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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 2 of 2016

In Re:

International Spirits and Wines Association of India

Informant

And

Uttarakhand Agricultural Produce Marketing Board

Opposite Party No. 1

Garhwal Mandal Vikas Nigam Ltd.

Opposite Party No. 2

Kumaun Mandal Vikas Nigam Ltd.

Opposite Party No. 3

CORAM

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Dr. M. S. Sahoo
Member

Justice G. P. Mittal
Member



Appearance during the preliminary conference:

For the Informant: Mr. Rajshekar Rao, Advocate
Ms. Nisha Kaur Oberoi, Advocate
Ms. Aishwarya Gopalakrishna, Advocate
Ms. Arunima Chandra, Advocate
Mr. Neelambara Sandeepan, Advocate
Mr. Sameer Dawar, Advocate
Ms. Gauri Puri, Advocate

Order under Section 26(1) of the Competition Act, 2002

1. The instant information has been filed by International Spirits and Wines Association of India (hereinafter referred to as the '**Informant**') under Section 19(1)(a) of the Competition Act, 2002 (hereinafter referred to as the '**Act**') against Uttarakhand Agricultural Produce Marketing Board (hereinafter referred to as '**OP-1**'), Garhwal Mandal Vikas Nigam Ltd. (hereinafter referred to as '**OP-2**') and Kumaun Mandal Vikas Nigam Ltd. (hereinafter referred to as '**OP-3**'), *inter-alia*, alleging contravention of the provisions of Section 4 of the Act. Subsequently, the Informant also filed additional information in the matter on 5th February 2016.
2. The Informant is stated to be a representative body of the international spirits and wines companies having business establishment in India. These companies include: (a) Bacardi India Private Limited; (b) Beam Global Spirits & Wine (India) Pvt. Ltd.; (c) Brown Forman Worldwide LLC; (d) Diageo India Private Limited; (e) Edrington Marketing; (f) Moet Hennessy India Private Limited; (g) Pernod Ricard India Private Limited (hereinafter referred to as '**Pernod**'); (h) United Spirits Limited (hereinafter referred to as '**USL**'); and (i) William Grant and Sons Limited.
3. OP-1 is stated to be a body corporate, established under Section 47 of the Uttarakhand Agriculture Produce Marketing (Development and Regulation) Act, 2011. *Vide* Order no. 208/XXII/2015/04(01)/2015 TC/47/27.04.2015



dated 27th April 2015 (hereinafter referred to as the '**Liquor Wholesale Order**'), the Government of Uttarakhand appointed OP-1 as the exclusive wholesale licensee of foreign liquor/beer/wine ('**alcoholic beverages**'), including the India Made Foreign Liquor (hereinafter referred to as '**IMFL**') in the State of Uttarakhand.

4. OP-2 and OP-3 are stated to be companies fully-owned by the State of Uttarakhand. In addition to the appointment of OP-1 as the wholesale licensee of alcoholic beverages, the Liquor Wholesale Order is stated to have appointed OP-2 and OP-3 as the exclusive sub-wholesalers of foreign liquor for 7 and 6 districts, respectively, in the State of Uttarakhand.
5. The Informant has submitted that the relevant market in the instant case can be defined as the "market for procurement, supply and distribution of alcoholic beverages in the State of Uttarakhand". It has been alleged that OP-1 enjoys dominant position in the relevant market and OP-2 and OP-3 have the ability to dictate the conditions in which the market for procurement, supply and distribution of alcoholic beverages shall operate in their respective districts.
6. The Informant has levelled allegations in relation to the following conducts of OPs: (a) OPs are not procuring IMFL brands in accordance with the consumer demand, which amounts to contravention of the provisions of Section 4(2)(b)(i) and Section 4(2)(c) of the Act; and (b) OP-1 has imposed onerous conditions in its agreements with IMFL manufacturers, in contravention of the provisions of Section 4(2)(a)(i) of the Act. Copies of the agreements entered into by OP-1 with USL and Pernod have also been enclosed with the information.
7. The contentions of the Informant, in relation to the arbitrary procurement of IMFL brands by OPs are briefly outlined as follows:



- 7.1. OPs are placing orders with alcoholic beverage manufacturers for supply of IMFL in an arbitrary and discriminatory manner with no relation to the consumer demand in the market.
- 7.2. OPs are not procuring IMFL from certain alcoholic beverage manufacturers despite demonstrably high demand for their brands thereby discriminating against certain manufacturers. This has resulted in the replacement of IMFL brands of certain members of the Informant with the brands of other alcoholic beverage manufacturers, for which there was significantly less demand when the Informant's members were supplying in the ordinary course. For example, IMFL market share of USL reduced from approximately 61% in August-October 2014 to 2% in August-October 2015. Similarly, IMFL market share of Pernod has reduced from 21.8% in August-October 2014 to 1.67% in August-October 2015.
- 7.3. Retailers are not being supplied with popular alcoholic beverage brands despite consumer demand and express stipulation in the Liquor Wholesale Order.
- 7.4. The concerned warehouses are being stocked with brands which command far less consumer demand and sales in the market than the brands of the Informant's members. This has led to stocks lying unsold in the warehouses. The stock piling at the warehouses has led to the issuance of stop-supply orders by OP-1.
- 7.5. The Opposite Parties are not maintaining, minimum stock levels and are not supplying IMFL brands in accordance with the retailers' demand, despite the express stipulation in Clauses 10 and 11 of the Liquor Wholesale Order.
8. The brief details of the purported unfair conditions in the agreements entered into by OP-1 with alcoholic beverage manufacturers, which are alleged to be



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in contravention of the provisions of Section 4(2)(a)(i) are as follows: (a) unilateral right of OP-1 to dispose of IMFL remaining unsold for over 150 days [Clause 7.2 and 7.3 of USL agreement and Pernod agreement]; (b) OP-1 has the right to impose penalty under certain circumstances but no opportunity to IMFL companies is envisaged before imposing such penalty [Clause 14 of USL agreement and Pernod agreement]; (c) right of OP-1 to terminate the agreement without providing any opportunity to IMFL manufacturer [Clause 4 of USL agreement and Pernod agreement]; (d) obligation of IMFL manufacturer to bear the cost of bottling, sealing, packing, loading, transporting, unloading and stacking of the products at the specified depot [Clause 2.1 of USL and Pernod agreement]; (e) obligation of IMFL manufacturer to bear transit losses and absence of joint mechanism to determine the stock delivered [Clause 2.4 of USL agreement and Pernod agreement]; (f) right of OP-1 to recall the offer for sale and suspend distribution of alcoholic beverages without providing opportunity to IMFL manufacturer [Clause 2.6 of USL agreement and Pernod agreement]; (g) condition that IMFL manufacturer shall be paid for the stock sold instead of the stock delivered [Clause 6 of USL agreement]; (h) unfettered right of OP-1 to impose penalty or dispose of unsold stock at the expiry time specified in that clause [Clause 7.1 of the Pernod agreement].

9. The Commission has considered the information and other materials available on record. The Commission has also heard the Informant during the preliminary conference held on 28th April 2016. None appeared for the Opposite Parties during the preliminary conference despite due service of advance notice. Therefore, the Commission proceeds to examine the merits of the allegations on the basis of materials available on record and the oral submissions made by the Informant during the preliminary conference.
10. The Commission notes that the gravamen of the information relates to the purported unfair procurement of IMFL brands by OPs and the unfair nature of conditions imposed by OP-1 in the agreements it has entered into with



IMFL manufacturers. According to the Informant, the said conducts of OPs are in contravention of the provisions of Section 4 of the Act.

11. For analysing the conduct of an entity under Section 4 of the Act, the relevant market needs to be delineated at the first instance with due regard to the relevant product market and the relevant geographic market. Allegations in the instant case relate to procurement and distribution of alcoholic beverages in the State of Uttarakhand. The Commission notes that alcoholic beverages comprise of beer, spirits and wines. Spirits include country liquor and branded spirits. However, country liquor can be distinguished from branded spirits in terms of product attributes, class of consumers and regulatory requirements/restrictions. The Informant has also clarified that the manufacture and sale of country liquor in the State of Uttarakhand is governed by a different license than what governs foreign liquor. In view of these, the Commission is of the view that the focal product/service is procurement and distribution of branded alcoholic beverages in the State of Uttarakhand. Further, distinction amongst different kinds of alcoholic beverages such as beer, rum, whisky, wine, scotch, *etc.* is not relevant in the facts and circumstances of the case as OPs procure and distribute all types of branded alcoholic beverages in the State of Uttarakhand.
12. Although the Informant has submitted that the relevant market in the instant case is the '*market for procurement, supply and distribution of alcoholic beverages in the State of Uttarakhand*', a holistic reading of the Liquor Wholesale Order suggests that only OP-1 has the right to procure branded alcoholic beverages from the manufacturers for the entire State of Uttarakhand; and OP-2 and OP-3 have to procure branded alcoholic beverages from OP-1 and then distribute the same to the retailers located in their respective areas. The Informant has further claimed that all the three OPs have been granted exclusivity in their respective businesses and areas of operation. Thus, the case appear to involve the following relevant markets:
(a) *market for wholesale procurement of branded alcoholic beverages in the*



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State of Uttarakhand; (b) market for distribution of branded alcoholic beverages in the licensed area of OP-2 in the State of Uttarakhand; and (c) market for distribution of branded alcoholic beverages in the licensed area of OP-3 in the State of Uttarakhand. The Informant has not detailed the ownership, managerial and control relationship, if any, between OP-1 and other OPs. This aspect may be of relevance to assess whether OPs belong to the same group and may also have a bearing on the definition of relevant market. These details may show that there is a unified market for procurement and distribution of branded alcoholic beverages in the State of Uttarakhand. However, the Commission is of the view that precise definition of relevant market, at this stage of the proceedings, is not necessary as the Commission is *prima facie* convinced that OPs will remain dominant in any of these plausible relevant markets as each of OPs has been granted exclusivity in its respective business and area of operation; and no other person can procure, supply or distribute alcoholic beverages in the State of Uttarakhand on account of the restrictions envisaged pursuant to the Excise Policy and the Liquor Wholesale Order.

13. Coming to the examination of the alleged arbitrary procurement of alcoholic beverages, the Commission notes that OPs are the only source of procurement and distribution of alcoholic beverages in the State of Uttarakhand and there appears to be a steep decline in the quantum of procurement of certain IMFL brands in August-October 2015 *vis-à-vis* August-October 2014. It is strange to note that the IMFL sales of USL has fell from 3,56,106 cases in the period of August-October 2014 to 10,776 cases during August-October 2015. Similarly, the IMFL sales of Pernod has also come down from 1,36,455 cases in August-October 2014 to 11,335 cases in August-October 2015.
14. In support of its claim, the Informant has also filed copies of the letters of retailers addressed to OP-2 and OP-3 (Copies available at Annexure 19 to the information) wherein concerns have been raised about the non-availability of



certain brands of foreign liquor and the financial loss suffered by them as a consequence. The Commission further notes that the Hon'ble High Court of Uttarakhand has also taken cognizance of these facts in the Writ Petitions filed by USL and Pernod (W.P. Nos. 2925 and 2932 of 2015). The relevant extracts of the judgment dated 23rd December 2015 in the aforesaid Writ Petitions are as follows (Copy of the judgment available at Annexure 8 to the information):

“15....In the instant case, the State has permitted wholesale trading of liquor. When the State has permitted such trading of liquor, the question is – can it be done arbitrarily? Law is well settled that the exercise of statutory discretion must be based on reasonable grounds and cannot lapse into the arbitrariness. It is true that no citizen has a legal right to claim a license as a matter of right, they cannot enter into a relationship by arbitrarily charging any person they like or discriminate between the persons similarly circumscribed. The State cannot escape the rigour of Article 14, in the sense that it cannot act arbitrarily. In the instant case, although the petitioners have not pointed out the name of the company, against whom they are being discriminated, as pointed out by learned Senior Counsel for respondent nos. 1 to 3, nevertheless, the fact remains that the sales of the petitioners had drastically dropped despite there being no consumption or supply related orders. Retailers are also facing grave hardship as they are not in a position to cater to the consumer demands, resulting in significant drop in sales. The respondent no. 1, it is alleged, has acted in a completely non-transparent manner, which, in turn, is to the detriment of the suppliers like petitioners and others. The Uttarakhand Agricultural Produce Marketing Board, as a matter of policy, will procure all brands in each FL2 and will authorise GMVN and KMVN to operate Sub-FL2 in all districts of Garhwal and Kumaon Divisions. As per policy, Sub-FL2's opened in each district will ensure the availability of all brands of



foreign liquor. To control illegal sale / smuggling of liquor only foreign liquor in bottles with the approved holograms by the excise department will be permitted for sale and the foreign liquor will be sold at the price fixed. Number of retailers wrote to the In-charge of the Sub-FL2, KMVN and GMVN requesting supply of liquor brandwise. General Manager of respondent no. 1 wrote a letter (Annexure 19 to the writ petition) to all the suppliers to provide previous year supply details of liquor (all brands) quantity (QPM) month wise and district wise so that it may help in generating demand to liquor companies and supplying IMFL/BEER to SubFL2.

19. Although short counter affidavit has been filed on behalf of the respondents, the statistics regarding sale of cases has not been controverted..." (emphasis added)

15. The aforesaid Writ Petitions were disposed off by a common order dated 23rd December 2015 of the High Court of Uttarakhand with directions to the Additional Excise Commissioner (Licensing) and District Collectors to fix minimum stocks (brand-wise) of Foreign Liquor to be maintained by OPs on the basis of orders placed by retailers and commensurate to the consumer demand. Accordingly, the Additional Excise Commissioner (Licensing) had issued notice dated 31st December 2015 fixing the minimum stock of foreign liquor (brand-wise) to be maintained by OPs. The Informant has claimed that the basis of ascertaining the minimum stock level with respect to certain brands is arbitrary and unclear but no further submissions have been made to elucidate the same.
16. It is observed that the sudden decline in the procurement of IMFL brands of USL and Pernod between August and October 2015 coupled with the fact that retailers have raised concerns about the non-availability of IMFL brands suggest that OPs have not made procurement of IMFL in accordance with the actual consumer demand. OPs being the only source of procurement and



distribution of alcoholic beverages in the State of Uttarakhand, the discriminatory and arbitrary procurement/distribution by OPs from IMFL manufacturers distorts competition. The Commission is *prima facie* convinced that such conduct of OPs has limited and restricted production of IMFL and resulted in denial of market access, in contravention of the provisions of Section 4(2)(b)(i) and Section 4(2)(c) of the Act.

17. As regards the purported unfairness of the stipulations contained in the agreements entered into by OP-1 with IMFL manufacturers, it is observed that OP-1 had entered into separate agreements with USL and Diageo India Private Ltd. on 15th May 2015 for supply of IMFL. Pursuant to the grievances raised by USL and Diageo, OP-1 had issued letters dated 15th May 2015 agreeing to certain amendments in the agreements (copy of the letters available at Annexure 21 to the information). Thus, it appears some negotiation of the terms and conditions did take place between OP-1 and IMFL manufacturers. However, terms such as unilateral right of OP-1 to dispose of stocks after the time period prescribed in the agreement, payment shall be made to the IMFL manufacturer only after sale of stocks instead of delivery, right of OP-1 to impose penalty on the IMFL manufacturer if the stocks supplied by them remain unsold beyond the period mentioned in the agreement, *etc.* appear to be unfair, one-sided and merits further examination. Therefore, DG is directed to investigate into the purported unfair stipulations in the agreements entered into by OP-1 with IMFL manufacturers from the perspective of Section 4 of the Act.
18. In view of the foregoing, the Commission directs DG to cause investigation into the matter under the provisions of Section 26(1) of the Act.
19. The Commission directs DG to complete the investigation and file a report on the same within a period of 60 days from date of receipt of this Order. During the course of investigation, if involvement of any other party is



found, the DG shall investigate the conduct of such other parties who may have indulged in the said contravention.

20. The Commission makes it clear that nothing stated in this order shall tantamount to final expression of opinion on the merits of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.
21. The Secretary is directed to send a copy of this order to DG, along with the information and other submissions filed by the Informant.

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

Sd/-
(Dr. M. S. Sahoo)
Member

New Delhi
Date: 19/07/2016

Sd/-
(Justice G. P. Mittal)
Member