



**COMPETITION COMMISSION OF INDIA**

**Case No. 10 of 2021**

**In Re:**

**Confederation of Indian Alcoholic Beverage Companies,  
16, ABW Rectangle One, D4, District Centre, Saket,  
New Delhi-110017**

**Informant No. 1**

**Association of Distillers, Brewers and Vintners of India,  
LG Floor, JNR City Centre, 30, Rajaram Mohanroy Road,  
Bangalore-560027**

**Informant No. 2**

**And**

**Kerala State Beverages (Manufacturing and Marketing)  
Corporation Ltd. (KSBC), KSBC Head Office, Bevco  
Tower, Palayam Vikas Bhavan, Trivandrum, Kerala-  
695033**

**Opposite Party No. 1**

**Travancore Sugar & Chemicals Ltd.  
Valanjavattom, P.O.-Thiruvalla , Kerala-689104**

**Opposite Party No. 2**

**CORAM:**

**Mr Ashok Kumar Gupta  
Chairperson**

**Ms Sangeeta Verma  
Member**

**Mr Bhagwant Singh Bishnoi  
Member**



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

1. The present information has been filed by the Confederation of Indian Alcoholic Beverage Companies ('IP-1'/'CIABC') and Association of Distillers, Brewers and Vintners of India (IP-2'/'ADBVI') (collectively referred to as 'Informants'/ 'IPs') under Section 19(1)(a) of the Competition Act, 2002 ('Act') alleging contravention of the provisions of Section 4 of the Act by Kerala State Beverages (Manufacturing and Marketing) Corporation Ltd. ('OP-1'/'KSBC') and Travancore Sugar & Chemicals Ltd. ('OP-2'/'TSCL') (collectively referred to as 'OPs') (IPs and OPs are collectively referred to as 'Parties').
2. IP-1 is stated to be an industry association representing alcohol beverages companies in India or companies closely associated with the Indian alcohol beverage industry. It is a registered non-profit making public limited company under Section 25 of the Companies Act, 1956. IP-2 is stated to be an association of large, small and medium scale distillers in the State of Kerala.
3. OP-1 is stated to be an authority entrusted with exclusive control over the procurement, wholesale and retail sale of liquor in the State of Kerala. It is a public sector corporation established on 23.02.1984 under the Foreign Liquor Rules, 1953, formulated under the Abkari Act. It is also stated that OP-1 was established pursuant to the suggestion of a judicial commission of inquiry appointed by the Kerala Government to streamline liquor trade in the State. In 2001, OP-1 was also entrusted with the majority retail outlets for sale of alcoholic beverages in Kerala. Thus, as per the Informant, the entire supply chain (*i.e.*, from procurement to distribution and sale of these liquor products to consumers) of India Made Foreign Liquor (IMFL), beer, wine, Foreign Made Foreign Liquor (FMFL) and Foreign Made Wine (FMW) in Kerala is controlled by OP-1.
4. It is further stated that OP-1, for the purposes of procurement of liquor, floats tenders periodically inviting liquor manufacturers to participate, register and enter into rate contracts with OP-1 for the sale of IMFL, wine and beer, *etc.* It is alleged that OP-1 unilaterally and unfairly fixes the rate contract price for the procurement of alcoholic beverages from members of IPs and other private manufacturers. Further, OP-1 also



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procures liquor from a government owned and controlled distillery, *i.e.*, OP-2, at different terms and conditions than those offered to private liquor manufacturers.

5. IPs have *inter alia* alleged that OP-1 has abused its dominant position by imposing unfair and discriminatory prices and terms on private alcoholic beverages manufacturers as against government brands and leveraged its monopoly position by providing favourable prices as well as terms and conditions in the purchase of product of OP-2.
6. The Commission considered the information on 15.06.2021 and directed the OPs to file para wise response(s), if any, to the information, latest by 19.07.2021, with an advance copy to each of the IPs. The IPs were also directed to file their comments, if any, to the response of OPs, latest by 02.08.2021. In deference to the said order, the OPs and IPs, after seeking due extension of time, submitted their reply/response on 31.07.2021 and 23.08.2021, respectively.

#### **FACTS, IN BRIEF, AS STATED BY THE PARTIES**

##### ***Relevant Market and Dominance***

7. It is stated by the IPs that OP-1 is an enterprise under Section 2(h) of the Act as it is engaged in procurement, supply and distribution of IMFL, wine, beers, FMFL and FMW, and while engaging in such economic activity, it does not perform any sovereign functions of the Kerala Government. Further, OP-1 and OP-2 are engaged in activities of trade within the State of Kerala. Also, it has been averred that OP-1 and OP-2 are vertically integrated.
8. As per the information, the distinction between different types of alcoholic beverages is not required as OP-1 procures and distributes all kinds of branded liquor, including foreign liquor. Therefore, IPs have submitted that the relevant product market should be '*the market for procurement and distribution of branded alcoholic beverages*'. Further, IPs have submitted that the relevant geographic market in the instant case should be the '*State of Kerala*', as the allegations pertain to the procurement and distribution of branded alcoholic beverages in the State of Kerala. Accordingly, as per the IPs, relevant



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market in the instant case is ‘*market for procurement and distribution of branded alcoholic beverages in the State of Kerala*’.

9. It is alleged that OP-1 has complete control over the entire supply chain of alcoholic beverages in the State of Kerala except miniscule sale through private bars etc. Further, the entry to market for liquor manufacturers is restricted and is exclusively done through OP-1, which acts as the nodal body controlling the supplies of alcohol in the State of Kerala.
10. Further, owing to exclusivity viz. the exclusive rights to control procurement, supply and retail of alcohol beverages granted to OP-1 by the Government of Kerala and the absence of alternative route by manufacturers to access the alcoholic beverages market in State of Kerala, the IPs have submitted that OP-1 enjoys dominant position in the relevant market. To substantiate this, the IPs have relied on the decision of the Hon’ble High Court of Kerala in *Xavier Residency v. The State of Kerala* (WP(C). No. 22195 of 2014), wherein it was noted that OP-1 is a monopoly in the retail and wholesale procurement and distribution of branded alcoholic beverages in the State of Kerala.
11. In response to the above submission, the OPs have submitted that OP-1’s exclusive right is only with regard to the wholesale purchase of liquor in the State of Kerala from manufacturers, and retail sale is conducted by more than 1300 vendors across the State under various categories of licenses, including FL-1, FL-2 etc. Thus, monopoly in retail sale as alleged by the IPs does not exist.
12. Furthermore, it is stated that OP-1’s exclusive right to procure liquor in the State of Kerala is a statutory right and not a situation resulting from marketing operations. If there was no reservation in the statute providing wholesale purchase solely by OP-1, there would not have arisen a situation of exclusive right.
13. IPs have sought to counter the submission of OP-1 by stating that it not only enjoys dominance in the relevant market but also controls the retail sale of branded alcoholic beverages in the relevant geographic market. This is because of the architecture of the governing laws, which provide that manufacturers/ suppliers have to sell their alcoholic



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beverages exclusively through OP-1. As a result, the suppliers are not at liberty to make direct sales to vendors at the retail level. Thus, in effect, the exclusive control exercised by OP-1 at the wholesale level of the branded alcoholic beverage supply chain has a direct integration effect and impacts the retail sale of alcoholic branded beverages.

14. Furthermore, the IPs have stated that there are about 311 retailers in the State of Kerala, all of whom are State Operating Enterprises (SOEs) and are controlled by the Kerala Government. Out of these retailers, about 275 retailers are controlled by OP-1 while 36 retailers are controlled through the Kerala State Cooperative Consumers Federation Limited. Therefore, an overwhelming number of the retailers (approx. 88%) in the State of Kerala are within the sole control of OP-1.
15. The allegations regarding abuse of dominance and the subsequent responses of the parties on these allegations are summarised in the following paragraphs.

***Unilateral and Unfair Fixation of Rate Contract Price by OP-1 for Procurement of Alcoholic Beverages***

16. IPs have alleged that OP-1 floats tenders for the supply of alcoholic beverages in an arbitrary manner and not every financial year, and further, OP-1 has the power to unilaterally accept or reject a price offered by manufacturers for supplying their products. The members of the IPs and other manufacturers get an opportunity to determine the basic price only when listing and offering a new brand. It is alleged that, once the listing is done, the manufacturers do not have much freedom to revise the prices for their products when fresh tender rate contracts are issued by OP-1.
17. It is also alleged that the members of IPs or other private manufacturers are never consulted while laying down the terms and conditions of OP-1's tender for the procurement of alcoholic beverages. It has been alleged that the tender for procurement of alcoholic beverages itself is a product of unilateral, unfair, imbalanced exercise of power to incorporate one-sided terms and conditions.



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18. It is also alleged that undue coercion is exerted by OP-1 upon the IPs in exercise of its monopsony position which has occasioned the selling of products by private manufacturers, at a loss to OP-1 and the exit of a few players.
19. It is stated that Clause 9(a) of OP-1' Tender states that “*on receipt of the offers and their scrutiny by the Corporation, it shall be open to the Corporation to enter into negotiation with the offerer*”. However, it is alleged that the said clause has rarely been effectuated. It is further alleged that any request by IPs and other private manufacturers routinely gets rejected by OP-1 without any opportunity for negotiation or participation on merits. It is also stated that OP-1 rejects such requests without providing any reasons.
20. It is also alleged that Clause 11(c) of the tender of OP-1, grants complete control of pricing to OP-1 without allowing the sellers any say. Clause 11(c) of OP-1's Tender states:
- “The decision of the Board of Directors of the Corporation shall be final with respect to:*
- (c) Price fixation, terms of payment and all other terms with the offerers in respect of goods quoted/sold to the Corporation.”*
21. As stated, the Informants were allowed only on three occasions in the last ten years to increase their price despite manifold increase in prices/costs of raw material, labour, packaging and transport. It is stated that IPs have also presented their case to the Chief Minister and Finance Minister of the Government of Kerala seeking price increase; however, their request was never accepted.
22. In view of the above submission, the IPs have submitted that Clause 11(c) of OP-1's Tender and its unilateral conduct of determining the rate contract price in its agreements with private alcohol beverage manufacturers, including members of the IPs, is one-sided, unfair and an abuse of monopoly power in contravention of Section 4(2)(a)(i) read with Section 4(2)(a)(ii) and Section 4(1) of the Act.
23. In its response, OP-1 stated that it is not controlling the entire distribution chain except the wholesale purchase and sales. The purchase prices of liquor products are determined



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through a transparent tender process, and the rates offered by the manufacturer suppliers are duly considered while finalising rates for procurement. The tender invited by OP-1 is not a competitive tender to determine any L-1, L-2. Its purpose is to fix the rate contract for the supply of IMFL etc to OP-1 from distilleries, breweries or blending units for the prescribed period. In the said tender process, the rate is quoted by the manufacturers. The authority to approve the rate contract rates rests solely with the Board of OP-1. Usually, the Board fixes rates for existing brands by allowing price escalation at periodic intervals and not necessarily every year. The escalation is granted considering the increase in cost factors *etc* and uniform yardsticks and terms and conditions are applied to all suppliers who participate in the Rate Contract Offer.

24. According to OP-1, for ascertaining the genuineness of the rates quoted by the liquor manufactures, the tender process requires manufacturers to submit a cost sheet containing the cost involved in production and supply of liquor to OP-1, including the profit margin for each brand. The various cost components as stated by the manufacturers/suppliers are considered while fixing the selling price of liquor to OP-1. Accordingly, as stated by OP-1, there is no infirmity or arbitrariness as regards the fixation of the wholesale price for liquor brands by it.
25. It is further averred that as a buyer, it is prerogative of OP-1 to decide on the terms and conditions of the tender. Being a commercial contract, manufacturers can participate in the tender process only if the conditions set out by OP-1 are met. It is also stated that the terms and conditions have been set by OP-1 since its inception in 1984 and ever since the liquor suppliers have never made any complaint regarding the process. As regards the periodicity of the rate contract, OP-1 has submitted that the periodicity of tender may differ due to several reasons. For example, during election years, the tender shall be subject to the code of conduct declared by the Election Commission.
26. As regard to the allegation of undue coercion, OP-1 submitted that it adopted no such practice. The members of IPs and other manufacturers quote rates as per their cost sheet and OP-1 accepts the same. It is also stated that IPs and other manufacturers always try to extract heavy profit while quoting for new brands.



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27. In addition to the above, OPs have also stated that, unlike other products, liquor cannot be considered a product open to competition. For alcohol, narcotics and like products, no element of competitive practice ought to be followed, on account of the social impact involved. There is no compulsion to supply liquor by any of the manufacturers if the rate is not feasible for them. OP-1 periodically revises the rates of existing brands which cannot be revised at the whims and fancies of manufacturers/suppliers or at fixed intervals. The last revision of prices was effected in 2017 and recently in 2021, granting a 7% increase each time over the existing rates.
28. OPs have further claimed that the contention of alleged arbitrary conduct of OP-1 as occasioning the sale of products by private manufactures at a loss to OP-1 and resulting in the exit of a few players is not true. If any of the suppliers have exited from the market, it is because of their inability to compete with the products of other members of the IPs' association and not because of the tender conditions or rate contract fixed pursuant thereto by OP-1. As per OP-1, the margin which the suppliers are now enjoying is more than sufficient. The OPs have also asserted that the suppliers stated to have exited from the market may be due to reasons attributable to their administrative factors.
29. As regards the allegation that Clause 11(c) of the Tender grants complete control of pricing to OP-1, it is stated that the product in question is a regulated commodity and such a condition is necessary to control liquor price; otherwise, suppliers would quote price that does not match with the justifiable cost of production and with a high incidence of tax, end consumers would suffer considerably in terms of their purchase price. Accordingly, OP-1 stated that, while negotiation is required in cases where Tenders are issued for determining L-1, L-2 etc, however, in the Tender of OP-1, which is for fixation of rate contracts with respect to different brands of alcoholic beverages, there is no such requirement.
30. The IPs in their rejoinder submission have stated that the exclusive rights of procurement by OP-1 results in a cascading effect on the vertical business chain which leads to abusive conduct in the relevant market. IPs have submitted that OP-1 procures at a margin of 8% on domestic brands from manufactures, but sells at 20% margin to the



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downstream retail market. The margin, thus, cannot be said to be minimal and is, in fact, far more than what many suppliers derive (or derive at all).

31. Further, the assertion of OP-1 that price increases are allowed by the Board at periodic intervals and not necessarily every year is based on an incorrect understanding of the concerns of suppliers. The suppliers do not demand price increase every year or at a fixed interval as a matter of routine; instead, they merely seek price escalation whenever input and other costs increase, which justifies fixation of higher price.
32. According to IPs, over the last 10 years, the price of raw materials (ENA) has risen by nearly 100%, the price of diesel by over 150%, wages by over 100% and costs of other inputs in a similar fashion. The cumulative impact of these components is an increase in the cost of production of liquor by over 150% over the last 10 years. In stark contrast, OP-1 has granted meagre price increases of 6% in 2009-10, 6% in 2012-13, 7% in 2017-18 and 7% in 2020-21, which amounts to less than 30%.
33. Over and above the rise in the cost of production, the introduction of turnover tax (TOT) (currently at an effective rate of 13%) by the Government of Kerala has saddled the suppliers with an additional expense. Further, the sales tax on liquor has risen from around 60-70% earlier to nearly 250% now, which is an increase of 400%.
34. As to the periodicity of tenders, it is submitted that OP-1 takes several months to issue and finalise a fresh tender. Meanwhile, suppliers are required to continue making supplies at the older rates. Further, the explanation provided by OP-1 that the imposition of the election code of conduct at times leads to temporary suspension of activities is not correct, as elections are not held always in conjunction with the issuance of tender or supplies made pursuant to such tenders. Even after the election code of conduct ceases, OP-1 takes an undue and lengthy time to take final decisions on tenders despite there being no proof adduced by OP-1 that the demand in the market can be staggered, and delay becomes justified.
35. IPs have submitted that OP-1 has not adduced any data/information to indicate that free-pricing would lead to illegal profit sharing between suppliers. IPs have submitted that



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the suppliers are primarily aggrieved by OP-1's fixation of purchase price without due consideration of the associated production costs incurred by the manufacturers/suppliers. Thus, OPs cannot escape liability based on the baseless argument that competition in liquor markets is undesirable, which if accepted, would result in defeating the intent and purpose of the Act, since it is sector and status neutral legislation.

### ***Preferential Treatment to Government Brands vis-à-vis Private Brands***

36. The IPs have further alleged that OP-1 grants preferential treatment and considerations to government brands in terms of (a) price increase as and when required, (b) lower wholesale margin, (c) lower cash discount, (d) priority in unloading at depots, and (e) instruction to retail shops to sell government brands on top priority as against the private brands, thereby placing private brands at a competitive disadvantage. Accordingly, IPs have alleged that the conduct of OP-1 is highly discriminatory in treating similarly placed enterprises differently, causing economic harm to members of the IPs *qua* the government supplier.
37. According to IPs, it is self-evident from the above that OP-1 has not granted a level playing field to ensure that all competitors are treated in the same way in the Relevant Market. The undue discrimination by OP-1 in favour of government-owned brands leads to higher costs to private brands, squeezes their margin while lowers costs of government brands while maximising their profits, thus jeopardising effective competition in the market. The IPs have alleged that this conduct of OP-1 is an abuse of its monopoly power in contravention of Sections 4(2)(a)(i) and 4(2)(a)(ii) read with Section 4(1) of the Act.
38. As regards the allegation that OP-1 grants preferential treatment and considerations to the government's own brands, OP-1 has submitted that there is only one state owned distillery unit in the State of Kerala belonging to OP-2. At present, only one brand (Jawan Rum with size of 1000 ml) is being produced from this unit. OP-1 has accepted that certain concessions are being given to the state owned undertaking, which is desirable for a public sector undertaking (PSU) following all norms, rules, and statutory provisions in public interest.



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39. According to OP-1, the averment that government brands get better marketing and visibility at retailer's stage is not true. In fact, private manufactures are playing foul and colluding with shop staff to suppress and substitute the government-produced brand (Jawan). Considering the price and quality of liquor, Jawan brand stands popularised in the market, which cannot be stated to be the promotion of retailing but because of the market demand created. It is also submitted that the allegation that retailers are mandated to buy certain fixed amounts of government brands is untrue.
40. Clause 11(d) of OP-1's Tender states that OP-1 shall be at liberty to relax, alter, amend, etc. the terms and conditions of the offer documents etc. to any Kerala Government owned distillery, etc. or any Kerala-based distillery in public interest and/or following guidelines issued by the State Government, and in such cases the offerors/rate contractors will not impede such action by corporation for any reason. This policy is in tune with the general policy of the government and not contrary to such policies. It is a fact that the State and Central Government are extending several concessions to many sectors considering inherent disabilities etc. Private brand manufactures need not question any preferential treatment to government brands as there is no unreasonable relaxation granted which is detrimental or prejudicial to private manufactures, and only justifiable relaxations are provided, which are not based on exclusive monopoly position but on policy decision which is fair and reasonable.
41. OP-1 has further clarified that there are about 100 suppliers supplying liquor to OP-1, and the impact of giving a small price advantage in the form of lesser margin to just one brand does not distort competition or affect the profitability of other suppliers. In this regard, OP-1 has relied on the judgment of Hon'ble Supreme Court in *State of Madhya Pradesh & Ors vs Nandlal Jaiswal & Ors*, which held that preference given shall not be violative of Article 14 of the Constitution as it cannot act arbitrarily or at its sweet will.
42. With regard to the submission of OPs regarding preferential treatment to OP-2, IPs have submitted that out, of 100 odd manufacturers/suppliers on the list of OP-1, only a handful of them actually make supplies. Further, IPs submitted that OPs have not provided any valid logical justification to explain the discriminatory treatment meted



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out to private suppliers as against OP-2. Even otherwise, all enterprises in a market are expected to compete on fair terms and conditions, and the objective of competition policy is not to unduly favour one over the other.

### ***Cash discount to ranked and non-ranked brand***

43. IPs have stated that Clause 5(k) of OP-1's Tender provides for cash discounts of varying ranges corresponding to the rate contract price of goods which is levied while reimbursing 100% value of actual sales to suppliers.
44. Initially, cash discount was stated to be levied at 2% only, and then, service charges were also levied on stock sold through OP-1's retail shops at 5%. Later, when service tax was levied by the Government of India at 10%, the service charges were enhanced to 5.5%. Subsequently, the service charge component was struck down by the Hon'ble Supreme Court. Thereafter, in order to capture the 5.5% service charge component, OP-1 increased the cash discount from 2% to 7.7%, and thus, it is still able to collect service charges disguised as a cash discount component.
45. Now, OP-1 imposes cash discount as high as at 7.75% for ranked brands and 21.75% for non-ranked brands i.e., non-popular brands. As per IPs, new brands are also non-ranked brands. This 21.75 % charge, which is over a fifth of the price for new or non-ranked brands, dampens the economic viability and businesses of the suppliers. The IPs have alleged that such cash discount levied on products is in violation of Sections 4(2)(i)(a) and 4(2)(a)(ii) of the Act.
46. In reply thereto, OP-1 has submitted that purchase of alcoholic beverages is complete as soon as liquor is unloaded at OP-1's warehouse. As per contract, supply is made at OP-1's warehouses, and for selling the liquor, it runs outlets throughout the State. For running the outlet exclusively to sell liquor brands supplied at warehouses, the suppliers have to bear the expenses for running retail outlets, and cash discount is collected towards the reimbursement of such expenses. OP-1 stated that it is also paying around 159% of the selling price towards excise duty from its pocket which it gets as reimbursement on sale only. While the blockage of funds is also a factor, OP-1 suffers



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more than the manufacturers/ suppliers. In any case, according to OP-1, this has nothing to do with disturbing any competition.

47. Further, OP-1 has submitted that a slightly higher rate is levied for special brands as the profit margin available to the suppliers for such brands is high which, according to OP-1, is evident from the cost sheet. A higher cash discount is taken for the sale of such brands through outlets on the ground that OP-1 has to incur expenses for the sale of these brands through outlets, unlike in the warehouse.
48. IPs in this regard have submitted that OP-1 purchases alcohol from both government-owned and private suppliers, and the terms and conditions offered to government-owned suppliers are more advantageous in nature. This discriminatory treatment results in an adverse impact on competitive forces in the market.
49. As regards preferential treatment to OP-2 in terms of lower cash discount, IPs have submitted that the purpose of the cash discount is to act as an incentive for OP-1 to make payment to suppliers on or before the due date. It is also submitted that cash discount is not offered by suppliers as compensation for any service rendered by OP-1 or for any expenses incurred by them, as asserted by the OPs. Instead, the objective of cash discount is to ensure timely payments to suppliers within the agreed period.

***Other unfair and abusive terms and conditions in OP-1's Tender***

50. Apart from the above allegations, the IPs have also alleged that various clauses of the Tender of OP-1 are in violation of Section 4(1) of the Act. These clauses *inter alia* pertain to the rounding off of MRP of a brand to the next higher multiple of tens by OP-1 and keeping the same to itself, fixing the number of brands to be sourced from manufacturers, unilateral deduction of cash discount, unilateral right to modify rate contract etc. It has been *inter alia* alleged that these clauses/conditions are unilateral, unfair, discriminatory and provide control over price determination to OP-1.
51. As regards the allegation regarding Tender conditions, OP-1 has submitted that, being a buyer and the transactions being commercial, it is necessary to include required



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provisions in the Tender to ensure smooth running of the business of OP-1. There is no compulsion on any manufacturer to respond to the Tender, and those who are willing to accept the terms need to participate in the tender.

52. OPs further stated that these conditions in the Tender are not unilateral and does not give any control over price as set out by the IPs. OP-1 cannot control and artificially manipulate the demand/supply conditions of alcoholic beverages in the State. These clauses are not ‘unfair’, ‘discriminatory’, ‘arbitrary’, as submitted by OP-1. Furthermore, the facts in the issue involved in the Commission’s final order in Case No. 02 of 2016 (*International Spirits Order*) regarding the abusive conduct of the Uttarakhand Board are not applicable in the instant case.
53. IPs further submitted that OP-1 has not provided any cogent reasoning or rationale for asserting that the Tender conditions are compliant with the Act. Further, the OPs have not extended any evidence of illegalities or malpractices by the IPs. Given the absence of any objective justification for the imposition of the clauses in OP-1’s Tender, the IPs have, *inter alia*, prayed for the following:
- (i) Informants have submitted an application under Section 33 of the Act requesting interim relief from the Commission that OP-1 be restrained from abusing its monopoly position.
  - (ii) To direct the Director General (DG) to cause an in-depth investigation into the matter.
54. The IPs have also sought confidentiality on the contents of information contained in Annexures 10, 11 and 14, in terms of Regulation 35(2) of the General Regulations, 2009 read with Section 57 of the Act, as these annexures, according to IPs, contain commercially sensitive information about the communications and pricing data of a member of the IPs.

### **Analysis of the Commission**

55. The Commission has considered the information and submission of the parties and notes that IPs have made allegation of abuse of dominant position by OPs in respect of procurement and distribution of branded alcoholic beverages in State of Kerala. For an



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analysis of the case under Section 4 of the Act, the first requirement is to establish that the OPs are enterprises, followed by delineating the relevant market as per Section 2(r) of the Act. The next step is to assess the dominance of OPs in the so defined relevant market in terms of factors enumerated under Section 19(4) of the Act. Once the dominance of OPs is established, the final step is to determine abuse of dominance, if any.

56. The Commission notes from the website of OP-1 that it is a company belonging to the Government of Kerala, which has been entrusted with monopoly rights in respect of purchase and distribution of IMFL, Beer, Wine, FML and FMW in State of Kerala. OP-2 is a company under the Government of Kerala and engaged in the manufacture of IMFL. Further, OP-1 also undertakes retail sales through its outlets. Accordingly, the Commission observes that both OPs are engaged in economic activities and thus, qualify to be an enterprise in terms of Section 2(h) of the Act.

57. The Commission notes that the allegations made by the IPs are primarily with respect to unfair and discriminatory treatment by OP-1 of various manufacturers/suppliers of alcoholic beverages in respect of the wholesale procurement of alcoholic beverages by OP-1 from such manufacturers/suppliers. Also, OP-1 has exclusive right with respect to the wholesale purchase/procurement of branded alcoholic beverages in the State of Kerala by virtue of the Abkari Act and analogous rules. Therefore, in the facts and circumstances of the present case, the Commission defines relevant product market as *'market for wholesale procurement and distribution of branded alcoholic beverages'*. In respect of the relevant geographic market, the Commission notes that alcohol is a subject in the State List under the Seventh Schedule of the Constitution of India and the regulations governing the procurement and distribution of liquor vary from State to State. This makes the State a possible distinct geographic market for the procurement and distribution of liquor. Further, the OPs have also acceded to the delineation of the relevant geographic market as contained in the information. Consequently, as the present case is related to procurement and distribution of liquor in the State of Kerala, the relevant geographic market would be the State of Kerala. Accordingly, the Commission delineates a relevant market in the present case as *"market for the wholesale procurement and distribution of branded alcoholic beverages in the State of Kerala"*.



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58. On the issue of dominance, based on the submission of the parties, the Commission notes that OP-1 is a statutory monopsonist for the purpose of procurement and distribution of relevant product within the relevant geographic market. As regards retail sale of branded alcoholic beverages, it has been stated that there are various other vendors, apart from OP-1. Upon considering the fact that OP-1 is a statutory corporation having sole right of wholesale procurement and distribution of alcoholic beverages in the State of Kerala, the Commission is of the *prima facie* view that OP-1 is dominant in the relevant market.
59. With regard to the analysis of the abuse of dominance by OP-1, the Commission notes from the submission of the IPs that manufacturers can quote base price for their products; however, the decision of OP-1 to accept or reject quoted price is final and cannot be contested as per provisions of Clause 11(c) of the Tender issued by the said OP. This clause provides OP-1 with significant and determinative countervailing buying power in fixing the prices of branded alcoholic beverages at which it will procure from manufacturers/suppliers of alcoholic beverages. Members of IPs (i.e., manufacturers/suppliers) have no other option but to sell their products to OP-1 at the terms and conditions decided by OP-1. The IPs have further contended that clause 9(a) of OP-1's Tender allows for negotiation and revision of prices only on paper and has rarely been effectuated as far as revision of prices of private manufacturers are concerned.
60. In respect of the above allegation, the Commission notes from the submission of OPs that authority to approve the rate contract rests with OP-1. In order to ascertain the reasonableness of the rate quoted by the liquor manufactures, it is prescribed as part of the tender process that they submit a cost sheet detailing the costs involved, including profit margin. Accordingly, members of IPs and other manufacturers quote their rates as per their cost sheet, and OP-1 accepts the same. The various cost components as stated by the manufacturers are considered while arriving at the purchase price by OP-1. From the cost sheet document enclosed with information, the Commission notes that the manufacturers/ suppliers provide to OP-1 detailed cost structure of the brands including Prime Cost, Factory Cost, Administrative overheads, Cost of Production, Selling & Distribution Overheads, Cost of Sales, Profit and Selling Cost. The cost sheet in the prescribed format is required to be confirmed by the chartered accountant of such



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manufacturers for each brand quoted. On the basis of this cost sheet, OP-1 decides the rate for purchasing liquor from manufacturers at the wholesale level.

61. The allegation of IPs is that the rate contract decided for a particular year is also applicable in succeeding years as OP-1 does not float tenders for rate contract each year. As alleged by IPs, since the cost structure changes every year, supplying the brands with old prices results in losses to the manufacturers/ suppliers. OP-1 has submitted that manufacturers/ suppliers quote higher profit margin in respect of brands which have high sales. Further, OP-1 has also cited an incidence wherein a particular manufacturer has quoted negative margin in its cost sheet. As regards the periodicity of revision of prices, the Commission notes that there is usually a 3 to 5 year lag between the revisions of rates, which, as per the IPs, should be done on an annual basis. On this issue, the IPs have submitted that their cost of production increased drastically (around 150%) in the past 10 years; however, due to the delayed tenders and meagre escalations of rate (around 30%) provided by OP-1, the IPs have been witnessing huge losses. In this regard, the Commission notes that the IPs have not been able to substantiate their allegations, particularly with regard to the alleged losses incurred by manufacturers on account of such supplies made by them to OP-1 and no evidence has been submitted in support of its contentions.
62. The Commission is of the view that while with respect to periodicity of tenders, generally no abuse can be determined as it is for the procurer to determine the periodicity with which it has to call for tenders to fix rate contracts, this right cannot be exercised in an arbitrary manner which becomes grossly unfair *qua* the manufacturers/suppliers. The Commission further observes that a monopoly right vested with any entity under a statute to do business exclusively cannot be without limitation. The only exclusivity it may enjoy has to be construed strictly within the laws that grant such exclusivity and cannot be said to be all pervasive. In the facts of the present case, the conduct of OP-1 cannot be faulted especially when the IPs have not been able to substantiate the losses that the manufacturers have purportedly suffered.
63. The Commission notes the submission of OP-1 that prices of alcoholic beverages cannot be fixed as is done for other products, considering that alcoholic beverages are a



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regulated commodity and also involve payments to the state exchequer in the form of taxes and levies which are linked to the prices that are fixed. In this regard, it may be required for prices to be fixed taking into account various factors, including cost, until the State decides to free the sector of its control. Since OP-1 is a procurer of a regulated commodity, Clause 11 (c) of its Tender dealing with the control of the liquor price does not *prima facie* appear to be an abuse, and it is not for the competition authority to determine what that appropriate price ought to be. Ideally, competitive price fixation should be *inter alia* an outcome of economic factors of demand and supply, but the same does not prevent the State or its instrumentality from exercising such powers of price determination when done within the framework of law and a stated policy, considering the nature of the underlying product and the checks and balance as are required. The Commission also observes that, though much relevance has been placed by the IPs on an earlier order of the Commission, in the *International Spirits case*, the facts of the said case are clearly distinguishable in-as-much as in *International Spirits case*, the State instrumentality was found to have been acting in derogation of the excise policy of the State and distorting supplies of alcoholic beverages which not in consonance with retail demand. In the present case, it has not been found that OP-1 is acting contrary to the provision of either the law or any excise policy of the State.

64. The IPs have claimed that while cost of production of liquor has increased by over 150% over the last 10 years, OP-1 has offered only about 30% price increase during the same period. From the submissions of OPs, the Commission, however, notes that there are many manufacturers who are regularly supplying their products, which tends to indicate that manufacturers may not be into losses, as has been claimed. In any case, the IPs have not provided any evidence of manufacturers who have exited the market on account of unviability of supply in the face of the alleged conduct of OP-1.
65. As regards allegations that OP-1 grants certain preferential treatments to OP-2's product, the Commission notes that OP-1 has accepted the preferential treatment accorded to OP-2's product. *Ex facie*, grant of preference to one brand over the other is discriminatory and not in consonance with the principles of competition law. However, in the present case, the same has been stated to be done under a policy declared upfront and that certain clauses of Tender permit such preferences in public interest. Further, the Commission



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notes from the submission of parties that there are several manufacturers supplying multiple liquor brands to OP-1, whereas OP-2 is only supplying one brand of rum i.e., Jawan Rum of 1000 ml. In this context, IPs have not been able to demonstrate as to how competition, in general, with the existence of so many brands in the market, is adversely affected by granting such preference to OP-2. In addition, the IPs have not been able to demonstrate, in their submission, that any favour accruing to one product has actually resulted in distortion of demand/consumer preference or that the choice of consumer is being impaired in any manner.

66. The Commission notes from the submission of parties that OP-1 provides cash discount to manufacturers ranging from approx. 7% to 22% (lower cash discount being favourable to the manufacturers). It appears from the submission of parties that cash discount is applied on wholesale price, which is decided by OP-1 based on cost sheet provided by the manufacturers. A lower cash discount is alleged to be given to the product of OP-2. In this regard, the Commission notes that OP-1 has sought to justify the differential cash discount between fast moving brands (with lower cash discount) *vis a vis* slow moving brands (with higher cash discount), and such discounts partly cover its costs of distribution. The Commission further notes that the IPs have not demonstrated how these discounts are resulting either in actual losses to manufacturers or discriminating one manufacturer *vis a vis* another and impairing their capabilities of effective supply of brands produced by them.
67. As regards allegations that various clauses of the Tender are unilateral and unfair, the Commission notes that OP-1 has stated that conditions in the Tender are not unilateral and that OP-1 cannot control and artificially manipulate the demand/supply conditions of alcoholic beverages in the State of Kerala. Having regard to the submission of OPs and the fact that the main allegation made against the OPs have not been found to be sustainable in view of the discussion above, the Commission does not propose to deal with allegations *qua* other clauses of the Tender. Even otherwise, it has not come on record as to how the impugned clauses of the Tender have been acted upon in a manner, in all these years, which is to the detriment of the manufacturers/ suppliers.



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68. Further, the Commission notes from submission of parties that OP-2 has no role in perpetuating anti-competition conduct, except that it is the beneficiary of the terms and conditions decided by OP-1.
69. The Commission also notes that subsequent to reserving of order in the matter on 16.09.2021, the IPs have filed an application dated 01.10.2021 under Regulation 12(2) read with Regulation 10(2)(b) of the Competition Commission of India (General) Regulations, 2009 (General Regulations). The Commission in this regard notes that by means of the said application, the IPs have strived to bring on record certain new allegations of anticompetitive conduct on the part of OP-1 viz. deduction of 10% of unloading charges by OP-1 as 'administrative charges' from the payment due to its suppliers. It is submitted by the IPs that this additional levy of 10% has aggravated financial burden of the members of the IPs, who are already incurring losses. The IPs have requested that the Commission treat these additional facts stated in the application as being part and parcel of the original information.
70. The Commission, with regard to the above application, at the outset notes that IPs have placed reliance on a circular dated 27.03.2021, issued by the OP-1 to all the suppliers regarding systemising the process of payment of unloading charges at the OP-1's FL-9 warehouses from 01.04.2021. The present information was filed in the Commission on 11.05.2021, and the IPs subsequently filed their further response to the reply of OP-1 on 23.08.2021, but these facts have been highlighted now.
71. With respect to the above, the Commission observes that certain facts have been sought to be placed on record by IPs purportedly placing reliance on the provisions of the General Regulations, which provisions do not appear to be applicable in the first place, in context of the request so made. As regards the examination of the allegations now raised on merits, the Commission notes that the grievance of the IPs is that suppliers are being required to pay 10% of the unloading charges as "administrative charges" from payments due. The Commission further observes that other than giving a theoretical calculation of such levy and annexing a copy of table depicting figures of payment against GTM/STN (Annexure B to the application), it has not been stated as to whether



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such deduction is in any manner *de hors* the terms and conditions for registration of manufacturers for entering into rate contract for sale of alcoholic beverages by OP-1.

72. In light of the facts and evidence on record and based on the submissions of parties, the allegations of abuse raised by the Informants are not found to be validated and no case of contravention of provisions of Section 4 of the Act can be stated to have arisen on the part of OPs, warranting an investigation.
73. In view of the foregoing, the Commission is of the opinion that there exists no *prima facie* case under Section 4 of the Act and the information filed is closed forthwith under Section 26(2) of the Act. Consequently, no case for grant of relief(s) as sought under Section 33 of the Act, arises and the same is also rejected.
74. Before parting with the order, the Commission deems it apt to deal with the requests of Informants seeking confidentiality over the information with respect to certain annexures enclosed with information under Regulation 35 of General Regulations, 2009. Considering the grounds put forth by the Informants for grant of confidential treatment, the Commission grants confidentiality to such documents filed by IPs in terms of Regulation 35 of the General Regulations, 2009, read with Section 57 of the Act for a period of three years from the passing of this order.
75. The Secretary is directed to communicate to the parties accordingly.

**Sd/-**  
**(Ashok Kumar Gupta)**  
**Chairperson**

**Sd/-**  
**(Sangeeta Verma)**  
**Member**

**Sd/-**  
**(Bhagwant Singh Bishnoi)**  
**Member**

**New Delhi**  
**Date: 21.10.2021**