

**COMPETITION COMMISSION OF INDIA**  
**[Case No. RTPe 16/2009]**

**May 23rd, 2011**

**M/s Cine Prekshakula Viniyoga Darula Sangh**

***Informant***

**Hindustan Coca Cola Beverages Pvt. Ltd.**

***Opposite Party***

**FINAL ORDER**

Consequent upon the repeal of Monopolies and Restrictive Trade Practices Act, the present case has been received by the Competition Commission of India (hereinafter referred to as “the Commission”) from the erstwhile Monopolies and Restrictive Trade Practices Commission (hereinafter referred to as “the MRTPC”) on transfer under Section 66(6) of the Competition Act, 2002 (hereinafter referred to as “the Act”). The complaint in the present case was filed before MRTPC by the Cine Prekshakula Viniyoga Darula Sangham (hereinafter referred to as “informant”) against Hindustan Coca Cola Beverages Pvt. Ltd (hereinafter referred to as “HCCBPL”) for its alleged restrictive and unfair trade practices.

- 2 As per the information, the informant, Cine Prekshakula Viniyoga Darula Sangham, is a registered society under the Andhra Pradesh Registration Act formed with the objective of safeguarding the welfare of cinegoers in the state of Andhra Pradesh. The Opposite Party, the HCCBPL, is a registered company and a leading producer of bottled water and soft drinks in India.
- 3 The allegations made by the informant, in brief , are as under:

- 3.1. It has been alleged that because of the tacit agreement/understanding between the HCCBPL and the stall owners at cine theaters, public parks, amusement parks, railway stations, bus stands, etc the stall owners are charging higher prices for the products like soft drinks, water bottles etc, over and above the Maximum Retail Price (hereinafter referred to as "MRP") printed on the products which is an unfair trade practice.
- 3.2. Even though as per the price list issued by the HCCBPL, the MRP of soft drinks are fixed at Rs. 8.00 per 200 ml pack and Rs. 10.00 per 300 ml pack bottle in the open market, the prices of such products are much higher in cinemas parks, amusement parks, railway stations, bus stands, etc. In some cinemas and such other places, the high price of soft drinks is openly displayed like; "all Cold Drinks at Rs.15/-." Further, the HCCBPL is supplying the 300 ml pack cold drinks to the stalls owners in the cinema theaters by printing higher MRP of Rs.15/- in collusion with the theatres though in the open market it is supplying same product by printing lower MRP of Rs.10/-, which is an act of price discrimination. This is being done only with a view to escape from the rigors of Weights and Measurement Act and to cheat cinegoers.
- 4 After examining the allegations leveled by the informant, the MRTPC vide its order dated 14.05.2009 directed the Director General (Investigation and Research) to investigate the matter and submit preliminary investigation report. Before the preliminary investigation report could be submitted, the MRTP Act was repealed and present case was transferred to the Commission in terms of provisions of section 66(6) of the Act.
- 5 The matter was considered by the Commission in its meeting held on 18.06.2010. After examining the entire material on record the Commission formed an opinion under section 26(1) of the Act that there exists a *prima facie* case and referred the matter to the DG for investigation into the matter.
- 6 During the course of investigation after finding that the facts, issues and opposite parties in this case are similar to those of Case No. UTPE 99/2009, the DG conducted common investigation in both the cases and submitted a consolidated report to the Commission on 25.11.2010.
- 7 In case no. 99/2009, apart from HCCBPL, INNOX Leisure Private Ltd.(ILPL) has also been made a party. ILPL is in the business of running cinema theaters. HCCBPL and ILPL have entered into an agreement for supply of beverages. In all other cases the issues are similar. However, DG has investigated the case with regard to ILPL.

## 8 **Findings of the DG Report**

- 8.1 For the purpose of investigation the DG has identified two issues, (i) Whether HCCBPL and ILPL are in a dominant position in their respective relevant market and whether any of the parties

has abused its dominant position in the relevant market; (ii) Whether HCCBPL and ILPL have entered into any agreement in contravention of section 3 of the Act.

8.2 During the course of investigation into the matter, the DG has considered the information and replies submitted by the opposite parties. The information on packaging and pricing details under which the products are sold by the HCCBPL to ILPL and ILPL to the customers were also taken into consideration. Besides, the certified copies of the annual audited accounts of HCCBPL, copies of agreements between HCCBPL and ILPL for the last three years, details of restrictions imposed by police department on bringing outside food material inside the complex of ILPL and other conditions of sale at the said places were also examined. The DG also recorded the statements of Shri Devdas Baliga, National Legal Counsel, HCCBPL and Shri Alok Tandon, Chief Executive Officer, ILPL.

8.3 The DG has delineated two relevant markets for the purpose of investigation in the matter, one relevant market for HCCBPL and other for ILPL. The relevant market for ILPL has been defined as “market of retail sale of bottled water and cold drinks inside the multiplexes of ILPL”, whereas the relevant market for the HCCBPL has been taken as “the market of supply of bottled water and cold drinks to the owners of closed market of multiplexes and to other commercial enterprises where it is treated as the preferred beverage supplier”.

8.4 After analysing the factors set out in section 19(4) of the Act, the DG has come to the conclusion that HCCBPL enjoys complete dominance as a supplier of the relevant product to ILPL by virtue of its agreement dated 01.09.2010 with ILPL which allows it unfettered rights to supply the bottled water and other cold drinks within the multiplexes of ILPL. Further, the agreement confers the status of preferred beverage provider on HCCBPL which forecloses the competition by not allowing the competitors of HCCBPL to enter the relevant market.

8.5 Further, the DG has concluded that ILPL enjoys complete dominance in the relevant market of sale of beverages within its multiplexes for the following reasons :-

- (i) The ILPL does not allow any outside vendor to sell bottled water and soft drinks inside its premises.
- (ii) It enjoys 100% market share in sale of bottled water and cold drinks within its premises as there is entry barrier.
- (iii) On the basis of its size and resources within its premises it enjoys complete economic power and commercial advantage over its competitors and consumers are completely depend on it.

- (iv) Because of exclusive supply agreement with HCCBPL for supply of bottled water and other soft drinks, the consumers have no countervailing power within the premises of ILPL.

8.6 The DG has come to the conclusion that the Act of HCCBPL in selling relevant products to ILPL at higher MRP is clear cut case of abuse of its dominance position by directly or indirectly imposing unfair and discriminatory pricing in sale of goods and therefore contravenes the provisions of section 4(2)(a)(ii) of the Act.

8.7 As per DG report since HCCBPL has been conferred a status of 'preferred beverage provider' by virtue of its agreement with ILPL, it results in complete foreclosure of competition due to marketing entry barrier for the competitors. Therefore, HCCBPL has violated the provisions of section 4(2)(c) of the Act by indulging into a practice which has resulted in denial of market access to its competitors in the relevant market.

8.8 The DG has also noted that by giving 'preferred beverage supplier' status to HCCBPL, ILPL has imposed restriction on the marketing of products of other beverage suppliers in its premises and has thus imposed unfair and discriminatory conditions in purchase of goods in violation of provision of section 4(2)(a)(i) of the Act.

8.9 The DG has also come to the conclusion that by selling bottled beverages to the cine goers at higher MRP, ILPL is abusing its dominant position by imposing unfair and discriminatory pricing in the sale of goods within its premises in violation of section 4(2)(a)(ii) of the Act.

8.10 As per the findings of the DG the ILPL has also denied access of relevant market to the competitors in violation of section 4(2) (c) of the Act by conferring 'preferred beverage provider' status to the HCCBPL in the agreement.

8.11 The DG has lastly concluded that both HCCBPL and ILPL have violated the provisions of section 3(4)(b) and 3(4)(d) read with section 3(1) of the Act by entering into anti-competitive agreement dated 01.09.2010 which has completely foreclosed the competition within the relevant production market of bottled water and other soft drinks within the premises of multiplexes owned by ILPL by choking the entry for competitors.

9 The Commission considered the investigation report submitted by DG and decided to send a copy of the investigation report to the parties. The Commission also directed the parties to appear for oral hearing, if they so desire. HCCBPL submitted its reply on 21/02/2011. The

counsel for HCCBPL also made oral submissions on 22.02.2011 and 23.02.2011. The informant did not choose to file any comments despite being served.

10 Although during course of investigation, the DG has collected information regarding the fact that HCCBPL has entered into 'exclusive supply agreement' with (i) Spice Jet Ltd., (ii) Oberoi Hotels, (iii) Trident Hotels, (iv) Hyatt Regency, (v) Ista Hotels, (vi) Star Wood – Le Meridien and Westin Hotels, (vii) Choice Hotels, (viii) Hilton Hotels, (ix) Leela Hotels etc regarding supply of beverages and packaged drinking water, but DG has analysed the case with reference to the agreement HCCBPL had entered into with ILPL. Since the basic issues in all such agreements are the same, the findings are applicable to all such agreements.

#### 11 **Reply of HCCBPL to DG Report**

The submissions made by HCCBPL in its reply, in brief, are as follows :

- 11.1 It has been submitted by HCCBPL that the DG has based his findings that HCCBPL has contravened the provisions of section 3 and 4 of the Act essentially on the basis of erroneous premises that, firstly, by entering into an exclusive supply contract with ILPL it has knocked out competition from ILPL multiplexes and secondly, HCCBPL has declared different MRPs for the same products sold at ILPL multiplexes when compared to retail market.
- 11.2 The HCCBPL has submitted that DG findings are untenable and there is no case in the matter. The DG has ignored the fact that the agreements between HCCBPL and ILPL are of short duration in nature and can be terminated at will at any time before expiry of the agreement period. Therefore, such agreements are incapable of foreclosing competition and causing appreciable adverse effect on competition (AAEC) in India.
- 11.3 On "exclusive supply agreements" it has been submitted that such agreements cannot be treated as anti-competitive per se unless it is proved that it results in AAEC in India. The DG findings on this issue are without any cogent basis and are liable to be rejected.
- 11.4 It has been contended that the mere act of declaring differential MRPs cannot constitute an abuse in terms of section 4 of the Competition Act, and it is common business practice all over the world and declaration of MRP in agreement with ILPL or with any other entities is legally permissible. In fact declaration of MRP is irrelevant for consideration of breach of competition law because retailers such as ILPL are free to charge any price up to or equal to the MRP and HCCBPL has no control over the same.

- 11.5 It has been submitted that the DG has failed to provide any objective or rational basis and has reached erroneous conclusions as to i) definition of relevant market, ii) position of HCCBPL in that relevant market, and iii) effect on competition because of the alleged practices of HCCBPL.
- 11.6 It has also been contended that there is an intense competition in the beverage industry throughout India and a large number of competitors in the market are vigorously competing with each other for sale of their respective products. In respect of certain outlets buyers enter into agreement with the suppliers on 'preferred beverage supplier' or even 'exclusive supply agreement'. But there is intense competition amongst suppliers for obtaining such contracts so as to sell their products. Every competitor has full opportunity to negotiate and obtain such contracts. It is evident from the fact that a large competitor of HCCBPL (PEPSICO) has entered into similar agreements with a large number of multiplexes having about 600 screens as against the multiplexes where HCCBPL has been able to enter into such agreements relating to only about 214 screens in India. These facts clearly show that neither there can be any AAEC in India as a result of alleged agreement between HCCBPL and ILPL, nor any refusal to deal or denial of market access.
- 11.7 Further, the fact that competing suppliers are also able to obtain such contracts even at locations where supplies were being made earlier by other competitors clearly shows free and intense competition amongst competing suppliers for obtaining contracts for supply of products to multiplexes.
- 11.8 It has been submitted that the supplies of products made to multiplexes constitutes even less than 0.3% of the total supplies of such products sold in market. In such situation supplies of only an insignificantly small quantity of the products to the multiplexes, cannot, in any event result in AAEC in India.
- 11.9 If the reasoning of DG regarding exclusive supply agreement is accepted, it could mean that every agreement for exclusive supply would be hit by section 4(2)(c) of the Act, which is not the intention of the Act.

**12      Decision**

- 12.1      The Commission has carefully gone through the material submitted by the informant, the report of the DG, the reply filed and oral submissions made by the HCCBPL before the Commission and all other relevant materials and evidence available on record.
- 12.2      It is noted that the activities being performed by the HCCBPL and the ILPL or similar such other organizations are covered in the definition of 'enterprise' under section 2 (h) of the Act.
- 12.3      From the facts and circumstances of the case, the issue which emerges for consideration before the Commission is whether the HCCBPL has violated the provisions of section 3 and/or section 4 of the Act.
- 12.4      On perusal of the record it seems that whole story in this matter is woven around the 'exclusive supply agreement' entered between HCCBPL and ILPL or other similar organizations. Copy of impugned agreement has been placed at Annexure-10 of the DG report. Perusal of this agreement discloses that during the currency of agreement, HCCBPL will act as 'preferred beverage provider' for supply of non-alcoholic beverages to ILPL owned multiplex cinema theatres located in various cities in India. Further, under the agreement both HCCBPL and ILPL have been given right to terminate it in the event of breach of any terms and conditions by other party.
- 12.5      It is also noted that HCCBPL in its reply has submitted that there is intense competition between suppliers of non-alcoholic beverages to compete for obtaining such contract with multiplexes and to buttress this argument they have pointed out that many multiplex owners like Adlabs/Big Cinemas, Cinemax and Waves Cinema have been switching over their suppliers periodically. HCCBPL has also submitted that it has been able to enter into such agreements with multiplexes having only 214 screens in India whereas its competitor PEPSICO has entered into similar agreements with a large number of multiplexes having about 600 screens.
- 12.6      In view of the facts and circumstances of the present case and aforesaid uncontroverted submissions of the opposite parties, the findings of DG that HCCBPL enjoy dominant position in the relevant market appear to be based on flawed delineation of relevant market. Considering the fact that there are large number of multi-screen theatres in India out of which HCCBPL is having exclusive supply agreement with multiplexes having

214 screens and PEPSICO with multiplexes having 600 screens, the relevant geographical market cannot be confined to the closed market inside the premises of multiplexes owned by ILPL who is only operating 38 multiplexes in India having 144 screens. If the relevant geographical market is taken as defined by the DG it would certainly lead to illogical conclusion and in that case every supplier having exclusive supply agreement with a retail outlet, restaurant or store will be deemed dominant within the closed premises of that retail outlet, restaurant etc. All this leads to the irresistible conclusion that there is not sufficient material on record to establish that HCCBPL is enjoying dominant position in the relevant market, properly so defined. Likewise, this analogy can be extended to the exclusive supply agreements entered between HCCBPL and other similar organizations.

- 12.7 Furthermore, in the present case the impugned agreement, which is for a short period of four months and that too is terminable by either party by giving 30 days notice, cannot be said to have resulted in denial of market access to the competitors. Even otherwise, the fact that multiplexes are switching over their supplier on periodical basis goes against the conclusion that competition is getting foreclosed.
- 12.8 In the light of above analysis it is evident that no contravention of section 4 of the Act can be found to have been established against HCCBPL.
- 12.9 Similarly the conclusion of the DG that HCCBPL has also contravened section 3(4) of the Act by entering into 'exclusive supply agreement' with ILPL cannot be accepted in the absence of proper assessment of AAEC by the DG. If the reasoning advanced by the DG in his report is accepted then every exclusive supply agreement will become per se anti-competitive. It has been brought out by the HCCBPL in its reply that the supply of products made to multiplexes constitute less than 0.3% of the total supply of such products sold in India. Taking into account the volume of business of total beverages market in India, there can be hardly any appreciable adverse effect on competition because of exclusive supply agreement between HCCBPL and ILPL or other such organizations unless shown otherwise on the basis of cogent material.
- 12.10 In the light of foregoing discussion, the Commission is of the opinion that no violation of provisions of section 3 and 4 of the Act has been established against HCCBPL. Thus, the conclusion drawn by the DG in his investigation is erroneous and cannot be accepted. In view of the above findings the matter relating to this information is disposed off accordingly and the proceedings are closed forthwith.

13 Secretary is directed to inform the parties accordingly.

**Member (G)**

**Member (R)**

**Member (P)**

**Member (GG)**

**Member (AG)**

**Member (T)**

**Chairman**