

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.

(Per M.L. Tayal, Member)



1. Information

1.1 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 16th 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").

1.2 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.

1.3 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.

1.4 Furthermore, it is averred that the MOU has the effect of restricting IR's ability to fulfil 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 that is 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.

1.5 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 listed companies in India in terms of turnover.

1.6 The information describes JSPL as 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, Chhattisgarh and production of power through its subsidiary Jindal Power Ltd. JSPL also manufactures long finished rails of 120 metres length 2 using RH Degasser technology. RDSO has now certified JSPL's rail manufacturing facility compliant with IRS-T-12-96 and specifications IRS-T-12-2009.

1.7 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.

1.8 On 7.9.2001, JSPL informed IR that its rail mill could begin production in the 2nd 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 dates and IR had refused to review exclusivity obligations with SAIL.

1.9 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 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.

1.10 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 explicative and 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.

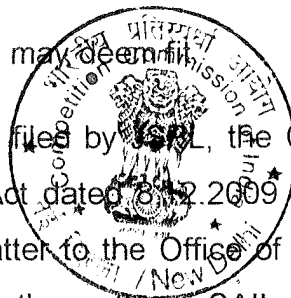
1.11 It is alleged that the exclusive supply of obligations imposed by IR on SAIL is a vertical restraint as per the information and its effect in the long-term would be to eliminate all competition in the relevant market.

1.12 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.

1.13 Upon consideration of the information filed by JSPL, the Commission passed an order under Section 26 (1) of the Act dated 08.12.2009 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 11.01.2011.

2. Summary of DG's investigation report:

2.2 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 of obligations; and (b) results in refusal to deal on 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.

2.2 The DG report has delineated the relevant market in terms of Section 2 (t) read with Section 19 (5)/(6)/(7) of the Act.

2.3 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 Adviser 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 with technical specifications prescribed by RDSO. Further, these specifications have to be inspected by RITES, a



Government of India Enterprise for quality assurance. The purchase of rails by IR has to be examined in view of these requirements.

2.4 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 a 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 structural alongside long rails as both projects can be manufactured using the same plant by both SAIL as well as JSPL.

2.5 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 for laying 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 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.”

2.6 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.

2.7 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 competitors 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 observations 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 inspection 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.

2.8 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 adventure 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% 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 completion for IR in the completion 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 enterprise.

(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:

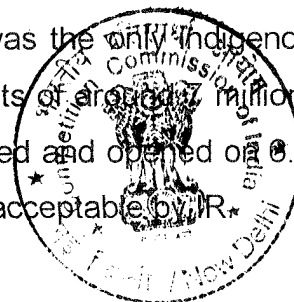
Being a State monopoly, IR is a dominant player in providing railway transportation in India.

(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.”*

2.9 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.

2.10 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 9th five-year plan. A global tender was floated and opened on 0.10.1997. Although 16 offers were received, no offer was found acceptable by IR.



2.11 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 million tonnes annually as against 1.00 lakh million 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 augmenting the activity of BSP so as to meet future requirements of IR.

2.12 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.”*

2.13 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, *“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.

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

2.15 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

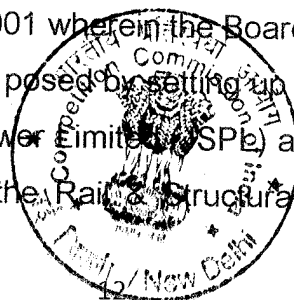


the minutes of the said meeting are part of the investigation report at Annexure-XIII. The relevant para 6.4 of the minutes are as below:

“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 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.”

2.16 In context of the above, the DG report refers to para (ii) of the MOU dated 1.2.2003 between SAIL & IR which shows the IR committed to buy its total requirements of long rails along with long rail panels from SAIL including normal 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. Though the cause of the abuse lies in the relevant market of procurement of long rails, its effect 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.

2.17 The DG has made reference to the minutes of the 270th 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.”*

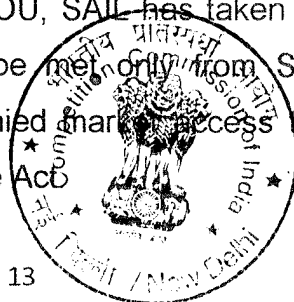
2.18 According to the DG report, the minutes of Board of Directors of SAIL coupled with the MOU between IR and SAIL indicate *“an attempt to counter the threat of competition from JSPL.”* The report also observes that though the MOU is subject to annual review within the overall policy of Government 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 competition. 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.

2.19 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.

2.20 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 by 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.

2.21 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.

2.22 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 suppliers and, therefore, violated Section 4(2) (c) of the Act



2.23 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. Accordingly 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.



2.24 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.

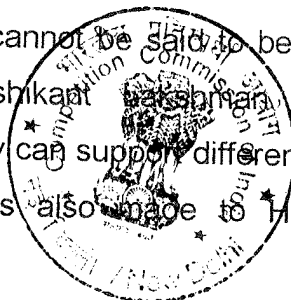
3. The Commission considered the investigation report of the DG and issued an order dated 27.01.2011 for sending a copy of the investigation report to the parties for filing their reply/objections. The Commission observed that the DG report had made IR an essential party and, therefore, directed that a copy of the investigation report should also be sent to the Ministry of Railways for filing their reply/objections.

3.1 The parties concerned, JSPL (Informant) and SAIL (Opposite Party) as well as Indian Railways (IR) filed written comments and made oral submissions before the Government 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.

4. Gist of submissions of OP:

4.1 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.

4.2 It was further argued that for an agreement were to be held 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 these, 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 Wasonary 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".

4.3 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.

4.4 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.

4.5 It was argued that the MOU in question is the arrangement with the Central Government, Ministry of Railway through the Railway Board and SAIL. This arrangement flows from the exercise of Executive Board 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 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 from time to time effectively exercised this favourable position which is evident from the fact that the change in price of rails vis-à-vis wholesale price shows lower price increase for the reference period 2002 to 2008.



4.6 Further, as regards the quality of rails, there cannot be any compromise on the specifications of RDSO followed by IR.

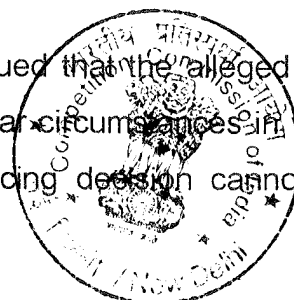
4.7 It was further submitted that substantial investment was made by SAIL at behest of IR for enhancing production of rails. Moreover, SAIL has to seek permission of IR before supplying prime quality rails to any third party. It was submitted that these facts indicate that there is no adverse impact 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.

4.8 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 JSPL. Reference was made to detailed analysis given by GENESIS which showed that at best the savings can be estimated around Rs.100 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, customer specific investment by the supplier and customer's control over pricing.

4.9 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.

4.10 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 whereas SAIL could not export rails due to its commitment to IR.

4.11 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.

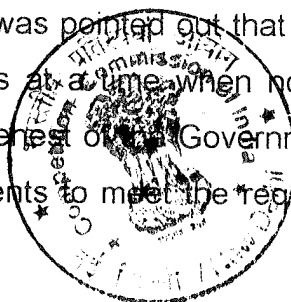
4.12 With reference to size and resources of SAIL, it was submitted that SAIL is in competition with all global steel makers who export rails to various countries including India and has lost many export opportunities due to its commitment to first meet the requirements of IR.

4.13 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 conclusion 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 from taking suitable recourse in case SAIL is not able to meet its requirement, IR still did not procure from JSPL, which clearly 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 show substantial countervailing buying power of the IR in the relevant market.

4.14 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 fields 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.

4.15 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.

4.16 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 comfortable position in finalizing to make the investment it had to do so, 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 structures from the market due to commitment of SAIL's production capacity towards IR.

4.17 The OP referred to Minutes of the 270th 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 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.

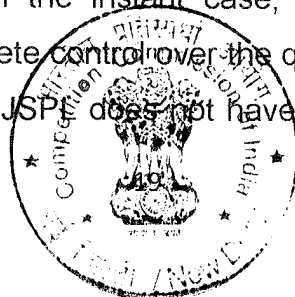
4.18 In view of the above, it was argued that SAIL neither had dominance in terms of Section 4 nor can its conduct be construed as abuse under the provisions of the Act.

4.19 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.

4.20 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 negate any contention that existing competitors are being driven from the market.

4.21 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.

4.22 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 reference 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.

4.23 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.

4.24 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.

4.25 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.

4.26 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.

5. Gist of submissions of Ministry of Railways (MoR):

5.1 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 formulation is a sovereign act and is governed by the Railways Act, 1989. Further, it was submitted that SAIL was obliged by way of government's ministerial directions 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 reliable and indigenous supplier of rails. This was also necessary because of huge investments required to set up manufacturing facility which would have a long gestation period. The government thought it 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 of 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.

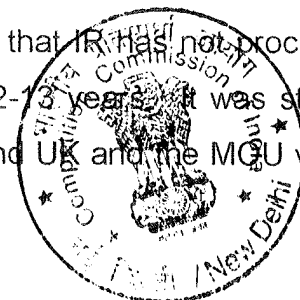
5.2 It was also submitted that in the present MOU, the final decision in terms of pricing lies with IR and till date, all payments have been made not as per the demand of SAIL but as per the decision of IR.

5.3 It was contended that IR's discharges 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.

5.4 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 national security, public interest etc. It was further submitted that the MOU reserves for IR the right to take such recourse as deemed fit in case of failure on part of 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.

5.5 As regards annual review clause, it was submitted that IR did not feel it necessary since it is satisfied with SAIL.

5.6 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, imports were made from Austria and UK and the MOU with SAIL has helped IR save scarce foreign exchange.



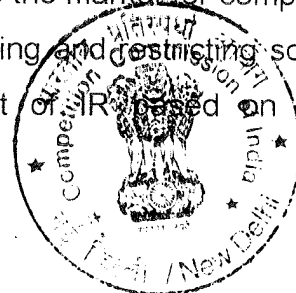
5.7 It was further submitted that IR had floated open global tender in 1997 followed by another pre-bid meeting in 1998 but no serious offers were received for manufacturing indigenously. It was emphasized that JSPL neither participated in the tender nor attended the pre-bid meeting. Under the circumstances, 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 forcibly 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 or technology.

5.8 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 concerns such as safety, strategic movement of defence, regional economic development, mobility of labour and similar other highly sensitive matters.

5.9 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.

5.10 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 and his non-intervention demonstrates that the pricing of long rails as determined by the pricing committee is in order and acceptable to the consumer, that is IR.

5.11 MoR contended that 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 scientific development but only reflects the actual requirement of IR based on RDSO specifications.



5.12 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 in India are required to adhere to RDSO specifications and that is why approval is required from IR in the interest of safety of railway operations.

5.13 As regards cost analysis submitted by JSPL, it was submitted that IR requires rails of different length due to geographical constraints, transportation issues, 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 RAILS. According to MoR, the MOU is in the best interest of IR.

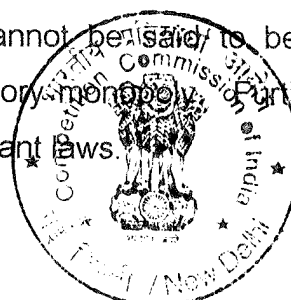
5.15 Without prejudice to its submissions on facts and merits, MoR also submitted that no fruitful purpose would be served by interfering with the existing MOU and it would only cause bottleneck in the supply of rails to IR. IR is a satisfied consumer and if the MOU is interfered with IR would suffer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

6. Submissions of the Informant (JSPL):

6.1 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 experts dated 14.4.2011.

6.2 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*.

6.3 It was submitted that even though an 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 potable 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.



6.4 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.

6.5 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.

6.6 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 substitution between rails and any other structural products. Similarly with respect to relevant geographic market, it was contended that considering cost of imports, logistics and transportation issues, the geographic market is limited to India in the instant case.

6.7 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).

6.8 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 has been no recent entry into the relevant market which is evidence of foreclosure of market.



6.9 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.

6.10 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.

6.11 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.

6.12 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 utilise 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.

6.13 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's selection of technology is expensive and inefficient which is a burden on the state exchequer. It is contended that higher cost for IR result in higher cost for ultimate consumers of railway transportation service.

6.14 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 were to face some problems with its Bhilai Steel Plant, IR will be left at SAIL's mercy to either wait or switch to expensive imports that would drain precious foreign exchange reserves.



6.15 It was also contended that the MOU has not led to any improvement in the production and distribution of the RDSO compliant rails as SAIL has not got any incentive 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.

6.16 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.

6.17 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 behaviour 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.

6.18 Specific submissions on remedies



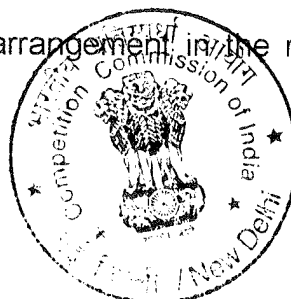
Introducing competitive conditions

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 Hon'ble Commission must direct IR and SAIL to terminate the MOU forthwith.

Fines

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 into its grossly anti-competitive conduct;
- (b) SAIL has continuously sought to delay the process by raising completely baseless and unmeritorious challenges to Hon'ble 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.

7. Findings of the commission

7.1 The Commission has given due consideration to the information filed, the investigation report of the DG and all the written and oral submissions made by the parties in course of the proceedings before this Commission in the instant case. The Commission has also noted that although the information was filed against SAIL (OP), the report of the DG had included IR as a "necessary party".

7.2 Upon consideration of all the relevant facts and circumstances of the case, the Commission observes that the following points emerge for determination in this case:

Point no. 1: What is the status of the Opposite Party and the "necessary party" viz. SAIL and IR, in this case, in terms of section 2(h) of the Act?

Point no. 2: Whether there exists any agreement between the OP (SAIL) and "necessary party" (IR) that contravenes provisions of section 3(4) read with section 3(1) of the Act?

Point no. 3: What is the relevant market in terms of section 19(5) read with sections 19(6) and 19(7) of the Act for the purpose of section 4?

Point no. 4: Whether the OP and/or "necessary party" are dominant in the relevant market?

Point no. 5: Whether there is an abuse of dominant position in contravention of section 4(2) read with section 4(1) of the Act?

8. Determination of point no. 1



What is the status of the Opposite Party and the “necessary party” viz. SAIL and IR, in this case, in terms of section 2(h) of the Act?

8.1 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.

8.2 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.

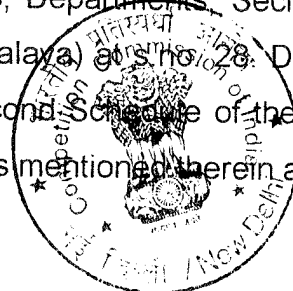
8.3 For this, reference is made to **THE GOVERNMENT OF INDIA (ALLOCATION OF BUSINESS) RULES 1961**. Relevant portion of the said Rules is reproduced below:

“1. 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”).

2. Distribution of Subjects -

1. 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.”

8.4 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 herein 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."*

8.5 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 railways 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;

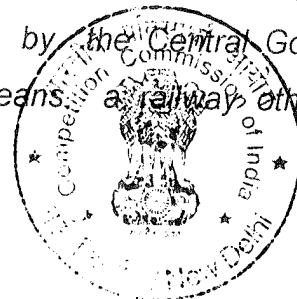
(e) all vehicles which are used on any road for the purposes of traffic of a railway and owned, hired or worked by a railway; and

(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;”

8.6 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.



8.7 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.

8.8 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.

9. Determination of point no. 2

Whether there exists any agreement between the OP (SAIL) and "necessary party" (IR) that contravenes provisions of section 3(4) read with section 3(1) of the Act?

9.1 Although the MOU dated 1st February, 2003 was an MOU between MOR and SAIL but through the MOU, an *understanding* was reached between SAIL and Indian Railways, through Railway Board. The details of the understanding have been given earlier in this order and therefore, they are not required to be elaborated upon at this place. Suffice to say that such an understanding between two "enterprises", viz. SAIL and IR is an "agreement" as defined under section 2(b) of the Act.

9.2 The next step is to determine whether this agreement is in contravention of section 3(4) read with section 3(1) of the Act. There are 4 essential ingredients of section 3(4):

- (a) There must exist an agreement amongst enterprises or persons



- (b) The parties to such agreement must be at different stages or levels of production chain, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services
- (c) The agreeing parties must be in different markets
- (d) The agreement should cause or should be likely to cause AAEC

9.3 It has been already shown above that the MOU is an agreement between SAIL and IR. Furthermore, SAIL is engaged in the activity of production of steel products, including rails while IR is engaged in provision of railway service of public carriage of passengers or goods. For IR to be able to provide railway services, rails are an essential input. Therefore, IR and SAIL are at different stages of production chain that ends with provision of railway services. At the same time, steel products and railways services are different markets. Thus, in the instant case, the first three essential ingredients of section 3(4) are present. It is now to be ascertained whether the nature of the MOU can be treated as exclusive supply or refusal to deal.

9.4 Explanation (b) to section 3(4) defines exclusive supply agreement as:

"exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

Explanation (d) to section 3(4) defines refusal to deal as:

"refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

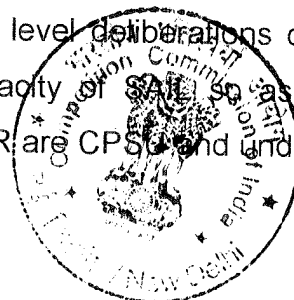
9.5 As can be seen, "exclusive supply agreement" is a restraint imposed on a **purchaser** by the seller, restricting the freedom of choice of purchasing from any source. It is considered economically harmful since it would result in undue competitive edge for the supplier to the disadvantage of its competitors.

9.6 However, a scrutiny of the clauses of the impugned MOU do not reveal any such restraint imposed by the seller, SAIL on the purchaser IR. In fact, it is noticed that as per clause (ii), the "commitment" of IR to buy its ~~own~~ requirements from SAIL



is also subject to "annual review within the overall policies of Govt. of India." Moreover, as per clause (iii) IR reserves the right to take such recourse as it may deem fit" in case of non-compliance of the committed delivery schedule by SAIL. Thus, very clearly, the wordings of the MOU in themselves do not pose any restrictions upon IR except in terms of the commitment to buy all its requirements from SAIL. If, as the buyer, IR is fully satisfied with SAIL and itself does not wish to buy from another source in India or abroad, it cannot be construed that SAIL has imposed a restriction of "refusal to deal" as conceived under the Act. It is amply evident from the submissions filed by MoR that as a consumer IR is fully satisfied with SAIL as a supplier. Such voluntary adherence of a buyer to a particular seller is not "refusal to deal" under competition laws. The question whether or not annual reviews are being actually done or done comprehensively is not the moot fact. The fact that SAIL cannot prevent IR from carrying out such a review as and when desired and as comprehensively as desired, is the most important fact. There is no indication or evidence that SAIL has prevailed upon IR to not carry out any review.

9.7 It is also important to view the commitment of IR in the context of the historical background of the MOU, which already has been given in detail earlier in this order. As has been given in the report of the DG, IR had started to get concerned about supply meeting its demand for rails in the mid-90s. The projected growth of IR was not going to be possible without assured supplies. The option of importing rails was not only more expensive but also would have created a burden of foreign reserve drain-out. There were also other factors such as reliability of unhindered supply and dependability of supplier involved. In context of India, where IR is not only providing passenger and goods transport but is also playing a pivotal role in growth and development of the economy and in national security, the importance of having indigenous source was undeniable. These policy considerations are amply clear from the written submissions made by the MOR on behalf of IR. Similarly, there is sufficient documentary evidence in form of the 1997 global tender and 1998 pre-bid meeting with interested suppliers to establish that IR made serious efforts to discover such an indigenous source for supply of rails. However, these efforts failed. It was only after that and as a consequence of Ministerial level deliberations of Govt. of India that decision was taken to augment the capacity of SAIL so as to fill the projected supply-gap of rails for IR. Since SAIL and IR are CPSUs and undertaking of

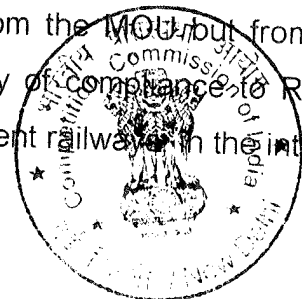


Govt. of India respectively, obviously the concerned Ministries had to work out a modality that neither party suffered because substantial public money was invested in both.

9.8 As the 3rd para of the MOU clearly states, (Indian) Railways was "the only user of such long rails" and hence it was reasonable for SAIL to get some assurance from IR that after augmentation of production capacity by SAIL for manufacturing rails, IR would continue buying from SAIL and the investment of public money would not go waste. Such a reciprocal arrangement required by a supplier of a monopsonist buyer is not unreasonable and cannot be viewed as any restraint on the purchaser. Moreover, considering that both SAIL and IR are under the overall control of Govt. of India, it would not be conceivable that either would willingly harm the other to earn super profits as would happen in case of normal private enterprises under different managements. The MOU clearly states that the commitment from IR would be subject to annual review within the overall policies of Govt. of India. Thus, the texture of the MOU is not that of a vertical restraint that a normal upstream business enterprise may like to impose upon a downstream enterprise with a view to enhance its own market power or to earn super profits. In any case, in a market where there are alternative suppliers but a single and large buyer like IR, there can be little possibility of imposition of such restraints by the supplier. This conclusion is supported by the fact that IR has the final say on pricing of rails.

9.9 The conduct of IR can be examined in context of "refusal to deal". Once again, it is seen that the MOU does not impose any restraint on SAIL not to sell rails to any other buyer or to produce any other product for any other market, in India or abroad, nor is there any indication or evidence that IR has tried to prevent SAIL from doing so. If the entire capacity of SAIL is consumed by IR and no marketable surplus is left for other sales, it does not amount to imposing any restraint on SAIL. If SAIL were to enhance its capacity and find other markets or buyers, the MOU would not be able to prevent it as long as supply to IR does not suffer.

9.10 As regards the requirement of prior approval of IR for sale of rails to any other party, it is seen that the condition does not emanate from the MOU but from the stipulations of The Railways Act, 1986 and the necessity of compliance to RDSO norms by all railways in India, whether IR or non-Government railways in the interest



of operational safety. If SAIL were to have any marketable surplus after meeting the needs of IR and were to export it, there would not be any necessity for adhering to RDSO specifications.

9.11 Similarly, buying from one source in preference over another source in itself cannot be considered as refusal to deal from the supplier that has been left out. What will have to be ascertained in such scenario is whether any AAEC is arising in terms of section 19(3) of the Act. This is the fourth essential ingredient of any agreement that is being examined for contravention of section 3(4).

9.12 While examining for AAEC any agreement that falls under section 3(4), the possibility of AAEC has to be examined at both levels of production and in both separate markets where the agreeing parties operate. Hence, in this case it has to be examined whether the MOU causes or is likely to cause AAEC in the market of railway services or in the market in which SAIL is operating or in both.

9.13 Section 19(3) lists factors that have to be considered by the Commission while determining AAEC. These are:

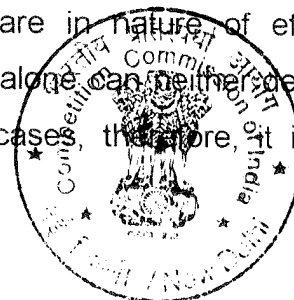
- (a) creation of barriers to new entrants in the market;*
- (b) driving existing competitors out of the market;*
- (c) foreclosure of competition by hindering entry into the market;*

- (d) accrual of benefits to consumers;*

- (e) improvements in production or distribution of goods or provision of services;*

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

9.14 The existence of first three factors would normally indicate AAEC while the absence would normally indicate no AAEC. The presence of the second three factors would normally indicate no AAEC as they are in nature of efficiency justifications. The absence of the second three factors alone can neither determine AAEC nor establish efficiency justifications. In most cases, therefore, it is more

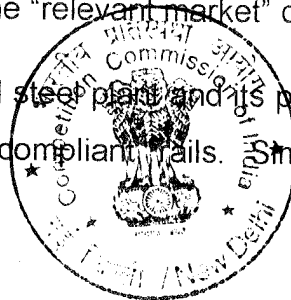


prudent to examine all the above factors together to arrive at a net impact on competition.

9.15 Since railways is a State monopoly in India, IR has no competitor in India. Therefore, it can be concluded that existence of any agreement or absence thereof cannot have any impact on the level of competition in the market of railways in India in terms of clauses (a), (b) or (c) of section 19(3). The entry barrier to IR exists due to the statutory regime and policy of Government of India and the MOU between IR and SAIL is of no relevance in existence of barriers to entry. Similarly, since there are no competitors to IR, factors like foreclosure of competition or exit of existing competitors have no relevance. There is also no evidence of harm to consumers of IR's railway services due to the impugned MOU nor is there any evidence that it has caused or is likely to cause deterioration in service or in scientific or technical development in railway services provided by IR due to the MOU. On the contrary, the MOU was intended to serve the purpose of improving railway services by ensuring dependable and adequate supply of rails at a price dictated by IR and of a quality specified by RDSO. Thus, factors given in section 19(3) are not relevant in the case of a market where there is a statutory State monopoly. Rather, in such a case, the conduct of the monopoly should be examined exclusively under section 4. However, this issue will be visited later in this order.

9.16 Coming to the upstream market where SAIL is operating, it would be possible for the MOU to cause AAEC. It should be kept in mind that as such, section 3 does not require determination of a "relevant market" as defined in section 2(r). The word "market/s" used in section 3(4) and 19(3) do not have the same connotation and focus as the term defined as "relevant market". The "market/s" of section 3(4) and 19(3) are intended to be broader because what is required is an assessment of AAEC and not of impact of dominance. This is so because section 3(3) covers enterprises engaged not only in identical but also in similar trades. Similarly, in context of section 3(4), the upstream or downstream enterprise could be a multi-product enterprise operating in more than a single "relevant market". Thus the "market/s" of section 3 would be broader than the "relevant market" of section 4

9.17 In the instant case, SAIL is an integrated steel plant and its product range, as an enterprise, includes more than RDSO compliant rails. Similarly, JSPL is



competing with SAIL, particularly in the market of structurals. When AAEC has to be examined in the upstream “market” where SAIL is operating, this inherent difference between “market” and “relevant market” must be kept in mind.

9.18 The corporate website of JSPL describes its product range as including:

“From the widest flat products to a whole range of long products, JSPL today sports a product portfolio that caters to varied needs in the steel market. The company also has the distinction of producing the world’s longest 121 metre rails and introducing large size parallel flange beams in India.

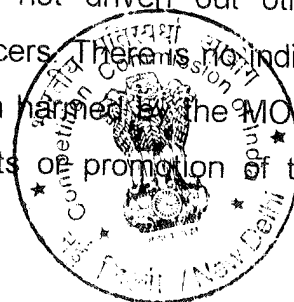
JSPL operates the largest coal - based sponge iron plant in the world and has an installed capacity of 3 MTPA of steel at Raigarh in Chhattisgarh. With a 0.6 MTPA wire rod mill and a one million tone capacity bar mill at Patratu, Jharkhand and a one million tone capacity bar mill, Jharkhand and a medium and light structural mill at Raigarh, Chhattisgarh, JSPL will shortly be commissioning a plate mill to produce upto 5.00 metre wide plates at Angul, Odisha.”

The corporate website of SAIL describes its product range as:

Structurals, crane rails, Z-section Centre Sill, Z-type sheet piling section, MS Arch, bars, rods, Rebars, HR Coils, sheets, Skelp Plates, CR coils and sheets, GC sheets, tin plates, electrical steel, pipes, rail, wheels, Axels, wheel sets, blooms, billets and slabs.

9.19 Thus, very clearly, both SAIL and JSPL are operating in the “steel market” which covers a wide range of products. The impact, if any, of the MOU in terms of AAEC has to be seen in this “market”.

9.20 Looking at impact of the MOU on the “market” in which both SAIL and JSPL are competitors, it can be seen that the MOU has not created any entry barrier in the market of steel products. Similarly, the MOU has not driven out other steel manufacturers nor has it hindered entry of new producers. There is no indication or evidence that consumers of steel products have been harmed by the MOU or that the MOU has hampered production of steel products or promotion of technical,



scientific and economic development in the steel sector. Thus, no factor of section 19(4) has been triggered is likely to arise due to the MOU between SAIL and IR in respect of rails.

9.21 This order has already examined the MOU in terms of "refusal to deal" and concluded that no such condition exists. It is IR that has voluntarily selected SAIL and is free to move to alternative suppliers in case it becomes dissatisfied with SAIL. Moreover, the fact that both are under the overall control of Govt. of India, it is not likely that IR would be restrained from selecting another supplier of rails as and when they feel it more beneficial unless it conflicts with overall policies of Govt. of India. Preference of a consumer, for reasons the consumer considers more beneficial cannot be considered as a restraint imposed upon the purchaser by the seller. If, as in this case, the consumer happens to be a monopsonist, the competition assessment should rather be done under section 4. Again, this issue is discussed later in this order.

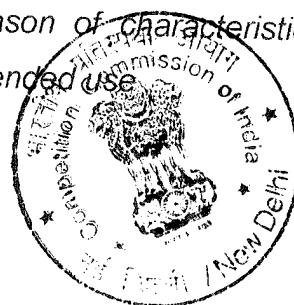
9.22 In view of the above discussion, I do not consider the MOU either as an instance of exclusive supply agreement or refusal to deal and hence it is not an agreement of the nature covered in section 3(4). Moreover, there is no AAEC in the steel market in respect of factors given in section 19(3).

10. Determination of point no. 3

What is the relevant market in terms of section 19(5) read with sections 19(6) and 19(7) of the Act for the purpose of section 4?

10.1 The competition issue in this case revolves around the purchase or sale of RDSO compliant rails. Section 2(c) defines "relevant product as:

"relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use



11.1 At this place it is useful to recall the observations of this Commission in its order in case no. 19 of 2010 (DLF Belaire case):

The evaluation of this “strength” is to be done not merely on the basis of the market share of the enterprise in the relevant market but on the basis of a host of stipulated factors as mentioned in Section 19 (4) of the Act. This wide spectrum of factors provided in the section indicates that the Commission is required to take a very holistic and pragmatic approach while inquiring whether an enterprise enjoys a dominant position before arriving at a conclusion based upon such inquiry. but, “for the purpose of” section 4, this “position of strength” must give the enterprise ability to operate independently of competitive forces” in the relevant market or ability to “affect its competitors or consumers or the relevant market in its favour”.

11.2 The factors given in section 19(4) for assessment of dominance are:

- (a) market share of the enterprise;
- (b) size and resources of the enterprise;
- (c) size and importance of the competitors;
- (d) economic power of the enterprise including commercial advantages over competitors;
- (e) vertical integration of the enterprises or sale or service network of such enterprises;
- (f) dependence of consumers on the enterprise;
- (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
- (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- (i) countervailing buying power;
- (j) market structure and size of market;
- (k) social obligations and social costs;



(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry.

11.3 It can be seen that the presence of some factors should establish dominance, whereas, the presence of some other factors dilute or mitigate dominance. For example, factors like a high market share and comparatively bigger economic power should be interpreted as factors that establish dominance. However, if the competitors are larger in size and importance, the dominance stands diluted. Similarly, if an enterprise is performing some social obligation and bearing high social costs, then its dominance is diluted because it would be operating independent of market laws. For example, if an enterprise is buying and distributing a product or providing some service to the poor and needy for free due to social obligations, it should not be charged with predatory pricing even if it is a dominant distributor of that product or provider of that service. To do so would reduce overall economic development and welfare. Furthermore, if there is a single consumer having great deal of economic power, the countervailing buying power will be too big for the selling enterprise to exercise its dominance in its own favour or against the consumer. That is why the Act provides the array of factors for ascertaining dominance.

11.4 As far as SAIL is concerned, it is engaged in production of RDSO compliant rails. Since it is the sole supplier to IR, which is the only buyer and consumer of such rails in India and since it caters to about 96% of demand for the relevant product in India, there can be no dispute that if only market share have to be considered, SAIL is dominant in the relevant market. However, the Act requires looking into all or any factor given in section 19(4) while determining dominance for the purpose of section 4. In cases such as this one, it is not prudent to restrict determination of dominance to evaluation of a single factor such as market share. Particularly in case of CPSUs



created to serve a larger socio-economic objective of the Government than simply making profits.

11.5 In the instant case, it cannot be denied that SAIL has comparatively higher economic power, bigger size and resources compared to its competitor. These would normally establish dominance. However, it is equally undeniable that being a CPSU, SAIL has to fulfil several social obligations on behalf of the Government and has to discharge many CSR responsibilities. It has to bear these social costs. Its contribution to economic development of the nation is also not in dispute. Similarly, being created from public money, it has a special responsibility to earn higher profits for the people of India and give higher dividends to the Govt. of India. This order does not have to get into quoting statistics of welfare activities done by SAIL or look at its historical contributions to Indian economy as these are all in public domain, for all to see.

11.6 Also, it has been seen that the relevant market is one in which IR is practically the only consumer hence the huge countervailing buying power of the consumer in this case cannot be ignored. Such a market structure makes it difficult for the seller to effectively exercise its supply side dominance. It also has to be considered that the decision of MOU was taken by the Govt. of India at a Ministerial level after considering the projected requirement of IR, the economic, social and strategic significance of railway operations for India and the need for secure and assured supply from indigenous sources for strategic considerations. Most importantly, IR has exercised its consumer's preference for selecting SAIL as a supplier for reasons given in detail in their submissions.

11.7 In conformity with the above view regarding how factors of section 19(4) should be examined and after considering all the factors of section 19(4) holistically, it would be difficult to conclude that SAIL is in a position to operate independently of competitive forces in the relevant market. If the Govt. of India, which controls SAIL or the IR decides to change the supplier of RDSO rails to IR, there is practically little SAIL would be able to do to retain its business. Moreover, SAIL will certainly not be able to influence IR or MOR in its favour unless IR has consumer's preference for SAIL and there are non-market considerations like safety or national security. Conversely, if for any non-market consideration, Govt. of India decides that IR



should buy rails from any other source or even import it or that SAIL should stop producing rails, there is little SAIL would be able to do. In fact, the market for RDSO rails in India is not a free market in any sense so neither the seller, SAIL nor the consumer, IR is making free economic decisions that players in a normal, free market are supposed to make. Such players in any market who do not have full control on their economic decisions can hardly be said to be capable of operating independently of market forces in any real sense for the purposes of competition laws. In fact, they are not operating according to normal market forces because the relevant market is not really a market governed by market forces.

11.8 As far as IR, the “necessary party”, is concerned, it is a purchaser of RDSO compliant rails. As per section 2(f), IR falls under the definition of “consumer” given in the Act in respect of the relevant market determined in this case. Once again, applying the principles enunciated above, it can be said that IR is able to operate free of competitive forces as a purchaser because it is the sole consumer and a State monopoly. However, since there are no competitors of IR the question of influencing competitors in its favour does not arise. Being the consumer itself, and the MOU being an expression of consumer preference, the question of influencing the consumer in its favour does not arise for this relevant market. Once again, being a consumer in the delineated market, as consumer, IR is well within its consumer rights to try to influence the market in its favour and get the best deal in its own view.

11.9 Again, applying the holistic interpretation of factors given in section 19(4), there can be no denying that IR has contributed towards economic development of India, has discharged several social obligations and borne huge social costs. Its position as a monopsonist purchaser in the relevant market is due to statutes. It is completely under control of Govt. of India through MOR and Railway Board. It is not capable of operating free of market forces and in fact, does not operate in a free market of railways services. If the Government were to give a direction on any aspect of its activity, IR would be bound to comply. Therefore, it would not be correct to hold IR dominant in context of competition law in general and Competition Act, 2002 in particular.

11.10 The unique structure of the “market” in this case is due to several non-market factors. This order will elaborate on this point at a later stage



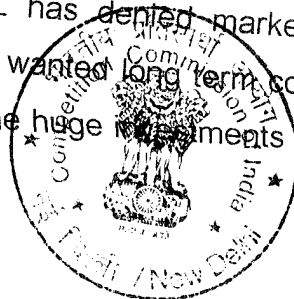
12. Determination of point no. 5

Whether there is an abuse of dominant position in contravention of section 4(2) read with section 4(1) of the Act?

12.1 SAIL is not in a position to limit or restrict production of RDSO compliant rails because of the MOU. It has to adhere to the quantity, quality and price dictated by its consumer, viz. IR. Another fact that cannot be brushed aside is that IR has complete control over the pricing as the decision of the Chairman of Railway Board is final in this regard. Thus SAIL cannot contravene section 4(2)(b)(i).

12.2 SAIL is also not in a position to limit or restrict technical or scientific development to the prejudice of consumer i.e. IR because in this case, RDSO is determining and developing the technology for IR. The consumer is deciding upon technology in this market. There is no reason to conclude that RDSO is either incapable or unwilling to do R&D for the betterment of IR. Any R&D done by SAIL would be of little significance for IR unless RDSO endorses it. Moreover, IR or MOR can procure any technology they desire from any other source and in fact even impose it on SAIL or any other future supplier. Thus, SAIL cannot contravene section 4(2)(b)(ii) in this relevant market.

12.3 It is also noted that the MOU was a product of certain developments in the 90s and direct involvement of Govt. of India. It is a single event and cannot be said to be a "practice", which should be a regular, repeated activity that prevails over a period of time. Moreover, the MOU was at the behest of the consumer, i.e. IR and under the aegis of the Govt. of India as represented through MOR and Ministry of Steel. Further, being a CPSU with 85% stake of the Govt. of India SAIL is bound to comply with Government decision and ensure that investment of large amount of public money does not go waste. It also has to be kept in mind that at the time of signing of MOU, there was no alternative source of RDSO compliant rails in India. In fact, no other entity had that capacity till 2008. This fact is not in dispute. Under the circumstances, it cannot be said that SAIL has denied market access for any competitor when none existed. It was IR that wanted long term commitments which was partly influenced by an appreciation of the huge investments of public money it

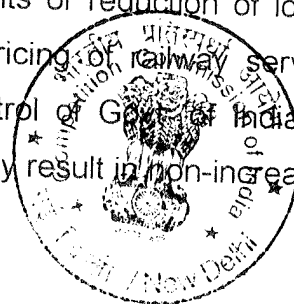


practically forced SAIL to make in the interests of IR. Therefore, SAIL cannot be said to be in contravention of section 4(2)(c).

12.4 As regards IR, since it is not producing RDSO compliant rails, it is in no position to limit or restrict production. It has a certain requirement and it will not purchase less or more since its budget is passed by the Parliament of India and it is subject to Government audit. Determination of quantity to consume by a consumer cannot be said to limit or restrict production. Since Chairman Railway Board has final say in pricing, it makes no economic sense to try to limit production of rails in any manner. Therefore, IR is not in contravention of section 4(2)(b)(i).

12.5 RDSO is the technical adviser of IR and as a consumer, IR would not limit or restrict any technical or scientific developments in production of rails to its own prejudice. Moreover, RDSO, IR or MOR is not dependent on SAIL for procuring better technology from any source. Therefore, the question of contravention of section 4(2)(b)(ii) to its own prejudice cannot arise.

12.6 The decision of IR to enter an MOU with SAIL is the decision of a consumer to select its supplier. Decision regarding the quantity, the quality and the price at which a consumer would buy as well as the final selection of a supplier is a right that constitutes consumer benefits. Such decisions cannot be considered as abuse in context of section 4(2)(c). By selecting a supplier for valid reasons, a consumer cannot be accused of denying market access to vendors whom it did not purchase from. It is not even true that by denying market access to other rail producers, IR would be in any position to exploit consumers in its own market, i.e. railway services by charging higher prices. Every buyer naturally wants to make best value for money deals. Any conduct that cannot and is not intended to translate into higher profit margins cannot be an abuse of dominant position, which has foreclosure of competition and higher profits as motive. Being a State monopoly, IR has no competitors, therefore it does not have to try to ward off competition. There is no evidence in this case that by entering the MOU, IR has got higher profits. At the same time, if at all the MOU has resulted in higher profits or reduction of losses, then, overall it is for the benefit of consumers since pricing of railway services, particularly passenger services is completely under control of Government of India and Indian Parliament and higher margins for IR would naturally result in non-increase of



ticket prices or even freight prices. In other words, *ceteris paribus*, higher margins would translate into lower prices for consumers of IR. Once again, it can be seen that IR is not operating in a free market where it is able to control its own output or force higher prices like a normal commercial enterprise. This is further evident from the fact that IR has been consistently subsidizing passenger services for the welfare of common man. It would serve no purpose to accuse a monopolist of predatory pricing because such pricing strategy is actually self-injurious for a any monopolist, specially a State monopoly. Considering these facts, IR cannot be held in contravention of section 4(2)(c).

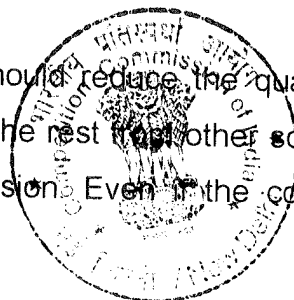
13. Other issues raised by the informant

13.1 The informant had raised some other issues that do not bear any direct relation to the points determined above. For instance, it has claimed that 120 meters rails produced by it are more efficient and cost effective. Similarly, the RD Degassing specification of RDSO is not valid and other degassing techniques, such as vacuum degassing are equally, if not more efficient.

13.2 On these points, it is my view that the technical specifications of any product that a consumer demands are best left to the consumer. This is because one of the cornerstones of economic thought is fulfilment of wants. The consumer is the best judge of what it wants and at what price or in what quantity. It is not for anyone else to decide on behalf of IR as to what length or specification of rails it should use for railway services.

13.3 JSPL has also contended that there could be savings for IR if it purchased from JSPL. In this context, it has been amply demonstrated by IR and SAIL that the estimated notional gains are not based on any incontrovertible calculations. I have found nothing contrary from the material on record. Even if it were so, it is for IR to decide whether or not the specifications of rails produced by JSPL would suit IR's requirement.

13.4 As regards suggestion of JSPL that IR should reduce the quantity of rails procured from SAIL to say, around 60% and buy the rest from other sources, in my opinion, once again, this is the consumer's decision. Even if the consumer is a



monopsony, it cannot be forced to evenly distribute its purchases from all available suppliers.

13.5 JSPL has also contended that in the absence of MOU, the consumers of railway services would benefit. The contentions made in this regard are just surmises. In fact, it is worth contemplating that if IR were to lose the final say on prices, whether cost of purchases might go up, resulting in IR getting constrained to raise passenger and freight charges. Therefore, there is no need to get into such speculations.

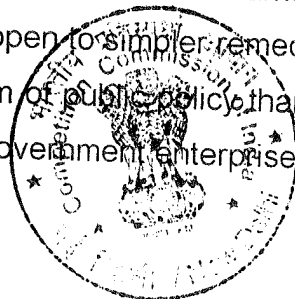
13.6 The "safety" question raised by JSPL similarly needs to be dismissed. There is no reason to believe, nor evidence that RDSO, IR, MOR or Govt. of India are not conscious of safety of operations. Neither is there any guarantee that by opting for rails produced by JSPL there would be reduction in rate of accidents. Safety considerations are the domain of competent authorities with technical expertise and legal mandate.

14. Conclusion

14.1 As discussed in detail in the foregoing part of this order, I do not find SAIL or IR in contravention of section 3 or 4 of the Act. However, as also indicated at a few places above, there are certain issues relating to competition that need to be highlighted.

14.2 Section 18 of the Act enjoins the Commission not only to eliminate practices having adverse effect on competition but also to actively promote and sustain competition, while balancing interests of consumers as well as freedom of trade. This is an onerous and complex task, particularly in the context of Indian socio-economic reality.

14.3 Competition is not only *in* the market but also *for* a market. While harm to competition *in* the market is more visible and open to simpler remedies, promotion of competition *for* the market is more in the realm of public policy than competition law enforcement. This is truer when in context of government enterprises.



14.4 In the instant case, it is a fact that due to government policy and law, there is no competition *in* the market of railway service. Consequently, competition *for* the market where IR is a purchaser gets distorted. It is therefore felt that Govt. of India, MOR and IR should remain highly sensitive to this fact and try to keep their procurement procedure as competitive as possible wherever IR is the dominant purchaser so that competition *for* that relevant market is not distorted unintentionally. Specifically in the context of the instant case, it is recommended that MOR and IR should carry out a comprehensive review of the MOU in the light of the fact that today there are other producers that are also capable of and willing to supply rails to IR. Similarly, they can examine whether RDSO specifications can be broadened to include other technologies. Such an exercise would result in greater efficiencies for the IR and it would eventually lead to greater good of the Indian economy.

14.5 Secretary is directed to inform the parties accordingly.

Sd/-
Member (I)

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