COMPETITION COMMISSION OF INDIA

Case No. 25 of 2023

In Re:

Bijay Poddar **…Informant**

9, Old China Bazar Street,

Room No. 99 & 100, 6th Floor,

Kolkata – 700 001.

And

Coal India Limited **…Opposite Party**

Coal Bhawan,

Premise No. - 04 MAR, Plot No. – AF-III,

Action Area-1A, Newtown, Rajarhat,

Kolkata – 700 156.

CORAM:

Ms. Ravneet Kaur

Chairperson

Mr. Anil Agrawal

Member

Ms. Sweta Kakkad

Member

Mr. Deepak Anurag

Member

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

1. The present information has been filed by Bijay Poddar **('Informant')** under Section 19(1)(a) of the Competition Act, 2002 ('**Act**'), against Coal India Limited **('CIL'/'OP')** alleging *inter alia* contravention of the provisions of Section 4 of the Act. OP is a 'Maharatna' Public Sector Undertaking under Ministry of Coal ('**MoC**'), Government of India and is the single largest coal producing company in the world.

2. The Informant has stated that the OP introduced a new scheme for e-auction of coal effective from 21.12.2022 named CIL e-auction scheme 2022 ('**2022 Scheme**') which replaced the earlier scheme *i.e.*, Spot E-Auction Scheme 2007 ('**2007 Scheme**').

3. The Informant alleged that various provisions of the 2022 Scheme are one-sided and "*unfair, complex and discriminatory*" which *inter alia* include requiring the bidders to clear all pending dues before bidding, taking a fixed advance bid security which has a discriminatory effect on different bidders when bid security is forfeited, the OP having the right to cancel the sale of coal under e-auction at its sole discretion without assigning any reason thereof, *etc.* The Informant has alleged that almost all the terms and conditions of the 2022 Scheme are one sided in favor of the OP without any corresponding reciprocal responsibility/penalty on the OP, in contravention of Section 4(2)(a)(i) and 4(2)(a)(ii) of the Act. The Informant has also sought Interim Relief under Section 33 of the Act against the OP.

4. The Commission considered the matter and *vide* its order dated 08.05.2024 decided to forward a copy of the Information to the OP for submitting its comments on the allegations contained therein. After seeking extension of time, the OP submitted its response on 12.08.2024.

OP's comments

5. It has been *inter alia* averred by the OP that the relevant product market should be the market for the '*sale of non-coking coal except under Fuel Supply Agreements*'. It is further submitted that in terms of characteristics and intended use, all non-coking coal is substitutable and part of the same relevant market. Therefore, the non-coking coal supplied under the institutional mechanisms would be both interchangeable and

substitutable with the non-coking coal sold under the 2022 Scheme. However, OP has further stated, there is a difference in the intended use of coal under institutional mechanisms such as Fuel Supply Agreements ('**FSAs**') with power companies.

6. It is further submitted by the OP that the relevant geographic market should be global. OP has submitted that the conditions of demand and supply for coal are homogeneous globally. This is particularly true in the case of e-auctions, where bidders continually opt for imported coal as a substitute for coal from e-auctions. Further, it has been stated that MoC recognises that both imported coal and domestically procured coal constitute a part of the same market as its National Coal Index ('**NCI**') has weightage as high as 50.25% for imported coal in case of non-coking top grade coal, which demonstrates the substitutability of imported coal with OP's coal.

7. It is submitted by the OP that the increase in the quantity of imported coal is in competition with coal supplied under e-auction, thereby making it substitutable for the consumer. It is submitted that there has been a steady increase in the import of non-coking coal over the past few years. In FY 2021-22, coal imports amounted to 151.77 Million Tonnes (MT), in FY 2022-23, this increased to 181.62 MT and in FY 2023-24, this went up to 202.88 MT. It is submitted by the OP that the prices of non-coking coal sold under e-auction are comparable to the prices of imported non-coking coal for similar grades of coal.

8. The OP has submitted that even though it is the largest coal producer in India, it is not dominant in terms of Section 4 of the Act, as it cannot act independently of market forces, nor can it influence the market or competitors or consumers in its favour. The OP has stated that India only produced 10.67% of the world's coal in 2023. As such, OP is not dominant in the global coal supply market. Further, major global competitors like Peabody Energy and Shenhua Group also constrain OP's market power.

9. On the issue of dominance, it has been further stated by OP that it is not dominant in the market for coal supply in India as: (i) OP's market position arises from the Coal Mines Nationalisation Act, 1973 and accordingly, its statutory status should be considered a mitigating factor under Section 19(4) of the Act; (ii) OP's autonomy is constrained by Presidential Directives and directions from the MoC and there is substantial Government

control over the OP's activities, limiting its commercial discretion; and (iii) the OP bears significant social costs and obligations, including operating a number of loss-making mines.

10. The OP has further submitted that guidelines issued by the MoC elucidate that it cannot arbitrarily choose the quantity of coal to be supplied to its customers. The MoC Guidelines unequivocally mandate that the OP and its subsidiaries must ensure the supply of coal to consumers in the power sector, meeting their Power Purchase Agreement ('**PPA**') requirements regardless of the trigger and annual contracted quantity levels. This stringent directive leaves OP with no commercial autonomy to determine the organization of e-auctions or to decide the quantity of coal allocated for such auctions.

11. Without prejudice to its above-mentioned submissions that it is not dominant in any plausible relevant market, the OP has asserted that it has not abused its market position and has provided clause-wise clarifications regarding the same. It has stated that it has always acted fairly given the wide-ranging constraints faced by it from various stakeholders.

12. The OP has submitted that the Informant previously filed another information before the Commission against OP and its subsidiaries, alleging a violation of Section 4 of the Act (Case No. 59 of 2013). It has been stated that the Informant challenged various clauses of the 2007 Scheme in the said information and a comparison of the 2007 Scheme and the 2022 Scheme shows that many clauses are substantially similar. OP has submitted that the Commission adjudicated the issues raised by the Informant in the Case No. 59 of 2013 and did not find any clauses of the 2007 Scheme to be violative of the Act, except clause 9.2 (which is *sub-judice* with the Hon'ble Supreme Court).

13. OP has further stated that due to the administrative nature of the allegations concerning clauses 3.1 ***(****Notifications for e-auctions)*, 7.2 *(Validity period for lifting of coal by road)*, 11.6, and 11.12 *(Procedure for filing complaints)* of the 2022 Scheme, these should be dismissed, and they do not impact competition in the markets or violate the Act. It is stated that Informant has failed to make any *prima facie* case for violation of the relevant provisions of the Act and the Information deserves to be dismissed outright.

14. OP has submitted that other than making bald allegations and assertions on alleged violations of the Act, the Informant has failed to even remotely state how competition has been affected in the market. Further, while making these baseless and outrageous allegations, the Informant has made false statements implying that the coal supplied by the OP is adulterated and that small and non-institutional buyers of coal need to bribe OP to procure coal. Accordingly, the Information is devoid of merit and deserves to be dismissed outright.

15. OP has further submitted that the issue of OP's dominance in the coal e-auction market is pending in Civil Appeal 5697 of 2017 before the Hon'ble Supreme Court. Therefore, to avoid inconsistent judicial outcomes, the Commission may not arrive at a definitive view of the matter and await the outcome of the proceedings before the Hon'ble Supreme Court in Civil Appeal 5697 of 2017.

16. The Commission considered the matter in its ordinary meeting held on 09.10.2024 and decided to pass an appropriate order in due course.

Commission's Analysis

17. The Commission has carefully perused the Information and comments submitted by the OP on the Information.

18. The Commission, on the basis of the material available on record, notes that the following issues arise for consideration and determination in the present case:

(i) What is the 'relevant market' in the present case?
(ii) Whether OP holds a dominant position in the relevant market?
(iii) Whether OP has abused its dominant position in terms of Section 4 of the Act?

Issue (i): What is the 'relevant market' in the present case as defined in Section 2 (r) of the Act?

19. In the present case, the gravamen of the Informant emanates out of the alleged abusive clauses of 2022 Scheme floated by OP for sale of coal. The basic thrust of the grievance

of the Informant appears to be the unequal terms and conditions set out in the said scheme.

20. As the allegations in the present case relate mainly to supply of non-coking coal to the successful bidders under 2022 Scheme in India, the OP has submitted that the relevant product market in the present case should be the market for the '*sale of non-coking coal except under Fuel Supply Agreements*'. OP has stated that as such, in terms of characteristics and intended use, all non-coking coal is substitutable and part of the same relevant market. Therefore, non-coking coal supplied under the institutional mechanisms would be both interchangeable and substitutable with the non-coking coal sold under the 2022 Scheme. However, given the difference in the intended use of coal under institutional mechanisms such as FSAs with power companies, the correct product market definition should be the market for the *sale of non-coking coal except under FSAs*.

21. Relevant product market has been defined in section 2(t) of the Act as 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. Furthermore, to determine the relevant product market, the Commission is to have due regard to all or any of the following factors *viz*. physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialised producers and classification of industrial products, in terms of the provisions contained in section 19(7) of the Act.

22. It is noted that supply/distribution of coal under e-auction is distinct from supply of coal under FSAs, as the user base and requirements are different in each case. Coal supplied under e-auction is for those buyers of coal, who are not able to procure it under FSAs, thus there appears to be no substitutability between the two modes of sale/distribution of coal *i.e.,* FSAs and e-auction. Further, the quantity of coal allocated under each mode is governed by the policy, and the pricing mechanisms is also different for each mode.

23. Under New Coal Distribution Policy ('**NCDP**'), for Power utilities and Fertiliser sector, it was stipulated that '*100% of quantity as per the normative requirements of consumers would be considered for supply of coal through Fuel Supply Agreements (FSA) by CIL at fixed prices to be declared/notified by CIL*'. For 'Other consumers', it was stipulated

that '*75% of quantity as per the normative requirements of consumers would be considered for supply of coal through FSA by CIL at fixed prices to be declared/notified by CIL. The balance 25% of coal requirements of the units will be sourced by them through e-auction/import of coal, as per their preference*.' It was further stated that '*Coal distribution through e-auction was introduced to provide access to coal to such consumers who are not able to source coal through the available institutional mechanisms for reasons like seasonality of coal requirement, limited requirement of coal not warranting long term linkage etc*'.

24. NCDP further states that "*around 10% of the estimated annual production of CIL would initially be offered under e-auction and quantity to be offered under e-auction would be reviewed from time to time by Ministry of Coal*."

25. In Case no. 59 of 2013, the Commission observed that"

> *36. The Commission is of opinion that no fault can be found with the relevant product market delineated by the DG. The Commission notes that coal distribution through e-Auction was introduced with a view to provide access to coal for such buyers who are not able to source coal through the available institutional mechanism. The opposite parties have sought to suggest the substitutability of imported coal for the small buyers under the e-auction scheme, without even indicating the* ***difference in price between the imported coal and the coal available under the e-auction scheme*** *and without even dealing with the other issues raised by the informant in terms of quality, quantity etc. Neither has it been shown as to who are the buyers who are importing such coal and for what purposes.*
>
> *37. Furthermore, the DG has categorically noted that* ***if the bidders attempt to purchase coal from the open market or through imports, the same is costly as they entail spot purchases, shipping in smaller vessels and inland transportation in India and other attendant multiple handlings.*** *It was also recorded by the DG that alternate fuels are neither easily available nor cost competitive with coal.*

> *38. The Commission is of opinion that* ***there does not exist any substitute for non-coking coal which is made available to the bidders under the spot e-auction*** *and, as such, the Commission holds the relevant product market as "sale of non- coking coal to the bidders under Spot e- Auction".*

26. From the perspective of variants of coal, broadly – there are two variants of coal produced/supplied in India – coking and non-coking coal. Coking coal, when heated in the absence of air, forms coherent beads with a strong and porous mass, referred to as coke. It possesses coking properties and is primarily used in steel manufacturing and metallurgical industries. It is also utilised for the production of hard coke. Non-coking coal refers to coal that does not possess coking properties and has higher ash content. It is primarily used as thermal grade coal for power generation. Additionally, non-coking coal is utilised by cement, fertiliser, glass, ceramic, paper and chemical industries.

27. Thus, Commission notes that from a demand-substitution point of view, there exists a clear distinction between non-coking and coking coal. In previous cases related to this sector, the Commission has found that based on the physical characteristics of non-coking coal which is used by the thermal power plants/ bidders under the spot e-auction, there is no effective substitute available for non-coking coal used by the thermal power plants in India/ bidders under the spot e-auction.

28. Therefore, in view of the foregoing, relevant product market in the instant matter is considered as '*production and sale of non-coking coal to bidders under e-auction scheme'*.

29. With regard to relevant geographic market, OP has submitted that *the relevant geographic market should be global / worldwide*. It was further submitted by the OP that there is no bar under Section 4 of the Act for the relevant geographical market to be wider than India. The true import of the explanation to Section 4 of the Act in the context of "relevant market" is that while the "relevant geographic market" may be narrower or wider than India, the assessment of the alleged anti-competitive conduct must be done in the context of the "relevant market" in India. OP has submitted various reasons why the

relevant geographic market should be global/wider than India such as (i) Conditions of demand and supply are homogenous, (ii) MoC recognises that both imported coal and domestically procured coal constitute a part of the same market, (iii) Increase in imported coal, (iv) Prices of coal sold *via* e-auction comparable with imported coal. OP has delineated the relevant market as *'sale of non-coking coal except under Fuel Supply Agreements globally/worldwide'*.

30. It is noted by the Commission that supply of coal in the entire country is uniform and homogeneous as there are no barriers within the territory of India in terms of geographic location for the consumers. Thus, the relevant geographic market may be considered as India. The contention of the OP that the relevant market for the present purposes has to be global and cannot be confined to India appears to be untenable for the reasons discussed in succeeding paras.

31. With regard to the increase in the imported coal, the Inter Ministerial Committee Report available on the site of MoC titled 'Strategy Paper on Coal Import Substitution' published on March 2024 stated that "… *The sector wise trend of coal imports in last 5 years projects that the import of coal is either less or same in last 5 years due to increased domestic coal production*."

32. Thus, it can be seen that the import of coal is either less or same in last five years due to increase in the domestic coal production. Therefore, the contention of the OP that there is increase in the import of coal does not appear to be correct. The data cited by OP is only of the last two financial years. If the data of last five financial years from the abovementioned report is taken into account, there appears to be no increase in import of non-coking coal, in fact it shows fluctuating trend within a range. In FY19, 183.40 MT of non-coking coal was imported, while in FY23, the same was 181.62 MT.

33. With regard to the prices of coal sold *via* e-auction being comparable with imported coal, the report available on the site of MoC titled 'Report on Price Trend of Coal' published in January 2024 stated that "*There are number of factors that contribute to the* ***notable discrepancy between the prices of coal in India and around the world***, ***including additional custom duties and cesses, import freight, freight insurance lighterage and demurrage charges and the GST on the imported coal.*** *Based on the global and Indian*

*data mentioned above, it is apparent that the **cost of the Indian coal is significantly lower than the cost of coal in the nations that India imports coal from**. Therefore, more emphasis should be placed on enhancing domestic production in order to increase the usage of coal produced domestically, which would benefit both Indian economy and the coal consumers."*

34. Further the Ministry of Power, Government of India, in an answer to un-starred question in Rajya Sabha (no.199 on 05.12.2023) responded/ replied "*The **price of the imported coal is not comparable with the price of domestic coal due to difference in calorific value**. The pricing of imported coal is linked with international indices for import coal, source of origin, other factors like ocean freight, insurance etc which is purely dynamic and vary with international demand supply scenario. Every generating company imports coal as per its requirements. Further, the cost of generation of electricity is dependent upon the quantity of imported coal used and the price of imported coal."*

35. It is noted that the price of imported coal appears to be higher than that of the domestically produced coal sold through e-auctions. Therefore, price of imported coal and domestically produced coal sold through e-auctions does not appear to be similar so as to be in same relevant market.

36. Regarding OP's contention that inclusion of import prices in the computation of NCI indicates substitution of imported coal with OP's coal, it may be noted that the operational guidelines of NCI state that '*This Index will be used to determine the variation in the PREMIUM either in the form of Rs/tone of coal produced by the Operators or in Percentage share of revenue of operators. The aim is to have an index that will truly reflect the market price.*' It goes on to state that '*CIL has a system of notification of coal prices at regular interval. The notified price of coal varies with the grade of coal and is used by all in the coal sector as reference price… The auction price reflects the market demand and supply situation currently prevalent in the country…. there is also a significant component of import of coal in the country especially for the Iron and steel sector and coastal power plants.'*

37. It further states that '*the purpose of the National Coal Index would be to determine how premium from coal block auctions would vary with time, i.e how the revenue share*

determined at the time of bidding would vary over time keeping step with the changing price levels….. The Index is meant to encompass all transactions of raw coal in the Indian market. This includes coking and non-coking of various grades transacted in the regulated (power and fertilizer) and non-regulated sectors. The ***transactions include those at notified price, coal auctions and coal imports***.'

38. It can be seen that the computation of index takes into account three major sets of prices – CIL notified price, auction price and imports price, which are allocated different weights accordingly. The very fact that the weight allocation is different indicates that the three modes of distribution of coal may not be substitutable with each other. As the guidelines themselves state, the prices vary across these modes, thus mere inclusion of import prices in computation of NCI does not seem to imply substitutability of imported coal with domestic coal.

39. Further, in Case No. 59 of 2013, the Commission observed the following:

> *42. The Commission notes that the contention of the opposite parties to argue that the relevant market for the present purposes has to be global and cannot be confined to India as was done by the DG, is legally untenable. From a plain reading of the Explanation to section 4 of the Act, "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. Thus, the plea advanced by the opposite parties contending the relevant market to be global is ex facie contrary to the express provisions of the Act and has to be rejected.*
>
> *43. In view of the above, the Commission is of opinion that relevant market in the present case may be taken as "sale of non- coking coal to the bidders under Spot e-Auction Scheme in India".*

40. Further, in Case Nos. 03, 11 & 59 of 2012, the Commission observed that "….*imported coal cannot be considered a substitute for domestic coal on account of several factors*

including the peculiar design and specifications of the boilers used in majority of Indian thermal power plants and further considering that imported coal is subject to customs duty and other levies, rendering it more expensive than domestic coal supplied by the Opposite Parties."

41. Accordingly, '*production and sale of non-coking coal to bidders under e-auction scheme in India''* is considered as the relevant market in the instant case.

Issue (ii): Whether OP holds a dominant position within the scope of Section 4 of the Act?

42. With regard to the dominance, the OP has asserted that it is not dominant in terms of Section 4 of the Act.

43. Based on the information available in the public domain, the Commission notes that the OP is the single largest coal producing company in the world. It fulfils approximately 79% of India's coal production needs. It functions through its subsidiaries in 84 mining areas spanning over 8 states of India. It has 313 mines of which 131 are underground, 168 opencast, and 14 mixed mines. It has been ascertained from information available in the public domain that OP appears to have more than 90 percent market share in e-auction of coal.

44. Further, OP's Integrated Annual Report 2022-23 states that out of total revenue from sale of coal (and others) of Rs 1,27,627.47 crores, Rs. 31,463.73 crores was from sale of coal through e-auction, constituting roughly 25% of OP's revenue. According to information available on MoC's website, OP contributes around 70 percent of coal production in India. According to information available on OP's website, it contributes to 55% of total power generation and meets 40 % of the primary commercial energy requirements of the country. Apart from power sector, OP supplies coal to various sectors such as steel, fertilisers, glass, power utilities, cement, ceramics, chemicals, paper, domestic fuel, and industrial plants.

45. The explanation to Section 4 of the Act states that: "*dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it*

to— (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour".

46. Further, the Commission in Case no. 59 of 2013 had observed the following –

> "50. *Further, it is also not in dispute that following the enactment of the Nationalization Acts, the coal industry was reorganized into two major public sector companies viz. Coal India Limited (CIL) which owns and manages all the old Government-owned mines of National Coal Development Corporation(NCDC) and the nationalized private mines and Singreni Colliery Company Limited (SCCL) which was in existence under the ownership and management of Andhra Pradesh State Government at the time of the nationalization.*
>
> *51. Thus, it is evident that in view of the provisions of the Coal Mines (Nationalization) Act, 1973, production and distribution of coal is in the hands of the Central Government. As a result, CIL and its subsidiary companies have been vested with monopolistic power for production and distribution of coal in India. In view of the statutory and policy scheme, the coal companies have acquired a dominant position in relation to production and supply of coal. The dominant position of CIL is acquired as a result of the policy of Government of India by creating a public sector undertaking in the name of CIL and vesting the ownership of the private mines in it.*
>
> *52. Thus, CIL and its subsidiaries face no competitive pressure in the market and there is no challenge at the horizontal level against the market power of the opposite parties.*
>
> *53. The Commission has considered in detail the various submissions advanced by CIL based on social costs and obligations, lack of freedom in deciding the quantity of coal to be supplied to the customers etc. to negate its dominance in the relevant market. On a careful perusal of the submissions, the Commission, however, is of opinion that even within the overarching policy and regulatory environment,* ***CIL has sufficient flexibility and functional independence in carrying out its commercial***

and contractual affairs. Such factors do not detract from CIL and its subsidiaries operating independently of market forces.

47. On the basis of above, it is clear that in the relevant market of 'production and sale of non-coking coal to bidders under e-auction scheme', OP enjoys a position of strength. OP's extensive reserves of coal and resultant share of the market provides it the market power to deal with its customers in favourable terms without any substantial risk of losing customers to its competitors. Thus, in terms of dominance as defined under the Act, the OP appears to be dominant in the relevant market of '*production and sale of non-coking coal to bidders under e-auction scheme in India*''.

Issue (iii): Whether OP has abused its dominant position in terms of Section 4 of the Act?

48. Now the Commission proceeds to analyse each individual clause of the 2022 Scheme which has been alleged by the Informant to be in contravention of Section 4 of the Act:

49. **Clause 1.2 –** This clause *inter alia* stipulates that before bid is accepted, buyer has to ensure that he has cleared all pending payments with OP in regard to any previous supply of coal to the bidder. In case of any arrears, the OP is entitled not to consider such bids.

50. It is alleged by the Informant that the buyer has to ensure that he has cleared all payments with the OP but there is no reciprocal provision of OP clearing all refunds with buyers. Further, it is stated by the Informant that OP does not keep the bid security (previously referred to as an Earnest Money Deposit ('**EMD**') under the 2007 Scheme) money in Escrow account but in current/CC/OD accounts of its subsidiaries, which allows them to earn interest on these deposits. The Informant has alleged that this clause is abuse of dominance under Section 4(2)(a)(ii) of the Act.

51. In this regard, it has been submitted by the OP that the requirement of clearing pending payments against previous supply is a widely accepted eligibility criterion in procurement schemes. Further, given that the payment terms in e-auction prescribe for advance payment for the lifting of coal, ordinarily there are no outstanding payments/ pending dues from the e-auction bidders. Accordingly, OP has stated that this clause has

not been relied upon by it for disqualification of bidders as such and that the nature of the clause does not provide any such scope for reciprocity.

52. The OP has further stated that in the usual course, successful bidders receive the complete quantities of coal for which they placed bids and made payments. Only in very rare circumstances, where OP fails to supply the coal in the modes and quantities the bidders bid for, do refunds become owed to the successful bidders. It is further submitted that OP processes refunds in a period of 40 days on an average, and is continuously working towards reducing this time period to a minimum number of days through automation of refunds, *etc*.

53. OP has also stated that once a bid is placed, the bid security and process fee amount are paid by a bidder during the first stage of an e-auction which is then deposited in an escrow account operated by service provider that assists in hosting the e-auction event. Once a bidder is successful, the amount in the escrow account is transferred to the respective subsidiary of the OP. It has stated that the amount received by the respective subsidiary is kept in current accounts, where some minimal interest may accrue. However, the amount so received is utilised for servicing various contractual expenses, production cost for coal including salary of employees, *etc*. and is not just kept in the account as such. OP has stated that there is no profiteering by it just by keeping money in its current accounts, which is a common practice.

54. The Commission notes that the provision for bidders being required to clear any outstanding payment before bidding in the e-auction appears to be a reasonable and standard requirement which is independent of the refund being processed by the OP. Further, with regard to whether OP is in a position to profiteer from the bid security deposited in the current accounts of its subsidiaries, in light of the clarification by the OP that such amount is utilised for meeting costs of production and is not kept in the account for earning interest, Accordingly, no case of contravention of Section 4(2)(a)(ii) of the Act is made out against the OP, on this count.

55. **Clause 2.5:** The clause *inter alia* stipulates that advance bid security will be paid by the bidder in the form of a non-interest bearing deposit.

56. It is alleged by the Informant that irrespective of the grade of coal, a non-interest bearing deposit of Rs.500 per tonne is taken from the bidder. In effect, if in case EMD is being forfeited (due to cancellation of rake), different bidders lose different percentage of floor prices, which differs according to the grade of coal. Informant has stated that all money so forfeited should be refunded and EMD should be 10% of the coal value. The Informant has alleged that this clause is unfair in violation of Section 4(2)(a)(i) of the Act.

57. In this regard, it has been submitted by the OP that the payment of bid security is a necessary requirement for bidders to participate in an e-auction under the 2022 Scheme. Bid security is a deposit that acts as a "*part payment*" and represents a guarantee that the contract will be fulfilled. Such bid security becomes a part of the purchasing price once the transaction is complete. In the context of the e-auction, a bid security requirement is imperative to ensure that the participants are serious and not merely speculators or frivolous bidders.

58. It is further submitted that Clause 6.1 makes it clear that the bid security is considered a part of the coal value to be paid by successful bidders and adjusted against the same. For unsuccessful bidders, the bid security amount is refunded in terms of Clause 8 of the 2022 Scheme (subject to Clause 9 of the 2022 Scheme).

59. It is stated by the OP that at the time of the introduction of the 2007 Scheme, the EMD was initially kept at INR 200 per tonne, which was subsequently increased to INR 500 per tonne. Thereafter, OP recently revised the bid security to INR 150 per tonne by way of its notification dated 11.07.2024.

60. It is further submitted by the OP that the suggestion of the Informant that bid security should be fixed as a percentage of the coal value/floor price of coal is untenable. Implementing such a system would be a highly complex process and would lead to high administrative burden and costs for the coal companies initiating the e-auction. OP has submitted that an e-auction is conducted for a cluster of mines which may have more than one grade of coal. Since coal is a heterogeneous commodity mined from under the earth, there is a possibility of variation in the grade of coal (between what is notified and what is mined) for each individual mine. Accordingly, it has been submitted by the OP that it is not feasible to determine bid security based on the grade of coal.

61. The Commission identifies the following issues to be examined regarding Clause 2.5 – (a) Is stipulation of bid security necessary for e-auction? (b) Is the bid security being levied by OP reasonable and fair? (c) Is it necessary and feasible for the bid security to be fixed as a percentage of floor price against a fixed amount per tonne?

62. The necessity of bid security to be collected by the seller is beyond question. Such a stipulation is usually a standard feature of such processes and serves to safeguard the auction process in multiple ways. It discourages frivolous bids and ensures that only serious bidders participate in the auction, protects the auctioneer by providing it with compensation in case the winning bidder fails to follow through on their offer, guarantees performance of the contract and builds mutual trust.

63. Regarding reasonableness of the bid security being stipulated in the 2022 Scheme, the Commission notes that at the time of filing the Information, the bid security so stipulated was Rs 500 per tonne, which has been now revised to Rs 150 per tonne by the OP *vide* notification dated 11.07.2024. While the Commission would not like to delve into the realm of "reasonableness" of such bid security, it appears that such bid security is being revised periodically by the OP in view of various market factors. Substantial reduction in bid security depicts absence of rigidity in determination of the bid security amount.

64. Regarding stipulating the bid security as a percentage of coal value, the Commission does not find any contravention of any provision of the Act in stipulation of bid security as fixed amount per tonne, and does not see any necessity for change in this process from a competition point of view. In view of the above, no case of contravention of Section 4(2)(a)(i) of the Act is made out against the OP.

65. **Clause 2.6:** This clause *inter alia* stipulates that bidder will have to pay process fee at Rs 20 per tonne for participating in the e-auction, which is non-refundable to the extent of provisionally successful bid quantity in the first stage of bidding process.

66. It is alleged by the Informant that there are all kinds of uncertainties in the second stage where mode of transport is decided and it is unfair for bidder to pay selling charges. It may happen that the bidder is successful in first stage and then unsuccessful in second stage, he will have to pay a process fee of Rs. 20 per tonne. In the second stage, it may

happen that coal booked by road may exceed the offer by road, and bidder may end up bidding unsuccessfully and paying process fee which is unfair. The Informant has alleged that this clause is abuse of dominance under Section 4(2)(a)(i) of the Act.

67. It is submitted by the OP that the process fee, an administrative charge levied on all provisionally successful bidders, is essential for facilitating the procurement process and is integral to organizing and managing the e-auction process. It is only collected from bidders that are provisionally successful in the first stage of the e-auction and is refunded to those that are not successful in the first stage in terms of Clause 2.6 of the 2022 Scheme. It is further stated by the OP that process fee is charged solely to carry out the procurement process and with the primary objective of covering operational costs. It is submitted by the OP that as such, it does not charge the process fee to unduly enrich itself. Therefore, the OP has submitted that the non-refundability of the process fee to bidders unsuccessful at the second stage of the e-auction process does not constitute an unfair condition.

68. It appears that for successful conduct of e-auction, there are administrative and other costs involved, and the entity conducting such an auction is within its rights to collect a process fee to cover the same. In view of OP's submission that such fee is only collected from bidders that are provisionally successful in the first stage of the e-auction and is refunded to those that are not successful in the first stage in terms of Clause 2.6 of the 2022 Scheme, no case of contravention of Section 4(2)(a)(i) of the Act is made out against the OP.

69. **Clause 3:** This clause *inter alia* sets the time of (minimum) 7 days between notification of the e-auction and the e-auction.

70. It is alleged by the Informant that given the fact that buyers and coal companies are scattered widely, this time is too short for buyers to verify the quality of grade *etc*. and has to bear high conveyance cost. The Informant has further alleged that this is done to indemnify the OP from any quality issues at a later stage. This time period should be extended to 15 days and OP must disclose the information of opening stock at the colliery, pending coal to be delivered, daily loading capacity and expected date of loading of coal and pending refunds.

71. It is submitted by the OP that while the DG had the benefit of reviewing Clause 3.1 of the 2007 Scheme (corresponding to Clause 3.1 of the 2022 Scheme) during the investigation in Case No. 59 of 2013, the DG and Commission have not found any issues with the same. It is further stated by the OP that participants of an e-auction event for coal are completely well versed with the procedures and notifications for the same. In fact, such participants keep a regular check for any e-auction being conducted by OP and its subsidiaries since dealing in coal is part of their main business operations. Therefore, 7-day advance notice period is sufficient and reasonable for all bidders to collate the necessary information and documentation for the e-auction. OP has submitted that this is purely an administrative issue relating to operational and logistical management which has no impact on competition in the market.

72. The sufficiency of time period between the notification of the e-auction and the e-auction appears to be a purely administrative issue, with no apparent ramifications on competition in the relevant market. Therefore, no case of contravention of Section 4 of the Act is made out against the OP.

73. **Clause 4:** This clause *inter alia* lays down a system of two stage bidding where first stage decides the successful bidder and second stage determines mode and source of supply on the basis of seniority of the bid in the first stage and choice of the bidder. The offer will be provided by the seller as a cluster of dispatch points. Bidders opting for rail mode should have successful bid quantity in multiple of rake fit quantity (4000 tonnes). If it is not found so, the equivalent bid security will stand forfeited. In case bid quantity is less than 4000 tonnes, default mode will be road. If bidder follows guidelines in submitting choice of mode, bid security will not be forfeited in case coal could not be allotted due to non-availability.

74. It is alleged by the Informant that this clause is too voluminous for buyer to understand and makes him prone to financial losses. It is stated that the fundamental right of the buyer to choose the quality of coal, its mode *etc*. is taken away from the buyer and put in hands of the algorithm. Informant has stated that clustering of collieries gives rise to a possibility of mixed grade of coal. In the previous scheme, bidding was done mode wise and each individual colliery was offered with grades, sizes and specification of coal with

floor price and quantity. The Informant has alleged that this clause is abuse of dominance under Section 4(2)(a)(i) of the Act.

75. In this regard, it is submitted by the OP that bidders are always free to approach it and its subsidiaries and seek any clarifications regarding any clause of the 2022 Scheme including Clause 4. It is stated by the OP that MoC Guidelines specifically require coal offered through e-auction to be transport mode agnostic. OP is merely implementing the policy decision of the MoC and is constrained to act in accordance with the same. OP is not at liberty to change the e-auction methodology contrary to the MoC Guidelines. OP has submitted that in line with the past decisions of the Commission such actions taken pursuant to a policy decision of the Government does not warrant investigation under the Act.

76. The OP has further stated that given the e-auctions conducted under the 2022 Scheme are mode agnostic, a basket of mines is included in the e-auction, providing buyers with the flexibility to choose their preferred mode of transportation. It is further stated by the OP that rationale for conducting e-auctions for clusters of collieries rather than individual collieries is to provide buyers with a broader range of choices and to avoid differential price discovery for similar sources. OP has submitted that by clustering mines based on their proximity to a railway siding, buyers are offered a common basket, ensuring a more consistent price discovery process and reducing the possibility of any influence on pricing. OP has submitted that each cluster comprises mines which are linked to a particular railway siding including their road dispatch points, bidders can choose to transport coal by either rail or road. If no rail siding is available near a mine, it is offered as a single cluster with only road dispatch points in one e-auction event.

77. It is the submission of the OP that clustering collieries into a single, mode-agnostic auction streamlines the auctioning process, enhancing efficiency. This approach reduces the administrative burden and logistical complexities associated with conducting multiple auctions for individual collieries and separate auctions for rail and road transport. Consequently, OP and its subsidiaries can optimize associated costs and save time for both the seller and the bidders by minimizing the number of auctions. Such mode-agnostic auctions also provide a level playing field for different coal consumers and increase operational efficiencies. It is submitted that this clustering promotes

participation from more buyers in each auction, leading to more competitive pricing in the bidding process.

78. Based on the above, there does not appear to be any merit in Informant's assertion that the clause detailing the auction process is too voluminous and makes buyer vulnerable to financial losses due to possible mistakes in understanding. The algorithm put in place by OP appears to be designed for optimal allocation of mode to bidders who have been successful in the first stage. The OP has clarified that in case of any doubt, bidders can approach it for clarification. Regarding clustering of mines, it appears that clustering has been done to smoothen the bidding and allocation process according to availability of different grades of coal. In view of the above, no case of contravention of Section 4(2)(a)(i) of the Act is made out against the OP.

79. **Clause 5:** This clause *inter alia* stipulates that the auction will be held on the representative grade and size, the successful bidder shall be bound to accept coal for any grade and size from the allotted source of the cluster. In case of change in declared grade of the dispatch point in the interim period from the date of bidding and the date of dispatch, the buyer can opt out from taking coal in the changed grade, and proportionate bid security from the date of grade notification will be refunded.

80. It is stated by the Informant that in case of non-acceptance of coal by the bidder due to a different grade than bid for, there should be no cancellation charges. It is also submitted that the buyer is entitled to liquidated damage along with money deposited and interest from date of deposit to date of refund. The Informant has alleged that this clause amounts to abuse of dominance under Section 4(2)(a)(i) of the Act.

81. In this regard, it is submitted by the OP that the Informant has failed to make any coherent allegation in relation to Clause 5 of the 2022 Scheme. OP has stated that this clause does not impose any cancellation charges on the buyer and the Informant has raised a frivolous allegation. The grade of coal is declared by the Coal Controller's Organisation ('**CCO**') which is an entity under the Government of India, operating completely independently of OP.

82. The OP has submitted that the objective of Clause 5 of the 2022 Scheme is to establish a balanced approach for determining the coal supplying price. It acknowledges the uncertainty associated with predicting the future grade of coal prior to mining of the coal and the fact that the buyer has made advanced payments to the seller for the coal supply. It provides for the mechanism for determining the coal supplying price and provides for the procedures surrounding the same. It states that in the event of redeclaration of the coal grade, the customer can opt out from taking the coal in the changed grade. In such an event, an equivalent portion of the bid security to the extent of the proportionate bid quantity from the date of the notification of the grade will be refundable.

83. It has been submitted by the OP that Clause 5.5 of the 2022 Scheme allows buyers to opt out from taking coal whose grade has been redeclared (between the bidding date and the dispatch date) and receive a refund of the bid security amount. It provides for a fair mechanism by giving the bidders the right to opt out from the sale. It has been further stated by the OP that there would be no cancellation charges on the buyer if he opts out due to a change in the grade of coal. OP has stated that the seller will not keep any amount with it and in case full payment is made by a buyer against a proforma invoice, the same will be refunded to them in case they choose to opt out.

84. The Informant's claim refers to cancellation charges in case of non-acceptance of coal by the bidder. However, it appears from the plain reading of Clause 5 that it does not refer to any cancellation charges. With regard to the circumstances where the bidder opts out due to grade revision, the clause mentions refund of bid security to the extent of proportionate bid quantity, which appears to be fair. In view of the above and based on OP's clarification, no case of contravention of Section 4(2)(a)(i) of the Act is made out against the OP.

85. **Clauses 6.6 & 6.7:** These clauses *inter alia* stipulate that for bidders getting rail borne supplies, there is an option of either depositing 100% bank guarantee or 100% amount through e-transfer or Demand draft (DD)/pay order. Bidders opting for bank guarantee will be notified to deposit coal value by e-transfer/DD/Pay order at least 3 days in advance before the expected date of offer to the Railways for allotment, within 48 hours of such notice. In case of non-deposit of 100% coal value, consent against rake programme will be withdrawn and bid security forfeited.

86. It is alleged by the Informant that if the OP is taking bank guarantee, then making buyer deposit 100% coal value in advance is against commercial terms. Informant has stated that the seller should load the rake and present the documents for payment to the buyer and if he fails to make payment, documents can be sent to bank for negotiations and charges borne by buyer. The Informant has further questioned that when seller is demanding increase of statutory taxes which are payable only after coal is dispatched, how can it take payment in advance at the time of submitting the rake programme?

87. It is submitted by the OP that the Informant has failed to understand the option provided by Clause 6.6 of the 2022 Scheme in relation to the payment of coal value wherein, the buyer can either deposit a 100% bank guarantee in the prescribed format; or deposit 100% of the amount through an e-transfer, demand draft, or pay order, accompanied by a debit advice certifying the transaction from the buyer's account. It is further stated that subsequently, Clause 6.7 of the 2022 Scheme provides that for buyers using a bank guarantee, the seller will notify them to deposit the coal value *via* an e-transfer, demand draft, or pay order at least three working days before the expected date of the offer to the Railways for allotment. The buyers are then required to deposit the full coal value within 48 hours of receiving the notice, with failure to deposit the same resulting in the withdrawal of the consent given against the rake programme and forfeiture of the bid security amount. It stated by the OP that in the first option, a bank guarantee merely serves as a security measure, ensuring that the seller is protected against the risk of non-payment and closer to the dispatch date, the actual payment is needed to ensure that the coal can be delivered. OP has stated that it is not an actual transfer of funds but a mere promise from the bank to pay if the buyer defaults. The bank guarantee remains as a fallback security measure until the actual payment is made. The actual payment is required to complete the transaction and facilitate the delivery of coal. It is submitted by the OP that such a requirement to make actual payment closer to the supply date is a standard practice to ensure that a seller receives the funds necessary to dispatch the goods.

88. It is submitted by the OP that even after having reviewed Clauses 6.6 and 6.7 of the 2007 Scheme (which correspond to Clauses 6.6 and 6.7 of the 2022 Scheme), during the

investigation in Case No. 59 of 2013, neither the Commission, nor the DG found any issues with the same.

89. It is further stated by the OP that Clause 6.8 which requires the buyer to pay additional sums due to any statutory provision beyond what is claimed in the invoice reflects common commercial practice where both parties comply with post-facto statutory changes. It also ensures that any change in statutory levies benefits the buyer through refunds. Thus, this clause is not an imposition on the buyer but a mechanism to address statutory changes promptly.

90. The Commission is of the view that the that OP's clarification makes it clear that (i) a bank guarantee only provides an initial security and closer to the dispatch date, the actual payment is needed to complete the transaction and ensure that the coal can be delivered. (ii) 2007 Scheme had a similar clause. It is further noted that in Case no. 59 of 2013, neither the DG nor the Commission found any contravention of the Act in the said clause.

91. The clause appears to be a standard practice for schemes of such nature. Requirement of bank guarantee exists to safeguard the seller in case the buyer defaults on the payment. While it is a fallback option for the seller, it cannot be the basis of supply of the product to the buyer, who would ordinarily be required to make an upfront payment to the seller, before the product is supplied, especially if it involves a bulky product like coal, in order to ensure its timely delivery and smooth completion of the transaction. In view of the above, the Commission notes that no case of contravention of Section 4 of the Act is made out against the OP.

92. **Clause 7**: This clause *inter alia* stipulates validity period for lifting the coal (in case of delivery by road) and allotment of rakes (in case of delivery by rail) as 45 days from the issue of sale order/consent. It further states that penal freight for overloading shall be borne by the buyer, and idle freight for underloading shall be borne by the seller, which shall be adjusted in the bills.

93. It is alleged by the Informant that this time period is too short, as the actual loading starts after 15 to 20 days as past delivery orders are liquidated. This time period should be increased to 90 days. Informant has stated that the OP cannot simply refund the bid

security after keeping it for 135 + 7 days without interest and liquidated damage. The Informant has questioned that if the OP is allowing credit of idle freight for underloading in the bills, then why buyers have to pay for overloading, as loading as per limit of railways is the responsibility of the seller.

94. Further, regarding various charges such as Left Behind Charges, Sizing Charges, Surface Transportation Charges, Ex cav Facility charges and Management Charges, the Informant has stated that they are being unfairly charged from the buyer.

95. It is submitted by the Informant that Left Behind Charges are collected by Railways from seller for their inability to load the rake on time and detain the rake. Regarding Sizing Charges, Informant has stated that there is no sizing of the coal as it is simply loaded in dumpers/trucks and transported to colliery railway siding for loading in rakes. Regarding Surface Transportation Charges, it has been submitted by the Informant that coal is sold by OP on a F.O.B./F.O.R basis, so all expenses of transportation till loading in rake should be on the account of Seller. Regarding Ex cav Facility charges, the Informant has stated that it apparently means Evacuation Charges which are charges for mining coal and should be borne by the seller. Regarding Management Charges, Informant has submitted that it apparently means payment of salaries and other expenses which are borne by the seller.

96. It is stated by the OP that even after having reviewed the 2007 Scheme in great detail, including Clauses 7.2, 7.6 and 7.7 of the 2007 Scheme (which correspond to Clauses 7.2, 7.6 and 7.7 of the 2022 Scheme), during the investigation in Case No. 59 of 2013, neither the Commission, nor the DG found any issues with these clauses. Further the OP has submitted the following:

a. **Validity period to complete the lifting of coal by road is too short:** This issue does not raise any competition concerns as it is within OP's purview to determine a reasonable validity period for buyers to lift coal as the supplier and the same is a mere administrative decision of OP which has no impact on competition. The validity period is based on commercial considerations, given that coal once mined is required to be lifted within a relatively short period of time for numerous reasons. Time taken for loading is almost exclusively dependent on the buyers procuring

and submitting certain relevant documents. The validity period of 45 days commences from the date of issuance of the delivery order.

b. **Undue pressure on buyers to agree to loading of coal (Clause 7.6 of the 2022 Scheme):** OP does not stop the buyer from raising complaints if they have some issue with the size, quality, etc. of coal. It is submitted that buyers can raise any complaints under Clause 11.11 of the 2022 Scheme which are dealt with by the General Manager/HoD (Marketing & Sales) of the concerned coal company. Buyers also have the usual legal recourse under the judicial system as per the Indian Contract Act, 1872.

c. **Charges for overloading and underloading (Clause 7.7 of the 2022 Scheme):** Clause 7.7 of the 2022 Scheme acknowledges that overloading is the buyer's responsibility, requiring them to ensure their bid quantity does not exceed the wagon's capacity. Underloading occurs when the seller fails to load the specified bid quantity. Clause 7.6 allows the buyer to oversee the loading process. Costs associated with underloading and overloading are absorbed by either the buyer or the seller, depending on the impact. Inconsistencies in wagon weight and size are a primary reason for overloading, as they are beyond the seller's control and additional coal is supplied to the buyer at no additional cost. To address these inconsistencies, OP is deploying coal handling plants to gradually move towards pre-weighted coal, thereby avoiding overloading and underloading.

d. **Other charges borne by the buyer:** The bidders quote their price over and above the said floor price. Thereafter, the coal is required to be mechanically sized, transported to the dispatch point and loaded into buyers' containers through various mechanical means, some of which are capital intensive. Thus, the buyers are separately charged for reimbursement of the associated costs. As such, these charges are fairly collected by OP from buyers.

(i) **Demurrage Charges:** It is levied by the railways under the Railways Act, 1989 (No. 24 of 1989) as a charge for the detention of any rolling stock after the expiry of free loading time allowed for such detention. The demurrage charges are generally borne by OP and not the buyer.

(ii) **Sizing Charges:** When coal is crushed by mechanical means to limit the top-size to 250mm, or any other specified lower size, the buyer is required to pay a sizing (or crushing) charge. These charges are notified by the OP (and its subsidiaries) periodically. This exercise of crushing coal is only done as per the requirement of the buyer and a charge is collected due to the high operational and infrastructure maintenance costs involved with the upkeep and procurement of the machinery involved in this process.

(iii) **Surface Transportation Charges:** These are the charges for the transportation of coal by the Seller from the pithead (where it is extracted) to the delivery point (where it is handed over to the buyer). Accordingly, such a charge is only applicable where the mode of transport is rail, as OP (and its subsidiaries) are required to transport coal from the mine to the railway siding in such case. Given that no such transportation is required for road transport mode as the buyer lifts coal from the mine itself, no such charge is levied for road transport. Surface transportation charges are borne by the buyer and are notified by OP (and its subsidiaries) periodically. A charge is collected due to the high operational costs including fuel, vehicle maintenance, and infrastructure maintenance at the pithead and at the delivery point. Further, a surface transportation charge is charged in order to ensure logistic and operational efficiency. Such charge is only applicable where the mode of transport is rail, as OP (and its subsidiaries) are required to transport coal from the mine to the railway siding in such case**.**

(iv) **Evacuation Facility Charges:** Once coal is mined, it is transported to railway sidings/ loading points. To ensure that rakes are loaded in free loading time permitted by the Railways and faster/ efficient loading of trucks, OP has created and continues to create infrastructural facilities from time to time. Accordingly, 'Evacuation facility charges' or 'evacuation charges', are levied for the loading of the rakes/ trucks with the use of appropriate machinery/ infrastructure. These charges are borne by the buyers, in order for OP to create /operate the said infrastructure. As such, this charge is collected due to the high

operational and infrastructure maintenance costs involved with the upkeep and procurement of the machinery employed.

(v) **Management Charges:** Management charge of INR 1 per tonne is a statutory levy imposed by the State Government of Jharkhand under the Jharkhand Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2017. Accordingly, such charge is collected by OP from the buyer for all supplies of coal made through road mode and paid onwards to the State Government of Jharkhand. As per Clause 7.5 of the 2022 Scheme, a period of 135 days is the timeline for ascertaining the lapsation of a rake, i.e. 45 days for seeking allotment of rake and thereafter 90 days for loading validity from the date of allotment. After a rake lapses, only a period of 7 days is taken by OP and its subsidiaries for processing the refunds. OP does not earn interest from the bid security deposited by bidders that are unsuccessful. Accordingly, the requirement that this money be returned with interest cannot be accepted because CIL would then be paying the purchaser out of its own pocket, as it is not earning any interest from this money.

97. The issue of sufficiency of validity period for lifting of coal is an administrative issue to be taken on technical grounds and does not appear to raise any competition concerns. With regard to the issue of buyer being made to pay for overloading of wagons, the OP has clarified that (a) the buyer is given the opportunity to be present at the loading end and oversee the loading process (b) the seller bears the cost of underloading and the buyer bears the cost of overloading (c) Overloading is often due to size inconsistencies, which is being remedied by the OP pre-weighted coal. In view of the clarification by the OP, there appears to be no contravention of provisions of Section 4 of the Act. Further, OP has also clarified regarding the justification behind imposition of overloading charges, demurrage charges, surface transportation charges, evacuation facility charges and management charges, which appear to be fair. In view of the above, the Commission notes that no case of contravention of Section 4 of the Act is made out against the OP.

98. **Clause 8**: This clause *inter alia* stipulates that the bid security will be refunded in case the bidder is unsuccessful in auction or due to non-allotment of coal due to non-availability. However, if no request is received from buyer, the OP will retain bid security

for future participation. It is alleged by the Informant that there is no corresponding penalty on seller.

99. It is stated by the OP that the Informant incorrectly alleges that this clause relates to the process fee and incorrectly characterises this as a penalty on the bidder.

100. From the plain reading of this clause, it appears that the provision is for refund instead of forfeiture (as was the case in Case no. 59 of 2013), so the requirement of having a reciprocal penalty clause on the seller as contended by the Informant does not appear to be necessary. In view of the above, the Commission notes that no case of contravention of Section 4 of the Act is made out against the OP.

101. **Clause 9**: This clause *inter alia* deals with forfeiture of bid security in various circumstances, one of which is failure of allotment of rakes which is termed as the sole responsibility of the buyer. It is alleged by the Informant that this clause is abusive as there is no reciprocal penalty on the seller. Informant has also cited Commission's order in Case no. 59 of 2013 in which a similar clause was held as abusive and a judgement by Hon'ble High Court of Kolkata against Bharat Coking Coal Limited ('**BCCL**') in which a buyer's EMD was forfeited by BCCL due to non-allotment of rakes, and the Hon'ble High Court had ordered BCCL to refund the EMD with interest, which was upheld by Hon'ble Supreme Court on appeal.

102. It is submitted by the OP that the allegations raised in relation to the forfeiture of bid security have previously been raised by the Informant before the Commission and are currently *sub judice* before the Hon'ble Supreme Court. Therefore, the Commission should not entertain these allegations and dismiss them outright. OP has submitted the following:

(a) Bid security is a deposit that is used to bind the bargain as a "part payment" and represents a guarantee that the contract will be fulfilled. Such bid security becomes a part of coal value once the transaction is complete. In the context of the e-auction, a bid security requirement is imperative to ensure that the participants are serious and not merely speculators or frivolous bidders.

(b) Bid security is a part of the coal value to be paid by successful bidders and is an advance payable as part of the purchase price. The fact that such bid security is forfeited if the transaction falls through does not make it a penalty.

(c) It is only in circumstances where the transaction is not completed on account of a fault of the bidder (such as non-lifting of coal, or non-payment of the coal value, etc.), that the bid security becomes liable to be forfeited**,** which too is not an unfair condition as per the law laid down by the Hon'ble Supreme Court (*Shri Hanuman Cotton Mills v. Tata Aircraft Limited (AIR 1970 SC 1986)*. Similarly, in *State of Gujarat v. Dahyabhai Zaverbhai (AIR 1997 SC 2701)*, it was held that it is valid for the security deposit to be forfeited if the party had abandoned the contract, and such party would not be entitled to a refund of such deposit).

(d) OP and its subsidiaries always supply the allocated quantity of coal if the same is available. The only times that there might be some shortfall in supplies due to the seller is if due to some unforeseen event (for example, certain force majeure events, etc.) or because supplies are required to be diverted to FSA customers (as has been the case in the past, where OP was directed through ministerial interventions to divert coal meant for e-Auction to power producers). In either event, OP makes all reasonable efforts to supply the allocated quantities.

(e) By way of an amendment dated 29.02.2024, OP introduced certain amendments to Clause 9 of the 2022 Scheme. In this regard, to alleviate the concerns raised by various bidders, a penal provision was introduced on OP and its subsidiaries in case they fail to supply the allotted quantity to the bidder (when the failure is on account of the seller) as Clause 9.7 in the 2022 Scheme. The said clause reads as follows - "*Penal provision for Seller: 9.7. Penalty at the rate of applicable bid security/ton will be applicable to the Seller (coal company) in case of failure to supply of allotted quantity to the bidder (for the portion of quantity below 90% of Booked quantity) for the reason attributable to the Seller only, subject to clause 11.2, clause 7.5 and clause 7.9 and other applicable provisions of the Scheme document*."

(f) By way of the same amendment, the following changes were also made to Clause 9 of the 2022 Scheme:

i. **Deletion of Clause 9.1 of the 2022 Scheme -** Clause 9.1 which provided for forfeiture of bid security in relation to bids for the rail mode when the bid quantity is not in multiples of the rake fit size, *i.e.* the standard capacity of railway wagons holding up to 4000 tonnes of coal, was deleted after the OP noticed that certain bidders were facing difficulties due to this clause. It was observed that bidders may not have the option to arrange for transport by road for such excess quantity due to various operational and other factors making it impossible for them to lift such coal from any mode of transport apart from rail.

ii. **Amendment to Clauses 9.4 and 9.5 of the 2022 Scheme -** Clauses 9.4 and 9.5 provide for forfeiture of bid security in case of failure of the buyer to lift the booked quantity and cancellation of the order after booking, respectively. After the amendment, the bid security is only forfeited if the buyer fails to lift 90% of the booked quantity. This amendment was introduced to provide buyers with some flexibility. Based on these amendments to Clause 9 of the 2022 Scheme, the allegations raised by the Informant regarding the forfeiture of bid security being a one-sided penalty on the buyer are no longer valid under the current version of the 2022 Scheme.

Clause 9.4 and 9.5, post amendment, read as follows:

Clause 9.4 *– If the successful Bidders do not lift 90% of the Booked Quantity within the stipulated validity period, the proportionate Security Deposit (as converted from the Bid Security amount) or the applicable BG amount for the unlifted quantity i.e. failed quantity below the level of 90% of Booked Quantity would be forfeited subject to clause 7.5, 7.9 & 11.2. Forfeitable Bid Security amount can be deducted from coal value also instead of BG encashment, as per choice of bidder. Such forfeiture, however, would not take place if the Coal Company has failed to offer full or part of the successful Bid quantity within*

the validity period. In such cases again, no forfeiture would take place if the balance quantity is less than a truck load/rake load."

Clause 9.5 *– If the Buyer cancels the order/Rake after booking, the applicable Bid Security or the applicable BG amount (for portion of quantity of the cancelled rakes below 90% of Booked Quantity) shall be forfeited for the rake/order cancelled."*

(g) It is further submitted by the OP that Informant has placed incorrect reliance on an order of the Hon'ble Calcutta High Court in *Bharat Coking Coal Limited (**BCCL**) v. Shree Enterprises Coal Sales Pvt. Ltd.* as this case pertains to a specific contractual issue. As such this case bears no implications on the present matter from a competition law perspective.

103. Before examining the clause, it is appropriate to revisit the observations of the Commission in Case no. 59 of 2013, on a similar clause in the 2007 Scheme.

104. With regard to clause 9.2 of 2007 scheme, the Commission in Case no. 59 of 2013 stated that "*clause 9.2 of the e-Auction Scheme whereby a buyer is saddled with penalty by way of forfeiture of EMD for non-lifting of coal after successful participation in the e-Auction, no corresponding penalty was provided thereunder, if despite acceptance of the bid the opposite parties failed to deliver the coal. Such stipulation in the Scheme is evidently result of market power exercised by the opposite parties and falls foul of the provisions of section 4(2)(a)(i) of the Act being ex facie unfair".*

105. It is observed by Commission that by the way of introduction of Clause 9.7, the OP appears to have alleviated the concerns raised by the Commission in Case no. 59 of 2013 regarding lack of reciprocity in an analogous clause in 2007 scheme by introducing a penal provision for the seller in case the coal is not supplied due to reasons attributed to the seller. This amendment balances the scales by making both the seller and buyer accountable in respective scenarios of non-supply of coal due to reasons attributed to either of them.

106. Further, it has been noted by the Commission that certain other changes have been made by the OP in the 2022 Scheme for the benefit of the bidders, such as deletion of the clause 9.1 stipulating forfeiture of bid security in relation to bids for the rail mode when the bid quantity is not in multiples of the rake fit size and has also appeared to have provided more flexibility to the bidder by amendments to Clauses 9.4 and 9.5, whereby the bid security is forfeited only if the buyer fails to lift 90% of the booked quantity.

107. These amendments to Clause 9 appear to have removed the anti-competitive elements in the 2007 Scheme, and the earlier version of 2022 Scheme, and provided more leverage to the buyer by reducing the percentage of booked quantity to be lifted before attracting forfeiture of bid security and post these amendments, the said clause in the amended 2022 Scheme does not appear to be in contravention of the provisions of the Act.

108. **Clause 10**: This clause *inter alia* deals with refund of balance coal value for the unlifted quantity. It is alleged by the Informant that the clause does not stipulate any time frame and interest for the refund.

109. It is submitted by the OP that the Informant's claims regarding delayed refunds by OP and its subsidiaries under Clauses 7.5, 8, 10, and 11.11 of the 2022 Scheme are unfounded and irrelevant to competition law. It is submitted that OP processes refunds promptly, subject to internal administrative and reconciliation processes.

110. In view of OP's clarification, the Commission notes that no case of contravention of Section 4 of the Act is made out against the OP.

111. **Clause 11.6:** This clause *inter alia* states that in case of dispute, decision of Director in charge of marketing will be final. It is submitted by the Informant that there should be timeframe for decision and a speaking order and formats of complaints along with email id etc. should be provided.

112. OP has submitted that these allegations have no nexus with any competition law issue as deciding the procedure for filing complaints is purely an administrative decision of OP. It is further stated that the idea behind not having a cumbersome procedure is to avoid imposing unnecessary burdens on bidders seeking to make a representation to OP.

Further, bidders that participate in an e-auction event can complain to OP or its relevant subsidiaries in any form or manner regarding any issues that they may face.

113. The Commission observes that while devising redressal procedure for buyer's complaint is generally an administrative issue, the Informant has not brought on record any material to substantiate as to how clause 11.6 results in any competitive harm to the buyers. In view of the above, no case of contravention of Section 4 of the Act is made out against the OP.

114. **Clause 11.8:** This clause *inter alia* stipulates that refusal from buyer on account on non-suitability and sub-standard quality will not be acceptable, but buyer has the option of third-party sampling and the buyers will submit a financial coverage towards upgradation of coal arising out of third-party sampling.

115. It is alleged by the Informant that this clause contains 28 conditions which make it difficult for small buyers to adhere to all conditions. Informant has stated that the grades declared are always one or two grade higher than actual. Clause 11.8.3 (iv) imposes a condition on buyers to pay extra money one grade upper if third party sample is drawn. Informant has stated that the seller should also deposit one grade lower price of coal if the result is inferior to grade of coal loaded and this money should be kept in a separate fixed deposit account. It is submitted by the Informant that an independent watchdog should be appointed to receive complaints regarding grade of coal and to check and declare the correct grade. Further, it is stated that the buyers must be allowed to draw a joint sample by government-approved laboratory and one sample given to buyer and one to seller.

116. It is submitted by the OP that coal is a heterogeneous commodity mined from the earth, which naturally leads to potential variations in the grade of coal between what is notified and what is actually mined. This inherent characteristic may result in discrepancies, known as grade slippage, between the expected and actual quality of the coal supplied. Therefore, in order to remedy such naturally occurring variation, under Clause 11.8 of the 2022 Scheme, buyers have the option of third-party sampling provided by the relevant service provider. OP has stated that the objective of third-party sampling is to offer buyers a transparent process to sample and verify the grade of coal being supplied. As

such, third-party sampling is available throughout the lifting period at the delivery point of the coal. It is further stated by OP that if third-party sampling cannot be conducted in accordance with Schedule I of the 2022 Scheme, the seller may undertake the sampling in the presence of the buyer. According to OP's submission, an assessment of grade slippage complaints filed against e-auctions conducted under the 2022 Scheme indicates minimal grade slippage. Accordingly, the incidental grade slippage under the 2022 Scheme is negligible, rendering the Informant's allegations unfounded. It is further stated by OP that during FY 2023-24, there is hardly any variation in the weighted average Gross Calorific Value ('**GCV**') of coal analysed *vis-à-vis* weighted average GCV corresponding to declared grade of coal across CIL.

117. The clause appears to be well laid out covering all scenarios and conditions and being comprehensive, there is no ground for it to be termed as an unfair condition.

118. Similar issue was dealt with. in Case nos. 03, 11 and 59 of 2012 (*Maharashtra State Power Generation Company Ltd. etc. v. Mahanadi Coalfields Ltd. & Ors. etc*.), wherein the issue was that OP was offering joint sampling only at the loading point, which was held as unfair by the Commission. However, under the 2022 Scheme, third party sampling is being offered at the delivery point and it is stipulated that such sampling shall be undertaken throughout the period of lifting, which appears fair. In the old scheme, third party sampling was not allowed.

119. Regarding Informant's allegation that Clause 11.8.3 (iv) imposes a condition on buyers to pay extra money one grade higher if third party sample is drawn, seller should also deposit one grade lower price of coal if the result is inferior to grade of coal loaded - Clause 11.8 (xii) *inter alia* reads as '*..The differential amount between initial invoice and the payable amount after third party sampling analysis shall be adjusted/paid through debit/credit note as the case may be within 7 days after reconciliation of final results*.' Thus, it appears to be a reciprocal clause having respective obligation for both parties. In view of the same, no case of contravention of Section 4 of the Act is made out against the OP.

120. **Clause 11.9 and Clause 11.10:** Clause 11.9 *inter alia* stipulates that OP can cancel the sale of coal under e-auction at its sole discretion without assigning any reason thereof

and no claim will arise. Informant alleged that the same right must also be given to the buyer. Further. Clause 11.10 *inter alia* states that OP has the right to amend/modify terms and conditions at any point in time. Informant has alleged that the clause is one sided and amounts to breach of contract.

121. In view of the fact that such clauses are standard in schemes/contracts of such nature, no case of contravention of Section 4 of the Act is made out against the OP.

122. **Clause 11.11:** This clause *inter alia* stipulates that both parties have the right to claim any excess statutory levy for a period of 3 years. It is alleged by the Informant that it will be tough for buyer to pay extra charges as 3 years is a long time period and OP does not refund any statutory excess and has cited an instance of the same wherein it is stated that OP's subsidiary Eastern Coalfields Limited ('**ECL**') has refused to refund extra cess charges amounting to INR 863 crores.

123. It is submitted by the OP that statutory charges are paid to the relevant government authorities by OP, and accordingly, the refund of such statutory charges is processed only after the same is refunded/ adjusted against by the government authorities. Therefore, a case of pending refund for statutory charges does not arise.

124. Regarding the allegation that OP's subsidiary ECL has refused to refund extra cess charges amounting to INR 863 crores, OP has stated that it is not substantiated with any details by the Informant. As per ECL's internal records, there is no such refund of INR 863 crores of cess charges pending with ECL.

125. The clause in its language is reciprocal in nature and is applicable on both buyer and seller, which appears fair. In view of the same and OP's clarification, no case of contravention of Section 4 of the Act is made out against the OP.

126. **Clause 11.12:** This clause *inter alia* stipulates that for settlement of disputes, buyer has to make a representation in writing to the General Manger/HoD (Marketing & Sales), who would deal with the matter within one month. If required, the matter will be determined by Director-in charge of Marketing.

127. It is alleged by the Informant that no prescribed rules and regulations have been provided in the scheme for buyers to make a complaint and concerned authority must pass a speaking order within 30 days of complaint.

128. It is submitted by the OP that the idea behind not having a cumbersome procedure is to avoid imposing unnecessary burdens on bidders seeking to make a representation to OP. Further, bidders that participate in an e-auction event can complain to CIL or its relevant subsidiaries in any form or manner regarding any issues that they may face, including through Grahak Samadhan Seva.

129. The Commission observes that as already stated, the procedure for settlement of disputes appears to be an administrative issue. In view of the same, no case of contravention of Section 4 of the Act is made out against the OP.

130. **Clause 11.13 (referred to as Clause 13 by the Informant):** This clause *inter alia* stipulates that revision of bid price in case of revision in notified price of bid grade of coal/change in grade shall be as per grade declaration. The Informant has stated that the OP collects GST, Compensation cess, Royalty Charges within 7 day of deposit of coal value. But these statutory charges which are 20% of coal value should be paid only once the coal is dispatched. Informant has further stated that the buyer is not sure of grade, price, taxes and delivery time and OP wishes to charge extra on account of revision of grade/price and taxes consequent to such an increase.

131. OP has not provided any comment on this particular clause and the allegation by the Informant.

132. Regarding revision of bid price in case of revision in notified price of bid grade of coal/change in grade, it appears to be fair for the buyer to pay the revised bid price as per the said changes. In view of the same, no case of contravention of Section 4 of the Act is made out against the OP.

133. In view of the foregoing and in the facts and circumstances of the present matter, the Commission is of the view that there is no *prima-facie* case of contravention of provisions of the Act warranting an investigation into the matter.

134. Accordingly, the Information is directed to be closed forthwith in terms of Section 26(2) of the Act. Consequently, no case arises for grant for relief(s) as sought under Section 33 of the Act.

135. The Secretary is directed to communicate to the parties, accordingly.

Sd/-
(Ravneet Kaur)
Chairperson

Sd/-
(Anil Agrawal)
Member

Sd/-
(Sweta Kakkad)
Member

Sd/-
(Deepak Anurag)
Member

New Delhi

Date: 30/12/2024