portion of the market. Further, the tenure of the agreement is not limited to only one year as is the case with other suppliers. Rather, the OP has fixed the initial tenure of the long term agreement for a period of five years. This fixed period tenure of fixed quantity completely drives existing competitors out of the market for 20% of explosive requirements of CIL. Thus, the conduct of CIL is abusive so far as it relates to restricting the market for other competitors due to its agreement with IOCL-IBP. Therefore, the agreement dated 31.07.2008 entered into by CIL with IOCL constitutes abuse of dominant position by CIL in terms of Section 4(2)(b)(i) of the Act.
- 5.7.9 DG has also found that by entering into an agreement with IOCL-IBP, OP has indulged in the practice which has resulted in denial of market access to other manufacturers and suppliers of explosives thereby violating provisions of Section 4(2)(c) of the Act.
- 5.7.10 Regarding, the applicability of provisions of Section 3(3)(a) and 3(3)(b) of the Act, DG has observed that in the present case it



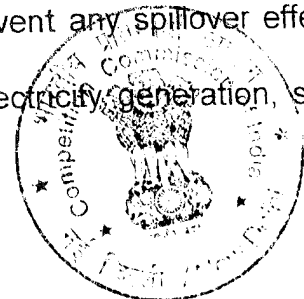
cannot be said that parties (IOCL-IBP and OP) involved are engaged in similar trade of goods or provision of services. Therefore, there cannot be a case of applicability of Section 3(3) in the present information. As regards applicability of Section 3(4), it has been stated by DG that conditions in the contract cast an obligation on OP to refuse to deal with other manufacturers of explosives in India to the extent of 20% of their requirements for a period of five years thereby foreclosing competition completely in the relevant market of procurement of explosives to that extent. The exclusivity provision in the Running Contracts is therefore a vertical restraint under Section 3(4) (b) of the Act as the agreement has the effect of an exclusive supply agreement. Further, the five years fixed term and 20% fixed quantity procurement also cast an obligation on OP to "refuse to deal" with other competitors, which is in violation of Section 3(4)(d) of the Act.

6. The Commission considered the DG report in its meeting held on 05.05.2011 and decided to send a copy of the investigation report (public version) to the parties for filing their replies/objections within two (2) weeks from the receipt of the report. The Commission also directed the Informant as well as the OP to appear for oral hearing if they so desire. The informant vide letter dated 12.04.2011 withdrew its



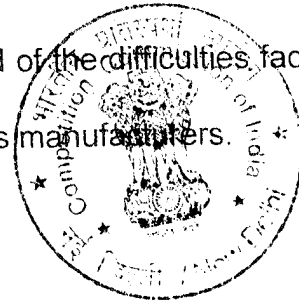
information stating that they have reached an informal understanding with the OP to clear and resolve the issues amicably.

- 6.1 On behalf of OP, Ms. Sweta Shroff Chopra and Mr. Harman Singh Sandhu, advocates from Amarchand & Mangal Das & Suresh A. Shroff & Co. appeared before the Commission. The OP, in course of proceedings, has inter-alia submitted as under:
- 6.2 The OP has denied that it has engaged in any anti-competitive behaviour, either by way of abuse of its alleged dominant position or through entering into an allegedly anti-competitive agreement. It also requested for clubbing of case filed by it against the informant (Case No.6 of 2011) stating that the issues being decided in this case are intrinsically linked and have significant overlaps.
- 6.3 The OP has also denied that it is a party to any anti-competitive agreement entered into in contravention of Sections 3(1) and 3(4) of the Act. On the contrary, it has submitted that the IOCL-IBP contract is beneficial for consumers of coal and promotes the economic development of the country in a time of worldwide recession by ensuring that it always has adequate and secure supplies of explosives to continue its mining operations and by securing supplies of coal for India's rapidly expanding infrastructure sectors. OP has also submitted that secure and constant supplies of coal prevent any spillover effects on industries dependant on coal, such as electricity generation, steel manufacturing etc.





- 6.4 As per the OP, it is not dominant and under no circumstances has engaged in any abusive conduct in any of the relevant markets, in contravention of Section 4(1) of the Act.
- 6.5 The OP has further submitted that the DG has misstated the facts and ignored the material fact that constituent members of the Informant had, on at least three occasions, collectively stopped supplies of explosives to it. The OP has been victimized by a cartel of the explosives suppliers, who on several occasions threatened and actually cut-off supplies of explosives to it. As per the OP, if explosives were not supplied to it, it might have been forced to shut its mining operations in a matter of days.
- 6.6 Accordingly, as per the OP, the IOCL-IBP contract was entered into solely as a result of the illegal conduct of the explosives suppliers and intermittent stoppages in the supply of explosives by them and this reason was clearly documented in a note for the 240<sup>th</sup> meeting of its Board of Directors. Failure by the DG to take into consideration this fundamental fact points towards the inadequacy of the DG's investigation. The suppliers of explosives acted illegally in order to 'arm-twist' the OP into agreeing to their unreasonable demands and excessively high prices for explosives and at all times, the Ministry of Coal, Government of India was fully apprised of the difficulties faced by the OP owing to the misconduct of explosives manufacturers.

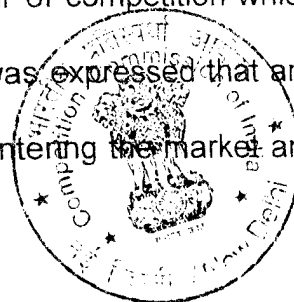


- 6.7 As per the OP, it was compelled to take corrective measures such as entering into contract with IOCL-IBP after facing consistent threats and collective boycotts from members of the Informant. The OP has also submitted that the Members of the Informant continue to engage in collusive activities and concerted actions.
- 6.8 It has further been submitted by the OP that in any event, there is no basis to suggest that the IOCL-IBP contract is a barrier to entry and is foreclosing the market for explosives to other explosives suppliers. In fact, to the contrary, the contract with IOCL-IBP is beneficial to both OP and the end users who are shielded from disruptions in supply of coal, because of disruptions in the supply of explosives. There is no credible evidence to suggest that the IOCL-IBP contract acts as foreclosure to any competitor or it denies access to the market for supply of explosives. Therefore, the said contract can neither be considered as anti-competitive nor a case of abuse of dominance.
- 6.9 The OP has requested that the Commission must set aside the DG's report because of failure by the DG, *inter alia*, to (a) define the relevant markets properly (b) consider significant factors such as level of imports and exports (c) consider the victimization of OP as an important element because of which it entered into the IOCL-IBP contract, (d) conduct any empirical analysis whether the IOCL-IBP contract causes



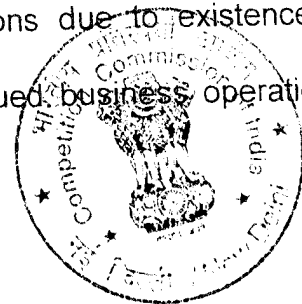
any foreclosure especially considering the fact, that explosive suppliers are free to and do in fact supply to more than 87% of the total market for procurement of explosives in India.

- 6.10 The OP has contended that if the Commission were to hold a breach on its part, it would send wrong signals to industry that large companies cannot even take legitimate steps to protect their commercial interests, especially in the face of collective boycotts and threats. Further, if the Commission accepts the DG's findings it would amount to the fact that a company, regardless of the fact whether it is a private enterprise or a public sector enterprise, could not enter into directly negotiated contracts with its suppliers.
- 6.11 The OP has also submitted that since no other contravention other than the fact that OP entered into a contract with IOCL-IBP in violation of Sections 3(4)(b), 3(4)(d), 4(2)(b)(i) and 4(2)(c) of the Act has been found by the DG, understanding of the IOCL-IBP contract is critical. It has been stated that OP cannot sustain its mining operations even for a single day without supply of explosives and thus any collective action of suppliers to stop supplies would have been detrimental to its the interest of consumers. The members of IP were not in favour of competition which is apparent from the letter to OP in which a fear was expressed that any new tenders by the OP will lead to new players entering the market and



also from various instances in the years between 2006 and 2010 wherein members collectively resorted to anti-competitive practices like fixing prices, submission of identical price bids, collective boycott of electronic reverse auction and collective boycott of supplies. Thus, time and date of delivery was the essence. In this backdrop, IOCL-IBP provided a reliable assured long term arrangement ensuring security of supply of explosives. Contract with IOCL-IBP was entered into after ensuring compliance with various internal procedures and was approved by the Tender Committee and Board of Directors. There was public interest involved in the continuity of business as coal is a crucial input for various industries covered under Essential Services Maintenance Act 1968. Many industries such as power, fertilizers, liquid fuel, cement etc. are significantly dependent on continuous and uninterrupted consumption of coal.

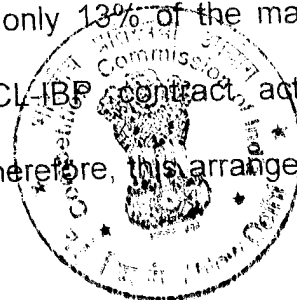
- 6.12 According to OP, the contract with IOCL also met the strategic and economic objective in securing the supply of a limited quantity of explosive requirements and out of this contract, it has secured itself an uninterrupted supply of approx. 60 days stock as a buffer arrangement against the possible disruption in explosives supplies by other suppliers. The OP has also justified the contract on the grounds of the complete absence of arbitrariness or mala fide intentions due to existence of cogent reasons such as security of its continued business operations,



extensive negotiations with Informant, approval of the tender committee and Board and consultations with the Secretary, Ministry of Coal.

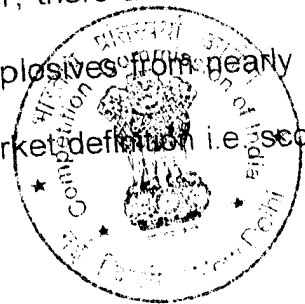
6.13 OP has also submitted that supplies of explosives from IOCL-IBP form a small part of the total market for explosives in India and cannot cause AAEC in the relevant market in India. According to OP, IOCL-IBP contract only reserves upto 20% of the total requirements of OP in favour of IOCL-IBP and this share equates to nearly 13% of the total explosives market. The other explosive suppliers have access to more than 87% of the market where they can sell their explosives and it continues to buy from these suppliers.

6.14 According to OP, the conclusions of DG are flawed since the contract with IOCL-IBP requires it to procure upto 20% of its total requirement and consequently is not an exclusive supply agreement under Section 3(4)(b) of the Act, since it is free to procure at least 80% from other sources. Further, it cannot be said that market access has completely been denied as competitors of IOCL-IBP are free to compete in the market for supplies of explosives. There is no creation of barriers to entry due to this arrangement and the contract does not drive existing competitors out of the market and also does not foreclose competition by hindering entry into the market since the arrangement applies only to 20% of the total purchases which constitutes only 13% of the market. Even the report of DG mentions that IOCL-IBP contract actually accounted for 14.5% of procurement of OP. Therefore, this arrangement



does not foreclose the market at all. DG has further also failed to show any evidence that any of the existing explosives manufacturers have been forced to exit the market due to this arrangement. The conclusions of DG that there was no benefit to consumers out of this contract is also not tenable since contract with IOCL-IBP ensured continuous supplies of coal to several ESMA based industries.

- 6.15 The Opposite Party has also submitted that since there is no abuse / anti-competitive agreement, it is not necessary for the Commission to decide on relevant market and dominance as is practice in other jurisdictions also. However, even if relevant market is to be decided, the Commission will have to consider that DG has not investigated the question of relevant market adequately and therefore has come to the erroneous conclusion. DG has failed to consider clear and significant evidence in relation to exports and import data to arrive at the relevant geographic market. The Opposite Party has also emphasized that relevant market in this case is global in nature and in that it is not a dominant consumer player. Therefore, the question of abuse does not arise.
- 6.16 On the issue of dominance, OP has submitted that the report of DG that it is a monopsony is incorrect because it is not the only purchaser but there are many purchasers in the market. Further, there are no barriers to entry in the market since OP itself sources explosives from nearly 20 explosives manufacturers. In light of correct market definition i.e scope



of relevant geographic market being global, size and resources of CIL and its consumption of explosives must also be examined in light of the fact that other large global players are also present in the mining industry such as Xstrata and Rio Tinto etc. Within India also, apart from OP, there are other consumers of explosives like Singareni Collieries, Tata, Jindal Steel etc. Thus, market for procurement of explosives is fairly widespread and there is no question of any foreclosure of suppliers, even if a small portion of the total market is given in favour of a particular supplier.

- 6.17 Summing up its arguments, the OP has argued that the DG's conclusions regarding the IOCL-IBP contract be rejected and it should be exonerated from all charges and findings of violations of the Act.

## **7. Findings of Commission**

7.1 The Commission has carefully gone through the information, report of DG and replies of all the parties. It has also noted that informant has sought to withdraw its information stating that the matter has been sorted out between it and the OP. However, the Commission considers it appropriate to look into issues involved in the case in order to find out whether there is any adverse effect on competition in the case based upon information filed before it.

7.2 As regards plea of OP of clubbing of the case filed by it against the IP (Case No. 6 of 2011), the Commission feels that since alleged



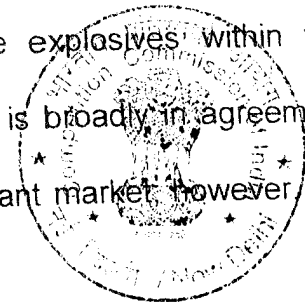
infringements of the provisions of the Act in the two case are distinct, it would be appropriate to deal with them separately.

7.3 Considering all available materials on record and after careful consideration, the Commission observes that following points arise for determination in the present matter:

1. What is the relevant market in the present case?
2. Does the Opposite Party hold position of dominance in the relevant market?
3. Whether the Opposite Party has infringed the provisions of Section 4 and/or 3 of the Act, as has been concluded in the report of DG?

## 8. Determination of issue no.1

8.1 The Commission observes that relevant market has to be determined as defined in Section 2(r) of the Act in the light of the provisions contained in Section 19 (5). The Commission has noted that the DG has analysed the relevant product and geographic market in a very exhaustive manner and has also dealt with various aspects of the product in question and on the basis the same, the DG has determined the relevant market as "the market of consumption of bulk and cartridge explosives within the national boundaries of India". The Commission is broadly in agreement with the DG on the issue of delineation of relevant market. However, the



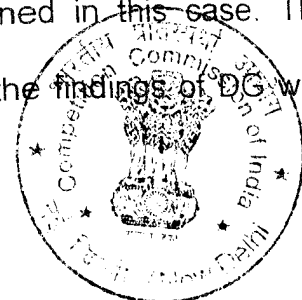


Commission feels that any relevant market cannot be separated into market for sellers and market for buyers since both sellers and buyers are an integral part of market. Thus, the Commission considers relevant market in this case to be the *“the market of bulk and cartridge explosives within India”*. While determining so, the Commission has also considered the contention of the OP that since there are global players outside India who are also the consumers of industrial explosives; the relevant geographic market must not be confined to India only. The Commission, however, observes that since the determination of issues involved in the case is with reference to the competition in India, therefore, the market consisting of bulk and cartridge explosives within the territory of India must be the appropriate relevant market in the case.

## **8.2 Determination of issue no.2**

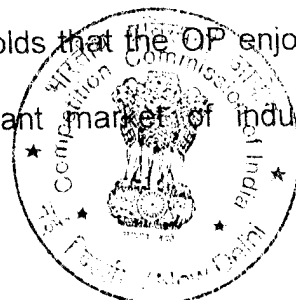
8.2.1 The Commission, as regards question of dominance, observes that the OP has contended that the Commission is not required to make a final determination on the relevant market and/ or dominance in the matter, since there is no case of abuse.

8.2.3 The Commission, however feels that for the determination of abuse it is required to be examined first whether a player is dominant in a relevant market and therefore it is necessary to find out whether the OP is a dominant player in the relevant market as defined in this case. The Commission, on this issue, broadly agrees with the findings of DG who



has analysed, in depth, the question of dominance of the Opposite Party on the parameters of factors mentioned in Section 19(4) of the Act and has concluded that the Opposite Party is in a dominant position in the relevant market.

- 8.2.4 The Commission finds that as per data given in the investigation report, OP is a major consumer of industrial explosives used in the mining sector. Further, with 9 direct subsidiaries and 2 indirect subsidiaries, in size and resources too, OP is having a superior position. The Commission has taken note of report of DG that in 2009-10, OP produced about 431 million tonnes of coal and other companies like TISCO, IISCO, DVC and Singareni Coal Company Limited produced smaller quantities as compared to the OP. Further, the OP is having sales of Rs.52187.79 crore and net profit of Rs.9622.45 crore and it is the largest producer of coal in India.
- 8.2.5 The Commission has also taken note of the fact as brought out in the report of DG that for non-captive purposes, due to restrictions imposed by the Government, as on date, barring some State Government controlled companies and Singareni Collieries Company Limited, which are having comparatively smaller operations, OP remains a major player. Therefore, based on the market share of consumption of explosives, size and resources, comparative position of the other consumers, existing policies of the Government, the Commission holds that the OP enjoys a position of dominant consumer in the relevant market of industrial



explosives.

### 8.3 Determination of issue no.3

8.3.1 The Commission has noted that the DG in his report has concluded that the agreement entered into by the Opposite Party and IOCL-IBP tantamount to abuse of dominant position in violation of Section 4 (2) (b) (i) and Section 4 (2) (c) of the Act.

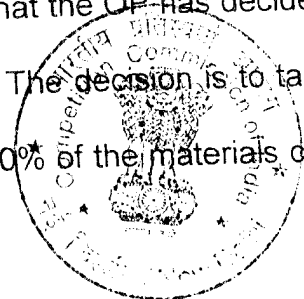
8.3.2 Before proceeding further, the Commission feels that the provisions of Section 4 (2) (b) (i) and Section 4 (2) (c) of the Act must be looked into, which are as under;

**Section 4(2) There shall be an abuse of dominant position under sub-section (1) if an enterprise or a group;**

**(b)(i) limits or restricts production of goods or provision of services or market therefor; or**

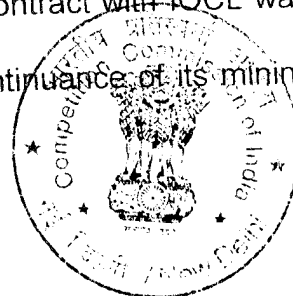
**(c) indulges in practice or practices resulting in denial of market access [in any manner]**

8.3.3 The Commission, on analysis of facts on record, finds no contravention of the aforesaid provisions of the Act in this case. The Commission while coming to this conclusion has noted that it is not that the OP has decided to procure entire explosives from IOCL-IBP only. The decision is to take only 20% of the required materials, thus, about 80% of the materials can

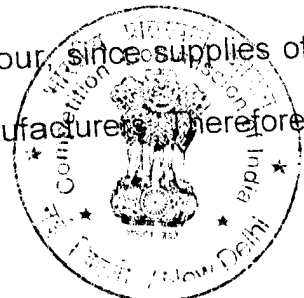


still be sourced from other suppliers. The Commission has noted that the DG has mentioned that during the last 6-7 years, the disruption in supply has only been observed for 2-3 occasions not exceeding more than two days on each occasion and therefore concludes that this could not be the reason for sourcing 20% of the requirement of the explosives from only one supplier i.e. IOCL-IBP by the Opposite Party.

**8.3.4** The Commission, in this regard, however, observes that even when OP has decided to source 20% of explosives from IOCL-IBP to ensure continued supplies without disruptions, overall competition in the market prevails. Suppliers are free to compete for supply of rest of requirements. Further, suppliers are also able to supply materials to the other consumers. The Commission finds merit in the contention of the OP that its contract with the IOCL-IBP is only for a small quantity, which is required to secure its ongoing coal mining operations, and a very large proportion of its explosive requirement is still procured from other suppliers. There have been no effective rebuttals on this issue. The Commission has also noted the submissions of OP that the agreement with IOCL-IBP was entered into after apprising the Ministry of Coal, Government of India about the difficulties being faced by it due to disruption in supply of explosives by the members of the Informant and has found merit in the whole contention that the contract with IOCL was to avoid disruptions in supplies and to ensure continuance of its mining operations without any problem.



- 8.3.5** The Commission feels that a consumer is free to select a supplier in its normal course of business after due diligence and after following due procedure in accordance with the relevant rules governing procurement, particularly when the consumer is a government body. A consumer will not harm itself consciously and if some wrong doing is done, for procedural flaws, relevant rules will take care of such anomalies. Once consumer choice has been exercised and selection is done by a consumer for getting supplies, other competing suppliers cannot claim that their supply or production is being restricted. The choice of supplier made by consumer will not fall within the purview of Competition Act, unless the choice is made in a manner which restricts competition in the market. In this case, since the OP has left open about 80% of the market for other suppliers and also since the members of constituent members are not barred from supplying to the OP, there appears to be no harm to overall competition in the market.
- 8.3.6** The Commission in this regard observes that the constituent members perhaps would be happy to get 100% of supplies to the OP, denying the supplies to those who are not its members. However, this could then become the reason for others to agitate their grievance. The selection or choice of supplier by a consumer, unless it falls foul of laws of competition, is not an issue which ought to be brought before a competition agency. By sourcing 20% of the supplies from IOCL-IBP, the OP is not affecting the relevant market in its favour, since supplies of a major portion are being sourced from other manufacturers. Therefore, it



cannot be said that there is any violation of Section 4 (2) (b) (i) and Section 4 (2) (c) of the Act since the arrangement does not limit or restrict production of goods or provision of services or market. There is no denial of market access either.

8.3.7 The Commission has also examined the allegations in terms of provisions of Section 3(3) of the Act and has found that the IP and IOCL-IBP both are suppliers of explosives and OP is a buyer in the case and therefore there they are not at the same level of production or supply chain. The allegations have also been levelled against OP (a consumer) for agreement with IOCL-IBP (a supplier). Since the alleged agreement for supplies has not been entered between the parties at the same level of production or supply chain, the Commission observes that provisions of Section 3(3) are not applicable in this case.

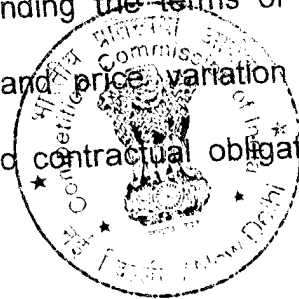
8.3.8 The Commission has also looked into carefully the findings of DG that the agreement by the OP with the IOCL-IBP amounts to exclusive supply agreement and refusal to deal with other competitors in violation of Section 3(4)(b) and 3(4)(d) of the Act. In this regard, the Commission observes that in order to establish contraventions of these two provisions, it needs to be examined whether the impugned agreement has caused any appreciable adverse effect on competition in the relevant market.



8.3.9 The Commission after carefully going through the entire facts on record and after examining the provisions of Section 19(3) of the Act has found that there is no entry barrier that has been created in the market due to contract with IOCL-IBP since about 80% of the supplies are still sourced from the suppliers other than IOCL-IBP. Further, the existing arrangement does not drive existing competitors out of the market since other consumers of the product are free to source from any supplier in the market including members of the informant body. The suppliers in the market are also free to supply to other consumers including the OP. Any supplier even if it is a new entrant, if otherwise eligible, can still participate in the tender process for making supplies to the OP.

8.3.10 The Commission observes that arrangement of continued supply of certain minimum quantities of explosives in order to secure continued supply of coal does not give rise to concern of foreclosure of the competition in the market in this case. The Commission further feels that in this regard, the plea of OP that interruption in supplies of explosives could have been detrimental to the production of coal and consequently to the industries dependent upon coal, also cannot be ignored.

8.3.11 Regarding other allegations regarding delay in security deposits, shortening of period of contracts or extending the terms of Running Contracts, reduction in prices, quantity and price variation etc. the Commission observes that these relate to contractual obligations and



thus do not come within the ambit of Competition Law, unless harm to competition is also caused due to such actions.

8.3.12 In view of the discussion above, the Commission is of the considered opinion that the OP in the present matter has not contravened any of the provisions of Section 4 and/or 3 of the Act and the matter deserves to be closed.

9. In view of the above findings, the matter relating to this information is disposed of accordingly and the proceedings are closed forthwith.

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

Sd/-  
Member (G)

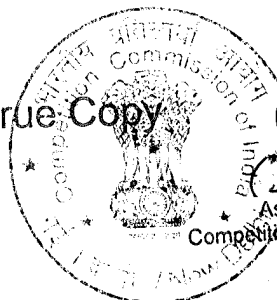
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