

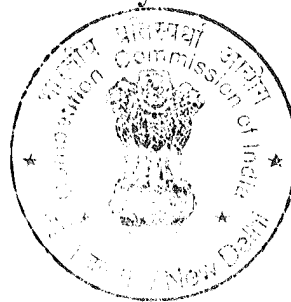
BEFORE THE  
COMPETITION COMMISSION OF INDIA

CASE NO. 11/2009

DATE OF DECISION: 20.12.2011

Jindal Steel & Power Ltd. – Informant

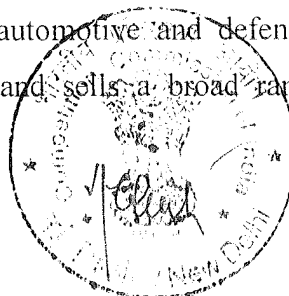
Steel Authority of India Limited – Opposite Party.



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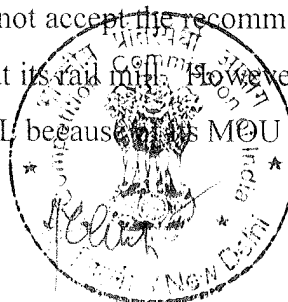
## Information

1. The present information was received by Competition Commission of India (CCI) (hereinafter referred to as the "Commission") from Jindal Steel & Power Limited (hereinafter referred to as "JSPL") on 16<sup>th</sup> October, 2009 under Section 19 (1) of the Competition Act, 2002 (hereinafter referred to as "Act"). The information was filed against Steel Authority of India Ltd. (hereinafter referred to as "SAIL").
2. The information alleges abuse of dominant position by SAIL in violation of Section 4 (1) of the Act. As per the information, SAIL has entered into an exclusive supply arrangement with Indian Railways (IR) through Memorandum of Understanding (MOU) dated 1.2.2003. It is alleged that the said MOU result in denial of market access to JSPL by foreclosing a substantial part of the relevant market. As per the information, the MOU contains exclusive supply obligations and results in refusal to deal which causes appreciable effect on competition in the relevant market in India in contravention of Section 3(4) of the Act.
3. As per the information, with nearly 96% market share, SAIL has a dominant position and substantial market share in the market for rails in India that are compliant with Research Design & Standards Organisation (RDSO), Ministry of Railways specifications. The MOU dated 1.2.2003 between IR and SAIL has the effect of foreclosing substantial part of the relevant market and has also led to reduction and/or elimination of competition in the relevant market.
4. Furthermore, the MOU has the effect of restricting IR's ability to fulfill its requirements for rail from sources other than SAIL. The MOU indirectly imposes restraint on IR so that IR cannot deal with other sellers during the exclusivity period even if other suppliers are able to provide better quality rails and at more competitive prices. This can cause significant market distorting foreclosing effect. It is averred that the higher the percentage of total sales in the relevant market, i.e. affected, the longer the duration of the conduct and the more regularly such conduct is done, the greater is an anti competitive foreclosing effect on the market.
5. The information describes the SAIL as the leading steel making Company in India. It is a fully integrated iron and steel producer, making both basic and special steel for domestic construction, engineering, power, railway, automotive and defence industries and for SAIL in export market. It manufactures and sells a broad range of steel products



including sheets, coils, structural products, railway products, bars, rods, alloy steel and others. It is ranked amongst the top 10 basic companies in India in terms of turnover.

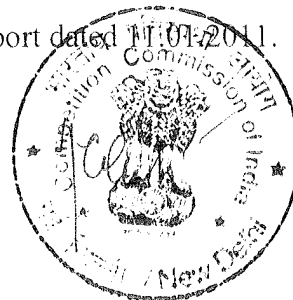
6. The information describes that JSPL is a listed public company registered under the Companies Act, 1956. It is engaged in the manufacture of steel and steel products at its manufacturing facility at Raigarh, Chhatisgarh and production of power through its subsidiary Jindal Power Ltd. JSPL also manufactures long finished rails of 120 metres length using RH Degasser technology. RDSO has certified JSPL's rail manufacturing facility compliant with IRS-T-12-96 and specifications IRS-T-12-2009.
7. The information also gives a factual background of the case and submits that IR had expressed intention to develop the indigenous source of quality rails in April, 1988. At that time, IR proposed to procure 100,000 tonnes p.a. from such new sources. The informant JSPL informed IR in January, 2001 that it was going to set up rail manufacturing mill conforming to international standards. In June 2001, IR informed JSPL that they may purchase rails from JSPL if the same were of appropriate quality and offered at competitive prices and on the required terms and conditions. JSPL continued to invest substantial sums on building its rail mill.
8. On 7.9.2001, JSPL informed IR that its rail mill could begin production in the 2<sup>nd</sup> quarter of 2002-03. However, on 21.12.2001, IR informed JSPL that SAIL had committed to supply IR's entire requirement of rails and that IR would continue to buy from SAIL. Subsequent repeated requests by JSPL through letters dated 6/9.5.2003 and 25.4.2006 were not considered by Ministry of Railways on the ground that in pursuance to the MOU entered with SAIL all requirements of IR were to be supplied by SAIL in respect of rails complying to IRS T-12-96 specifications of RDSO. This MOU dated 1.2.2003 continues till date and IR has refused to review exclusivity obligations with SAIL.
9. Further, despite repeated requests from JSPL to get its rail mill inspected and approved by RDSO, the inspections were carried out only between February – July, 2005. RDSO observed that JSPL was not using the degassing technology for removal of hydrogen content. The information states that there are two main techniques of degassing rail steel i.e. using RH degasser or vacuum tank degasser and JSPL was using the latter technology which did not comply with specifications laid down by IR. During October, 2005 and November, 2007, JSPL tried to convince IR that it was not a good idea to set specifications to a specific technology but IR did not accept the recommendation. Finally in November, 2007, JSPL installed RH degasser at its rail mill. However, despite this, IR did not purchase any of its requirements from JSPL because of its MOU with SAIL.



10. The information defines the relevant market as “rails which conform to the RDSO specifications laid down by IR in India.” The information alleges that SAIL is dominant in the relevant market and its conduct is exclusionary. SAIL is an incumbent dominant seller and IR is the dominant purchaser. As a result, there is an anti-competitive foreclosure in the market for new/smaller players.
11. The exclusive supply obligations imposed by IR on SAIL is a vertical restraint as per the information and its effect in the long-term would be to eliminate all competition in the relevant market.
12. The information specifically alleges contravention of Section 4 (2) ( c) of the Act in terms of denial of market access as well as contravention of Section 3 (4).

The information sought the following reliefs from the Commission:

- (i) Order SAIL to end the exclusivity obligations with IR;
  - (ii) Impose fines on SAIL as per Section 27 of the Act for entering into an anti-competitive agreement;
  - (iii) Introduce competitive bidding arrangement in the relevant market for purchase of rails;
  - (iv) Pass an order to pay the costs of the complainant/information provider; and
  - (v) Pass any other order that the Commission may deem fit.
13. Upon consideration of the information filed by JSPL, the Commission passed an order under Section 26 (1) of the Act dated 8.12.2009 holding that prima-facie, the case exists for referring the matter to the Office of the Director General (DG) for conducting an investigation into the matter. SAIL preferred an appeal to the Competition Appellate Tribunal (hereinafter referred to as the “Tribunal”) under Section 53 (B) of the Act. The Tribunal stayed the proceedings and remitted the case to the Commission for a fresh hearing. The Commission reconsidered the matter and passed another order dated 29.6.2010 making a reference to the DG to conduct investigation into the matter. Accordingly, the DG submitted investigation report dated 11.07.2011.



### Summary of DG's investigation report:

14. Since the allegation made by the Informant relates to MOU dated 1.2.2003 between the Opposite Party (OP), SAIL and Indian Railways (IR), the DG has considered IR an essential party in this case. The investigation was focused on analyzing whether the actions of SAIL were in violation of the provisions contained in Section 3(4) and Section 4 of the Competition Act, 2002. Specifically, the investigation report examines the allegation of the Informant that the MOU - (a) contains exclusive supply obligations; and (b) results in refusal to deal by IR, which causes an appreciable adverse effect on competition in the relevant market in India and, therefore, falls foul of Section 3(4) of the Act. Subsequently, SAIL has abused its dominant position through the exclusivity provisions of the MOU which has an effect of foreclosing a substantial part of the relevant market to competitors.
15. The DG report has delineated the relevant market in terms of Section 2 (t) read with Section 19 (7) of the Act.
16. The report observes that Research Designs & Standards Organization (RDSO) was established in 1957 under the Ministry of Railways (MoR) at Lucknow to function as the Technical Advisor of railway and its production units and to provide comprehensive engineering, consultancy and project management services relating to designs, new technology, standards, testing, technical investigation, inspection, safety etc. All railway tracks owned and operated by Indian Railways have to comply to technical specifications prescribed by RDSO. Further, these specifications have to be inspected by RITES, a Government of India Enterprise for quality assurance. The projects of rails by IR have to be viewed in view of these requirements.
17. The Informant has contended that the relevant market in the case is the market for rails, which conforms to the RDSO specifications laid down by IR in India. On the other hand, SAIL argued that for an integrated steel plant manufacturing of a saleable product starts from iron ore which can undergo a gamut of processes to transform into any type of finished product. Therefore, SAIL argued that the relevant market includes heavy structurals alongside long rails as both products can be manufactured using the same plant both by SAIL as well as by JSPL.
18. The DG has considered the arguments of JSPL as well as the detailed report of Genesis Economic Consulting Private Limited (GENESIS report) submitted by SAIL. The investigation report observes that heavy structural cannot replace long rails of railway



tracks. Applying the principles of the SSNIP Test, it may be seen that a small but significant non-transitory increase in price of long rails will not make the consumers switch to heavy structurals. It is observed that IR is the major consumer of long rails and its demand for the same cannot be substituted by heavy structurals. Therefore, according to the DG report, the relevant product in the present case is long rails for the purpose of assessment of Section 3 & 4 of the Act. Further, the relevant geographical market in the present case is India since IR operates only in India and its demand for long rails comes from its operations in India. In conclusion, the DG report states, “therefore, for the purpose of information, the long rails are the relevant product, geographical limit of India is the relevant geographic market and the manufacture of long rails in India is the relevant market for SAIL and the consumption of long rails in India is the relevant market for IR for the assessment of violation of provisions of the Act”.

19. The DG report observes that both SAIL and IR satisfy the definition of “enterprise” contained in Section 2 (h) of the Act and both these entities “are operating in different relevant markets of production of long rails and consumption of long rails.” Further though the information does not level any allegation against the conduct of IR, it remains the necessary party for the assessment of issues in the present case.
20. The investigation report has examined SAIL according to the parameters laid down in Section 19 (4) of the Act. The gist of the observations made may be summarized as below:

**(a) Market share, market structure and size of the market:**

As per the information made available by SAIL, it had sold 814302 tonnes of rails to various parties during 2008-09 of which 749928 tonnes were sold to IR. As against this, during the period, JSPL had sold 34787 tonnes. Thus the market share of SAIL was 96%. Presently, only SAIL and JSPL comply with RDSO specifications thus the HHI index was very high at 9232 which denotes very high concentrated market.

**(b) Size and resources of SAIL:**

For financial year 2009-10, the annual turnover of SAIL was Rs.40060 crores (1 crore equal to 10 million) and net profit was Rs.6790 crores. In comparison, the turnover of JSPL was Rs.11083 crores and net profit was Rs.3634 crores.

**(c) Size and importance of the competitors and economic power of SAIL including commercial advantages over competitors:**



It is observed that with the market share of 96%, SAIL enjoys definite commercial advantages over its competitor JSPL in the relevant market.

**(d) Vertical integration of SAIL:**

It is observed that SAIL is a fully integrated iron and steel maker and among the maharatnas of public sector undertakings. Its products include a wide range of steel products and it has extensive net work in the country. Its operations are highly integrated giving it a distinct edge over its competitors.

**(e) Dependence of consumers on SAIL:**

The investigation report observes that after entering into a MOU with IR, the consumer, i.e. IR is dependent on SAIL, therefore, SAIL is a dominant enterprise.

**(f) Statutory monopoly/dominant position of SAIL:**

It is stated that SAIL is a Government of India enterprise but not a statutory monopoly.

**(g) Entry barriers:**

Steel plants are capital intensive and hence require very heavy investment. Moreover, long rails have a very specific market and mainly the demand comes from only one consumer, i.e. IR. Therefore, the report concludes the presence of entry barriers in the market which adds to the dominance of SAIL.

**(h) Countervailing buying power:**

The investigation report observes that the MOU between IR and SAIL provides for review of pricing by joint pricing committee with a condition that the decision of Chairman, Railway Board shall be final and binding. The quality of rails produced by SAIL has to be compliant to RDSO specifications. According to the investigation report, since the pricing of long rails, "is carried out for the mutual advantage of both SAIL and IR", IR does not enjoy any countervailing buying power. This means that the dominance of SAIL is enhanced.

**(i) Social obligations, social costs and relative advantage, by way of contribution to the economic development by SAIL:**



The report observes that although SAIL is a central PSU owned and controlled by Government of India, it is not performing any sovereign functions. Its contention that it has been involved in fulfilling the nation's socio-economic objectives, infrastructure and industrial development as well as discharge of corporate social responsibility are not linked in any manner with the pricing of its products supplied to IR. Therefore, these contentions are irrelevant.

21. As regards, Indian Railways, the DG report observes "IR cannot be said to be carrying out any sovereign functions in the strict sense". It further states that IR is an economic venture of the Government of India and therefore, it is covered in the definition of "enterprise" given in Section 2 (h) of the Act. The report further assesses the dominant position of IR in the relevant market which may be summarized as below:

**(a) Market share of the IR:**

IR is the sole provider of railway transportation in India except for some metro services. IR procures long rails for new lines and replacement of old tracks. There are a few private sidings of certain manufacturing units, mines, ports, etc. which also procure long rails but IR consumes 96-97% of long rails sold in India. Accordingly to the report, IR enjoys almost absolute dominance in the relevant market of consumption of long rails in India.

**(b) Size and resources of IR:**

Virtually there is no competition for IR in the consumption of long rails. The size and resources of IR can be adjudged by looking at its total earnings which have arisen from Rs.47038 crores in 2004-05 to Rs.79837 crores in 2008-09.

**(c) Size and importance of competitors:**

IR has practically no competition in the relevant market of procurement of long rails.

**(d) Economic power of the enterprise including commercial advantages over competitors:**

The report observes that "IR possesses enough economic power due to share and size of its activities". Further, it enjoys "complete dominance in the relevant market based on its economic power and commercial advantages enjoyed by it."

**(e) Vertical integration:**





IR has various zonal railways, several coach, locomotive and wheel factories and has also promoted various PSUs such as CONCOR, IRCON, IRCTC etc. for carrying out various integrated activities.

**(f) Dependence of consumers on the enterprise:**

The report states that in the passenger transport market through rails, IR enjoys absolute dominance in absence of any competitor for the services provided while in freight transport; it enjoys 35% of market share. Therefore, as per the DG report, based on dependence of consumers, IR is highly dominant enterprises.

**(g) Monopoly or dominant position whether acquired as a result of any statute:**

The report observes that IR is a state monopoly and is a part of the Government of India through Ministry of Railways and no other enterprise can run railway services in India. Therefore, IR enjoys complete dominance.

**(h) Entry barriers:**

Railway services in India are not open for private enterprises.

**(i) Countervailing buying power:**

According to the DG report, the buyers of railway services have no countervailing buying power.

**(j) Market structure and size of market:**

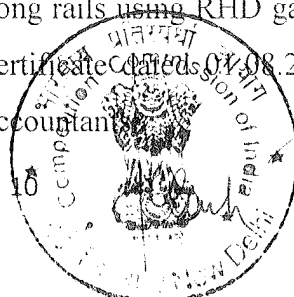
Being a State monopoly, IR is a dominant player in providing railway transportation in India.

**(k) Social obligations and social costs and relative advantage by way of contribution to economic development:**

The report observes “there is no denial of the fact that IR has certain social obligations and has to contribute to the economic development of the country but the same cannot be a plea for procuring inputs for running its transport services.”



22. Based on the above analysis in accordance with parameters given in Section 19 (4) of the Act, the DG report concludes that SAIL is a dominant enterprise in the relevant market of manufacture of rails in India and IR is a dominant enterprise in the relevant market of procurement of rails in India.
23. The report further examines the allegation of abuse of dominant position by SAIL and IR. As per the investigation report, in 1997, IR realized the need to develop a new indigenous source for supply of rails in view of the available capacity at Bhilai Steel Plant (BSP) of SAIL which was the only indigenous supplier of rails and on assessment of projected requirements of around 7 million tonnes during the 9<sup>th</sup> five-year plan. A global tender was floated and opened on 6.10.1997. Although 16 offers were received, no offer was found acceptable by IR.
24. In view of this experience, IR decided to issue a notice for pre-bid meeting before floating of another tender. The pre-bid meeting in which about 25 firms participated was held on 28.4.1998. However, the prospective bidders wanted the period of commitment raised to at least 15 to 20 years against the five years desired by IR. In addition, the bidders wanted to supply 2.00 lakh tonnes annually as against 1.00 lakh tones required by IR (1.00 lakh is equal to 100,000). IR was not in favour of these conditions proposed by prospective bidders. Under the circumstances, Ministry of Railways finally decided that the problem of supply shortfall should be dealt at ministerial level in Government of India and the matter may be taken up with Ministry of Steel for augmenting the activity of Bhilai Steel Plant so as to meet future requirements of IR.
25. The report further states, "from available information and documents, it is clear that JSPL did not participate in the tendering process undertaken by IR during October 1997. Further, JSPL was also not present during the pre-bid meeting conducted by IR on 28.04.1998. From the documents of tendering process and pre-bid meeting, it is evident that IR had made earnest efforts to develop indigenous sources for procurement of rails. However, its efforts to develop such source failed.
26. The investigation report then refers to the information filed by JSPL wherein it is stated that JSPL informed IR on 4.1.2001 that it was going to manufacture state-of-the-art rails in India. The subsequent development given in the DG report has already been detailed in earlier paras and is, therefore, not repeated here. The DG report further states that "JSPL was not in a position to produce long rails using RHD gassing technique till April 28, 2008. This is verified from the certificate dated 01.08.2010 issued by M/s. S.S. Kothari Mehta & Company, Chartered Accountants."



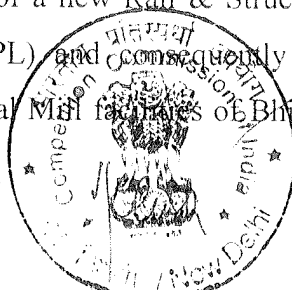
27. As per the investigation report, the inspection conducted by RDSO in February 2005 and July 2005 of JSPL facilities had revealed that JSPL was not complying with RDSO specification, IRST-12-96.

28. JSPL wrote to IR on 20.05.2003 and 20.01.2004 trying to convince IR that the technology used by JSPL was superior as compared to the one specified by RDSO. The investigation report of the DG examined the records of the proceedings of the Review Committee of the Railway Board held on 24.02.2006 on this issue. A copy of the minutes of the said meeting are part of the investigation report at Annexure-XIII. The relevant para 6.4 of the minutes are as below:

“though ED/M&C agreed that RH degasser is better and efficient compared to other processes presently in use in absolute terms when used for plain carbon steels, he was of the view that other methods are also dependable and capable of meeting the requirement. In any case, use of other methods is pegged to approval by RDSO/purchaser after satisfying itself after measurement at tundish level which takes care of all aspects of hydrogen pick up on the transit from degasser to tundish. With time, some better methods may also come up. If there are frequent cases of failure to achieve desired levels first time, we may not approve the process. Only when the purchaser has satisfied himself about the reliability of the system, a new process can be approved. This provision will allow the evaluation and adoption of better processes or more economical processes satisfying our requirement”.

29. In context of the above, the DG report refers to para (ii) of the MOU dated 1.2.2003 between SAIL & IR which states the “railway committee to buy and sell its total requirements of long rails, has also the plans of its normal requirements in other lengths like 13m, 26m etc. subject to annual review within the overall policies of Government of India. According to the DG, this commitment to buy total requirement of IR from SAIL forecloses completely for the competitors in the market for manufacture of long rails due to effect relationship. Though the cause of the abuse lies in the relevant market of procurement of long rails, its effects is seen in the market of manufacture of long rails as well. The DG report further comments, “the MOU is not open for any review. Therefore, it is a perpetual agreement whereby IR cannot procure its requirement of long rails from any other source except SAIL.” As per the report, this makes the foreclosure effect more severe.

30. The DG has made reference to the minutes of the 270<sup>th</sup> meeting of Board of Directors of SAIL held on 28.05.2001 wherein the Board has acknowledged the need “to meet the threat of competition posed by setting up of a new Rail & Structural Mill (R&SM) by M/s. Jindal Steel & power Limited (JSPL) and consequently accorded in-principle approval for upgrading the Rail & Structural Mill facilities of Bhilai Steel Plant. At the



same time, the Board also desired that “avenues of export of rails as well as diversifying the customer’s base be explored.”

31. According to the DG report, the minutes of Board of Directors of SAIL coupled with the MOU between IR and SAIL indicate “an attempt to counter the threat of competition from JSPL. The report also observes that though the MOU is subject to annual review within the overall policy of Government of India, actually the review is limited to determination of pricing by a joint pricing committee of IR and SAIL. It does not encompass review of procurement from only one source and hence does not allow the entry of competitor. According to the DG, the MOU restricts the production of long rails by any other competitor and, therefore, forecloses the market. According to the report, the conditions of the MOU are in contravention of Section 4(2)(b) (i) of the Act.
32. According to the investigation report, the Indian Railways by adhering to its own specifications as laid down by RDSO has limited and restricted technical or scientific development relating to manufacture of long rails. This is a contravention of Section 4 (2)(b)(ii) of the Act.
33. The DG report further observes that the decision to enhance production capacity of SAIL to meet the requirements of IR was taken only in 2001 whereas JSPL had informed about its intentions to set up production unit in November, 1999. As per the report not giving, JSPL chance of supplying after installation of production capacity was denial of market access in violation of Section 4(2) (c ) of the Act by IR.
34. The report also states that SAIL is unable to sell its products to other purchasers both domestic and foreign due to its commitment to supply rails to IR. Although the MOU does not place any such restrictions, in effect, IR has restricted ability of SAIL to sell its products to other parties as per the DG report. According to the report, this is a contravention of Section 4 (2) (a)(i) of the Act by IR.
35. At the same time, through the MOU, SAIL has taken a commitment from IR that all the requirements of IR shall be met only from SAIL. The DG report, therefore, concludes that SAIL has denied market access to other purchasers and, therefore, violated Section 4(2) ( c) of the Act.
36. The DG report has also examined the exclusivity provision of the MOU between SAIL and IR and has concluded a vertical restraint in contravention of the Section 3(4)(d) of the Act. The DG report analyses appreciable adverse effect on competition (AAEC) resulting from the MOU in terms of Section 19(3) of the Act. The observations of the investigation report can be summarized as below:



**(i) Creation of barriers to new entrants, driving existing competitors out and foreclosure of competition:**

The assurance sought by SAIL and acceded to by IR leads no scope for any competition in procurement of long rail market. The additional investment made by JSPL “is the waste till such time JSPL is allowed for entry into 96% of the market which belongs to IR.” As per the report, the MOU has the effect of foreclosure of competition and thus creates entry barriers as well as drives the existing competitors from the market.

**(ii) Accrual of benefits of consumers:**

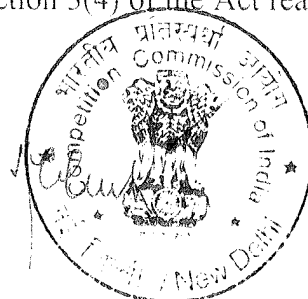
As per the DG report, IR has failed to indicate whether it has achieved any saving due to purchase of long rails from SAIL or that such savings have been passed on to the ultimate consumers of railway services in India. As per the report, JSPL has been able to demonstrate that IR would have saved Rs.400 crores if it uses 120 meter length rails produced by JSPL. According to the investigation report, this denotes appreciable adverse effect.

**(iii) Improvements in production or distribution of goods or provision of services and promotion of technical, scientific and economic development by means of production or distribution of goods of provision of services.**

As per the DG report, neither SAIL nor IR have been able to demonstrate that by following RDSO specifications, they are manufacturing or purchasing “the most superior rails in the world at the most competitive prices.”

It is also not known whether the RDSO specifications are also evolving in line with the developments across the world in this area. According to the DG report, this indicates AAEC.

37. In conclusion, the DG report holds that the condition set out in the MOU regarding procurement of complete requirement of long rails by IR from SAIL is an exclusive supply agreement which has the effect of refusal to deal with other competitors. Therefore, IR and SAIL are in contravention of Section 3(4) of the Act read with Section 3(i) as the MOU causes AAEC in India.



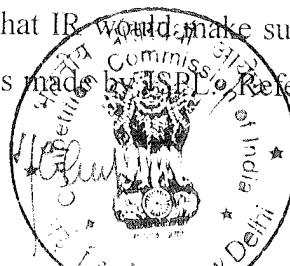
38. The Commission considered the investigation report of the DG and issued an order dated 27.01.2011 for sending a copy of the investigation report to the parties for filing their reply/objections. The Commission observed that the DG report had made IRs an essential party and, therefore, directed that a copy of the investigation report should also be sent to the Ministry of Railways for filing their reply/objections.
39. The parties concerned, JSPL (Informant) and SAIL (Opposite Party) as well as Indian Railways (IR) filed written comments and made oral submissions before the Commission and also submitted written arguments from time to time during the course of the proceedings. Ms. Pallavi Shroff, Counsel (Amarchand & Mangaldass and Suresh A. Shroff & Company) made submissions on behalf of the Informant. Mr. Parag Tripathi, Senior Advocate (Luthra & Luthra, Law Offices) made submissions on behalf of the OP. Mr. B.S. Chahar, Sr. Counsel and Dr. Ashwani Bhardwaj, Advocate, made submissions on behalf of Ministry of Railways.

**Gist of submissions of OP:**

40. It was submitted that the Competition Act is prospective in nature and Sections 3 & 4 came into force w.e.f. 20.05.2009. The MOU dated 1.2.2003 being a prior agreement is beyond the purview of the Act.
41. It was further argued that for an agreement to be in contravention of Section 3(1), it has to cause or likely to cause an appreciable adverse effect on competition in India (AAEC) and for this, it is important to determine whether the agreement is amongst persons at different stages or levels of production chain in different markets. It was argued that in the instant case, SAIL is the supplier and IR is the ultimate consumer and, therefore, they cannot be said to be in a production chain. A reference was made to Shashikant Lakshman Kale v/s UOI (4SCC366)/1990 to emphasise that public policy can support differential treatment of a public sector Corporation. Reference was also made to Hindustan Paper Corporation Ltd. v/s Govt. of Kerala (AIR 1989 SC 1713) to submit that Government Companies have special privileges which are recognized by the Companies Act, 1956. It was further submitted that the impure MOU is nothing but a record of the policy decision of the Government of India. Since SAIL is a Government Company, the MOU binds SAIL to implement policy decision of the Government of India. It was also contended that SAIL and IR are both under controlling ownership of the Government of India, therefore, provisions of Section 3 and 4 of the Act, cannot apply under the concept of “a single economic entity”.



42. It was submitted that IR carries out a sovereign function of development and maintenance of safe and secure rail net work in India. Therefore, as such, it is not an enterprise under the Act.
43. It was submitted that one of the most important objects of the Act is to protect the interest of consumers and it was argued that in the present case, IR was the ultimate consumer. Since both the consumer (IR) and the supplier (SAIL) are highly satisfied with the MOU, any action to quash the MOU would be highly prejudicial to the interest of the consumer in this case.
44. It was argued that the MOU in question is the arrangement within the Central Government - Ministry of Railway through the Railway Board and SAIL. This arrangement is in exercise of Executive Power by the Government of India through the concerned ministry and there is no jurisdiction over such arrangement under the provisions of the Act. Attention was drawn to the condition in the MOU that makes it subject to annual review within the overall policy of the Government of India. This condition makes it abundantly clear that the MOU emanates and flows from the Government policy. It was contended that the key issue to be determined in the case is as to how the MOU harms the interest of the consumer, which in this case, is IR. In this context, it was submitted that the MOU provides that the decision of the Chairman, Railway Board will be final with regard to pricing of the rails supplied by SAIL to IR. It was submitted that IR has in fact effectively exercised this favourable position which is evident from the fact that the change in price of rails vis-à-vis change in wholesale price index shows lower price increase for the reference period 2002 to 2008.
45. Further, as regards the quality of rails, there cannot be any compromise on the specifications of RDSO followed by IR.
46. It was further submitted that substantial investment was made by SAIL at the behest of IR for enhancing production of rails. Moreover, SAIL has to seek permission of IR before supplying prime quality rails to any third party. It was submitted that these facts indicate that there is no adverse impact emanating from the MOU on account of price, quantity or quality as far as the consumer, i.e. IR is concerned. This satisfactory position of the consumer is emphasized by the fact that the Hon'ble Union Ministry of Railways had reviewed the system of procurement of rails in 2010 and had decided to continue with the MOU.
47. The OP also rejected the claim of the Informant that IR would make substantial savings of more than Rs.500 crores by opting for long rails made by ISPL. Reference was made



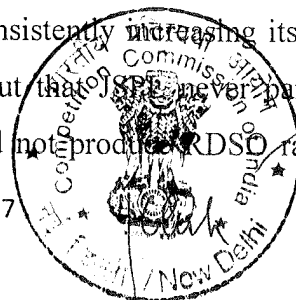
to detailed analysis given by GENESIS which showed that at best the savings can be estimated around Rs.1.00 crore or 0.03% of the total cost of procurement. It was argued that for this marginal and disputed saving, IR will have to forego the benefits of MOU which included security of supply and control over pricing.

48. The OP also submitted that at the time of signing of MOU, there were no other indigenous supplier except SAIL and, therefore, not contracting for full capacity of SAIL would have left IR with insecurity regarding supply.
49. It was argued that the definition of relevant product taken by DG was flawed because manufacturers/suppliers of steel cater to consumers which include consumers for structurals as well as for rails including head hardened rails. Similarly, the geographic market should not be limited to India since the IR itself floated global tender in 1997 and 1998 and since it cannot be denied that imports are perfect substitutes of indigenous rails. It was pointed out that JSPL itself had exported to Iran in the past and SAIL could not export rails due to its commitment to IR.
50. As regards dominance, the OP argued that the alleged dominance of SAIL must be assessed in the light of the peculiar circumstances in which the MOU was entered into. The control of IR over pricing decision cannot be ignored. The substantial investment incurred by SAIL at the behest of IR has to be taken into account especially when production of structurals is more profitable.
51. With reference to size and resources of SAIL, it was submitted that SAIL is in competition with all global steel makers who export rails to various countries including India and has lost many export opportunities due to its commitment to first meet the requirements of IR.
52. It was argued that JSPL has itself admitted that IR is dominant in the relevant product market in which it is a consumer. Therefore, the confusion that IR does not possess any countervailing buying power is baseless. This is evident from the fact that the Chairman, Railway Board has the final say in pricing of rails purchased from SAIL. It was further contended that although the MOU does not restrict IR to take suitable recourse in case SAIL is not able to meet its requirement, IR still did not procure from JSPL which reflects the consumer preference of IR. It was also pointed out that SAIL cannot sell prime quality rails to other users without clearance from IR. It was submitted that all these facts shall be substantial countervailing buying power of the IR in the relevant market.





53. The OP also submitted that it was fulfilling several social obligations as a public sector undertaking and was incurring substantial cost on discharging its CSR commitments in the field which included education, health and poverty alleviation. This is to be given due recognition while interpreting Section 19(4) of the Act for determining dominance.
54. It was further submitted that JSPL had itself admitted that SAIL was the only manufacturer in India which had the ability to supply rails to fulfil the entire requirement of IR. The MOU was entered into by IR because it wanted a single indigenous supplier. In a situation where IR decides prices, quality and quantity of rails, it cannot be said that IR is dependent upon SAIL.
55. The OP vehemently denied having prevented the entry of JSPL into the supply of RDSO compliant rails in India. It was pointed out that IR entered into the MOU with SAIL for ensuring supply of rails at a time when no other player was prepared to do so. This MOU was at the behest of the Government of India which also directed SAIL to make critical investments to meet the requirements of IR. It was submitted that although SAIL was not in a comfortable position in finalizing to make the investment it had to do so as it was a policy decision at the level of Union Ministries which SAIL is under a mandate to follow. Supply of rails to IR has resulted in disadvantage for SAIL in the structural market due to commitment of SAIL's production capacity towards IR.
56. The OP referred to Minutes of the 270<sup>th</sup> Board Meeting of SAIL and submitted that the minutes clearly show the intention of trying to meet substantial competition faced from competitors. The fact that SAIL was forced to install facilities in RSM at Bhilai and a decision was also taken to explore alternate market for exports shows that SAIL was not able to act independently of its competitors.
57. In view of the above, it was argued that SAIL neither had dominance in terms of Section 4 nor can its conduct be construed as abuse under the provisions of the Act.
58. With respect to the conclusion drawn by the DG regarding contravention of Section 3(4) of the Act, the OP strongly contended that there was no AAEC. It was argued that the MOU was entered into at a time when there was no other indigenous producer of RDSO compliant rails in India. Moreover, JSPL had entered the market in full force only after the signing of the MOU. This shows that the MOU did not create entry barriers in the market.
59. It was also argued that JSPL has been consistently increasing its capacity in the overall structural market. It was also pointed out that JSPL never participated in the tender process initiated by IR in 1997 and could not produce RDSO rails before April, 2008.

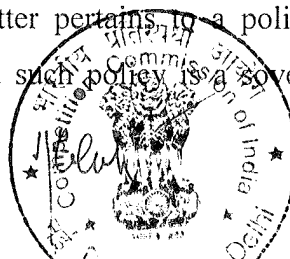


JSPL is also capturing orders from non-IR segments where it gets high margin. These facts prove that existing competitors are being driven by the market.

60. It was also pointed out by the OP that the MOU stipulates that in the event SAIL is unable to meet IR's delivery schedule, IR is free to take suitable recourse. This shows that MOU does not foreclose competition in the market.
61. It was submitted that in the instant case, IR was in the position of the consumer and that it had complete control over the quantity, price and quality of rails it procured from SAIL. Further, JSPL does not have the capacity to meet the entire demand of IR. It was contended that IR's preference for indigenous and secure source of supply for rails from a single supplier reveals the preference of the consumer. Therefore, in this case, the consumer is benefitted.
62. The OP rebutted the contention of the Informant that the MOU has not led to any improvement in the production or distribution of RDSO compliant rails. It was argued that RDSO specifications are not stagnant but evolve continuously. It was submitted that SAIL's facilities have been used time and again as testing ground for RDSO thereby leading to improvement in production and distribution.
63. The OP also countered the charge of direct and significant harm to users of rail transport services. It was submitted that in this case the product in question has only one major "consumer", viz. IR. The MOU was entered into at the behest of the Govt. of India and gives IR complete control over the quality, quantity and price of rails. These factors have placed IR in the best possible situation any consumer can be in a market.
64. It was submitted by the OP that SAIL had invested about Rs.711 crores at the behest of IR for creating new facilities upgradation of production quality and expansion of existing facilities etc. It was argued that the exclusivity clause is a part of the reciprocal contract which makes it feasible for SAIL to dedicate its capacity for IR. These factors indicate promotion of technical, scientific and economic capacity and have to be accordingly viewed under Section 19 (3) of the Act.
65. In conclusion, the OP prayed that the Commission may reject the findings of the report filed by the DG and reject allegations of contravention of Section 4 or Section 3 (4) of the Act.

**Gist of submissions of Ministry of Railways (MoR):**

66. It was submitted by MoR that the present matter pertains to a policy laid down by Ministry of Railways, Government of India and such policy is a sovereign Act and is



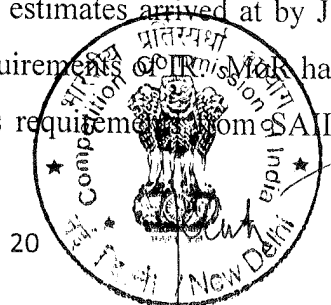
governed by the Railways Act, 1989. Further, it was submitted that SAIL was obliged by way of ministerial direction to put in place sufficient capacity to meet the needs of IR for supply of rails in terms of both quantity and quality. Based on past experience and the fact that no other source was available for long term needs of IR, it was felt necessary to have a long term commitment from supplier of rails. This was also necessary because of huge investments required to set up manufacturing facility which would have a long gestation period. It was thought prudent to enter into MOU with a Government PSU, which was fully under the control of the Central Government and it was neither plausible nor prudent to commit to a new source. Further, a commitment of 15-20 years with a new supplier was not considered in the interest of IR especially when a Central Public Sector Undertaking, viz. SAIL was capable to fulfilling the requirements of IR. It was submitted that SAIL had agreed to increase production and quality of rails at the behest of Indian Railways after no other supplier was available despite efforts of IR.

67. It was also submitted that in the present MOU, the final decision in terms of pricing lies with IR and till date, all payments have been made not as per the demand of SAIL but as per the decision of IR.
68. It was contended that IR performs sovereign functions of the Government and in public interest and, therefore, it is not an “enterprise” within the meanings of Section 2(h) of the Competition Act.
69. It was submitted that the MOU was a result of Government policy and it is for the Government to decide its policy after considering several factors including liability, public interest etc. It was further submitted that as per the MoU IR has the right to take such recourse as deemed fit in case of failure on part of the SAIL to deliver as per the agreed conditions. Therefore, such MOU cannot be termed as “exclusive supply agreement” in terms of Section 3(4) of the Act. The MOU does not restrict IR from acquiring rails from any other source if SAIL fails to deliver.
70. As regards annual review clause, it was submitted that IR did not feel it necessary since it is satisfied with SAIL.
71. MoR also disputed the observations of the DG that IR has not procured rails from any supplier situated outside India in the last 12-13 years. It was stated that during 1986-1999, the imports were made from Austria and UK and the MOU with SAIL has helped IR save foreign exchange.
72. It was further submitted that IR had floated open global tender in 1997 followed by another pre-bid meeting in 1998 but no serious offers were received for manufacturing



indigenously. It was emphasized that JSPL neither participated in the tender nor attended the pre-bid meeting. Under the circumstances, it was decided at the Ministerial-level that there should be development of infrastructure at Bhilai Steel Plant of SAIL. Due to the requirement of huge investment and long gestation period, a reciprocal long term commitment had to be given for SAIL. It was contended that like any other prudent consumer, the Government is not bound to purchase from any other Company if Government owned Company itself is fulfilling its requirements at competitive rates. It was contended that RDSO acts as a Technical Adviser to IR and is associated with development of new and improved products and absorption of new technologies. Therefore, RDSO's specifications of rails cannot be said to discourage external players.

73. It was argued that it is open to the consumer to decide what he wants to buy particularly with a product like rail, which has a lot of safety concerns, strategic movement of defence personnel and similar other highly sensitive matters involved.
74. It was also contended that rails have a global market and it was not correct to limit the geographical market to India in this case.
75. MoR submitted that Chairman of Railway Board is expected to intervene and correct the pricing of rail only if he has enough reason to do so. His non-intervention demonstrates that the pricing of long rails as determined by the pricing committee is in order.
76. IR caters to social, strategic and commercial needs of the nation. It was submitted that dominance of IR should take into account all these factors. On the issue of the finding of the DG that SAIL had abused its dominant position, MoR submitted that the MOU does not foreclose the market for competition. Laying down specifications cannot be construed as limiting and restricting the scientific development but only reflects the actual requirement of IR based on RDSO specifications.
77. MoR contested the finding of the DG that IR had restricted SAIL from selling to any other party without prior approval of IR. It was submitted that all rails laid down on the network of rails India, require to adhere to RDSO specifications and that is why approval is required from IR in the interest of safety of railway operations.
78. As regards cost analysis submitted by JSPL, it was submitted that IR requires rails of different length due to geographical locations, transportation, constant maintenance requirement etc. It was contended that estimates arrived at by JSPL were abstract and presumptive and not based on actual requirements of IR. MoR has also submitted that it was not SAIL that forced IR to buy its requirements from SAIL but it was IR which



forced SAIL to enhance its capability and meet the requirements of IR. According to MoR, the MOU is in the best interest of IR.

79. Without prejudice to its submissions on facts and merits, MoR also submitted that no fruitful purpose would be served by interfering with the existing MOU and it would only cause bottleneck in the supply of rails to IR. IR is a satisfied consumer and if the MOU is interfered with IR would suffer adversely.

**Submissions of the Informant (JSPL):**

80. JSPL has relied on the opinion filed by it, its rejoinder dated 31.3.2010, written submissions dated 29.3.2010, its observation to the DG's report dated 18.4.2011 and opinion of RDE dated 14.4.2011.

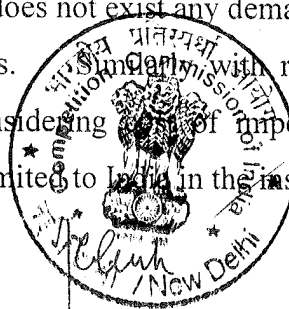
81. In its arguments, JSPL submitted that in the instant case, the anti-competitive conduct by SAIL and IR continues, therefore, the anti competitive effect of the MOU is within the purview of the Competition Act. The Informant has relied on the order of Bombay High Court in "Kingfisher Airlines and other v/s Competition Commission of India."

82. It was submitted that even though MOU has an annual review clause, no renewal of the terms and conditions have taken place till date. In effect, it makes the MOU perpetual. It was contended that everything done by IR, i.e. buying portable water, catering services, buying wagons etc. cannot be said to be outside the purview of any law simply because IR is a statutory monopoly. Further action of statutory monopolist is not protected from the relevant laws.

83. It was also contended that SAIL and IR are separate enterprises since the control of the Government is only to the extent of holding shares and there are no structural links between the two. Both are under different administrative ministries and, therefore, cannot be said to be under common management and control. IR and SAIL have complete independence and operate in different markets.

84. The informant contended that IR is not acting as the state but just like any party to a contractual agreement with respect to an agreement. The MOU cannot be considered to be a Government policy.

85. The Informant reiterated its contention that the relevant market in this case is RDSO compliant rails in India. It contended that there does not exist any demand substitutability between rails and any other structural products. Similarly, with respect to relevant geographic market, it was contended that considering the nature of imports, logistics and transportation issues, the geographic market is limited to India in the instant case.



86. The Informant emphasized the contentions made in the information and submissions before the DG to state that SAIL was dominant in the relevant market where it had approximately 96% market share. The Informant also revisited other factors given under Section 19(4) of the Act to highlight the dominance of SAIL in the relevant market. Since these contentions were substantially same as those given in the information and also before the DG, it is not necessary to elaborate upon the same. JSPL contended that the exclusivity arrangements have led to denial of market access in violation of Section 4(2)(c). Further, it was contended that by adhering to its own specifications, IR is limiting and restricting technical or scientific development relating to manufacture of long rails and is in contravention of Section 4(2)(b)(ii).
87. JSPL submitted that the exclusive supply arrangement between SAIL and IR causes AAEC and is in contravention of Section 3(4). It has resulted in increased costs for JSPL and if the arrangements continue, JSPL may be forced to exit from the relevant market. It was also pointed out that there have been no recent entry into the relevant market which is evidence of foreclosure of market.
88. It was contended that IR has admitted that they cannot buy from JSPL because of the MOU and therefore, the MOU is a significant barrier to entry for any competitor of SAIL.
89. It is submitted by JSPL that the investments made by SAIL in augmenting rail manufacturing capabilities was due to direct threat from JSPL and not at the behest of IR.
90. It was contended that total exclusivity in perpetuity incorporated in the MOU cannot be justified under any circumstances. It is further contended that even if some exclusivity was to be retained to protect investment, it could have been granted for shorter duration, smaller quantity of rails and limited to long rails only. This is not the case with MOU.
91. It was contended that the MOU has harmed both IR and the ultimate consumers of rail services in India. It was contended that in the absence of the MOU, IR would have been able to source its requirements in a competitive market from more than one competing supplier. Consequently, requisite investment in improving the product would be made. IR would have been able to benefit from cost savings because of competitive pricing. In the process, JSPL would be able to exercise economies of scale and emerge as effective competitor. This would have given positive signals to potential new entrants who would continuously compete and enhance their technical knowhow to produce better and efficient products.



92. JSPL has also questioned the safety aspect of rails produced by SAIL and contended that longer rails of 120 mtr are safer. The Informant also contended that IR is using rails, expensive and inefficient which is a burden on the state exchequer. It is contended that higher cost for IR results in higher cost for ultimate consumers of railway transportation service.
93. It was contended that it is a matter of common sense that there will be a security of supply in the market where there is more than one supplier. It was argued that if for any reason SAIL has some problems with its Bhilai Steel Plant, IR will be left on SAIL's mercy to either wait or switch to expensive imports that would drain exchange reserves.
94. It was also contended that the MOU has not led to any improvement in the production and distribution as SAIL has not been able to improve or innovate, it was further argued that RDSO is engaged in continuous R&D activities on behalf of IR and, therefore, IR has no need of access to any R&D that SAIL might do.
95. In conclusion, the Informant sought the following reliefs from the Commission and also suggested remedies as given below:

In light of above, JSPL reiterates that –

- (a) The MOU is anti-competitive agreement within the meaning of Section 3(1) and Section 3(4); and
- (b) Both IR and SAIL have abused their dominant positions in respective relevant markets in violation of Section 4 of the Competition Act.

**Specific orders sought from the Hon'ble Commission:**

- (a) Order SAIL and IR to immediately terminate the MOU;
- (b) Impose fines on SAIL and IR in accordance with Section 27 of the Competition Act for entering into an anti-competitive agreement which has caused an AAEC by foreclosing almost the entire market for RDSO compliant rails in India;
- (c) Impose fines on SAIL and IR in accordance with Section 27 of the Competition Act for abusing their respective dominant positions;
- (d) Permanently restrain SAIL and IR from indulging in such ant-competitive behavior in future;



- (e) Introduce competitive bidding arrangement in the relevant market for purchase of rails;
- (f) Pass an order to pay the costs to the complainant/information provider; and
- (g) Pass any other order that the Hon'ble Commission may deem fit.

## **SPECIFIC SUBMISSIONS ON REMEDIES**

### **Introducing competitive conditions**

96. JSPL submitted that the MOU between IR and SAIL is the main stumbling block which is preventing the competition from emerging in the rails market and the Commission must direct IR and SAIL to terminate the MOU forthwith.

### **Fines**

97. **SAIL:** In addition to above, JSPL made the following specific submissions in relation to fines that should be imposed on SAIL;

- (a) Throughout the entire process, SAIL has left no stone unturned to derail the investigation through its grossly anti-competitive conduct;
- (b) SAIL has continuously sought to delay the process by raising completely baseless and unmeritorious challenges to Commission's jurisdiction and decisions;
- (c) All the challenges raised by SAIL during these proceedings have eventually been decided against SAIL at all levels of the judicial ladder i.e., at the CCI, High Court and even the Hon'ble Supreme Court of India;
- (d) During the entire process, SAIL has continued with its belligerent stand and continued with its attempt to deny access to JSPL and further, has denied all the opportunity to IR to source better quality rails at better prices.
- (e) In light of above aggravating factors, the Hon'ble Commission has been requested to impose strictest fines on SAIL for its continued anti-competitive conduct.



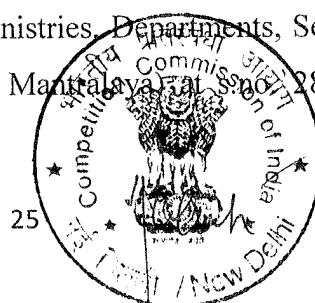


- (h) Permanently restrain SAIL and IR from indulging in such anti-competitive behavior in future;
- (i) Introduce competitive bidding arrangement in the relevant market for purchase of rails;
- (j) Pass an order to pay the costs to the complainant/information provider; and
- (k) Pass any other order that the Hon'ble Commission may deem fit.

### **Findings of the commission**

98. The preliminary issue for the Commission's discussion is whether both SAIL and IR are enterprises in terms of provisions of the Competition Act.
99. It is observed that the SAIL is a Central Public Sector Undertaking (CPSU) wherein the Govt. of India holds about 85% stake. It is engaged in the production and supply of a wide range of steel products including rails. This fact is undisputed and therefore, SAIL is an "enterprise" within the definition of section 2(h) of the Act.
100. As regards the status of Indian Railways (IR) which has been treated as "necessary party" in the investigation report of the DG, there is need to also determine whether Ministry of Railways (MOR) is one and the same as IR or are they two distinct though related entities.
101. For this, reference is made to **THE GOVERNMENT OF INDIA (ALLOCATION OF BUSINESS) RULES 1961**. Relevant portion of the said Rules is reproduced below:
- a) *Allocation of Business - The business of the Government of India shall be transacted in the Ministries, Departments, Secretariats and Offices specified in the First Schedule to these rules (all which are hereinafter referred to as "departments").*
  - b) *Distribution of Subjects -*
- The distribution of subjects among the departments shall be as specified in the Second Schedule to these rules and shall include all attached and subordinate offices or other organisations including Public Sector Undertakings concerned with its subjects and sub-rules(2), (3) and (4) of this rule."*

102. The First Schedule gives a list of Ministries, Departments, Secretariats and Offices which lists Ministry of Railways (Rail Mantralaya) at S.No. 28. Distribution of work



amongst various departments is given in Second Schedule of the Rules. The allocation of the business of Govt. of India to MOR is mentioned therein as:

*“MINISTRY OF RAILWAYS (RAIL MANTRALAYA)*

*RAILWAY BOARD (RAIL BOARD)*

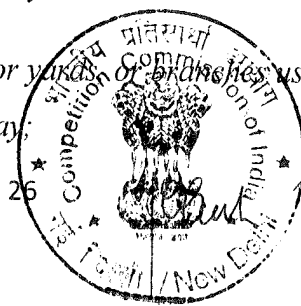
- 1. Government Railways- All matters, including those relating to Railway revenues and expenditure, but excluding Railway Inspectorate and Railway Audit.*
- 2. Non-Government Railways – Matters in so far as provision for control by the Ministry of Railways, Railway Board as provided in the Railways Act, 1989 (24 of 1989) or in the contracts between the Government and Railways, or in any other statutory enactments, namely, regulations in respect of safety, maximum and minimum rates and fares, etc. excluding the item of work allocated to the Department of Urban Development.*
- 3. Parliament Questions regarding offences relating to pilferage of railway property other than offences relating to crime on Government Railways and Non-Government Railways.*
- 4. Administration of pension rules applicable to Railway employees.”*

103. Indian Railways (IR) is a departmental undertaking of Govt. of India, controlled through Ministry of Railways (MOR) and administered by Railway Board that reports to the Ministry of Railways. IR was created by consolidation of about 42 railways in 1951 as a single Government railway and placed under overall administrative control of the Railway Board. “Railway” is defined under section 2(31) of The Railways Act, 1989 as,

*“ "railway" means a railway, or any portion of a railway, for the public carriage of passengers or goods and includes--*

*(a) all lands within the fences or other boundary marks indicating the limits of the land appurtenant to a railway;*

*(b) all lines of rails, sidings, or yards or branches used for the purposes of, or in connection with, a railway;*



*(c) all electric traction equipments, power supply and distribution installations used for the purposes of, or in connection with, a railway;*

*(d) all rolling stock, stations, offices, warehouses, wharves, workshops, manufactories, fixed plant and machinery, roads and streets, running rooms, rest houses, institutes, hospitals, water works and water supply installations, staff dwellings and any other works constructed for the purpose of, or in connection with, railway;*

*(e) all vehicles which are used on any road for the purposes of traffic of a railway and owned, hired or worked by a railway; and*

*(f) all ferries, ships, boats and rafts which are used on any canal, river, lake or other navigable inland waters for the purposes of the traffic of a railway and owned, hired or worked by a railway administration, but does not include--*

*(i) a tramway wholly within a municipal area; and*

*(ii) lines of rails built in any exhibition*

*ground, fair, park, or any other place solely for the purpose of recreation;”*

104. The Railways Act, 1989 further defines and differentiates railways into “Government railway” and “non-Government railway”. Section 2(20) says “*Government railway*” means a railway owned by the Central Government. Section 2(25) says “*non-Government railway*” means a railway other than a Government railway.

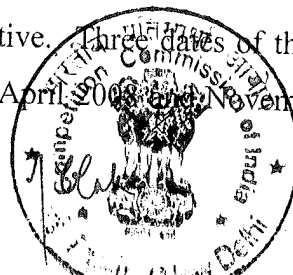
105. As seen above, Ministry of Railways has greater control over IR, which is “Government railway” and lesser degree of supervision and control over non-Government railways. Thus, very clearly, IR is a “Government railway” as distinct from MOR, which performs a supervisory role in relation to all railways in India on behalf of Govt. of India. While IR performs the economic role of an enterprise, MOR is vested with the role of policy formulation or discharging the sovereign functions aspect related to the railway industry in India.

106. IR as a departmental undertaking of MOR is engaged in the activity of public carriage of passengers or goods and all other activities mentioned in section 2(31) of The Railways Act, 1989 quoted above. Thus IR is engaged in provision of railway service as defined



above. "Transport" is included in the definition of "service" given in section 2(u) of the Act and public carriage of passengers or goods is transport. Therefore, IR is an "enterprise" within the definition of section 2(h) of the Competition Act, 2002.

107. The central issue before the Commission is whether the Memorandum of Understanding (MoU) signed by SAIL in the supply of rails to Indian Railways (IR) is anti-competitive by foreclosing the market for new entrants. The thrust of the arguments put forward by the informant is that the MoU between SAIL and IR in the supply of rails is an exclusive supply agreement between a dominant seller and a dominant buyer results in entry barriers by way of denial of market access and refusal to deal. The informant has alleged violation of Sec 3(4) of the Act. Since SAIL is a dominant player in the market of rails, the informant has further averred that vide the MoU, SAIL has abused its position of dominance (or super-dominance the preferred nomenclature used by the informant) foreclosing the market for new entrants thereby contravening Sec. 4(2).
108. Having heard the arguments put forth by the parties and having analyzed the investigation report of the DG, the Commission's observations and analysis is set out in the following paragraphs. The critical issue is whether the MoU, an exclusive supply agreement, is anti-competitive and forecloses competition. The allegations of violation of Sec 3(4) and Sec 4(2) calls for examining the fundamental tenet of market functioning that 'buyers' choice', is not anti-competitive. The analysis will keep in focus the hypothesis that an agreement between a seller and buyer represents efficient outcomes provided it is based on rational considerations. Questioning this approach as has been done by the informant, points towards the possibility that exclusive supply agreements may affect competition. Economic rationale does not automatically lead to this conclusion. Efficiency of such supply agreements is dependent on the conditions incorporated in the agreement. Therefore, we need to look at the rationale of the MoU under investigation, the conditions and nature of the MoU, and whether the MoU leads to foreclosure of competition; so as to determine whether the MoU under investigation is anti-competitive.
109. The MoU is recognized as a valid agreement/ contract. The present MoU between SAIL and IR is in the nature of a contract and is the basis on which the informant has alleged that the action of SAIL is anti-competitive. Three dates of the MoU have been highlighted by the informant – February 2003, April 2003 and November 2010, the first



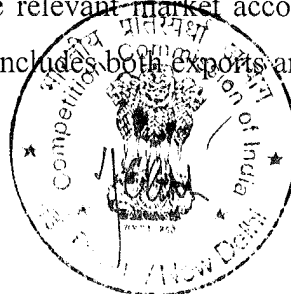
being the date on which the MoU was signed. On this date SAIL was the only RDSO compliant supplier of rails to IR. In 2008, JSPL equipped with an RH Degasser technology, appeared as a new entrant to RDSO compliant rail market. Up to the year 2008, SAIL was the monopoly supplier to IR. From 2008 onwards, the rail steel market has one buyer and two potential suppliers with IR still as the dominant buyer of rails. The review in November 2010 is a reiteration of the existing MoU, whereafter IR came to the conclusion that there was no justification for IR to shift its source. IR in its filings has stated that it reviewed the MoU on 10<sup>th</sup> November 2010 and “then considering the safety aspect of the investment made by SAIL, it did not find it suited to review it further”.

110. The issue to be examined is whether IR is free to choose its supplier and exercise the right of ‘buyer's choice’ and to continue to exercise this right, or whether SAIL as a dominant player in the market for rails has locked IR into a long-term contract that deters new entry.

### **Relevant Market**

111. At the outset it is necessary to define the relevant market. The relevant market, consisting of both the relevant product market and the relevant geographic market, have been defined differently by the different parties in this case. Using the concept of SNNIP test JSPL, the informant, has defined the relevant product market as “RDSO compliant rails”, as rails that do not comply with the RDSO specifications are not interchangeable and cannot exert competitive pressure. The relevant geographic market for rails is India. According to them, high transportation costs and requirement of RDSO compliance restricts the scope for imports of rails.

112. To SAIL the relevant product market is RDSO compliant rails including head hardened rails as well as other industrial use rails conforming to various other global specifications. SAIL has extended the definition of relevant product to include substitutability from the supply side and the relevant market accordingly includes both rails and structurals. The geographic market includes both exports and imports of rails. IR



however constrains the relevant product market to rails conforming to RDSO specification but extend the geographic market beyond the boundaries of India.

113. DG in his report has defined the product market as rails conforming to RDSO specification. The geographic market has been sub-divided into manufacture of rails in India and procurement of rails in India.
114. In defining the relevant product market the Commission is inclined to accept the definition of the DG and in doing so defines the market as 'rails compliant with RDSO specification'. This definition is in conformity with Sec 2(t) where demand side substitution is the determining factor in drawing the contours of the relevant product. Studies on steel industry confirm that in the long range products, namely structural and rails, there is very little switching. A shift to rails is determined purely by demand. The shift, of course, entails additional capital investment and there is a time lag.
115. The geographic market is taken as India by the Commission. Imports and exports are part of the competitive pressures. The Commission looks at competition in the Indian market where international trade is a factor for and of competition.
116. Given the relevant market definition, IR is a monopsonist buyer of long rail steel. The present MoU is an agreement between a monopolist and a monopsonist buyer. SAIL at the time of signing the MoU, was a de-facto monopoly supplier as regards RDSO compliant rails. Switching from structural to rails, although possible, has a cost and time dimension limiting the scope for substitutability.

#### **Buyer's Choice– Supply Agreements (MoU)**

117. The exercise of buyer's choice normally is not a competition issue and not questioned by the Commission unless, as alleged by the informant, there is dominance of a single player. A dominant buyer such as IR, if it purchases solely from a single seller (also dominant) without citing appropriate reasons, can perhaps be seen to foreclose competition. The unrestrained exercise of the 'buyer's choice' argument in such situations can raise competition concerns as in the present case. The starting point therefore for

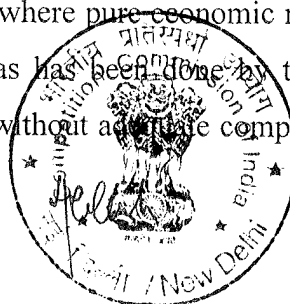


apprehending the rationale for the MoU and allegations therein arises from the exercise of ‘buyer’s choice’.

118. Firms often source their intermediate input requirement from the market either through conventional market mechanisms or by alternative procurement mechanisms which are through agreements such as MoUs. Horn and Wolinsky in their paper 1988 paper on long term agreements observe that these arrangements are often with ‘bilateral monopolists’ defined as where both the buyer and seller are in monopolistic position. Similarly a paper by Cusumano and Takeishi (1991) on purchase of automobile parts by automotive manufacturers in Japan and USA show that in the US sample 59% of the parts were procured from one supplier and 70% in the case of Japanese firms. The authors found that the manufacturer-supplier relationships were “long-term and stable”.

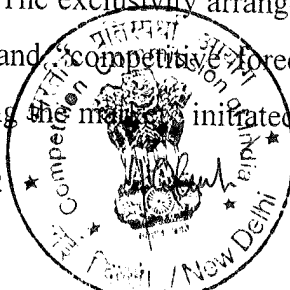
119. The economic rationale of buyer’s choice for IR to sign the MoU is to ensure a steady and secure supply of domestically produced rail steel. Prior to the SAIL supply, rails were imported. Requirements of rapid rail transport network expansion, combined with maintenance of technical security standards, pointed towards development of domestic manufacture of rail steels. Imports are more expensive than domestic rails, as Indian steel produce is one of the cheapest in the world. Easy access to raw material such as iron ore make it cost effective for steel manufacturers, and for IR, to source rails through a steady domestic source. Domestic supply source also provides for continuous up-gradation in the quality of rails (length and strength), to meet the requirements of faster trains with heavier loads. All rails purchased by IR have to be cleared by RDSO and are classified as RDSO compliant rails. Security of supplies of rails (RDSO compliant) tends to minimize transaction costs and costs of uncertainty. This dimension is of great importance for national transport networks like IR.

120. We now address the rationale for SAIL signing the MoU. We find that this was done at the behest of the Ministry of Railways. For SAIL this meant a shift from the more lucrative structural market to the less lucrative rails market. It also involved additional investment for the shift with further investments to upgrade the quality of rails. ‘National interest’, rather than profit motive, was the guiding principle. Did SAIL get a good deal? This is a difficult question to answer, for the decisions of SAIL and IR are within the paradigm of state-oriented development policy, where pure economic rationale was often not the deciding factor. Critics might argue, as has been done by the informant, that SAIL’s entry into the steel rail market was not without adequate compensation by IR. IR



presumably may have compensated SAIL in terms of SAIL's foregone opportunity cost of shifting from rails to heavy structural. The perception is based on the fact that SAIL in its negotiations with IR, did not insist on an exit option or a termination date of the MoU. We will analyze later to what extent this argument is valid in the present case.

121. The MoU between SAIL and IR reflects the outcome of bargaining between a seller and buyer. In economics it is viewed as bargaining in a 'bilateral monopoly', where both the agents (SAIL and IR) are monopolists. In bilateral monopoly, equilibrium price and quantity outcome is indeterminate. A solution is to use the notion of Nash bargaining which enables the derivation of a price-quantity solution compatible to both parties. Nash bargaining in this context entails the joint maximization of the surplus from agreement. The outcome of this Nash bargaining is the price-and-quantity contract between SAIL and IR, as reflected in the MoU signed in February 2003. It is an efficient outcome. The MoU cannot, therefore, be termed as anti-competitive on this basis.
122. The allegation of the informant is that the MoU signed in 2003 while competitive at that time, ceases to be so in 2008 when the informant is ready to enter the rail market with RDSO compliant rails. The issue that needs to be examined is whether under conditions of competing suppliers, the MoU is anti-competitive and as claimed by the informant has the potential to create entry-barriers. As per the informants submission, SAIL being a market leader in the production of steel, any fresh investments made by SAIL in the production of long rails would have been recovered in a short space of time. The need to continue with the MoU and the virtual exclusivity granted by the MoU gives SAIL a significant commercial advantage. SAIL, therefore, prefers the comfort of a locked-in relationship.
123. The allegation of the informant is that SAIL as a dominant player entered into an open ended agreement and that the MoU of 2003 has not taken into account the possible entry of new suppliers of RDSO compliant rails. The exclusivity arrangement of the MoU is to the informant a strategy of entry barrier and anti-competitive foreclosure of the relevant market for new/smaller player from entering the market initiated by the dominant steel





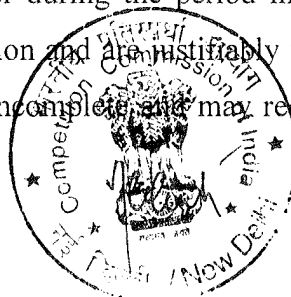
manufacturer SAIL. The prevailing supply agreement and the conditions of the agreement as alleged by the informant does not provide any incentive to the incumbent “to provide a better price or even a technologically improved product”. Ultimately it is the end consumer who loses.

124. A long term price-and-quantity agreement, which is complete and is common knowledge among all potential market participants, is not inherently exclusionary in nature, even though the agreement is between bilateral monopolists.

125. In the light of the above arguments some essential conditions for completeness of the agreement would entail :

- a. Specific duration of the contract (based on an objective criterion such as recovery of initial investment by SAIL) – as per the informant the MoU is open ended and does not make specific mention of the length of the contract;
- b. Review process of the contract – according to the informant the review process was removed as per the communication of 10<sup>th</sup> November 2010;
- c. An exit clause for either party - The exit clause as per the informant is not complete either: it merely mentions that IR is free to select a different supplier if SAIL fails to meet its demands. It does not specify conditions under which SAIL can exit the contract.

126. The case rests on anti-competitiveness of the MoU and the effort of a dominant player in rails (SAIL) to include conditions that are incomplete. The MoU removes the necessity of finding RDSO compliant rail steel every period and therefore, the uncertainty in supply. It is also in line with empirical evidence showing that why industrial procurements are made through contractual arrangements. Nonetheless, the efficiency gain of a contract relies a lot on whether it is complete or incomplete. A complete contract takes into account all possible contingencies which are likely to affect the relationship between the buyer and the seller during the period in which they interact. Complete contracts do not require renegotiation and are justifiably without a termination date. However, most real life contracts are incomplete and may require renegotiation to



improve the welfare of the participating agents in the contract. We address the issue whether this MoU is incomplete or not and whether this incompleteness creates any competition concerns.

127. DG in the investigation report has concluded that both IR and SAIL indulged in AoD in the relevant markets of procurement and manufacture of **long rails** violating Sec 4(2)(b)(i). According to DG by seeking assurance from IR for regular placement of orders SAIL forced IR to procure all its requirements of long rails from the Bhilai steel plant of SAIL providing the required comfort to SAIL. IR on the other hand restricted SAIL from selling its product to third parties resulting in contravention of Sec 4(2) (a) (i) of the Act discernible in terms of imposing unfair and discriminatory conditions in purchase of the goods. Imposition of RDSO specifications in the manufacture of **long rails** IR foreclosed the market for competition in the relevant market, according to the DG. The DG concludes that the MoU is not only exclusive but also perpetual which is still foreclosing the market for procurement of long rails for competition violating Sec. 4(2)(c) of the Act.

128. Analysing the features of the contract in detail, there can be a claim that it is incomplete to the extent that it does not provide for the contingency of a competing supplier of rails available in the domestic market. Cognizance should be taken of the fact that the arrival of JSPL as a RDSO compliant alternative to SAIL is a contingency that could affect the buyer-seller relationship between IR and SAIL. If a more efficient competing domestic supplier is available, it changes the opportunity cost of IR for procuring rails. Before this event, there was no outside option for IR other than SAIL. Now, there is the possibility of an alternative to SAIL's supply. At the same time, there is no exit clause for SAIL, nor is there a mention of a penalty (compensation) that IR could pay SAIL in the event it finds a second more efficient supplier. Hence, the emergence of another supplier in the market is a contingency not covered in the MoU which can raise several arguments suggesting that renegotiation of such an incomplete contract could be welfare enhancing if, as claimed, the JSPL's bid shows that it is a more efficient and a reliable provider of rail steel compared to SAIL after allowing for the cost of renegotiating and rewriting a new contract).



129. From the submissions it is noted that the MoU is open ended and there is no specific duration of the contract, the first condition for a complete contract. Generally the period of any agreement (MoU) is defined to cover the period of payback of the investment in the rail steel mill by SAIL. SAIL has not specifically mentioned the break-even period of the initial investment. One of SAIL's internal documents does mention 3.3 years as the payback period of the initial investment. Keeping in mind the fact that at least some part of the investment can be fungible and reused for the production of heavy structurals, the payback period of that part of the investment exclusively made for production of rail steel is not immediately clear.

130. The second condition is that of regular reviews of the MoU. In the recent review in 2010 (November) IR have stated that “considering the safety aspect of the investment made by SAIL it did not find it suited to review it further”. The only reason for IR to nullify the contract is when SAIL fails to supply the required amount to IR. The arrival of competing and more efficient domestic supply may therefore, not yet be considered as justified reason for terminating the contract as long as SAIL satisfies the conditions of supply in the MoU. The MoU does not take into account the contingency of arrival of competing RDSO compliant supply from another source. It does not spell out the action that IR would take if such a contingency arises in the future.

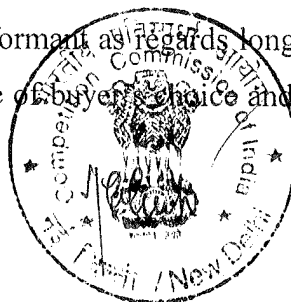
131. Lastly, there is no exit clause for SAIL. To the informant the lack of this clause is on account of the fact that SAIL, aware of the potential entrant JSPL, has used its dominant position to create entry barriers. The documents only indicate that IR was aware of JSPL's plans. It is unlikely that JSPL would have discussed its plans with SAIL, it's competitor. The lack of an exit clause is perceived as reflecting the adequateness of the price paid by IR. The allegation is that the negotiated price compensates SAIL adequately such that it is in the interest of the latter to participate in the contract and to continue with the contract.



132. Tying the arguments on ‘incompleteness’ and completeness’ vis-à-vis the MoU of SAIL and IR, points for enquiry as regards contravention of Sec 3(4) and Sec 4(2) could be summarised as follows. IR’s action was justified at the time when the MoU was signed when there was no competing reliable domestic supply other than SAIL. The compulsions of assuring a regular domestic supply therefore, seems to have been an overriding concern for IR in the signing of the MoU, rather than emphasising conditions on efficiency from a dynamic perspective.
133. The absence of dynamic efficiency in the contract implies that long run cost efficiency is not internalized within it. As the supply scenario changed from that in 2003 to that in 2008, with the arrival of an RDSO compliant supplier (JSPL) in the market, the partially complete MoU becomes an inappropriate benchmark for the choice of vendor of RDSO compliant steel rails for IR. With entry in the upstream market, it is now a game of a monopsonist facing a choice of bilateral/multilateral agreements with two possible vendors.
134. Nonetheless, the final analysis of the extent of incompleteness of the contract needs to factor in some essential ground realities. First, the argument that JSPL is a more efficient supplier than SAIL can be rejected, because the purported welding efficiency is significantly less than the estimates of JSPL. Second, the pricing committee in the SAIL-IR MoU, largely comprised of members of Railways, has successfully reduced prices to some extent in 2008. Third, the production of JSPL is much smaller (production of 34,787 tonnes in 2008-09) compared to SAIL (production of 8,31,922 tonnes in 2008-09). Fourth, access to the rail market does not give SAIL any significant economic advantage. Rails as a proportion of the total steel market is about 2 per cent in India as of now. Therefore, it seems more likely that SAIL has been persuaded to provide rail to IR.

#### **MOU: Competition Perspective**

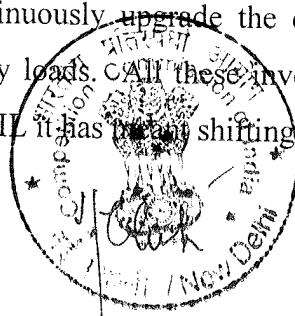
135. Having examined the allegations of the informant as regards long-term agreement of SAIL and IR first in the theoretical perspective of buyer’s choice and complete contracts



and alternative perspective of the informant, the impact on competition is to be examined in terms of the ground reality.

136. Let us address the basic question whether the incompleteness of the MoU between SAIL and IR leads to foreclosure of the market. In economic theory long run contracts have been analysed from two opposite perspectives. Traditionally, Posner (1976) and Bork (1978) (Chicago School) used the notion of individual rationality to argue that long term contracts cannot act as barriers to entry. Individual rationality demands that a consumer would not be willing to sign a long term contract with a monopolist unless it gets as good a deal as it would by not signing and waiting for new entry. A differing and more recent view put forth by Aghion and Bolton (1987) suggest that when there is a dominant buyer, it may be appropriate to lock into a contract of indefinite length as is the case of SAIL and IR. By locking itself into a contract of indefinite length with SAIL, IR reduces the size of the potential entrants' market and also reduces the probability of future entry. Aghion and Bolton (1987) point that it is possible for a monopoly seller **with private information** about entry to foreclose competition through a long run contract with the buyer.

137. Taking up the argument of 'individual rationality' did IR get a good deal and even more critical did SAIL get a good deal from the MoU? As mentioned earlier for IR the comfort of the MoU lay in minimising the uncertainty of supplies. In the case of SAIL the informant assumes that IR has sufficiently compensated SAIL. But from the statement made by IR after the review in 2010 that considering the 'safety aspect of the investment' made by SAIL perhaps compensation is still required for SAIL. In this statement IR clearly displays concern for SAIL. SAIL was asked in national interest to shift from structural to rails. SAIL was required to continuously upgrade the quality of rails to provide for longer rails capable of taking heavy loads. All these investments signify a loss in terms of opportunity cost. In fact, for SAIL it has meant shifting from a more



lucrative market to a less lucrative one. By emphasising 'safety of investment' IR is providing a safe harbour for a less commercially lucrative product. The decision under the given circumstances is rational.

138. A variant of Aghion and Bolton's perspective (with complete information) is the informant's allegation on entry barriers of the agreement. The facts on the ground reflect an interesting trend. In response, we can state that given the scale of operations of SAIL, it is obvious that the profitability of SAIL would not be affected even without the MoU. Therefore, we cannot infer any anti-competitive intent on the part of SAIL in signing the MoU with IR. More importantly, data on rails market shows that the supply of rails to non-IR is now a proportion of around 25% of the rails market.

**Table – Sale of Rails**

Financial year	IR's purchases of rails kiloton	SAIL's sales to non-IR customers - kiloton	JSPL's sales of rails - kilotons	Total sales of rails - kiloton	Proportion of total rails purchased by IR	Proportion of total rails purchased by firms other than IR
04-05	739	152	4	894	83%	17%
05-06	636	217	11	864	74%	26%
06-07	694	188	5	888	78%	22%
07-08	687	202	20	909	76%	24%
08-09	767	197	35	999	77%	23%

Source: RRB Economics Report submitted by JSPL on 1 September 2011



139. Market for rails in the non-IR private sidings and industrial use is emerging. With the introduction of containerisation vide private ports the scope for JSPL to grow exists. The table however, indicates that the market for rail is dominated by IR but the growing private sidings which will see greater growth as private ports emerge do not indicate that the market for rails is in any way constrained by the MoU. In a sense, the dominance of SAIL is in a dormant market, especially where the overall rail steel market is quite limited relative to the overall size of operations of the three parties (IR, JSPL, and SAIL) as of now. The actual performance of JSPL in the private siding market is not available. But presumably as the only other supplier of rails, JSPL should be in a position to command a premium.

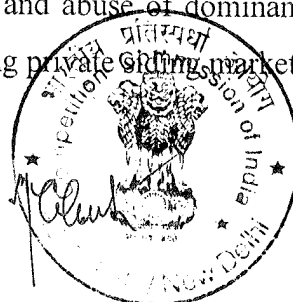
140. From a different non-price perspective, the requirement of IR is for continuous supply of high quality apart from quantity dictated by safety conditions of the national network. And at this moment only SAIL can meet these requirements. Safety is a very important dimension of rail transport. Over the years SAIL has been continuously upgrading the quality of its rails and is now rated among the best. Is it justified for IR to look at compelling suppliers at this point, when JSPL is still being stress tested on private sidings? Arguments of foreclosure do not arise, or to suggest that IR will ignore presumably a more efficient provider of steel is premature to say the least. JSPL has nowhere in its dealing with IR shown that it will be more efficient on a sustained basis, where efficiency is to be defined in terms of IR's requirements.

141. The argument that SAIL has locked IR into the agreement, and that IR is satisfied with the performance of its current provider of steel rails, SAIL, and therefore is not interested in considering another vendor, has no substance when there is no viable competitor. The MoU review in fact reflects a rational revealed preference for a particular supplier relative to another supplier (JSPL) till JSPL meets the required comfort level demanded by IR of assured supplies, high quality and competitive prices. To claim that due process was not given to JSPL in the review is to ignore the ground realities.



142. IR and SAIL interact in multiple markets and not just in the market for steel rails. SAIL is a customer for Indian Railways services for transporting its products from factory locations to final destination points. IR also purchases other steel products (for overhead traction, structurals, castings) in which SAIL has a big presence (railway products comprise approximately 7% of SAILs overall annual output). The continued interaction between IR and SAIL as buyers in some markets and sellers in some others might explain the perceived "comfort" that these entities mention in their dealings in the steel rail market. An interpretation of that "comfort" as stated by JSPL might be the leverage that SAIL has over IR due to its interactions in multiple other markets is not a sustainable argument. Nonetheless, this is not the reason cited by the IR for not selecting JSPL as a potential supplier. It can be a bit disconcerting that IR's provides no justification specifically as regards JSPL's candidacy on any objective criteria such as failure to meet quality standards (its product is RDSO compliant since 2008) or due to its inability to supply the required amount. The only reason, and definitely a valid reason for continuing with the present MoU is IR's concern over the safety of SAIL's investment, and that SAIL is satisfying all of IR's current demand. Given the ground realities of the case (the size of production of SAIL as opposed to JSPL and the overall limited size of the rail steel market), it is most likely that objective criteria such as capacity to supply must have played a role in IR's decision. Further, the fact that JSPL is a new entrant and is being stress tested on private sidings, as elaborated in the next paragraph, adds reason to IR's decision. As long as such objective criteria dictate IR's actions, there is no concern from a foreclosure point of view.

143. Decisions of buyers are not merely price-quantity determined. In the present case, a major consideration for IR is the security of long terms supplies of quality rails and, as stated earlier, long term agreement between SAIL and IR is in the genre of manufacturer-supplier relationship which are 'long-term and stable', especially as the informant is still to enter the market. IR by providing JSPL rails on private sidings, as is normally the required stress testing process after clearance from RDSO, does not give substance to the allegation of the informant that IR has not considered the availability of rail supplies from other suppliers on account of SAIL's dominance and abuse of dominance. It is equally possible that in future, JSPL may prefer the growing private siding market.





## Conclusions

144. From the analysis of the market for rails the MoU between SAIL and IR, as an agreement to supply rails on a continuous basis, is rational both on price and non-price considerations and is not anti-competitive. The primacy of the buyers choice is for RDSO rails available as per IR's requirements in terms of both quantity and the period when required. It is also noted that there has been continuous up-gradation by SAIL to meet standards which are now internationally comparable and acknowledged. IR describes the agreement as an outcome arising out of need for reliable supplies when no other party was willing to participate in the international tender when first floated. As noted empirical studies have shown that major automobile manufacturer also source their intermediate inputs vide agreements of stable and long term relationship. SAIL, although a dominant player in the rails market, was assigned the position at a time when investment considerations of the Government were dictated by the need for rapid expansion of the transport network. For SAIL it meant a shift out of the more lucrative structural market to rails requiring fresh investments

145. The allegation that the SAIL used its dominant position to foreclose competition rests on the three conditions of a) open ended contract; b) removal of the review clause and c) lack of an exit clause does not hold ground on a reading of the MoU and the actual processes on ground. Similarly the perception that IR has suspended regular reviews of the MoU does not hold ground. The Commission is more inclined to accept the view put forward by SAIL that the review is related to the purchase orders of IR, which occur annually once the railway budget is passed by Parliament. At the same time, the price review is done on a regular basis and we note that IR proposes to review the current pricing formula to arrive at a more appropriate pricing formula. The present pricing formula has slowly shifted from a purely administrated pricing formula in 1999 to incorporate market related pricing benchmarks by giving 50% weightage to steel prices in the input cost of rails negating the allegation of JSPL that SAIL faces no competitive constraints in its pricing policy.



146. The lack of an exit clause, the Commission observes, does not lead to foreclosure of the rail market as alleged by the informant. Firstly, the informant's rails are still under field tests. The contention that the exclusivity provision of the MoU imposes a 'refusal to deal' condition is not tenable as the field testing of JSPL is still on in terms of their usage on private sidings. Secondly, and more significantly the market for rails is emerging and, with expansion of port infrastructure and dedicated freight containers, the market for rails is expected to see considerable growth with expansion of private sidings. The MoU has not hindered competition in the rail market. The allegation that SAIL as a dominant player has strategized to create entry barriers by locking IR into a long-term MoU is not borne out by the available evidence. As of now, the market for rails is between two players and can be characterised as a bilateral monopoly. The MoU signed in 2003 was a rational outcome and the review in 2010 with no other contending supplier of comfort remains rational.

The Commission therefore, finds that the MoU between SAIL and IR is not anti-competitive and does not lead to foreclosure of the market. The Commission therefore closes the case.

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Member (C)

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Member (AG)

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