COMPETITION COMMISSION OF INDIA

Case No. 45 of 2021

In Re:

International Spirits and Wines Association of India 201, Tower 1A, DLF Corporate Park, M G Road, Gurugram – 122102, Haryana	**Informant**

And

Prohibition & Excise Department, Government of Andhra Pradesh Office of Commissioner of Prohibition & Excise, Excise Complex, RS No. 88-2B, Sai Vihar Apartments, Poultry Farm Road, Prasadampadu (V), Vijayawada - 521108, Amaravathi, Andhra Pradesh	**Opposite Party No. 1**
Andhra Pradesh State Beverages Corporation Limited Office of Commissioner of Prohibition & Excise, Excise Complex, RS No. 88-2B, Sai Vihar Apartments, Poultry Farm Road, Prasadampadu (V), Vijayawada - 521108, Amaravathi, Andhra Pradesh	**Opposite Party No. 2**

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

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

1. The present information is filed by the International Spirits and Wines Association of India (**ISWAI/Informant**) under Section 19(1) (a) of the Competition Act, 2002 (**Act**) alleging contravention of the provisions of Section 4 of the Act by the Prohibition & Excise Department, Government of Andhra Pradesh (**OP-1/P&E**

Department) and Andhra Pradesh State Beverages Corporation Limited (**OP-2/ APSBCL**).

2. The Informant is stated to be an association of international spirits and wines companies which have business operations in India. Eight companies constitute ISWAI, *i.e.*, (a) Bacardi India Private Limited (**Bacardi India**), (b) Beam Global Spirits & Wine (India) Pvt. Ltd., (c) Brown Forman Worldwide LLC, (d) United Spirits Limited (**Diageo India/USL**), (e) Moet Hennessy India Private Limited, (f) Pernod Ricard India Private Limited (**Pernod India**), (g) Campari India Private Limite and (h) William Grant and Sons Limited.

3. OP-1 is stated to regulate the production, manufacture, possession, transport, purchase and sale of liquor, and the levy of duties of excise and countervailing duties connected therewith in the State of Andhra Pradesh, as prescribed under the Andhra Pradesh Excise Act, 1968 (**AP Excise Act**). OP-1 is engaged in the commercial activity of procuring and distributing liquor at the wholesale level and also enter into Rate Contract Agreements (**RCA**) with manufacturers/suppliers for the purchase of branded alcoholic beverages for onward supply to OP-2 at the retail level.

4. OP-2 is a company incorporated to act on behalf of the Government of Andhra Pradesh for the purposes of Section 68-A of the AP Excise Act. The Information states that, under Section 4 of Andhra Pradesh (Regulation of Trade in Indian Made Foreign Liquor, Foreign Liquor) Act, 1993 (**1993 Act/ AP IMFL Act**), OP-2 is conferred with the privilege of importing, exporting, carrying out wholesale trade and distribution of (i) Indian Made Foreign Liquor (**IMFL**), (ii) imported foreign liquor (**IFL**), (iii) wine, and (iv) beer in the State of Andhra Pradesh (the first three products are collectively referred to as **Branded Alcoholic Beverages**). The Information further states that Section 6 of the AP IMFL Act confers an exclusive privilege to OP-2 for retail operations.

5. As per the Informant, the State of Andhra Pradesh follows the corporation model, wherein the State Government runs the business of procurement, sale and

distribution of Branded Alcoholic Beverages either through the excise department (OP-1) or a separate public sector company/corporation (*i.e.* OP-2), which is fully owned by the State Government. The Information states that such a corporate entity controls the pricing, trade and distribution of Branded Alcoholic Beverages in the relevant State.

6. The Informant has submitted that the OPs together discharge functions relating to Branded Alcoholic Beverages and forming part of the procurement and distribution of Branded Alcoholic Beverages in the State of Andhra Pradesh and also enter into RCAs between manufacturers/suppliers. Therefore, both the OPs are jointly active in the wholesale trade and procurement of liquor, whereby they invite price offers from suppliers/manufacturers of Branded Alcoholic Beverages on a periodic basis prior to entering into RCA. The Informant has averred that, owing to the monopolistic status of the OPs, the suppliers/manufacturers have no practical alternative for trading in Branded Alcoholic Beverages in the State of Andhra Pradesh other than contracting with the OPs.

7. The Informant has further mentioned that the role of OP-2 changed from 2019, allowing it to also conduct retail distribution, which has allegedly made the already existing arbitrary and unfair treatment meted out by the OPs more pronounced.

8. The Informant has claimed that the OPs are 'enterprises' and has delineated the relevant market to be "*the market for wholesale trade and retail distribution of Branded Alcoholic Beverages in the State of Andhra Pradesh*".

9. The Informant is aggrieved of the following:
   a. OPs abusing their powers in an arbitrary and exploitative manner to impose unfair commercial terms on manufacturers/suppliers.
   b. OPs not engaging in the procurement of Branded Alcoholic Beverages on an objective basis.
   c. OPs conduct leading to discriminatory treatment and significant commercial loses for manufacturers/suppliers of Branded Alcoholic Beverages (ISWAI

members) and severe reduction of supply of beverages to consumers of their choices/demanded beverages.

10. The Informant has stated that the OPs are dominant in the relevant market and enjoy 100% market share in it, which arises out of the rights granted to them under the AP IMFL Act. It is also stated that, due to the statutory framework, there is no competitive constraint on the OPs in the relevant market.

11. The Informant has alleged that the OPs have distorted market dynamics by arbitrarily placing orders for the supply of Branded Alcoholic Beverages and have discriminated in favour of select alcoholic beverage manufacturers/suppliers (to the detriment of ISWAI members). With respect to the arbitrary procurement of alcoholic beverages, the Informant has provided examples of significant fall in market shares and sales volumes of key brands of ISWAI members *i.e.*, Diageo, Pernod and Bacardi. As per the Informant, the secondary sale of certain brands of the Informant's members experienced significant decline when retail trade moved from private retailers to the OPs. In order to support this allegation, the Informant submitted the market shares and sales volume of Diageo, Pernod and Bacardi in the relevant market for the Financial Year (**FY**) 2018-19, FY 2019-20 and FY 2020-21.

12. The Informant has also provided monthly data of total indents raised by the OPs on Diageo India and Pernod India across all brands. The data for December 2019 to January 2020 (for Pernod) shows a steep decline in the order for supply (**OFS**) issued by the OPs. In this regard, the Informant has also submitted that OP-2 had orally instructed Pernod India to substantially reduce the quantity and submit revised requisitions/indents, contradicting OP-2's tender conditions/contractual terms and orders, which require members of Informant to maintain adequate stocks of their brands.

13. The Informant has also averred that OPs' conduct resulted in the replacement of Branded Alcoholic Beverages of ISWAI members with brands of manufacturers who traditionally had insignificant or no demand. Thus, as per the Informant, the OPs

were unduly favouring certain brands after October 2019, when retail trade shifted to OP-2.

14. The Informant has also emphasised that, since 2019, loyal customers of brands of ISWAI member were unable to buy their favorite brands. For substantiating the same, the Informant has referred to Pahle India's (an independent research organisation) survey report of 2021.

15. The Informant also highlighted that some of its members wrote to the OPs for rectification of demand, but to no avail.

16. The Informant has also alleged imposition of unfair, discriminatory and onerous terms and conditions in RCAs on ISWAI members, which include:
    i) payment timelines arbitrarily decided by OPs, and suppliers only get paid after downstream sales are made by the retailers to the end-consumers (as opposed to payment for stock supplied to the OPs);
    ii) imposing penalty for slow-moving goods (although determination of demand is solely done by the OPs);
    iii) the unilateral right to extend the RCAs (which has been exercised by the OPs multiple times with unchanged supply rates) or cancel the RCA;
    iv) rescinding Offer for Supply (OFS) issued by OPs to manufacturers.

17. All the above alleged conduct, as per the Informant, is in contravention of Section 4(2)(a)(i) and 4(2)(b)(i) read with Section 4(1) of the Act. Thus, the Informant has prayed to the Commission to hold that the OPs have *prima facie* contravened the provisions of Section 4 of the Act and direct the Director General (**DG**) to cause an investigation into the matter.

18. The Informant also submitted an application under Section 57 of the Act, read with Regulation 35 of the Competition Commission of India (General) Regulations, 2009 (**General Regulations**), requesting the Commission to provide confidentiality over paragraph 60 of the Information and a graph based on the data mentioned in

paragraph 60. The said paragraph is related to internal estimates on sales of Diageo's and Pernod's brands in Telangana and is stated to be commercially sensitive.

19. The Commission considered the matter in its Ordinary Meeting dated 19.01.2022 and decided to seek comments of the OPs on the public version of the Information filed by the Informant. In addition, the OPs were directed to provide certain information with respect to the procurement and distribution of branded alcoholic beverages in the State of Andhra Pradesh. The Informant was also given liberty to file its further response/comments to the reply/response of the OPs thereafter, with an advance copy to the OPs.

20. OPs filed their collective responses *vide* letter dated 31.05.2022, which was received by the Commission on 03.06.2022 in two parts, both in the confidential as well as non-confidential versions, after obtaining extensions of time from the Commission. The first part contained responses on queries raised by the Commission and the second part contained para wise response to the Information.

Reply of the OPs

21. At the outset, the OPs have submitted that the present Information has been filed with an intention to colour the mind of the Commission and is an attempt to couch tender/contractual issues as competition law violations. It is also stated that the Information deals with State's policy decisions and are outside the purview of the Commission's jurisdiction. While providing a brief background of regulations surrounding the procurement and distribution of alcoholic beverages in Andhra Pradesh, the OPs stated that State Governments in India have the exclusive right to legislate on the "*production, manufacture, possession, transport, purchase and sale of*" all types of alcohol and liquors by virtue of Item 8 of the State List contained in the Seventh Schedule read with Article 246 of the Constitution of India.

22. As per the OPs, in furtherance of achieving the objectives set out under Article 47 of the Constitution of India, the State Government of Andhra Pradesh (Government) promulgated the Andhra Pradesh (Regulation of Trade in Indian Liquor, Foreign

Liquor) Act, 1993, the preamble of which reads as follows: "*carefully considered the whole matter and has taken a policy decision that in public interest the exclusive privilege of supplying in wholesale the Indian liquor, Foreign liquor, Wine and Beer in the whole of the State of Andhra Pradesh shall be vested in the Andhra Pradesh Beverages Corporation Limited, a corporation wholly owned and controlled by the Government, and that the right to sell the same in retail shall be auctioned by the State in place of the present practice of granting licences*."

23. The OPs stated that Section 4 of the 1993 Act accorded Andhra Pradesh Beverages Corporation Limited (**APBCL**) with the exclusive privilege and right to import, export, and carry-on wholesale trade and distribution of Indian liquor, foreign liquor, wine and beer on behalf of the Government. The OPs further stated that, as per Rule 22 of the Andhra Pradesh (Regulation of Trade in Indian Made Foreign Liquor, Foreign Liquor) Rules, 1993 (**1993 Rules**), APBCL, as an 'Agent' of the government, was exercising an exclusive right in the wholesale trade of **IMFL** and **FL**.

24. OPs have referred to various Government Orders (**GO**) detailing the authorisations/sanctions of the Government provided to the OPs, procurement model followed and transfer of liquor procurement function from OP-1 to OP-2. OPs submitted that, *vide* GO No. 93 dated 10.03.2015, the Government of Andhra Pradesh authorised OP-1 to import, export and conduct wholesale trade in IMFL and FL. Thereafter, *vide* GO No. 272 dated 16.07.2015, sanction was accorded to incorporate a new corporation *i.e.*, OP-2, for doing wholesale trade of alcoholic beverages. Thus, from March 2015 to September 2019, the Government of Andhra Pradesh followed a model wherein procurement was undertaken by OP-1 and retail sale was undertaken by private establishments.

25. Subsequently, *vide* GO No. 373 dated 22.08.2019, OP-2 was granted exclusive right for retail sale in Andhra Pradesh. Again, *vide* GO No. 313 dated 09.11.2021, the Government of Andhra Pradesh transferred the function of liquor procurement from

OP-1 to OP-2. Thus, currently, OP-2 has exclusive right of procurement as well as retail sale of IMFL and FL in the State of Andhra Pradesh.

26. OP-1 denied its involvement in wholesale procurement, trade or retail supply of alcoholic beverages in the State of Andhra Pradesh. OP-1's primary function was stated to be issuance of licence for the sale of liquor to retail shops and bars. As per OP-1, as it ceased to carry out the function of wholesale procurement of liquor, it was not engaged in any economic activity within the meaning of 'enterprise' as per the Act.

27. OPs averred that, in 2019, the new State Government took various steps to reduce consumption levels of alcohol in the State, including establishment of de-addiction centres, levy of Additional Retail Excise Tax, setting up of a Committee to educate citizens on the ill effects of alcohol consumption *etc*. Further, *vide* order dated 16.08.2019, the number of liquor retail shops reduced to 3500 from 4380, which further reduced to 2934 by the end of May 2020.

28. OPs also emphasised that the legislative competence of the state and the limited scope of judicial review in such policy matters has been repeatedly recognised by the Hon'ble Supreme Court of India in several cases. The Ops, by way of the referred Supreme Court judgments, have stated that they clearly show that state policy is paramount and should not be interfered with, especially if it is in furtherance of Article 47 of the Constitution of India.

29. The OPs relied on the Commission's previous decisions, wherein it has repeatedly observed that a procurer can stipulate conditions/clauses in the tender document as per its requirements which, by themselves, cannot be deemed anti-competitive if the same appear to be commercially justifiable. Relying on the same, the OPs have stated that the tender invitation bearing No. P&E DEPT/APSBCL/1/2015-16/1, dated 15.10.2015 (**2015 Tender**) released by OP-1 was undertaken in furtherance of the responsibilities bestowed upon it to regulate the wholesale procurement, trade and distribution of branded alcoholic beverages in Andhra Pradesh. The tender

conditions were formulated and incorporated in the tender documents after due internal deliberations by Government authorities. Further, fixation of tender conditions was a right of the procurer, and the suppliers who bid for the tender were aware of these conditions.

30. As regards the allegation of arbitrary procurement, the OPs vehemently denied engaging in arbitrary procurement of alcoholic beverages and imposing unfair and exploitative terms and conditions on the suppliers/manufacturers of alcoholic beverages.

31. The OPs disagreed with the relevant market definition as provided by the Informant and submitted that it is imperative that the relevant market is correctly identified in order to determine whether there has been any abuse of such dominance by the OPs in that relevant market. As per the OPs, the correct relevant market should be "*market for wholesale procurement of branded alcoholic beverages*", as the Informant is supposedly aggrieved by the conduct of the OPs in the procurement market and not in the sale of alcoholic beverages. The OPs also stated that the members of the Informant are engaged in the economic activity of supplying branded alcoholic beverages all over India and are in no way precluded to only deal with the OPs. Thus, it was untenable for the Informant to suggest that the relevant geographic market should be limited to the State of Andhra Pradesh. Referring to the 2015 Tender, the OPs highlighted that the price offers were invited on behalf of the Government of Andhra Pradesh from suppliers 'located within the country'. Therefore, the geographic market in this matter should be defined as whole of *India*. Accordingly, OPs have submitted that relevant market for assessment of dominance should be "*the market for wholesale procurement of branded alcoholic beverages in India*".

32. The OPs submitted, *inter alia,* that they are merely one of many procurers of alcoholic beverages in India and the market share of OPs in the relevant market is less than 5 percent, and thus, they are not dominant in the relevant market.

33. OPs further submitted that OP-1 has not abused its dominant position and the reduction in the sale of certain brands of the Informant from 2018-19 to 2020-21 may have been due to various reasons, including:

   a. The drastic fall in the overall sale of alcoholic beverages in the State of Andhra Pradesh due to the steps taken by the Government, such as reduction in the number of shops, reduction in maximum possession limit of liquor, abolition of permit rooms *etc*. in pursuance of the avowed policy of the Government to reduce consumption levels of alcohol as well as the lockdowns on account of the COVID-19 pandemic;
   b. The actions of the Informant's members themselves as they were placing smaller indent quantities on OP-1 and not honouring the OFS placed on them.

34. The OPs stated that the Informant is only concerned with the control of the market through its members' products and that it is losing control of the alcoholic beverage supply market and products due to new brands entering the market. In addition, OPs also stated that:
   a. The figures of procurement submitted by Informant are primarily based on the evidence submitted by only three manufactures who, in essence, contend that their market share has declined due to the conduct of the OPs, which is incorrect.
   b. The decline in the procurement and sales of liquor was due to a change in state policy and various steps taken by the Government to drastically reduce alcohol consumption in the State.
   c. The decline coincided with the onset of COVID-19 and State lockdowns.
   d. A perusal of the data provided shows that the OPs always procured the entire amount that was sought to be supplied by the members of the Informant. This is also acknowledged in the Information itself where it is stated that OP-2 issued OFSs for 100% of the indents raised.
   e. Due to the shift in the retail sales when OP-2 took over the sales of liquor by shop in October 2019, there may have been some unexpected glitches, due to which payments may have been delayed. The members of the Informant made

various representations at the time, and although most moneys due for the subsequent period have been released, some amount is still outstanding. The reduction in indents may have been a method to apply pressure on the State Government to release payments. However, this appears to have backfired as new suppliers entered the market, and consumer preferences may have shifted in the process.

35. With respect to reduction in sales, the OPs claimed that the Informant itself stated that a few brands of Diageo India witnessed an increase in procurement and sales in FY 2019-20. Similarly, Pernod India also acknowledged that its vodka and wine brands did not see a reduction in sales, which goes against the allegations of discrimination.

36. The OPs have denied the allegations that their procurement policy has led to the fall of Informant's members' brands and stated that decreasing revenue of some manufacturers cannot be considered an act of abuse by OPs. OPs stated that, in a competitive market, when the sales of one competitor increases, the sales of other competitors are bound to go down. As per the OPs, there was a decline in the demand and consumption of the Informant's member brands which was sought to be depicted through data pertaining to sales by bars as opposed to shops, which falsified the Informant's claims of discrimination and preferential treatment.

37. It was further submitted by OPs that bars are not controlled by either OPs and are run by private parties. However, the sales of the Informant's members in bars would show that there has been a similar decline in the quantity of alcoholic beverages sold by these bars. Sales of alcoholic beverages by bars account for approximately 13-17 % of the total sales by volume and 10-18 % by value of all the alcoholic bevearges.

38. OPs have submitted that there has been a considerable reduction in the sale of liquor since October 2019, which is primarily due to the Government's avowed policy to reduce consumption of liquor and the lockdowns during the COVID-19 pandemic. The slight uptick in sales in 2021-22 is only due to the lifting of the lockdowns and

rationalising the taxes and duties (to reduce inter-state smuggling), which resulted in lower MRPs. There is no deliberate design on the part of OPs either to discriminate against or encourage any brands of liquor of any manufacturer.

39. OPs contended that the sales of USL fell considerably in 2018-19 compared to 2017-18, *i.e.*, prior to OP-2 taking over retail sales, which is when the Informant claims the alleged discrimination began. The market shares of USL continued its slide in 2019-20, but only marginally, even though OP-2 took over retail sales in the said financial year.

40. According to OPs, a similar scenario could be observed in the case of Pernod India, which saw a decline in sales during 2017-18 to 2018-19, followed by an increase in sales by 9.2% before falling significantly in the COVID year. In FY 2021-22, there was an increase in actual sales compared to sales in FY 2020-21 of its product.

41. OPs have further clarified that the so-called 'preferred' suppliers as alleged by the Informant have not shown any significant increase in sales. Modi Distilleries' sales increased during FY 2019-20 to 2020-21, but observed a decline in 2021-22. Kaya's sales were entirely insignificant during the entire period, while Boutique Spirit's market share exhibited a fluctuating trend. OPs submitted that said sales data does not show any preference or discrimination, but merely establishes that certain new players have entered the market and garnered a minuscule market share in the overall declining market.

42. The OPs averred that the Informant is trying to eliminate competition in the market by attempting to force their products and removing other/newer players. Rather, the increased procurement choice has resulted in increased consumer choice in the market in the form of introduction of new brands, which have been accepted well by the retail consumers of the State of Andhra Pradesh, which indicates that consumers are enjoying the procurement decisions of OPs and wide choices available in the market.

43. Without prejudice, OPs also submitted that, even assuming that the procurement of alcoholic beverages of Informant's members has gone down in the State of Andhra Pradesh for a year or two, the OPs have the entire country to sell their products, and more than 95% of the procurement market in India is still open for supply by these alcoholic beverage manufactures.

44. OPs highlighted that though the Informant has impugned several clauses of the tender bearing No. P&ED/APSBCL/FL/2017-18/1 dated 06.01.2018 (**2018 Tender**), it was only a draft tender and not issued by OP-1, and therefore, no reliance should be made on the 2018 Tender. Rather, as per the OPs, all the RCAs were entered into with various suppliers pursuant to the 2015 tender. Moreover, no grievance was raised by manufacturers from 2015 till filing of the Information with the Commission with respect to any clauses, which show that the same was an afterthought to pressurise the State Government into acceding to the Informant's demands.

45. With respect to non-payment of dues being alleged as competition law violation, the OPs submitted that the allegations in the Information arise out of the contractual dispute in relation to the recovery of pending dues owing to the procurement of alcoholic beverages by the OPs and fail to disclose any competition law concerns.

46. The OPs have stated that they are like facilitators for the sale of alcoholic beverages in the State of Andhra Pradesh and hence, do not make payment when alcoholic beverages are supplied to IMFL Depots by the Informant's members. In case of retail shops, the payments are made only after 45 days of the sale of the stocks to the end consumer and in case of bars, payments are made only after 45 days from sales to a bar licensee. Furthermore, as per the OPs, being a government department, payments do take time. However, there has been no discrimination in payments made to the members of the Informant or any other supplier.

47. The OPs have also emphasised that, as per the averments made in the Information, various figures of unpaid dues were submitted by Informant, ranging from Rs. 11.45 crores to Rs. 550 crores for the period of October 2019 to February 2020 in the case of Diageo India. However, as per the OPs, the Informant itself admitted in the

Information that, as on date of filing Information, only a sum of Rs. 65 crores was pending payment, and that too, for the period of September to October 2019.

48. With regard to Bacardi India, the OPs have stated that only Rs. 9.5 crores have been claimed as pending payment for the period of September to October 2019, which establishes that the State Government has cleared the payments of all suppliers without discrimination, and only certain relatively minor amounts are due. OPs emphasised that this period coincided with the takeover of the retail distribution of liquor in the State by OP-2 and there were some natural glitches in the process of transferring such a vast undertaking. However, OPs submitted that the payment of the outstanding amounts is also in process and will be cleared shortly. OPs stressed that the Information is merely an attempt to armtwist the State Government to release the payment at the earliest, and that such attempts should not be encouraged by the Commission.

49. Further, OPs have claimed that outstanding payments are due to 57 suppliers and not just members of the Informant. Therefore, the Informant's claim of discrimination or preferential treatment fails.

50. As per the OPs, the slow-moving stocks clause was introduced when private parties were operating the retail stores, which were placing orders only for brands that had heavy incentive schemes that were given by the suppliers. This led to several stocks being held at the depots maintained by OP-2. Thus, at retail outlets, alcohol stocks that were selling slowly attracted penalties to create space for fastmoving stocks, considering the space constraints both in depots and retail outlets. However, as per the OPs, this condition was amended on 30.11.2021 to give some comfort to suppliers.

51. OPs further denied that they have the unilateral right to extend or cancel RCA as the RCA was initially for one year, extendable by one more year and thereafter by mutual consent only. OPs also submitted that no RCA had been cancelled so far, and the Informant willingly participated in the offer process for supply of alcoholic beverages without raising any objections.

52. As per the OPs, the Informant has misrepresented and twisted the facts, as aforementioned clauses of RCA were put in place at a time when the private parties were ostensibly carrying out the function of supplying alcoholic beverages for retail sales, *i.e.*, during the period between 1993-2019. The OPs also averred that RCAs are standardised agreements which are common for all suppliers and were under extension only until fresh notifications were issued for supply of alcoholic beverages. OPs submitted that the premise behind the insertion of the abovementioned clauses was to address situations that may arise after the placing of OFS. However, the OFS have never been rescinded so far once placed upon the manufacturers.

53. The OPs also asserted that since September 2019 no penalties were imposed on the non-moving/slow-moving liquor stocks lying in the IMFL depots but were levied on such stocks lying in the retail shops. Moreover, as there was no change in the terms and conditions, the Informant ought not to allege the terms and conditions to be unfair.

54. The OPs also claimed that the Informant has not provided any evidence with regard to 'preferred' manufacturers having their dues paid early over others. Moreover, as per the OPs, it is incorrect to allege that the stocks of alcoholic beverages of the Informants members are deliberately held in the depots and are not dispatched to the retail outlets. The OPs submitted that the stocks do not attract any penalty as they currently do not fall under non-moving/slow-moving category.

55. With respect to allegations of Clause 5.3 of 2018 Tender and Clause 7.1 of the 2015 Tender being unilateral in favour of OPs, it was contended by the OPs that the Commission, in its decisional practice, has acknowledged that every entity, notwithstanding being dominant or otherwise, possesses the freedom to choose its trading partners as a basic fundamental right, and the OPs have referred to previously decided cases to buttress their contentions.

56. With regard to the allegation of unilateral termination of RCA at a mere notice of one month of being arbitrary because suppliers keep stocks in the pipeline and sudden termination will lead to financial losses, OPs submitted that the same is

unfounded as the suppliers always have the option to sell their stock in any other part of the country. Further, according to OPs, this clause never been exercised by the OPs. With respect to the indemnity clause, the OPs contended that they are general in nature and not anti-competitive to trigger a violation of the Act.

57. OPs submitted that the Informant has alleged that it has no right to inspect during unloading, and yet, the replacement cost has to be borne for breakage of goods by the supplier, and therefore, is in violation of the Act. In this regard, OPs submitted that they duly afforded the opportunity to inspect the unloading of the stocks supplied by the members of the Informant. Moreover, the authorised representatives of members of the Informant are allowed to inspect the process of unloading as a routine policy. Further, the unloading at depots is captured through CCTV cameras, both inside and outside the depots, which categorically contradicts the claims made by the Informant. OPs also stated that the transportation and unloading of goods at the depots is the responsibility of the supplier, and hence, the supplier alone is liable for any losses owing to breakage of goods arising out of the unloading process. In contrast, for transportation from the depot to the retail shops and unloading at the retail shops, OP-2 bears the risk and loss for any damage.

Rejoinder of Informant

58. The Informant filed an application dated 06.06.2022, requesting the Commission for access to evidence and materials submitted by the OPs in confidential version. The Informant stated in the said application that, though the OPs shared a non-confidential version of the reply to the Information filed, the data and responses to the questions posed by the Commission have not been shared with the Informant.

59. The Informant, *inter alia*, submitted that it would be unable to prepare a meaningful and effective response in its rejoinder to the OPs' reply without access to the confidential data and materials submitted by OPs to the Commission. Therefore, the Informant requested access to the confidential information as well as the responses to the queries posed by the Commission *vide* its order dated 19.01.2022 to prepare a

rejoinder to the OPs' reply. Further, the Informant requested the Commission to provide an extension of time till all case records are made available to file reply/ rejoinder.

60. The Commission considered the aforementioned request of the Informant in its ordinary meeting on 14.06.2022 and noted that, as per Regulation 35(8) of General Regulations, as amended, there is no inherent right of the Informant to be part of the confidentiality ring, unless the Commission, in appropriate cases, is of the view that inclusion of the Informant in the ring is considered necessary or expedient for effective inquiry. In this regard, the Commission noted that data and information filed by OP, *inter alia*, pertained to commercial and sales information of third party manufacturers competing with members of the Informant in the relevant market.

61. The Commission thus held that the Informant has not made out a case disclosing satisfaction of the requirements of proviso to Regulation 35(8) of the General Regulations and rejected the application of the Informant. However, the OPs were directed to forward a non-confidential version of the first part of their reply (containing replies to the queries of the Commission) to the Informant. Informant was also granted 3 weeks' time from receipt of the first part of the reply from OPs to enable it to file its rejoinder/ further response to the non-confidential version of the reply of the OPs, with an advance copy to the OPs.

62. The Informant, thereafter, moved another application dated 27.06.2022 seeking, *inter alia*, review and recall of the Commission's order dated 14.06.2022 and access to the confidential data and materials submitted by the OPs to the Commission. The Commission considered the same in its Ordinary Meeting dated 05.07.2022 and rejected this application on the grounds that there is no inherent right vested in the Informant to be part of the confidentiality ring unless the Informant is able to demonstrate that its inclusion in the confidentiality ring is necessary or expedient for an effective inquiry and the proceedings before it is inquisitorial in nature. However, the Commission made it clear that no reference or reliance shall be made to the confidential data and materials submitted by OPs that have not been shared with the

Informant, while forming an opinion in terms of the provisions contained in Section 26 of the Act.

63. The Informant submitted its rejoinder to the reply of OPs *vide* its letter dated 20.07.2022 in confidential as well as public version.

64. The Informant submitted that that the present case relates to two sets of allegations *i.e*. (i) arbitrary procurement of Branded Alcoholic Beverages by the OPs and (ii) the imposition of unfair terms and conditions in the wholesale supply and retail distribution of such Branded Alcoholic Beverages by the OPs in the State of Andhra Pradesh.

65. Further, as per AP IMFL Act, OPs have the sole privilege to engage in wholesale trade and retail distribution of Branded Alcoholic Beverages in the State of Andhra Pradesh. Therefore, the focal product/service provided by the OPs is relevant for the purpose of delineation of the relevant product market, which is the service of wholesale trade and retail distribution. Therefore, relevant market will be "*market for wholesale trade and retail distribution of Branded Alcoholic Beverages*".

66. Moreover, since each State has the power to enact such laws within its own territorial jurisdiction, the conditions of competition for procurement and supply of Branded Alcoholic Beverages are homogenous within the boundaries of a State and are distinct from other States. Therefore, the relevant geographic market will be the State of Andhra Pradesh, and not India.

67. By virtue of the AP IMFL Act, the OPs carry out exclusive wholesale procurement and retail distribution of Branded Alcoholic Beverages in the State of Andhra Pradesh. Therefore, the OPs enjoy 100% market share in the relevant market as the statutory framework ensures that there is no possibility of entry of any competitor in the relevant market.

68. With respect to abuse of dominance, the Informant submitted that OPs' conduct relates to:

(i) Denial of market access to manufacturers/suppliers through arbitrary placement of OFS for Branded Alcoholic Beverages and discrimination in favour of select alcoholic beverage manufacturers/suppliers (to the detriment of ISWAI members).

(ii) Imposition of unfair terms and conditions in RCAs and the implementation of the same.

69. The Informant has submitted that OPs' arguments are misleading because the Year-wise Depot Sales recorded by the Excise Department, Government of Andhra Pradesh reflect that the sales of alcoholic beverages (IMFL and Beer) have increased over the previous two to three years.

Table: Depot Sales (Quantity in number of cases)

Year	IMFL Quantity	% increase/ decrease	Total Alcohol Quantity	% increase/ decrease
2019	29,450,171	--	5,02,82,580	--
2020	1,91,11,370	- 35 %	2,49,09,146	- 50 %
2021	2,64,46,183	38 %	3,44,81,560	38 %

70. Based on the above data, the Informant submitted that during the COVID-19 pandemic (2020), there was a decrease in IMFL sales compared to 2019 by 35%, and total alcohol sales reflected a decrease of 50.4% during the same period. IMFL sales in 2021, in comparison to 2020, reflected an increase of 38%, and total alcohol sales reflect an increase of 38.4% during this period.

71. The Informant also submitted data regarding IMFL sales in 2022, as recorded on the Excise Department's portal till 27.06.2022. As per the Informant, during June 2021 and June 2022, there was a 27% increase in the sale of IMFL and 50% increase in the total sale of alcohol. Thus, the Informant has rebutted OPs' claim that there has been a reduction in the sale of certain brands of the Informant during 2018-19 to 2020-21 due to COVID-19 and other reasons.

72. The Informant also submitted that the demand for alcoholic beverages increased drastically and recovered from the downslide that occurred during the pandemic, which is contrary to OPs' claims that the demand for alcoholic beverages has decreased owing to steps taken by the Government to prohibit alcoholic beverages or increase excise and other duties. In support of this argument, the Informant submitted month wise sales of alcoholic beverages for 2020, which is given below:

Table: Month- wise Depot Sales in 2020 (Quantity in number of cases)

Month and Year	IMFL	Beer	Total Sales
January 2020	25,03,286	9,90,079	34,93,365
February 2020	23,39,209	8,84,443	32,23,652
March 2020	16,57,506	7,99,931	24,57,437
April 2020	0	0	0
May 2020	11,68,697	2,86,309	14,55,006
June 2020	12,58,430	2,98,257	15,56,687
July 2020	11,75,409	2,11,782	13,87,191
August 2020	12,64,332	2,59,781	15,24,113
September 2020	18,39,494	5,83,926	24,23,420
October 2020	20,07,544	6,20,975	26,28,519
November 2020	18,90,334	6,18,053	25,08,387
December 2020	22,10,593	6,68,111	28,78,704

Source: Website of the Excise Department, Government of Andhra Pradesh

73. According to the Informant, despite the above data, which demonstrates a rise in the demand of total alcohol sales in 2021 and 2022, after the COVID-19 pandemic, brands of popular manufacturers such as Diageo have consistently experienced a decline in their sales and market share in the State of Andhra Pradesh, since the OPs have taken control of the retail trade in October 2019. The following table shows the trend of market share of Diageo since 2018-19:

Diageo's market share

Financial year	2017-18	2018-19	2019-20	2020-21	2021-22
Market share	29.9%	34.9%	30.6%	0.5%	0.6%

Source: Diageo's internal data.

74. According to the Informant, the OPs claimed that there has only been a marginal decrease in Diageo's market share in 2019-20. OPs' claim is misleading because

the State Government took over control of retail sales only in October 2019. The effect of the OPs' arbitrary procurement is reflected in the subsequent years of 2020-21 and 2021-22. Even Pernod India's market share in the State has experienced a drastic drop as demonstrated below.

Pernod India's market share

Financial year	**2017-18**	**2018-19**	**2019-20**	**2020-21**	**2021-22**
Market share	43.1%	40.8%	32%	3.0%	4.8%

Source: Based on CTEL data

75. The Informant averred that there is no rational justification for the drastic fall in demand for the products of members of the Informant, specifically in the state of Andhra Pradesh, given the fact that the brands offered by the Informant's members are popular across India and because of the demand-stickiness that the alcoholic beverages market experiences. On the basis of the above facts and figures, Informant submitted that:

a) The Branded Alcoholic Beverages market has a strong element of habit formation and brand loyalty. It is unimaginable that the sales of brands which have historically enjoyed high demand as well as market share suddenly drop off and there is a sudden upsurge of brands that were not previously present in the Relevant Market.

b) Demand and supply conditions may fluctuate from time to time; however, such a significant and inexplicable shortfall in the demand of brands of the Informant's members is not on account of new/ small players entering into the market but rather due to the OPs' conduct and artificial intervention.

c) A similar observation was also noted by the Commission in the Case of International Spirits and Wines Association of India v Uttarakhand Agricultural Produce Marketing Board and Others (Case No. 02 of 2016/ Uttarakhand Case), holding that, *"such sudden variation in sales of IMFL may not occur due to any overnight or sudden change in consumer preferences of certain brands of whisky. … sudden change in sale of certain brands of IMFL* *vis-a-vis others is indicative of the changes induced on the supply side/distribution as opposed to change in demand for the preferred brands."*

d) The Informant submitted that the OPs have contended that there is an increase in consumer choice owing to the decisions of the procurer (*i.e.* the OPs). However, on the contrary, the consumer choice, which is based on various factors like brand loyalty, quality and price, has been manipulated through OPs' conduct in favouring market players other than ISWAI members while issuing OFS, which results in the latter's brands being missing from retail shelves for extended periods of time. This is also evident owing to OPs' conduct that many popular brands of Diageo have been forced to exit the market despite Diageo's long-standing position in the market as a key player with local knowledge and strong brands.

76. As regards OPs' claim that it is their right to decide the tender conditions, the Informant submitted that it does not have the right to frame arbitrary, unfair, unilateral and onerous conditions. According to the Informant, implementation of such clauses is not necessary to invite competition law scrutiny. The existence of such unfair clauses and the ability of the dominant entity to implement it itself is enough for the Commission to assess it.

<u>Analysis of the Commission</u>

77. At the outset, the Commission observes that the main allegation of the Informant relates to arbitrary procurement of alcoholic beverages and imposition of unfair and exploitative terms by the OPs on suppliers/manufacturers of alcoholic beverages, who are members of the Informant in the State of Andhra Pradesh, which is in contravention of Section 4 of the Act. It is also alleged that OPs discriminate against members of the Informant, as OPs do not engage in the procurement of Branded Alcoholic Beverages on an objective basis, which is leading to discriminatory treatment and significant commercial losses for the members of the Informant.

78. The Commission considered the Information and reply/rejoinder filed by the parties. For an analysis of the case under Section 4 of the Act, the first requirement is to establish that the OPs are enterprises, followed by a delineation of 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.

79. The Commission notes from the submission of Informant that OPs perform economic activities in relation to the procurement and distribution of Branded Alcoholic Beverages as well as issuance of licence for the sale of liquor to retail shops and bars in the State of Andhra Pradesh. 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.

80. The Commission notes from the submission of OPs that, earlier, as per Andhra Pradesh (Regulation of Trade in Indian Made Foreign Liquor, Foreign Liquor) Rules 1993, OP-2 was exercising an exclusive right in the wholesale trade of IMFL and FL, as an 'Agent' of the Government. Thereafter, *vide* GO No. 373 dated 22.08.2019, OP-2 was granted exclusive right for retail sale in Andhra Pradesh. Subsequently, *vide* GO No. 313 dated 09.11.2021, the Government of Andhra Pradesh transferred the function of liquor procurement from OP-1 to OP-2. Thus, currently, only OP-2 has exclusive right of procurement as well as retail sale of IMFL and FL in the State of Andhra Pradesh. The Commission also notes from the submission of OPs that, presently, OP-1's primary function is the issuance of licence for the sale of liquor to retail shops and bars, and other activities are conducted by OP-2 only.

81. The Commission, in the facts and circumstances of the present case, defines the relevant product market as "*market for wholesale procurement, distribution and retail sale 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 that the policy and rules and regulations governing the procurement and distribution of alcoholic beverages vary from State to State. This makes the State a possible distinct geographic market for the procurement and distribution of liquor. Further, different states follow different models of procurement and distribution including retail sales of alcoholic beverages, having regard to the excise policy in vogue in such state. Thus, the Commission does not find any merit in the submission of OPs that the geographical market is the whole India. Consequently, as the present case is related to procurement and distribution of liquor in the State of Andhra Pradesh, the relevant geographic market would be the territory of the State of Andhra Pradesh. Accordingly, the Commission delineates the relevant market in the present case as *"market for the wholesale procurement, distribution and retail sales of branded alcoholic beverages in the State of Andhra Pradesh*".

82. On the aspect of dominance, based on the submission of the parties, the Commission notes that OP-2 is a statutory monopsonist for the purpose of procurement and distribution of alcoholic beverages and also of retail sales of relevant product within the relevant geographic market. Upon considering the fact that OP-2 has sole right of wholesale procurement, distribution of alcoholic beverages and also of retail sales of alcoholic beverages in the State of Andhra Pradesh, based on the excise policy of the State, the Commission is of the *prima facie* view that OP-2 is dominant in the relevant market so defined.

83. At the outset, in order to examine the allegations of abuse of dominance through arbitrary procurement of alcoholic beverages by the OPs, the Commission analysed the indents raised by certain members of Informant on OPs, OFS issued by OP against the said indents, sales figures and market share of Informant's members. The Commission notes that both the parties have also provided monthly data of total indents raised as well as OFS issued by OPs on Diageo India and Pernod India across all brands which are similar. The data provided by Informant shows that for the month of December 2019 to January 2020 (for Pernod), there

was a decline in OFS issued by the OPs in respect of the said company's products. The month wise indents raised and OFS issued by OPs are as below:

Month-wise OFS raised by the OPs on Pernod India (all brands) from Oct 2018 onwards		
Month & Year	**Indents Raised**	**OFS Issued**
OCT '18	244759	244759
NOV '18	272230	272230
DEC '18	231422	231422
JAN '19	252114	252114
FEB '19	244942	244942
MAR '19	295961	295961
APR '19	203427	203427
MAY '19	321991	321991
JUN '19	209512	209512
JUL '19	252029	252029
AUG '19	381453	381453
SEP '19	345636	345636
OCT '19	273939	273939
NOV '19	334546	334546
DEC '19	499020	135890
JAN '20	428250	209550
FEB '20	97077	97077
MAR '20	35750	35750
APR '20	0	0
MAY '20	24532	24532
JUN '20	16300	16300
JUL '20	27000	27000
AUG '20	33314	33314
SEP '20	36025	36025
OCT '20	26626	26626
NOV '20	32764	32764
DEC '20	22172	22172
JAN '21	6237	6237
FEB '21	4500	4500
MAR '21	7450	7450
APR '21	0	0
MAY '21	3000	3000
JUN '21	7000	7000
JUL '21	11550	11550

Month-wise OFS raised by OPs on Diageo India (all brands) from Oct 2018 onwards		
Month & Year	**Indents Raised**	**OFS Issued**
OCT '18	911756	911756
NOV '18	656665	656665
DEC '18	847604	847604
JAN '19	975714	975714
FEB '19	1060305	1060305
MAR '19	1067288	1067288
APR '19	970371	970371
MAY '19	1497570	1497570
JUN '19	1066110	1066110
JUL '19	1157310	1157310
AUG '19	1575944	1575944
SEP '19	1375288	1375288
OCT '19	753813	753813
NOV '19	1072491	1072491
DEC '19	1,254,619	357,624
JAN '20	958,172	412,266
FEB '20	1,078,694	167,913
MAR '20	24,150	11,800
APR '20	0	0
MAY '20	19,300	19,300
JUN '20	71,369	0
JUL '20	71,369	2,276

AUG '21	7100	7100
SEP '21	14645	14645
OCT '21	23436	23436
NOV '21	39950	39950

84. From the above data submitted by the Informant, it can be seen that, with respect to Pernod India, decline in OFS issued, in comparison to indents raised, was only observable for a period of two months *viz.* December 2019 and January 2020. Similarly, from the data provided with respect to Diageo India, it is discernible that the decline in OFS issued in comparison to indents raised was for the period December 2019 till March 2020 and thereafter, from June 2020 to July 2020. The Commission observes that, though the quantity raised through indents and OFS almost matches in most of the months, the data indicates a declining trend in the supply of IMFL by Pernod and Diageo for a limited period. The Informant also submitted that OP-2 had orally instructed Pernod India to substantially reduce the quantity and submit revised requisitions/indents, contradicting OP-2's tender conditions/contractual terms and orders, which require the members of the Informant to maintain adequate stocks of their brands.

85. The Commission notes that, though there is some variance in the data provided by the Informant and the OPs with respect to indent raised and OFS issued, the trend of data provided by the Informant and the OPs is almost similar. It is evident from the aforementioned data that the Informant's members themselves have been placing smaller indent quantities on the OPs for several months. Furthermore, the submission of the OPs with respect to indent and OFS quantities issued by OPs indicates that there has been a reduction in the quantities offered by the suppliers. Thus, the members of the Informant were also not supplying their products as per OFS issued for reasons best known to them. The Commission also notes that in the absence of any evidence whatsoever, the assertion of the Informant that OPs orally instructed them to supply less than OFS is not tenable. Further, the Commission observes that the Informant or its members have not made any complaints at any forum until now with regard to aforementioned instruction/ irregularity by OPs.

86. The Informant has made reliance on the Commission's decision in Case No. 02 of 2016 (Uttarakhand Case), wherein the Commission held that:

"130. In view of the ongoing discussion, it is evident that OP-1 did not place any orders for many brands of Pernod and USL for many months during the 11 months period, that Liquor Wholesale Order was in effect, and the OPs were the only route to access the market for alcohol manufacturers on account of the sole rights of procurement and distribution vested under the Liquor Wholesale Order. Further, this conduct on the part of OP-1, despite existence of retailers' demand for IMFL, indicates limiting or restricting wholesale procurement and distribution of IMFL in the State of Uttarakhand and denial of market access to producers of certain brands of IMFL in the State of Uttarakhand, in violation of Section 4(1) read with Section 4(2)(b)(i) and Section 4(2)(c) of the Act."

87. The Commission observes that no *carte blanche* reliance can be placed by the Informant on the aforementioned decision as, in the said case, the Commission had evidence on record that one of the OPs was not placing any orders even though indents were raised. Thus, the wholesale procurement was not in accordance with retail demand. However, in the present case, OFS were duly raised/issued by OPs coherently for substantial period and it was the Informant's members who could not supply the OFS quantity in several months, as has been stated by the OPs. Thus, this allegation of the Informant lacks credence in the *prima facie* view of the Commission.

88. The Commission notes from the data provided by the Informant and the OPs that, though there is an apparent declining trend of market share of the Informant's members, there is no concrete evidence to suggest that such decline in market share is due to the alleged anti-competitive conducts of the OPs. The same, as per the Commission, may be attributed to various reasons, such as change in State policies, COVID-19 pandemic, change of customer preferences and entry of new competitors/brands in the industry. Further, most of the period during which the Informant has alleged decline in the sale of the brands of its members was afflicted

by the pandemic, which is not a normal/usual functioning market scenario but has been exceptional and unprecedented, which drastically affected the demand and supply of various goods and services and not just alcoholic beverages.

89. The next allegation of the Informant pertains to the imposition of unfair, discriminatory and onerous terms and conditions in RCAs on Informant's members, which include:

i) payment timelines being decided arbitrarily by the OPs, and suppliers only get paid after downstream sales are made by the retailers to the end-consumers (as opposed to for stock supplied to the OPs);

ii) imposing penalty for slow moving goods (although determination of demand is done solely by the OPs);

iii) unilateral right to extend (which has been exercised by the OPs multiple times with unchanged supply rates) or cancel the RCA;

iv) rescinding OFS.

90. With respect to the allegation of arbitrary payment guidelines being imposed by the OPs on the Informant's members, the Informant contended that there appears to be no rational commercial justification for withholding payment to the Informant's members. In this regard, OPs have submitted that this period coincided with the takeover of the retail distribution of liquor in the State by OP-2, which was in October 2019, and there were some natural glitches and delays in the process of transferring such a vast undertaking. Having said that, OPs submitted that processing of outstanding amounts, not only to the Informant and its members but also to other suppliers, was in process and that OP-2 is taking earnest steps to clear all the dues. OPs have also disputed the claims of the Informant of discriminatory and/or preferential treatment to certain suppliers other than the Informant's members and claimed that outstanding payments are due to 57 suppliers and not just members of the Informant.

91. As regards delay in payment, the OPs submitted that, being a government corporation, OP- 2 does not have surplus funds to pay the suppliers immediately,

and there is no competition issue in making payments after a slight delay. With regard to this contention of OPs, the Commission is not impressed by the submission of the OPs that, being a Government-owned company, it has some leeway in delaying payments to its supplier. It is expected that departments improve their functioning when they operate in a commercial space in the market for procurement and sale of goods and services. Having said that, in the facts and circumstances of the present case, benefit of doubt may be available to OPs in view of the categoric assertion that such delays were occasioned owing to transfer of retail trade to OP-2 and that the said company is taking earnest steps to clear the dues of the manufacturers, including the members of the Informant.

92. On the issue of delay in payment, the Commission in Case No. 16 of 2019 (M/s Maa Metakani Rice Industries Vs State of Odisha & Another) held as under

> *"94. …… The Commission observes that, subject to terms of the contract entered by the parties, any unjustified, gross and unreasonable delay in release of dues or withholding of legitimate dues by a dominant enterprise vis-à-vis another entity within the fold of such contractual relationship may be examined within the provisions of Section 4 of the Act, when such conduct leads to affecting the competitive landscape, the commercial ability, sustainability, existence and even bargaining power of the entity involved.*"

93. In light of the above, the Commission hopes that the OPs would endeavour to clear the dues of manufacturers expeditiously as stated by them and does not wish to delve further into this aspect.

94. With respect to the allegation of imposition of penalty by OPs upon slow moving goods, the Informant has claimed that Clause 3.11 D of the 2018 Tender and Clause 2.13 E of the 2015 Tender states that a manufacturer/supplier has to liquidate any slow-moving stock once notified by the P&E Department. These clauses further provide that, if at least 25% of stock of any brand is not sold within 6 months' (180 days), such brand would be considered 'slow-moving' and may entail penalty on such stocks. The Informant has averred that since the OPs are

solely responsible for determining demand and placing orders, when stock so procured is not sold and becomes 'inactive', the liability for the same cannot be solely attributable to the manufacturer/supplier of Branded Alcoholic Beverages. In this regard, the Commission notes from the submission of OPs that the aforementioned condition was introduced when private parties were operating the retail stores. This condition was amended by OPs on 30.11.2021 to comfort suppliers. The amended condition states that, for the purpose of calculating the period in respect of slow-moving stocks of IMFL and FL, the date of delivery challan to retail outlets instead of GRN at depots will be taken into account.

95. The Informant has also alleged that the OPs also halt supply of stock to retail outlets. In this regard, the Informant filed an RTI to understand the criterion of supply. The response to the RTI shows that the criteria for issuing an OFS is "*110% of average sales during preceding two months (minus) stocks on hand (minus) OFS to be executed.*" Having noticed the criterion evolved by the OPs, the Commission is of the *prima facie* view that OPs' actions can be said to be based on an objective criterion and are not downright arbitrary, as contested by the Informant. The Commission does not have any misgivings in relation to the clauses pertaining to slow-moving stock, and it would suffice to say that OPs ought to exercise the clause uniformly in a non-discriminatory manner and with abundant care and caution.

96. It is also alleged that OPs have unilateral right to rescind OFS. The Commission notes from the submission of OPs that this clause was included at a time when private players were carrying out the function of supplying alcoholic beverages for retail sales during the period 1993 to 2019. According to OPs, the premise behind the insertion of this clause was to address situations such as complaints by consumers against the quality of certain brands. OPs have also submitted that the OFS have never been cancelled so far. The right of OPs to cancel OFS in a given situation may arise where justification so exists in certain circumstances. The Commission ordinarily would not like to interfere in such situations. However, it may be advisable for OPs to make suitable amendments in the clause or issue

appropriate clarifications so that manufacturers are put to sufficient notice and have certainty with regard to the use of such clause.

97. With respect to the allegation of right to cancel/unilaterally reject rate offers/proposals (notice period of one month) under Clause 5.3 of 2018 Tender and Clause 7.1 of the 2015 Tender, OPs have submitted that it is wrong to allege that the OPs are vested with the unilateral right to extend or cancel the RCA. They stated that the RCA is initially for one year, extendable by one more year and thereafter by mutual consent only. Further, according to the OPs, no RCA has been cancelled so far.

98. The Commission frowns upon unilateral termination clauses introduced by entities which have market power and which reduces the bargaining power of the parties contracting with the dominant entity. However, OPs have stated that RCAs are entered into for only a period of one year, and any extension of tenure is only for one year and that too by mutual consent only. Thus, this clause is in reasonable contemplation of all manufacturers who wish to giving their offer/proposal to OPs. The Commission cannot substitute its wisdom to that of the procurer in respect of the terms of procurements, the periodicity thereof and terms of RCAS *etc.*, which, however, are observed in this case not to be of longer tenure and where burden, if any, on a supplier may persist longer and induce uncertainty in its operation. Having said that, it is the responsibility of a dominant procurer to allay concerns, if any, that persist in the mind of supplier surrounding such clauses, notwithstanding the fact that OPs have not put to use such clauses as stated by it. The Commission leaves it to the OPs to make suitable adjustments in the clauses bearing in mind the niceties of policy so as to dispel the notion of ‘take it or leave it’ approach as the manufacturers/suppliers rely solely on the OPs for supply of their products in the State of Andhra Pradesh.

99. The Commission notes from the submission of the OPs that there has been no instance wherein the aforementioned clause has been exercised by the OPs. As per the OPs’ submission, the Informant has made bald assertions without any

grievance, and they never raised such issues before, even at the time of participation in the tender.

100. As regards allegations that various clauses of RCA are unilateral and unfair, the Commission notes that OPs have stated that conditions in the RCA are not unilateral and that OPs cannot control and artificially manipulate the demand/supply conditions of alcoholic beverages in the State of Andhra Pradesh. Having regard to the submission of OPs and the fact that the main allegation relating to violation of competition law, made against the OPs has not been found to be sustainable in view of the discussion above, the Commission does not deem it necessary to deal with allegations *qua* other clauses of RCA.

101. 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 in the matter.

102. In view of the foregoing, the Commission is of the *prima facie* view that no case of contravention of the provisions of the Act is made out against the OPs, and the matter is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.

103. 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
Dated: 19.09.2022