



## COMPETITION COMMISSION OF INDIA

Case No. 02 of 2016

**In Re:**

**International Spirits and Wines Association of India (ISWAI)** **Informant**  
403, 4<sup>th</sup> Floor, Vivanta by Taj, Sujan Singh Park,  
Subramania Bharti Marg,  
New Delhi - 110003

**And**

**Uttarakhand Agricultural Produce Marketing Board** **Opposite Party No. 1**  
Mandi Bhavan, Near Collectorate Campus,  
Rudrapur, Udham Singh Nagar,  
Uttarakhand- 263153

**Garhwal Mandal Vikas Nigam Ltd.** **Opposite Party No. 2**  
74/1, Rajpur Road,  
Dehradun, Uttarakhand - 248001

**Kumaun Mandal Vikas Nigam Ltd.** **Opposite Party No. 3**  
Oak Park House, Mallital,  
Nainital, Uttarakhand - 263002

**Appearances:**

<b>For the Informant:</b>	Mr. Amit Sibal, Senior Advocate; Ms. Nisha Kaur Uberoi, Mr. Gautam Chawla, Mr. Mathew George, Advocates, and Mr. Rajiv Chauhan (ISWAI)
<b>For the Opposite Party-1</b>	Mr. Rahul Narayan, Mr. Karan Chandhiok, Ms Shruthi Rao, Mr. Shashwat Goel, Advocates, and Mr. Vijay Kumar, OP-1
<b>For the Opposite Party-2</b>	Mr. Kailash Pandey, Advocate
<b>For the Opposite Party-3</b>	Ms. Lagna Panda and Mr. Salman Qureshi, Advocates



सत्यमेव जयते



**CORAM:**

**Mr. Ashok Kumar Gupta**  
**Chairperson**

**Ms. Sangeeta Verma**  
**Member**

**Mr. Bhagwant Singh Bishnoi**  
**Member**

**Order under Section 27 of the Competition Act, 2002**

1. The present case has been initiated based on an information filed under the provisions of Section 19(1)(a) of the Competition Act, 2002 (the 'Act') by International Spirits and Wines Association of India ('Informant') against Uttarakhand Agricultural Produce Marketing Board ('OP-1'), Garhwal Mandal Vikas Nigam Ltd. ('OP-2') and Kumaun Mandal Vikas Nigam Ltd. ('OP-3') (collectively referred to as 'OPs'), alleging contravention of the provisions of Section 4 of the Act.
2. The Informant is a company incorporated under the provisions of the erstwhile Companies Act, 1956 and is a representative body of the International spirits and wines companies having business establishments 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 ('Pernod'); (h) United Spirits Limited ('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. OP-2 and OP-3 are stated to be companies incorporated under the



सत्यमेव जयते



provisions of the erstwhile Companies Act, 1956 and are fully-owned by the State of Uttarakhand.

4. The Informant submitted that the State of Uttarakhand, through its Chief Secretary, issued an Excise Policy dated 31.03.2015 (**‘Excise Policy’**), effective from 16.04.2015, which provided that a new wholesale arrangement (governed by FL2 license) shall be brought into force within one month of the notification of such policy. In terms of the said policy, the State of Uttarakhand through its Chief Secretary, pursuant to Order No. 208/XXII/2015/04(01)/2015 TC/47/27.04.2015 dated 27.04.2015 (**‘Liquor Wholesale Order’**) appointed OP-1 as the exclusive wholesale licensee for foreign liquor/beer/wine (**‘alcoholic beverages’**), including Indian Made Foreign Liquor (**‘IMFL’**) (FL2 licensee), in the State of Uttarakhand. In addition to appointment of OP-1 as the wholesale licensee for alcoholic beverages under the said Liquor Wholesale Order, OP-2 and OP-3 were appointed as the exclusive sub-wholesalers (**‘sub-FL2 licensees’**) of alcoholic beverages for Garhwal and Kumaun divisions, respectively, in the State of Uttarakhand. It was alleged that, as a consequence of such appointment a monopoly had been vested in the aforementioned OPs making them dominant in the relevant market *“for procurement, supply and distribution of alcoholic beverages in the State of Uttarakhand.”*
5. It was further stated that the Government of Uttarakhand issued a new excise policy on 31.03.2016 for the financial year 2016-17 in terms of which OP-2 and OP-3 ceased to operate as sub-FL2 licensees with effect from 31.03.2016. Subsequently, the Government of Uttarakhand *vide* an order dated 19.04.2016 discharged OP-1 from all responsibilities of dealing with the procurement of alcoholic beverages in the State of Uttarakhand with effect from 19.04.2016.
6. It was averred by the Informant that the OPs placed orders for supply of IMFL brands in an arbitrary manner, contrary to Clauses 10, 11 and 12 of the



सत्यमेव जयते



aforementioned Liquor Wholesale Order. Contentions of the Informant, that the OPs took advantage of their monopoly and abused their dominance, are as follows:

- i. The OPs were placing orders with alcoholic beverage manufacturers for supply of IMFL in an arbitrary and discriminatory manner with no relation to the consumer demand, for certain brands of beverages in the market.
  - ii. The OPs were not procuring alcoholic beverages of certain brands, despite demonstrably high consumer demand for such alcoholic beverages and thereby discriminating against manufacturers of these beverages. This 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, market share of USL in supply of IMFL in the State reduced from approximately 61% in August-October 2014 to 2% in August-October 2015. Similarly, market share of Pernod in supply of IMFL reduced from 21.8% in August-October 2014 to 1.67% in August-October 2015.
  - iii. The OPs were not maintaining minimum stock levels and were not supplying IMFL brands in accordance with the retailers' demand, despite express stipulation in Clauses 10 and 11 of the Liquor Wholesale Order.
7. The Informant further alleged that OP-1 also entered into an agreement with IMFL manufacturers which contained unfair and onerous conditions, the details of which are summarised below:



सत्यमेव जयते



- i. Unilateral right of OP-1 to dispose of IMFL remaining unsold for over 150 days [Clause 7.2 and 7.3 of Agreement dated 22.06.2015 of USL with OP-1 and Agreement dated 15.05.2015 of Pernod with OP-1].
  - ii. OP-1 had the right to impose penalty upon IMFL manufacturers under certain circumstances but no opportunity was envisaged of hearing IMFL manufacturers before imposing such penalty [Clause 14 of aforementioned Agreements].
  - iii. Right of OP-1 to terminate the agreement without providing any opportunity to IMFL manufacturers [Clause 4 of aforementioned Agreements].
  - iv. Obligation of IMFL manufacturers to bear the cost of bottling, sealing, packing, loading, transporting, unloading and stacking of the products at the specified depot [Clause 2.1 of aforementioned Agreements].
  - v. Obligation of IMFL manufacturers to bear transit losses and absence of joint mechanism to determine the stock delivered [Clause 2.4 of aforementioned Agreements].
  - vi. Right of OP-1 to recall the offer for sale and suspend distribution of alcoholic beverages without providing opportunity to IMFL manufacturers [Clause 2.6 of aforementioned Agreements].
  - vii. Condition that IMFL manufacturers would be paid for the stock sold instead of the stock delivered by them [Clause 6 of the USL Agreement].
  - viii. Unfettered right of OP-1 to impose penalty or dispose of unsold stock at the time of expiry of agreement [Clause 7.1 of the Pernod Agreement].
8. Based on the above, the Informant alleged that the OPs had abused their dominant position, in contravention of the provisions of Section 4(2)(a)(i), 4(2)(b)(i) and 4(2)(c) of the Act. Accordingly, the Informant prayed to the Commission to direct the Director General ('DG') to cause an investigation into the matter.
9. The Commission, after forming a *prima facie* opinion, *vide* its order dated 19.07.2016, passed under Section 26(1) of the Act, directed the DG to cause an



सत्यमेव जयते



investigation into the matter and submit the Investigation Report. The Commission observed in its order:

*'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.'*

10. Subsequently, the OPs moved an application, *inter alia*, seeking recall of the aforesaid order dated 19.07.2016, passed under Section 26(1) of the Act. The Commission considered the application in its meeting held on 31.08.2016 and declined the same. Subsequently, OP-1 filed a Writ Petition being WP(C) 10411/2016 before the Hon'ble High Court of Delhi against the said orders of the Commission dated 19.07.2016 and 31.08.2016. The OPs contended in the said petition that the impugned orders of the Commission dated 19.07.2016 and 31.08.2016 were without jurisdiction as they were administering the liquor policy of the State of Uttarakhand and, therefore, were not an '*enterprise*' within the meaning of Section 2(h) of the Act. The OPs further contended that the subject matter of complaint had already been adjudicated by the Hon'ble High Court of Uttarakhand and, therefore, the proceedings before the CCI were barred by the principles of *res judicata*. The Hon'ble High Court of Delhi dismissed the petition filed by OP-1 *vide* order dated 22.09.2017. The Hon'ble High Court of Delhi observed that the OPs were enterprises within the meaning of Section 2(h) of the Act. Appeals preferred by the OPs, against the said order, were dismissed



सत्यमेव जयते



by the Division Bench of the Hon'ble Delhi High Court vide order dated 17.10.2017. The OPs further appealed to the Hon'ble Supreme Court which was also dismissed *vide* order dated 25.01.2018.

### **Findings of the DG**

11. Pursuant to the directions of the Commission under Section 26(1) of the Act, the office of the DG conducted an investigation into the matter and submitted its Investigation Report to the Commission on 28.03.2018, in terms of the provisions of Section 26(3) of the Act. Brief findings as recorded by the DG in the Investigation Report are as under:
  - a. For the relevant product market, the focal product/service in the present case was identified as procurement and distribution of branded alcoholic beverages in the State of Uttarakhand. The distinction amongst different kinds of alcoholic beverages such as whisky, rum, brandy, gin, beer and wine was not relevant due to the fact that OPs procured and distributed all types of branded alcoholic beverages in the State of Uttarakhand. In respect of the relevant geographic market, all the OPs in present case were fully owned and controlled by the State of Uttarakhand, and operated in the State of Uttarakhand and had their functional operational autonomy and were independent entities having their own control over their activities. Further, Liquor Wholesale Order dated 27.04.2015 had granted exclusivity to all three OPs in their respective business and areas of operations, wherein OP-1 provided the services of wholesale procurement of branded alcoholic beverages to its two sub-FL2 licensees (OP-2 and OP-3) and OP-2 and OP-3 were required to ensure availability of all brands of alcoholic beverages in their branches/depots in all districts of their respective Garhwal/Kumaun divisions in accordance with the demand of the retailer licensees (FL-5) of the concerned districts. Accordingly, the relevant markets were delineated as:



सत्यमेव जयते



- (a) market for wholesale procurement of branded alcoholic beverages in the 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.
- b. On the issue of dominance of the OPs, in the relevant market, the DG reported that the OPs were in a position of monopoly and were enjoying 100 per cent market share of the relevant markets in their respective areas of operations as OP-1 had exclusive and sole rights of procurement of branded alcoholic beverages on wholesale basis; and OP-2 and OP-3 had exclusive and sole rights of distribution of branded alcoholic beverages to retailers in their licensed areas of operations as clearly mentioned in the Liquor Wholesale Order. This created entry barriers for any other entity to carry on activities pertaining to procurement, supply and distribution of branded alcoholic beverages in the relevant markets. It was further seen that owing to the monopolistic status and sound financial position, reflected in their financial statements, the OPs enjoyed exclusive economic power and commercial advantages, which allowed them to operate independently of the market forces. Moreover, there was also complete absence of any countervailing buying power with the consumers. After analysing the factors, enumerated under Section 19(4) of the Act, the DG concluded that the OPs were in a dominant position in the respective relevant markets as delineated above.
- c. The Liquor Wholesale Order remained valid in the State of Uttarakhand for the period from 27.04.2015 to 19.04.2016, which was considered as the relevant period in the instant case (**Relevant Period**) during which OP-1, OP-2 and OP-3 were involved in exclusive activities pertaining to procurement, supply and distribution of alcoholic beverages in the State of





सत्यमेव जयते



Uttarakhand. Prior to implementation of the Liquor Wholesale Order, USL and Pernod, members of the Informant, were amongst the major suppliers of alcoholic beverages in the State of Uttarakhand, based on the respective sales volume of their brands. As per the sales figures, the sales volume of USL and Pernod dropped significantly during the financial year 2015-16, whereas the sales volume of other suppliers increased significantly during the same period. Further, such significant growth in the sales volume of IMFL of other suppliers during the period from May 2015 to April 2016, was not found in the subsequent period, *i.e.* from May 2016 onwards, post the issuance of new Excise Policy. Thus, during the period from May 2016 onwards, the sales volume of IMFL of other suppliers dropped drastically.

- d. The month-wise procurement and demand for IMFL for the relevant period, as provided by OP-1 *vide* reply dated 19.01.2018 (Table 1), showed that OP-1 being the sole procurer of alcoholic beverages in the State of Uttarakhand having 100 per cent market share (and undisputed dominance), deliberately ignored the relevance of different brands of alcoholic beverages. Further, OP-1 was not maintaining the minimum stock of all brands of IMFL as per the Liquor Wholesale Order.

**Table 1: Month-wise demand and procurement during May 2015 to April 2016**

Month	Name of Supplier	No. of cases indented by OP-2 and OP-3 as sum total of all brands of IMFL	No. of cases procured by OP-1 from manufacturers as sum total of all brands (in round numbers)
May 2015	Alcobrew Distilleries	950	1378
	India Glycols Limited	47,115	38,557
	Jagatjit Industries Limited	12,300	9968
	Khoday India Limited	1,300	274
	Pernod Record India Pvt. Ltd.	39,700	29,400
	Radico Khetan Ltd.	52,125	44,957



	Allied/Sarthak Blenders & Brothers Pvt. Ltd.	6,900	7,995
	United Spirits Ltd.	86,960	1,31,155
<b>May Total</b>		<b>2,47,350</b>	<b>2,63,684</b>
June 2015	India Glycols Limited	36,100	21,970
	Jagatjit Industries Limited	900	3,250
	Khoday India Limited	-	1,749
	Pernod Record India Pvt. Ltd.	27,100	45,388
	Radico Khetan Ltd.	55,050	15,111
	Allied/Sarthak Blenders & Brothers Pvt. Ltd.	800	5,993
	United Spirits Ltd.	70,390	1,48,247
<b>June Total</b>		<b>1,90,340</b>	<b>2,41,708</b>
July 2015	India Glycols Limited	4,250	57,013
	Jagatjit Industries Limited	3750	10443
	Khoday India Limited	-	3,397
	Pernod Record India Pvt. Ltd.	8,012	68,182
	Radico Khetan Ltd.	4,510	77,509
	Allied/Sarthak Blenders & Brothers Pvt. Ltd.	-	21,475
	United Spirits Ltd.	18,175	1,45,455
<b>July Total</b>		<b>38,697</b>	<b>3,83,474</b>
August 2015	Alcobrew Distilleries India Pvt. Ltd.	-	5,191
	India Glycols Limited	500.00	52,510
	Jagat Jit Industries Limited	-	19,508
	Khoday India Limited	-	6,069
	Pernod Ricard India Pvt. Ltd.	-	1,539
	Radico Khaitan Ltd.	1,500.00	82,217
	Allied/Sarthak Blenders & Bottlers Pvt. Ltd.	-	32,144
	United Spirits Ltd.	3500.00	929
<b>Aug. Total</b>		<b>5,500.00</b>	<b>2,05,108</b>
September 2015	Alcobrew Distilleries India Pvt. Ltd.	300.00	14,568
	India Glycols Limited	9,450.00	73,198
	Jagat Jit Industries	16,100.00	27,098



	Limited		
	Khoday India Limited	1,450.00	13,003
	Pernod Ricard India Pvt. Ltd.	37,250.00	2,561
	Radico Khaitan Ltd.	42,450.00	1,26,730
	Allied/Sarthak Blenders & Bottlers Pvt. Ltd.	32,000.00	46,775
	United Spirits Ltd.	41,060.00	1,300
<b>Sep. Total</b>		<b>1,80,060.00</b>	<b>3,05,233</b>
October 2015	Alcobrew Distilleries India Pvt. Ltd.	500.00	22,803
	India Glycols Limited	1,210.00	47,713
	Jagat Jit Industries Limited	11,050.00	46,363
	Khoday India Limited	7,700.00	7,070
	Pernod Ricard India Pvt. Ltd.	11,530.00	8,022
	Radico Khaitan Ltd.	15,000.00	1,03,301
	Allied/Sarthak Blenders & Bottlers Pvt. Ltd.	13,100.00	55,407
	United Spirits Ltd.	18,285.00	6,132
<b>Oct. Total</b>		<b>78,375.00</b>	<b>2,96,820</b>
November 2015	Alcobrew Distilleries India Pvt. Ltd.	-	18,558
	India Glycols Limited	-	28,266
	Jagat Jit Industries Limited	-	30,030
	Khoday India Limited	-	8,017
	Pernod Ricard India Pvt. Ltd.	-	21,595
	Radico Khaitan Ltd.	-	71,009
	Allied/Sarthak Blenders & Bottlers Pvt. Ltd.	-	38,899
	United Spirits Ltd.	-	16,195
<b>Nov. Total</b>		<b>-</b>	<b>2,28,071</b>
December 2015	A.B. Grain Spirits Pvt. Ltd.	-	5,996
	Alcobrew Distilleries India Pvt. Ltd.	-	22,690
	India Glycols Limited	-	56,918
	Jagat Jit Industries Limited	-	31,165
	Khoday India Limited	-	1,299
	Pernod Ricard India	-	1,941



	Pvt. Ltd.		
	Radico Khaitan Ltd.	-	1,13,231
	Allied/Sarthak Blenders & Bottlers Pvt. Ltd.	-	66,777
<b>Dec. Total</b>		-	<b>3,00,016</b>
January 2016	A.B. Grain Spirits Pvt. Ltd.	-	5,941
	Alcobrew Distilleries India Pvt. Ltd.	-	8,348
	India Glycols Limited	-	32,162
	Jagat Jit Industries Limited	-	16,800
	Khoday India Limited	-	3,497
	Pernod Ricard India Pvt. Ltd.	-	885
	Radico Khaitan Ltd.	-	74,656
	Allied/Sarthak Blenders & Bottlers Pvt. Ltd.	-	60,107
<b>Jan. Total</b>		-	<b>2,02,395</b>
February 2016	A.B. Grain Spirits Pvt. Ltd.	1,040.00	3,593
	Alcobrew Distilleries India Pvt. Ltd.	682.00	11,894
	India Glycols Limited	2,810.00	25,459
	Jagat Jit Industries Limited	2,060.00	11,708
	Khoday India Limited	900.00	-
	Pernod Ricard India Pvt. Ltd.	1,670.00	-
	Radico Khaitan Ltd.	2,395.00	65,310
	Allied/Sarthak Blenders & Bottlers Pvt. Ltd.	390.00	41,907
	United Spirits Ltd.	2,303.00	12,953
<b>Feb. Total</b>		<b>14,250.00</b>	<b>1,72,768</b>
March 2016	A.B. Grain Spirits Pvt. Ltd.	-	1,546
	Alcobrew Distilleries India Pvt. Ltd.	-	10,690
	India Glycols Limited	-	15,253
	Jagat Jit Industries Limited	-	13,479
	Pernod Ricard India Pvt. Ltd.	-	23,192
	Radico Khaitan Ltd.	-	12,433



सत्यमेव जयते



	Allied/Sarthak Blenders & Bottlers Pvt. Ltd.	-	25,993
	United Spirits Ltd.	-	17,527
<b>March Total</b>		-	<b>1,20,114</b>
April 2016	Alcobrew Distilleries India Pvt. Ltd.	-	11,402
	India Glycols Limited	-	22,416
	Jagat Jit Industries Limited	-	1,991
	Pernod Ricard India Pvt. Ltd.	-	17,903
	Radico Khaitan Ltd.	-	33,918
	United Spirits Ltd.	-	58,138
<b>April Total</b>			<b>1,45,768</b>

- e. It was evident that OP-2 and OP-3, did not raise indents regularly on the OP-1, which should have been based on demand as per Liquor Wholesale Order. Moreover, no indents were raised at all for several months, *i.e.* November 2015, December 2015, January 2016, March 2016, and April 2016. The DG observed that during the month of September 2015 despite receiving indents from OP-2 and OP-3 to supply brands of USL and Pernod, OP-1 did not supply sufficient quantity of brands of USL and Pernod, *i.e.* OP-1 received indents from OP-2 and OP-3 to supply a quantity of 41,060 and 37,250 cases of brands of USL and Pernod, respectively. However, OP-1 supplied to OP-2 and OP-3 only 1,300 and 2,561 cases of USL and Pernod, respectively, during this period. A similar instance also occurred during the month of October 2015, wherein OP-1 supplied lower number of cases than the indented cases of USL and Pernod. Therefore, OP-1 did not procure brands of USL and Pernod in sufficient quantity to meet requisitions made by OP-2 and OP-3 in respect of brands of USL and Pernod.
- f. Further, analysis of month and year-wise sales volume (in number of cases) by major suppliers in the State of Uttarakhand during the FYs 2013-14 and 2016-17 was undertaken. A year-on-year increase or decrease in the sales



volume of IMFL, in terms of percentage, of USL, Pernod and other suppliers in the State of Uttarakhand is given in Table 2.

**Table 2: Numbers and Percentages (in parentheses) change in IMFL sale by USL, Pernod and other major suppliers**

S.No	Manufacturers of IMFL	Change in FY 2014-15 over 2013-14	Change in FY 2015-16 over 2014-15	Change in FY 2016-17 over 2015-16
1	United Spirits Ltd./ Diageo India Pvt, Ltd.	132444 (9%)	-946731 (-59%)	599087 (92%)
2	Pernod Recard India Pvt. Ltd.	200016 (65%)	-289456 (-57%)	307236 (141%)
3	Radico Khaitan Ltd.	82731 (21%)	359511 (75%)	-253417 (-30%)
4	Allied Blenders & Distillers Pvt. Ltd./Sarhak Blenders & Bottlers Pvt. Ltd.	60708 (235%)	393763 (455%)	-331490 (-69%)
5	India Glycols Ltd.	110252 (59%)	181727 (61%)	-44231 (-9%)
6	Rock & Storm Distilleries Pvt. Ltd.	19517 (53%)	264223 (469%)	-248091 (-77%)
7	Jagat Jit Industries Ltd.	29547 (60%)	152858 (194%)	-170540 (-74%)
8	Doon Valley Brewers Ltd.	NA*	161564 (2415%)	-159836 (-95%)
9	Alcobrew Distilleries India Pvt. Ltd.	NA*	117170 (28509%)	-72321 (-62%)
10	Khoday India Ltd.	4956 (187%)	36830 (485%)	-26230 (-59%)
11	A.B. Grain Spirits Pvt. Ltd.	NA*	NA**	-9564 (-56%)

\*There was no sale in FY 2013-14; \*\*There was no sale in FY 2014-15

- g. It was noted that there was a significant drop in the sales volume of both USL (-59%) and Pernod (-57%) in terms of percentage during the FY 2015-16 as compared to sales in the FY 2014-15. Contrarily, there was a huge increase in the sales volume in terms of percentage during the FY 2015-16 as compared to the FY 2014-15 for all other major suppliers. On the other hand, during the FY 2016-17, there was a huge increase in the sales volume of USL (+92%) and Pernod (+141%) in terms of percentage as compared to the FY 2015-16.



सत्यमेव जयते



However, in case of all other suppliers, there was a huge decrease in the sales volume in percentage terms during the FY 2016-17 as compared to the FY 2015-16. The DG concluded that this is indicative of the fact that sales were not based on actual consumer demand during the relevant period.

12. Based on a detailed analysis of the said data, the investigation concluded that there was a significant shortfall in the sales volume of IMFL of both USL and Pernod during the period from May 2015 to April 2016 as compared to the corresponding period in earlier years. Further, it was also evident that the sales volume of IMFL of both USL and Pernod registered a significant growth in the immediate succeeding period from May 2016 onwards. In this connection, the DG also noted that the sales volume of IMFL of other suppliers in the State of Uttarakhand recorded a significant growth during the period from May 2015 to April 2016 as compared to the earlier periods and the period subsequent thereto.
13. The DG noted that the OP-1 disregarded the mechanism of procurement of different brands of alcoholic beverages, as per the Liquor Wholesale Order and Order of Additional Commissioner of Excise. As per the Investigation Report, OP-1's arbitrary approach in placing orders for alcoholic beverages resulted in gross decline in procurement of alcoholic beverages from USL and Pernod. Based on the aforesaid, the DG in its report concluded that OP-1 contravened the provisions of Section 4(2)(c) read with Section 4(2)(b)(i) of the Act.
14. The DG, however, stated that it did not find the acts of OP-2 and OP-3 in contravention of the provisions of Section 4(2)(c) read with Section 4(2)(b)(i) of the Act, as the investigation brought out that OP-2 and OP-3 were wholly dependent on OP-1 for supply, having no independent authority to procure alcoholic beverages on their own. Further, despite the requisitions of different brands of alcoholic beverages raised by OP-2 and OP-3, OP-1 was not following the same while procuring alcoholic beverages from the manufacturers. Further,



सत्यमेव जयते



OP-2 and OP-3 had no *inter-se* agreement, whatsoever, with the manufacturers/suppliers of alcoholic beverages and were not getting any direct supplies from them.

15. In respect of the issue as to whether there were complaints from retailers and consumers in respect of non-availability of brands of IMFL, the investigation concluded that Liquor Wholesale Order provided a mechanism of redressal of complaints of retailers in case of non-availability of IMFL in accordance with their demand. The DG found that OP-2 provided several copies of complaints made by retailers which were forwarded to OP-1, despite which OP-1 continued with arbitrary manner of procurement. In this regard, the contention of OP-1 that the complaints from retailers were not directed to it and that there was a redressal mechanism provided under the 'Liquor Wholesale Order' did not absolve OP-1 from the responsibility of procuring brands in accordance with the demand of different brands of alcoholic beverages raised by retailers. The investigation found that while disposing the *Writ Petition No. 1677 of 2015*, filed by several retailers about non-availability of brands demanded by them, the Hon'ble High Court of Uttarakhand had observed that "*FL2 Licence is now with Mandi Parishad Uttarakhand, therefore, Mandi Parishad is duty bound to supply all the brands as demanded by dealers at the earliest*". The Investigation also observed that OP-1 did not follow orders of the Excise Authorities in respect of the mechanism to be followed with regard to maintenance of stock of different brands of alcoholic beverages. The senior officials of OP-1, in their statements before the DG, harped on primacy of '*ádhibhar*' (Minimum Guarantee Duty) and tried to ignore the importance of 'brands' of alcohols in issuing procurement orders.
16. As mentioned in the DG's Report, *Writ Petition No. W.P.(C) 2932 and 2925 of 2015* were also filed before the Hon'ble High Court of Uttarakhand by two IMFL manufacturers/suppliers (*i.e.* USL and Pernod), *inter alia*, alleging that





सत्यमेव जयते



the Additional Excise Commissioner (Licensing), Uttarakhand had failed to provide the minimum stock of IMFL, which was to be maintained in the warehouses of FL-2 licensees. The Hon'ble High Court of Uttarakhand *vide* its judgement dated 23.12.2015 had directed the Additional Excise Commissioner (Licensing) and the District Collector of the different districts to ascertain and communicate the minimum stock of IMFL, on the basis of the consumer demand and order placed by the retailers, which was to be maintained at all times in the FL-2 licensees' warehouses. In pursuance to the order of the Hon'ble High Court of Uttarakhand, the Additional Excise Commissioner (Licensing), *vide* order dated 31.12.2015 directed OP-1 to maintain monthly minimum stocks of each brand of IMFL based on 15 per cent increase in the quantity of sale of each brand of IMFL during the FY 2014-15. In this context, OP-1 submitted before the DG that Additional Excise Commissioner (Licensing) was supposed to fix minimum stock requirement for OP-1, while the collectors for the respective districts were supposed to fix the minimum stock requirement of OP-2 and OP-3. Based on the submissions of OP-1 and the Additional Excise Commissioner (Licensing), the DG found that OP-1 did not follow the directions of the Additional Excise Commissioner (Licensing) in respect of procurement of alcoholic beverages.

17. The DG in the investigation report thus concluded that non-maintenance of minimum level of different brands at all times and carrying out the procurement of alcoholic beverages in a manner which was arbitrary and one-sided by OP-1 adversely affected competition and OP-1 abused its dominant position in the relevant market, which resulted in denial of market access to the products of USL and Pernod in the State of Uttarakhand. Thus, the DG found actions of OP-1 in contravention of the provisions of Section 4(2)(c) read with Section 4(2)(b)(i) of the Act. Further, considering the dependence of OP-2 and OP-3 on OP-1 for supply and having no independent powers to procure alcoholic beverages on their own, investigation concluded that OP-2 and OP-3 could not



सत्यमेव जयते



be held to be contravening the provisions of Section 4(2)(c) read with Section 4(2)(b)(i) of the Act.

18. As regards clauses of the agreements entered into by OP-1 with USL and Pernod for purchase of alcoholic beverages, the investigation found that Clauses 7.1, 7.2, 7.3, 14, 4, 1.1, and 2.6 were one-sided, unfair, abusive and anti-competitive in terms of Section 4(2)(a)(i) of the Act. The findings of the DG with regard to these clauses are as under:

19. Clause 7.1 of USL agreement and Pernod agreement was as follows:

*“7.1 If stock of Beer and IMFL/FMFL is not disposed of within 60 and 120 days (180 days for Wine cider and Brandy), respectively, the corporation would levy inactive stock penalty at Rs. 3/- per case per day and any tax/levy chargeable on inactive stock penalty. This penalty will be charged proportionately in case of loose bottle also on the same pattern. The Board out of any payment due to manufacturer shall recover such inactive Stock Penalty.”*

In this regard, OP-1 submitted before the DG that this clause was to ensure financial viability and to avoid significant increase in costs associated with unsold stock. The DG noted that, on the one hand, OP-1 had right of option to dispose unsold inventory and, on the other hand, OP-1 also kept the right to levy inactive stock penalty at ₹ 3/- per case per day on USL and Pernod. In this regard, the DG also noted that OP-1 was required to procure IMFL in accordance with market demand based on indents received from the Sub-FL2 licensees. In a situation where OP-1 procured IMFL without considering the market demand which may have resulted in piling of unsold stock, then the suppliers/manufacturers should not be made liable for the resulting losses. Therefore, the DG concluded that the right to levy inactive stock penalty did not seem to be fair and was found to be violative of the provisions of Section 4(2)(a)(i) of the Act.



सत्यमेव जयते



20. Clauses 7.2 and 7.3 provided unfettered and unilateral right to OP-1 to dispose of IMFL remaining unsold for over 150 days. Further, the difference between the price of delivery of the alcoholic beverages and the amount so realised by disposal of IMFL was required to be borne by the manufacturers. In this regard, OP-1 submitted before the DG that to ensure financial viability and to avoid significant increase in cost associated with unsold stock, it had this option to dispose of any unsold inventory. In this regard, the DG noted that it is logically inferred that there should never be any significant unsold inventory, if OP-1 procures brands of IMFL as per the market demand in accordance with competition dynamics in the market. In case, OP-1 procures brands of alcoholic beverages without considering the market demand which results in piling of unsold stock, the suppliers/manufacturers should not be made liable for the resulting losses. Further, these Clauses do not elaborate the manner of disposal of unsold stock by OP-1. In view of the above, Clauses 7.2 and 7.3 of OP-1 agreements with USL and Pernod were found to be contravening the provisions of Section 4 (2) (a) (i) of the Act.
21. Clause 14 of the said agreement enabled OP-1 to claim liquidated damages from USL and Pernod in the event of each breach of agreement by them. Such liquidated damages were put at ₹ 3 lakh for each breach of agreement and the amount of liquidated damages was capped at 10% of the total value of the liquor to be delivered by them. In this regard, OP-1 submitted before the DG that this clause enabled to claim compensation of any additional costs as it did not have sufficient mechanism to cover any additional expenses through its functions and operations. The DG noted that the submission of OP-1 lacked merit because the argument of it not having sufficient mechanism to cover additional expenses did not seem to justify its right to claim liquidated damages. Further, there was no mechanism provided in the clause for grant of any opportunity to USL and



सत्यमेव जयते



Pernod to address any breach of agreements by them to avoid liquidated damages.

22. As regards Clause 4, it gave right to OP-1 to terminate any or all of the orders for supplies placed on USL and Pernod in the event if USL or Pernod or any of their representatives, workers, employees indulged in forgery, falsification, fabrication of any document, bill, voucher or delivery challan or commit any offence by not adhering to the laws in respect of supply of liquor or if they indulged in any unfair trade practices. Further, such clause also granted right to OP-1 to terminate any or all the orders for supplies placed on USL and Pernod if they or their representatives indulged in any activity which was 'prejudicial to the interest of the Board (OP-1)'. In this regard, the DG found that the term 'prejudicial to the interest of the Board' had not been explained and seemed to grant wide discretion to OP-1 to terminate any or all of the orders for supplies placed on USL and Pernod if OP-1 considered that actions of USL and Pernod or their representatives were prejudicial to its interest.

23. Clause 1.1 of USL agreement and Pernod agreement had different provisions. Clause 1.1 of USL agreement is reproduced below:

*"1.1 Order for IMFL for each month will be given in the beginning of the month with 30 days validity and supply have to be made within these 30 days. Order will be determined as per companies growth of same month of previous year. Subsequent order will be given on the same formula but the closing stock will be deducted."*

The DG after considering the submission of OP-1 found that this clause defined the methodology to be adopted between OP-1 and USL in terms of timings of placing of order and delivery of supplies and the basis of determining the quantity of OP-1 for placing order for supplies to USL. Further, the DG noted that OP-1 continuously breached the clause during the relevant period as it did not rely on the sales volume of USL during the previous year, *i.e.* 2014-15 while



सत्यमेव जयते



determining the quantity in the procurement orders issued by it to USL during the year 2015-16 which was a direct result of abuse of dominant position by OP-1.

24. Clause 1.1 of Pernod agreement is as under:

*“1.1 The quantity of Liquor to be procured and distributed shall be determined by the Board from time to time in view of the demand for Liquor manufactured/supplied by the Manufacturer.”*

As mentioned in the DG’s report, the above clause specified that OP-1 is required to consider the demand of liquor manufactured/supplied by Pernod as the basis to arrive at the quantity of order of supplies to be made by OP-1 to Pernod. However, the DG found that OP-1 was in continuous breach of this clause during the relevant period as OP-1 did not rely on the demand of liquor manufactured/supplied by Pernod while determining the quantity in the procurement orders issued by it to Pernod during the relevant period which was a direct result of the abuse of dominant position by OP-1. Therefore, the DG concluded that the conduct of OP-1 in respect of execution of the above clause is anti-competitive.

25. As regards Clause 2.6 of USL and Pernod agreements, this clause gave OP-1 the right to recall the pending orders for supplies in case USL and Pernod did not deliver the ordered quantity or indulged in repeated delays in adhering to the delivery schedule. OP-1 may also impose penalties on USL and Pernod in case of the above scenario. In this context, the DG found that this clause did not provide any mechanism wherein USL and Pernod were given opportunity to take corrective measures before OP-1 exercised the said rights. After considering the submission of OP-1, the DG concluded that Clause 2.6 of the USL and Pernod agreements were one-sided, unfair, arbitrary and hence anti-competitive.



सत्यमेव जयते



26. The investigation concluded that OP-1 had inserted one-sided, unfair and anti-competitive clauses in agreements dated 15.05.2015 and 22.06.2015 entered into by OP-1 with USL and Pernod, respectively, and thereby OP-1 abused its dominant position in the relevant market.

### **Objection/Suggestion to DG Report**

27. The Commission considered the Investigation Report submitted by the DG, in its ordinary meeting held on 26.04.2018, and decided to forward copies of the same to the parties for seeking their respective objections/suggestions thereto. The OPs were directed to file their written objections/suggestions by 25.05.2018 and the Informant was directed to file the same by 01.06.2018. OP-3 submitted its objections to the DG's Report on 25.05.2018 whereas OP-1, after seeking extensions, submitted its objection to the Investigation Report on 20.07.2018.
28. Both OP-1 and OP-3, *inter alia*, opposed the findings of the DG on the relevant geographic market by contending that each type of alcoholic beverages would constitute a distinct and separate relevant market. They stated that the Investigation has overlooked the fact that the OPs operated in a supply chain and as such did not offer any product and consequently, had no role to play in determination of price and demand of alcohol beverages. Therefore, distribution channel could not constitute a separate relevant product market.
29. Further, it was submitted that the narrowest possible delineation of the relevant geographic market would be the State of Uttarakhand, as alcohol is a State subject and the competitive landscape is regulated uniformly across the state. Accordingly, OP-1 and OP-3 suggested the relevant market as: (a) Market for beer in Uttarakhand, (b) Market for Wine in Uttarakhand, and (c) Market for Spirit in Uttarakhand, which could further be categorised into five categories (whisky, rum, vodka, gin and brandy).



सत्यमेव जयते



30. On the issue of alleged dominant positions of OPs, both OP-1 and OP-3 contended that their activities of procurement and supply of alcoholic beverages, respectively, were in operation for a very short period of time and could not be concluded as market power. Further, OP-1 and OP-3 claimed that they could not act independently as institutional factors prevented them from exerting their market power as they were required to adhere to the Liquor Wholesale Order. Moreover, both the OPs also contended that their assets and revenues each did not even meet the *de minimis* thresholds notified by the Commission. In addition, OP-1 also submitted that USL is 5861% bigger than OP-1's FL-2 division in terms of value of assets and 234642% larger in terms of turnover. Thus, on basis of the above mentioned facts, OP-1 and OP-3 submitted that the findings of the DG suffered from inconsistencies and, therefore, could not be relied upon to conclude the dominance of OPs. However, OP-3 supported the conclusion in the investigation report that there was no contravention of Section 4(2)(c) and 4(2) (i) of the Act by OP-3 as it was totally dependent upon OP-1.
31. As regard the findings on abuse of dominance, OP-1 submitted that the DG's report concentrated only on two manufactures, namely USL and Pernod. The submissions of various other alcohol beverages manufacturers including Beam Global Spirits and Wines (India) Pvt. Ltd. and Bacardi India Pvt. Ltd. were not relied upon. The submissions of other players indicated as to how the market had a more level-playing field with regard to supply of alcoholic beverages in 2015-16. Further, the DG has focused on procurement only between the months of August 2015 and January 2016. OP-1 placed orders on USL and Pernod, consistently for three months – May, June and July 2015. The DG's report has made no analysis of these months when OP-1 placed orders for supplies upon USL and Pernod but these orders were never honoured by these companies.
32. The DG has without any assessment concluded that consumer demand was demonstrated through sales of USL and Pernod in the year 2014-15 and 2016-17. This observation was baseless and without merit as consumer demand was



सत्यमेव जयते



not predicated on a specific brand of alcoholic beverages which meant that for a consumer, the demand was typically for a category of alcohol. For instance, within category of whisky, the consumers considered all brands as interchangeable. Accordingly, OP-1 submitted that high market shares of USL and Pernod were not attributable to high consumer demand but to the capital intensive nature of the industry. As the companies like USL and Pernod had significant resources, their products have a wider outreach which did not reflect the brand specific demand by consumers. The presence or absence of a specific brand would not affect consumers' purchasing decision. OP-1 substantiated its argument with the submission of the fact that during 2015-16, total supply of alcoholic beverages in the State of Uttarakhand increased to approximately 38,53,494 cases in comparison to total supply in 2014-15, which was 32,98,697 cases. This showed lack of brand loyalty in the supply of alcoholic beverages. Thus, OP-1 submitted that lower procurement of alcoholic beverages of USL and Pernod could not be considered as against actual consumer demand.

33. As regards findings of the DG that OP-1 did not make supplies in accordance with the brand-wise indents raised by OP-2 and OP-3, OP-1 submitted that indents raised by OP-2 appeared to be on unofficial letter(s) (*i.e.* not on letter head). Therefore, OP-1 was not able to locate these corresponding documents in its record. Further, the DG placed extensive reliance on the statements made by Mr. B.L. Rana, General Manager, OP-2 to state that there was regular raising of brand-wise indents by OP-2. However, OP-1 submitted that these statements could not be relied on, given that their veracity had not been established as OP-1 was not allowed to cross-examine the said officer on the statement given by him.
34. Further, OP-1 submitted that retailers had more than one mode of procuring alcoholic beverages. Firstly, Clause 11 of the Liquor Wholesale Order dated 27.04.2015 provided for an alternative mode of procurement in the form of redressal mechanism whereby Excise Department could ensure supply of





सत्यमेव जयते



specific alcoholic beverages in line with the indents provided by the retailers. Secondly, the Hon'ble High Court of Uttarakhand, in its judgement dated 09.07.2015 [Writ Petition 1677 (M/S) of 2015] granted the State Excise Department the liberty to permit retailers to procure liquor directly from the distilleries of alcohol manufacturers if the retailers could not procure alcohol in the quantities demanded by them through OPs. In pursuance to judgement of the Hon'ble High Court of Uttarakhand, the Uttarakhand State Excise Department addressed a letter dated 10.07.2015 to all District Collectors in the State of Uttarakhand directing them to act in accordance with the direction given by the Hon'ble High Court of Uttarakhand. Further, OP-1 submitted that the DG ignored the submissions made by the Uttarakhand Excise Department which clearly evidences the fact that the Hon'ble High Court of Uttarakhand had created an alternate mechanism for procurement of alcoholic beverages.

35. Apart from above, OP-1 also stated in its submission that the Informant provided month-wise supply orders of alcoholic beverages received by its members, namely USL and Pernod, which are commercially sensitive information. Accordingly, OP-1 submitted that such exchange of commercially sensitive information, *prima facie*, appears to be a contravention of the provisions of Section 3(3) of the Act.
36. As regards findings of the Investigation Report that certain clauses of the agreements signed between OP-1 and IMFL manufacturers were one-sided and abusive in nature, OP-1 submitted that terms and conditions as drawn up by it were not arbitrary and unfair as they were based on established models of procurements of alcohol in different states. Further, it submitted that the agreements were finalised based on negotiations with USL and Pernod. OP-1 also submitted that alleged violation of Liquor Wholesale Order and resultantly Clause 1.1 of the Agreements regarding determination of quantity of alcohol to be procured was beyond the jurisdiction of the Commission as contractual breach could not be considered a competition law issue.



सत्यमेव जयते



37. OP-1 submitted that it never invoked these clauses in the Relevant Period to the detriment of these manufacturers. Also, this was verified when the Informant admitted in its submission dated 12.09.2016 that no penalty was ever paid by USL in the FY 2015-16 for unsold stock or for any other reason. OP-1 submitted the following business justifications for the clauses of the Agreements which have been found anti-competitive by the DG:

- (i) **Clauses 7.1- 7.3** are inserted to ensure financial viability through option to dispose of unsold inventory in a timely manner. Any unsold inventory declines in qualitative value and these clauses were introduced to minimise the risk of sub-standard products being sold.
- (ii) **Clause 14** enabled OP-1 to claim compensation for any additional costs, due to lack of sufficient mechanism to cover any additional expenses or overheads through its functions and operations in the relevant market(s), it merely reserved its right to seek damages.
- (iii) **Clause 4** did not vest with OP-1 any unfettered right. It only enabled OP-1 to cancel order placed upon the alcohol manufacturers if they acted prejudicially to its interests and not to unilaterally terminate the agreement.
- (iv) **Clause 1.1:** OP-1 submitted that a contractual breach could not be considered to be a competition law issue.
- (v) **Clause 2.6** gave the right to recall the pending orders for supplies in case USL and Pernod did not deliver the ordered quantity. The clause further mentions that OP-1 may impose other penalty on USL and Pernod for repeated delay. The DG found this clause to be one-sided, unfair and arbitrary. In this regard, OP-1 submitted that the terrain through which alcohol was distributed was not conducive to ensure a seamless supply and, products were damaged in the process. In such a manner, it would actually be unfair to demand losses by OP-1 who was merely procuring and



सत्यमेव जयते



transporting the product pursuant to the directions issued to it. Further, breakages of alcohol bottles, while inevitable would also unjustifiably increase costs of operations of OP-1. Accordingly, OP-1 justified this clause as it was a redressal mechanism, entered into based on one-on-one negotiations with USL and Pernod.

38. OP-2, *vide* application dated 10.08.2018 submitted that it accepted the findings in the Investigation Report. OP-2 mentioned that it was regularly placing the orders as per the Liquor Wholesale Order dated 27.04.2015. It was not allowed to procure the alcoholic beverages on its own as the sole right of procurement was vested with OP-1.

***Informant***

39. The Informant supported the findings and conclusions arrived by the DG in relation to delineation of the relevant market, dominant position of OP-1, OP-2 and OP-3 and abuse of dominant position by OP-1. However, the Informant disagreed with the determination of the DG, in relation to the conduct of OP-2 and OP-3, which according to the DG was not in contravention of the provisions of Section 4 of the Act. The Informant submitted that OP-2 and OP-3 were mandated under the Liquor Wholesale Order to ensure availability of all brands in accordance with demand and their complicity in relation to placement of orders to OP-1, could not be overlooked merely on account of the fact that they did not have any independent right to procure alcoholic beverages.
40. The Informant also submitted its response to the objections to the DG's report filed by OP-1 and OP-3. As regards submission by OP-1 with regard to delineating the relevant product, the Informant contented that OP-1's objection confused the delineation of relevant market under Section 5 of the Act with Section 4 of the Act. According to the Informant, delineation of the relevant market has to be done keeping in mind the service that is being provided by the parties in question, which the DG has correctly defined. Further, the objection of



सत्यमेव जयते



OP-1 was erroneous in nature in as much as OP-1's focus has been on the product and not upon the service/activity of procurement and distribution provided by it. As regards the claim of the OP-1 that relevant geographical market was same across the entire State of Uttarakhand for procurement and distribution of alcoholic beverages, the Informant submitted that OP-1 had not considered the licenses provided to OP-2 and OP-3, which were clearly restricted to a demarcated set of districts.

41. On the issue of dominance, OP-1 submitted that it was operating as FL-2 license holder for a short period and during this short period of operation; it could hardly wield any market power or possess an ability to exert an influence over a significant period of time. In this regard, the Informant submitted that the statutory monopoly granted to OP-1 by virtue of the Liquor Wholesale Order was for a period of five years and not limited to a year. However, its statutory monopoly was revoked by the Government after a period of one year through notification 288/XXIII/2016/04(01)/2016 dated 19.04.2016. The Informant also noted that the time period was not a relevant test for determining abuse of dominance in the facts of the present case as OP-1 enjoyed a legal monopoly and was granted the exclusive right for the wholesale procurement and distribution of alcoholic beverages in the State of Uttarakhand. Thus, an assuagement of market position at different points of time would have no effect on finding of dominant position as OP-1 was placed in the position of a monopolist.
42. Further, the Informant noted that OP-1 and OP-3 had made similar submissions and adopted similar positions in their legal defence, whereas OP-2 which was also playing an identical role as OP-3 has adopted considerably different approach in legal defence and its submission before the DG's office. As per the Informant, it was possibly because OP-1 and OP-3 had common managing Director and hence, were acting in unison, whereas OP-2 was acting independently.



सत्यमेव जयते



43. As regards OP-1's allegation that providing information regarding sales figure of USL and Pernod, which was commercially sensitive, amounted to contravention of the provisions of Section 3(3) of the Act, the Informant submitted that such information was provided by USL and Pernod directly to external counsel only. Further, complete confidentiality was maintained at all times by redacting any competitor information or commercially sensitive data, from the copies shared with USL and Pernod, while finalising the Information and response. The Informant also submitted that OP-1 had not provided any evidence/detail establishing how sharing of disaggregated (historical) sales data had caused an appreciable adverse effect on competition.
44. On OP-1's objection that the DG had limited its assessment to only two alcoholic beverage manufacturers (USL and Pernod), the Informant noted that these two manufacturers were amongst the largest suppliers of the alcoholic beverages in the State of Uttarakhand and, therefore, were most affected enterprises by the abusive practice of the OPs. This had also been admitted by OP-1 in its reply to the DG's report that procurement was done in arbitrary manner to dislodge the alleged duopoly of USL and Pernod in the State of Uttarakhand.
45. With regard to alternative procurement mechanism to address complaints from retailers, the Informant submitted that OP-1, despite the order dated 09.07.2015 passed by the Hon'ble High Court of Uttarakhand, did not take any steps to either comply with and/or to remedy the grievance raised by the retailers. Further, the Informant pointed out that in the order dated 23.12.2015, the Hon'ble High Court of Uttarakhand noted its earlier order dated 09.07.2015 and observed that: (a) retailers were facing grave hardship as they were not in a position to cater to the consumer demands, resulting in significant drop in sales, (ii) several retailers wrote to in-charges/officials of OP-2 and OP-3 with request for supply of liquor brand-wise, (iii) retailers wrote to OP-1 to provide them all brands of IMFL for sale in the open market, as there was demand for the same in



सत्यमेव जयते



the said market, and (iv) retailers also questioned OP-1 as to why the orders were not being placed to the alcoholic beverage manufacturers commensurate to the quantity procured month-wise corresponding to the same period of the last financial year. As submitted by the Informant, the above observations of the Hon'ble High Court of Uttarakhand took note of the alleged alternate procurement mechanism provided in one order dated 09.07.2015, and yet found that retailers were still suffering even as of 23.12.2015 owing to the inaction of the OPs.

46. The Informant further submitted, although no such alternate procurement policy was adopted as was evident from the Hon'ble Uttarakhand High Court order dated 23.12.2015, even assuming that a policy was adopted which allowed the retailers to procure brands from the alcohol beverage manufacturers directly, such a procurement policy would be impractical and not be commercially feasible for a number of reasons such as being economically unviable, regulatory difficulties for retailers, in addition to transport and logistical issues.
47. In response to OP-1's submission that there was no denial of access as OP-1 continued to procure from USL and Pernod, the Informant submitted that there was a clear violation of Section 4(2)(c) of the Act for the following reasons: (i) OPs denied market access through discriminatory procurement practices as retailers were forced to procure only those IMFL brands that were available with OPs, and (ii) non-fixation of minimum stock levels as no supplies were made by the Informant's members for several IMFL brands for 3-6 months. Informant also rebutted the interpretational issue raised by OP-1 that it did not either 'purchase' or 'sell' alcoholic beverages and hence Section 4(2)(a) was not applicable to the activities of OP-1. In this regard, the Informant submitted that OP-1 attempted to interpret Section 4(2) (a) in a convoluted manner without taking into account that (a) manufacturers are dependent on OP-1 in order to access the market and such access is for the ultimate purpose of sale of the products, and (b) the medium to reach the point of actual sale (between the



सत्यमेव जयते



retailer and the end-consumer) is controlled by the OPs. Therefore, if OP-1's interpretation is accepted then it would mean that a dominant entity which controls the entire distribution chain could never be held guilty of abuse of dominant position.

48. The Informant further submitted that the sudden surge in sales by USL and Pernod when OPs exited from operation with effect from 19.04.2016 indicated that OPs abused their dominant position by not placing orders commensurate with demand for brands of USL and Pernod, which historically enjoyed high demand. The Informant placed reliance on some sales data from the DG's report to explain such arbitrary conduct of OPs for not placing orders.

### **Show Cause Notice**

49. Pursuant to the receipt of objections to the Investigation Report by the Parties, the Commission heard the parties on 07.08.2018 and 13.08.2018 on the DG's report. The learned Senior Counsel, appearing for the Informant supported the findings and conclusions arrived by the DG in relation to delineation of the relevant markets, dominant position of OP-1, OP-2, and OP-3 and abuse of dominant position by OP-1. However, the Informant disagreed with the determination of the DG, in relation to the conduct of OP-2 and OP-3, which according to the DG was not in contravention of the provisions of Section 4 of the Act. The Informant contended that OP-2 and OP-3, along with OP-1, being controlled by the State of Uttarakhand, constituted a "group", as has been defined under Section 5 of the Act, and each of the OPs has abused its dominant position, both separately as well as a group. Further, according to the Informant without the active or passive involvement of OP-2 and OP-3, OP-1 would not have been able to abuse its dominant position. The Informant also alleged that had Clauses 11 and 12 of the Liquor Wholesale Order been followed in a free and fair manner, the demand for liquor of the Informant's members would have



सत्यमेव जयते



remained in proportion to the sales witnessed prior to the issuance of the said order and as affirmed by the sales figure of the subsequent year, viz. 2016-2017.

50. While the Learned Counsel of OP-3 argued in response to the Informant's submission on the issue of its contravention of provisions of Section 4 of the Act, counsel for OP-2 stated that its written submission made *vide* its application dated 10.08.2018 may be treated as response to the Informant's submission.
51. The Commission observed that the DG in the Investigation Report had found that OP-1 indulged in arbitrary and unfair procurement of IMFL in the State of Uttarakhand. Further, the DG in the Investigation Report stated that despite the requirement of Liquor Wholesale Order and several communications from Additional Excise Commissioner, OP-2 and OP-3 failed to maintain the minimum stock levels of different brands of alcoholic beverages, during a large part of the relevant period. The DG's report also stated that sales of USL and Pernod drastically declined during the relevant period and normalised back from April 2016 onwards, upon the Liquor Wholesale Order being replaced subsequently by a new order.
52. The Investigation Report of the DG premised that OP-2 and OP-3 were not in a position to act independently, in terms of the Liquor Wholesale Order and the said OPs had exclusive rights of distribution to retailers in their respective divisions. Further, the Investigation Report mentioned that OP-2 and OP-3 were totally dependent on OP-1 for supplies.
53. After hearing the parties and considering the Investigation Report of the DG, the Commission observed that the question that needed to be examined in the present case was whether OP-2 and OP-3, acted in contravention of their respective roles and responsibilities as dominant suppliers, in the respective relevant markets. Thus, the Commission *vide* its order dated 30.08.2018 (hereinafter referred to as '**Show Cause Order**'), issued a notice to OP-2 and





सत्यमेव जयते



OP-3, to provide an explanation as to why the said OPs should not be held in contravention of the provisions of Section 4(2)(b)(i) and 4(2)(c) read with Section 4(1) of the Act, notwithstanding that the investigation had found the conduct of OP-2 and OP-3 to not have fallen foul of the provisions of the Act.

### **Objections/Response to Show Cause Notice**

54. The Commission *vide* its order dated 30.08.2018, directed the parties to file their respective replies to the observations of the Commission as contained in the said order within a period of four weeks of the receipt of the order. Subsequently, OP-2 and OP-3 submitted their responses on 08.10.2018 and 12.10.2018, respectively. The Informant did not submit any response but *vide* application dated 22.10.2018 requested the Commission for an early hearing in the matter. The Commission considered the responses to its order dated 30.08.2018 on 01.11.2018 and observed that OP-1 had not filed its response within the stipulated period. The Commission *vide* its order dated 01.11.2018, granted a final opportunity to OP-1 to submit its response within a period of two weeks, and directed that the matter be listed for final hearing on 06.12.2018.
55. In the meantime, OP-1 submitted an application dated 29.11.2018, requesting the Commission to postpone the hearing scheduled on 06.12.2018, stating that it had preferred an appeal being Competition Appeal (AT) No. 84 of 2018, with the Hon'ble National Company Law Appellate Tribunal (NCLAT) against the order dated 30.08.2018 of the Commission.
56. The parties appeared for final hearing on 06.12.2018. However, the learned Counsel for OP-1, at the outset submitted that the Hon'ble NCLAT, *vide* its order dated 05.12.2018, had granted an *ad-interim* stay on the proceedings before the Commission, till the next date of hearing, *i.e.* 14.12.2018, when the appeal filed by the said OP was listed before the Hon'ble NCLAT. The learned Counsel for the Informant objected to said submission stating that perusal of the



सत्यमेव जयते



order passed by the Hon'ble NCLAT dated 05.12.2018 indicates that stay was operative only *qua* OP-1 and there was no stay of hearing by the Commission *qua* other OPs. The Learned Counsel for OP-3 supported the stand of OP-1 that the order of the Hon'ble NCLAT was applicable to the entire proceedings before the Commission, and not *qua* OP-1 only. The Commission after hearing the submissions of the parties directed the matter to be listed for final hearing including on the notices to OP-2 and OP-3 as contained in the order dated 30.08.2018 of the Commission and fixed the matter accordingly for final hearing on 21.12.2018. Thereafter, the Hon'ble NCLAT had *vide* its order dated 19.12.2018, vacated the stay against hearing and granted time to OP-1 to file its reply to the observation of the Commission contained in the order dated 30.08.2018 by 04.01.2019. Further, the Hon'ble NCLAT directed that though it will be open to the Commission to hear the matter, but no final order shall be passed by the Commission, till the next date of hearing before the Hon'ble NCLAT, *i.e.* 25.01.2019.

57. After hearing the parties, the Hon'ble NCLAT *vide* its order dated 30.01.2019, granted an *ad-interim* stay on the proceedings before the Commission, till the next date of hearing, *i.e.* 25.02.2019, in Competition Appeal (AT) No. 84 of 2018 filed by OP-1. In view of this order passed by the Hon'ble NCLAT, the Commission postponed the final hearing to 20.03.2019.

58. The Hon'ble NCLAT finally heard the appeal filed by OP-1 on 23.07.2019 and pronounced its judgement on such appeal on 12.03.2020, dismissing the same. In its judgement, the Hon'ble NCLAT observed as under:

*“21. In view of the aforesaid fact we hold that the impugned order dated 30<sup>th</sup> August, 2018 does not amount to passing of an order under Section 27 of the Act, 2002 and thereby the appeal under Section 53B read with Section 53A is not maintainable.*

*22. Further the parties against whom certain observations have been made i.e. Garhwal Mandal Vikas Nigam Ltd and Kumaon Mandal Vikas Nigam Ltd. are not appellants in the present case and have not*



सत्यमेव जयते



*challenged the impugned order. In the circumstances while the appeal fails, we allow the Commission to pass appropriate orders after hearing the parties in accordance with law. The appeal is dismissed with the aforesaid observations. Liberty is given to Commission to pass appropriate final order in accordance with law. No cost.”*

59. In response to the Show Cause Notice dated 30.08.2018, OP-1, OP-2 and OP-3 submitted their replies dated 04.01.2019, 04.10.2018 and 12.10.2018, respectively. Submissions of the OPs are summarised below:

- (a) OP-1 in its reply dated 04.01.2019, has primarily dealt with its objections on delineation of the relevant markets, assessment of dominance, compliance with Liquor Wholesale Order, reduction of sales of some brands of USL & Pernod, and Complaints redressal mechanism. These submissions were already submitted by OP-1 in its objection to the Investigation Report *vide* its submission dated 20.07.2018 and the same have been mentioned in the preceding paragraphs.
- (b) Further, OP-1 submitted that the order dated 30.08.2018 was passed by the Commission wherein conclusive findings were made regarding it without giving an opportunity to the said OP for being heard. Moreover, the said order did not consider any of the submissions made by OP-1 in its comments and objections to the DG's Report. OP-1 also submitted that the observations made by the Commission *vide* its order dated 30.08.2019 relied on the oral statement of Mr. B.L. Rana, General Manager-Tourism and Liquor of OP-2 for which no cross-examination was permitted. Therefore, OP-1 submitted that the oral statement of Mr. B.L. Rana could not be relied upon and ought to be expunged from the record for this matter.
- (c) As submitted by OP-1, the findings against OP-1 had been made in ignorance of the fact that procurement and sale of alcoholic beverages in the State of Uttarakhand was regulated solely by the Excise Department.



OP-1 submitted that the overarching regulatory role of the Excise Department was never examined by the DG. Accordingly, OP-1 submitted that the findings of the DG and observation of the Commission in the order dated 30.08.2018 clearly indicated bias.

- (d) OP-2 submitted that the Liquor Wholesale Order conferred the duty on it to send requisitions/indents to OP-1, based on demand of the retailers. However, as submitted by OP-2, demands raised by it were never adhered to by OP-1, whereas, OP-3 submitted that as per the Excise Policy and Liquor Wholesale Order, functions of OP-3 were limited solely to the distribution of alcoholic beverages as supplied by OP-1 to the FL-5 licensees. The decisions regarding procurement of alcohol from the Alcoholic Beverage Manufacturers were taken solely by OP-1. It was thus evident that the allegations against OP-3 as made by the Informant could not stand as they did not pertain to activities of OP-3. As submitted by OP-3, it was responsible for the distribution of alcoholic beverages to the retailers and collected the payments made by the retailers, and transferred the amounts to OP-1. OP-1 then made payments to the alcoholic beverage manufacturers. OP-1 was also required to pay expenses incurred by OP-2 and OP-3. Of the remaining amount, after payment of expenses to OP-2 and OP-3, if there was a portion attributable to OP-2 and OP-3 as income, then OP-1 was to retain 75% of the attributable amount and transfer remaining 25% to OP-2 and OP-3.
- (e) OP-2 agreed with the findings of DG that acts of OP-2 and OP-3 were not in contravention of Section 4(2)(c) read with Section 4(2)(b)(i) of the Act, as there were totally dependent on OP-1 for supply of alcoholic beverages, having no independent authority to procure on their own. OP-2 states that demands were raised to OP-1 for various brands, but supplies were never in accordance with indents/demands raised, which was brought to the attention of the DG in form of copies of such letters.



सत्यमेव जयते



OP-2 regularly raised demands till Oct. 2015 and thereafter not so frequently, as there were instructions from OP-1 that demands were not to be raised brand-wise, rather they were to be raised as per *Adhibhar* (Minimum Guarantee Duty, paid by retailers on an estimated quantity). Still OP-2 kept on sending demands though not as frequently. It is not true that OP-2 failed to discharge its responsibilities under the Liquor Wholesale Order. OP-2 did all it could do, by informing OP-1 regarding consumer/market demands and also kept on informing Excise Department about the same.

- (f) OP-2 contended that it was not in a dominant position in the relevant market, as it was an agency to supply and distribute alcoholic beverages to the extent of permits issued by the State Excise Department. The maintenance of Minimum Stock level was dependent on procurements which were carried out by OP-1 as the power to procure alcoholic beverages was not vested with OP-2.
- (g) Further, as per the orders of Hon'ble High Court of Uttarakhand, if OPs were not able to supply to the retailers as per their demand, then Excise Commissioner was instructed to make such arrangements to make the alcoholic beverages available within 72 hours, failing which the retailer had right to procure the alcoholic beverages directly from the manufacturers.
- (h) OP-3 submitted that it was not accepting the responsibility of raising indents as per the retailers' demand. Whereas OP-2 accepted its duty to send indents as per the retailers demand. However, the investigation found that OP-2 did not raise indents on OP-1 for several months (such as, for November 2015, December 2015, January 2016, March 2016, and April 2016).



सत्यमेव जयते



- (i) OP-3 stated that the minimum stock was to be maintained by OP-1 at two FL-2 warehouses, which was to be ascertained by the Additional Excise Commissioner (Licensing), and for the districts under sub-FL2 to be ascertained by the District Collector. For the period, OP-3 operated as sub-FL2, no minimum stock was ascertained by District Collectors for any of the districts for which OP-3 was responsible. OP-3 was not involved in procurement of alcoholic beverages. Thus, the findings related to procurement could not apply to OP-3. If OP-1 did not procure alcohol as per the demand placed, then OP-3 could not be held at fault for as to how the procurement process was carried out by OP-1.
- (j) OP-3 has also contended that if manner of procurement, supply and distribution was not in consonance with consumer demand, then there would have been an overall drop in the sale of alcoholic beverages. However, total sales in the relevant period went up and the number of manufacturers catering to the market increased from 26 to 39.
- (k) OP-3 also contended that compliance or non-compliance with Liquor Wholesale Order was not a subject matter that warranted any investigation/inquiry under the provisions of the Act. No harm was caused to competition or consumers on account of alleged conduct of OP-3 during the relevant period. The submission in respect of delineation of the relevant market had not been considered. The Commission in its own order of combination of *Diageo Plc, Relay BV. and USL* had explicitly held alcohol to be agnostic to brand specification. Further, OP-3 cited the decision in *Ashish Ahuja v. Snapdeal.com* (Case No. 17 of 2014) wherein the Commission concluded that the two markets are different channels of distribution of the same product and are not two different relevant markets. OP-3 submitted the relevant market in the present matter to be market for alcoholic beverages in the State of



सत्यमेव जयते



Uttarakhand w.r.t following segments: Beer, Wine and Spirits (Whisky, Rum, Vodka, Gin and Brandy).

- (l) OP-3 stated that the DG made an error in concluding that OP-3 did not place indents on OP-1 for six months, rather indents were placed telephonically by OP-3 on OP-1, a fact acknowledged by OP-1 in its submission. OP-3 had also submitted before the DG regarding the loss of almost of all its records due to a fire outbreak in 2015, in respect of which a copy of FIR and news article were filed.
- (m) According to OP-3, there was nothing on record to demonstrate retailers' actual demand of IMFL during the relevant period. The Show Cause Order appeared to assume that specific brands of USL and Pernod were indicative of demand of IMFL. Even if it was assumed that consumer preference for alcoholic beverages was brand-specific, such specificity could be said to exist for premium and luxury brands. For instance, a consumer may not consider Johnnie Walker Black Label whisky to be substitutable with Glenfiddich Single Malt whisky. End-consumers of non-premium whisky brands (McDowells, Royal Stag, Imperial Blue, Whytehall, Afterdark, *etc.*) tend to be price-sensitive and not brand-specific. The DG had not examined the overall market scenario and had based the analysis on availability of 2-3 brands.
- (n) It was further contended that established liquor manufacturers/marketers had well-entrenched distribution network, which small and mid-sized manufacturers lacked, this acted as an entry barrier and placed smaller and newer players in a competitively disadvantageous position. The Liquor Wholesale Order intended that market for alcoholic beverages in the State of Uttarakhand was not dominated by a few large players and all liquor manufacturers must be given a fair chance to cater to the market.



सत्यमेव जयते



- (o) The Show Cause Order was limited to the supply/sale of brands of USL and Pernod only. The proceedings arose out of the information filed by ISWAI, which has 9 members out of which 5 are present in the State of Uttarakhand. It is stated that the brand-wise sales of other liquor manufacturers had not been examined. Even though a statement of other manufacturers had been recorded, neither Show Cause Notice nor the DG's Report considered statements of manufacturers other than USL and Pernod. Consumer preference for alcoholic beverages was not brand-specific.
- (p) The increase in sales of these brands after the Liquor Wholesale Order was rescinded as compared to sales during the relevant period had been relied by the Informant to conclude that the percentage change in sales proved that procurement and supply was not in accordance with actual demand whereas the fact was that high sales before and after the relevant period was on account of capacity strength and distribution reach of USL and Pernod, which other manufacturers lacked.
- (q) OP-3 also submitted that there was arbitrary supply by USL and Pernod. As per USL's data, the average market demand for each month based on sales for the FY 2014-15 was 87,885 cases. The order placed by OP-1 in the month of May was 76,130 cases, however, USL supplied 1,24,527 cases which clearly indicated that the dispatches were based on its own will and caprices.
- (r) Also, OPs were not part of a 'Group' and were neither a Single Economic Entity. Merely because OP-1 and OP-3 are government controlled and had a common managing director did not automatically mean that OP-1 and OP-3 did not function as independent enterprises. Also, OP-1 and OP-3 are structurally different, as the former is a board established under the Agricultural Produce Marketing (Development and





Regulation) Act, 2011 while latter is a government company established under the Companies Act, 1956.

**Analysis:**

60. The Commission has perused the investigation report of the DG, the respective suggestions/ objections on the DG Report filed by the OPs and the Informant and the replies to Show Cause Notice dated 30.08.2018 filed by the OPs and other material available on record. It also extensively heard the learned counsel(s) for the parties in the final hearing held on 15.12.2020. On consideration of the aforesaid, the following issues arise for determination in the present matter:
- i. Whether the relevant markets delineated by the DG are appropriate?
  - ii. Whether OP-1, OP-2 and OP-3 enjoy dominant position therein in the relevant market(s)?
  - iii. If answer to Issue No. 2 is in affirmative, whether the OPs have abused their dominant position in violation of the provisions of Section 4 of the Act ?
61. OP-1 had contended that it is not an enterprise and accordingly preferred writ petition before the Hon'ble High Court of Delhi against the *prima facie* order for the investigation under Section 26(1) of the Act, dated 19.07.2016. The OPs contended before the Hon'ble High Court that in the information being examined by the Commission, the OPs were only acting as agents of the State of Uttarakhand and neither of them could be considered as an 'enterprise' under Section 2(h) of the Act. The Hon'ble High Court in its judgement categorically held that the provisions of Section 2(h) of the Act also include a department of Government which is engaged in any activity relating to production, storage, supply, distribution, acquisition or control of articles or goods. The OPs were engaged in supply and distribution of IMFL. Such activity carried on by the OPs was clearly not relatable to any sovereign function of the State of Uttarakhand



सत्यमेव जयते



and, therefore, the OPs were not excluded from the ambit of Section 2(h) of the Act. Therefore, OPs were held to be enterprises within the meaning of Section 2(h) of the Act.

62. Further, OP-1 was engaged in the wholesale procurement and distribution of alcoholic beverages such as Foreign Liquor (which included IMFL) in the State of Uttarakhand. OP-2 and OP-3 were engaged as exclusive sub-wholesaler in the supply and distribution of alcoholic beverages in their respective regions, Garhwal and Kumaun in the State of Uttarakhand. Such activities pertaining to procurement and distribution/supply are in the nature of 'economic and commercial activities' for which profit distribution has also been defined under the provisions of the Liquor Wholesale Order itself. The Commission in its decision dated 29.11.2017 in the matter of *In Re: Surinder Singh Barmi and The Board of Control for Cricket in India*, Case No. 61 of 2010, has held that the definition of 'enterprise' under Section 2(h) is wide enough to include within its purview any economic activity carried on by any entity. As per this definition, an entity which is engaged in an activity relating to production, storage, supply, distribution, acquisition or control of any article or goods, or provision of services is an enterprise. An activity can be considered as an economic activity if an entity is operating in some market and there are buyers and sellers.
63. The Commission reiterates that if an entity is engaged in any activity, no matter with or without profit motive, it would be considered an enterprise as it interfaces with the market and hence, with other alternatives for the product or service in question. It is not 'generation of profits' rather the defining feature of an entity to be termed as an 'enterprise' under the Act is that the entity is engaged in some economic or commercial activity under Section 2(h) for the purposes of Section 4 of the Act.



सत्यमेव जयते



64. OP-3 in this regard, has cited the decision in *United Breweries Ltd. v. The Commissioner, Department of Excise, Entertainment and Luxury Tax, Govt. of NCT of Delhi*, Case No. 22 of 2019, wherein the Commission had held that the Commissioner, Department of Excise, Entertainment and Luxury Tax, Government of National Capital Territory (NCT) of Delhi (Office of Delhi Excise Commissioner) cannot be considered an enterprise. The Commission had in the said case observed that the alleged anti-competitive conduct related to discharge of its statutory functions that fell within the realm of public policy.
65. The Commission observes that the facts of the present case have to be differentiated from this earlier decision cited by OP-3. In this cited decision, the allegations were made against the department of Government of NCT of Delhi, responsible for regulation of liquor and narcotics which included country liquor, IMFL, foreign liquor and collected excise tax as prescribed from time to time. For such regulation, the statutory powers emanated from the Delhi Excise Act, 2009 and the rules framed thereunder and Medicinal & Toilet Preparation Act, 1955. The allegations pertained to imposition of licensing conditions for grant of L-1 license for wholesale vendor of IMFL.
66. At the outset, in respect of the issue/dispute that has arisen in the present matter, the Commission notes that the precedent is clear and well settled that in case of trade in liquor, the State has following three options: (a) To completely prohibit the trade in liquor, or (b) To create a monopoly for itself over manufacture, sale, possession or distribution of alcohol, or (c) To allow private individuals to trade in liquor. In the matter of *Khoday Distilleries Ltd v. State Of Karnataka and Others* (1995 SCC (1) 574), the Hon'ble Supreme Court has held that "*It (State) carries on business in products which are not declared illegal by completely prohibiting their production but in products the manufacture, possession and supply of which is regulated in the interests of the health, morals and welfare of the people. It does so also in the interests of the general public under Article*



सत्यमेव जयते



19(6) of the Constitution.” Therefore, each State has power to formulate its own policy regarding such trade, and regulate the supply of liquor within its territorial jurisdiction to ensure that what is supplied is “liquor of good quality” in the interest of health, morals and welfare of the people.

67. In the present matter, OP-1 is the licensee for procurement and distribution of liquor in the State of Uttarakhand and OP-2 and OP-3 are sub-licensees for their respective regions. The Commission observes that the grant of license for the trade of liquor is a statutory function, but in the present case, it is the Licensees, even though being wholly-owned Government entities, which are engaged in the economic activity of ‘procurement and distribution/supply of IMFL’ in the State of Uttarakhand.
68. Based on the above, the Commission holds OP-1, OP-2 and OP-3 to be ‘enterprises’ within the meaning of Section 2(h) of the Act.

#### ***Relevant Market***

69. The Commission notes that the focal product/service in the present matter is procurement and distribution of branded alcoholic beverages in the State of Uttarakhand.
70. The main grievance of the Informant 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. The Commission while forming a *prima facie* view under Section 26 (1) of the Act had observed 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 present case as the OPs procure and distribute all types of branded alcoholic beverages in the State of Uttarakhand.



सत्यमेव जयते



71. On a holistic reading of the Liquor Wholesale Order, it is seen that only OP-1 had the exclusive right to procure branded alcoholic beverages from the manufacturers for the entire State of Uttarakhand; and OP-2 and OP-3 had the exclusive right to distribute further the branded alcoholic beverages procured from OP-1 to the retailers located in the respective areas assigned to said OPs in such Order.
72. OP-1 has placed reliance on the decision in *In Re: Global Tax Free Traders and William Grant and Sons Ltd. & Ors.* (Case no. 87 of 2013) to contend that market for alcohol can further be divided into categories based on its ingredients, alcoholic content and manufacturing process. It has also cited decision in *United Spirits Limited/ Relay B.V. (Diageo)* [Combination Registration No. C-2012/12/97] to contend that market should be based on the type of alcohol. Further, OP-1 argued that a distribution channel cannot constitute a separate relevant product market, as per the Commission's previous orders in the *Mohit Manglani v. M/s Flipkart India Pvt. Ltd. & Ors.* (Case 80 of 2014) ('Mohit Manglani Case') and *Ashish Ahuja v. Snapdeal & Ors.* (Case 17 of 2014) ('Ashish Ahuja Case').
73. The Commission notes that the allegations of abuse have been reported in the market for procurement and supply of IMFL/Liquor. It is this service provided by OP-1 that is relevant for the purpose of delineation of relevant product market and not the types of alcoholic beverages which were supplied. Further, Liquor Wholesale Order enabled the OPs, especially OP-1, to procure and distribute all kinds of alcoholic beverages and any segmentation based on kinds of alcoholic beverages is not relevant for the purposes of defining the relevant market in the present matter.
74. The procurement and distribution of alcoholic beverages in the State of Uttarakhand, was undertaken by OPs, irrespective of the type of alcoholic beverages such as beer, wine, spirits, *etc.* OP-1 has contended that it operated in



सत्यमेव जयते



the supply chain and it did not offer any product, or have any role in the pricing of the products. It was simply an intermediary that procured alcoholic beverages from the manufacturers and then supplied to OP-2 and OP-3 for distribution.

75. The Commission observes that the competition assessment in respect of an alleged contravention of the provisions of Section 4 of the Act is different in scope and nature from a competition assessment of a proposed combination by way of merger notification under Section 6(2) of the Act. The Commission notes that erstwhile Hon'ble COMPAT in the matter of *The National Stock Exchange of India Ltd. v. CCI* (Appeal no. 15 of 2011), wherein it was held that the relevant market for stock exchanges is the service provided by the stock exchanges and is not dependent on the underlying product being traded in such exchange such as equity, derivatives, Futures or Options, *etc.*
76. In respect of reliance placed by OP-1 on the decisions in the *Mohit Manglani* Case and *Ashish Ahuja* Case, the Commission notes that the facts and circumstances involved in the present matter are different from that of the aforementioned decisions, as the OPs in present case are responsible for the procurement and distribution of beverages in the relevant market whereas the said cases pertained to online distribution channels being substitutable with the offline distribution channels, *i.e.* brick-and mortar stores, company-owned showroom, franchise stores, *etc.*
77. In respect of the relevant geographic market, the Commission notes that the regulations governing the procurement, distribution and supply channel of liquor vary from State to State, as each State forms a distinct geographic market for the procurement and distribution of liquor. Consequently, as per the Liquor Wholesale Order, with respect to procurement, the State of Uttarakhand is the relevant geographic market and for the distribution of liquor, the territory is further sub-divided into two separate geographic markets, *viz.* Garhwal and Kumaon region.



सत्यमेव जयते



78. Accordingly, the Commission finds that distinction amongst different kinds of alcoholic beverages such as beer, rum, whisky, wine, scotch, *etc.*, does not seem to be relevant in the facts and circumstances of the present case as the Liquor Wholesale Order has given exclusivity to the OPs in their respective areas of operations, *i.e.* procurement and distribution of all types of branded alcoholic beverages in the State of Uttarakhand. In other words, the OPs will remain dominant in any of the plausible relevant markets as each of the OPs had been granted exclusivity in its respective business and area of operation; and no other person could procure, supply or distribute alcoholic beverages in the State of Uttarakhand on account of the restrictions envisaged pursuant to the Liquor Wholesale Order. Accordingly, the Commission accepts the DG's findings on the relevant market and rejects the OPs' submissions. Therefore, the Commission is of the view that the relevant market for the purpose of the instant case would be (a) market for wholesale procurement of branded alcoholic beverages in the 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.

***Dominance:***

79. The Commission notes that it is relevant to appreciate the Liquor Wholesale Order granting exclusivity of operations to the OPs with respect to procurement and distribution of alcoholic beverages in the State of Uttarakhand. The provisions were framed in a manner that entry to any competitor in the relevant market was denied and all the OPs were able to act exclusively and independently in their respective relevant markets during the relevant period. Further, under the provisions of Section 19(4) of the Act, assessment of dominant position is seen in respect of multiple factors. The DG upon considering the factors such as entry barriers, market share of enterprises, size of resources and economic power reached the conclusion that OP-1 is in a



सत्यमेव जयते



dominant position in the relevant market of wholesale procurement of branded alcoholic beverages in the State of Uttarakhand, whereas OP-2 was in a dominant position in the relevant market for distribution of branded alcoholic beverages in its licensed area in the Garhwal region of the State of Uttarakhand and OP-3 is in a dominant position in the relevant market for distribution of branded alcoholic beverages in its licensed area in the Kumaun region in the State of Uttarakhand.

80. The OPs contended that they are not active in the market of IMFL/Liquor and do not compete with alcoholic beverages manufacturers, wherein the latter are big corporate companies with large number of resources at their disposal. OP-1 contended that it could not have been in a dominant position as its functions as an FL-2 licensee were restricted by the statutory mandate and it had no independence in its decision-making. The Excise Department of the State of Uttarakhand (U. K. Excise Department) played an overarching regulatory role in the process of procurement of alcoholic beverages in the State of Uttarakhand. The Uttarakhand Excise Department *vide* the Cost Card Order for FY 2015-16 determined the prices of the alcoholic beverages that OP-1 procured from different alcoholic beverage manufacturers. Through this Cost Card Order, the Uttarakhand Excise Department also fixed the commission due to OP-1 at ₹ 70 per case of alcoholic beverage. Further, the functions of OP-1 as an FL-2 licensee were determined by the Liquor Wholesale Order. Clause 14 of the Liquor Wholesale Order directed OP-1 to strictly comply with all directions or instructions issued by the Uttarakhand Excise Department and the Government of Uttarakhand.
81. OP-1 contends that it was an FL-2 licensee for an extremely short period of less than one year (from 01 May 2015 to 19 April 2016). OP-1 has placed reliance on the decision of the Commission in the case of *Belaire Owner's Association v. DLF Limited & Ors.*, (Case No. 19 of 2010) (*'Belaire case'*) wherein it was held





सत्यमेव जयते



that a position of strength can only be obtained over years and that dominance cannot be acquired or ascertained in a transient period of time. OP-1 submitted that the time period in which it was an FL-2 licensee is merely transient and does not result in dominance in the relevant market.

82. OP-3 submitted that OP-1 was responsible for procurement of alcoholic beverages, and OP-3 as a sub-FL-2 licensee played a limited role wherein it distributed such procured alcoholic beverages from OP-1 to retailers/ FL-5 licensees in its territory of operations. Accordingly, OP-3 could not be said to be present in the relevant market for sale of alcoholic beverages in State of Uttarakhand. In a similar manner, OP-2 emphasised that OP-1 was the sole agency for procurement of branded alcoholic beverages and OP-2's role was limited to receiving branded alcoholic beverages from OP-1 and distributing the same to retailers/ FL-5 licensees.
83. The Commission notes that the alcoholic beverages manufacturers were entirely dependent on the OPs for access to the retailers and in turn the end-consumers in the State of Uttarakhand. The important factor for consideration as per the provisions of Section 19(4) of the Act, is whether the dominant position is bestowed upon OP-1 owing to the Excise Policy and the provisions of the Liquor Wholesale Order and subsequently upon OP-2 and OP-3 in their relevant spheres of operation. In terms of the Liquor Wholesale Order, during the relevant period, OP-1 was the exclusive procurement agency and OP-2 and OP-3 were sole distributors of IMFL for their respective regions, and there was no other alternate access route to the market for the manufacturers who were entirely dependent upon the OPs for their services of procurement and distribution.
84. The Commission differs with the contentions raised by the OPs against the findings of the DG with respect to dominance of the OPs. OP-1's assertion that its function as a FL-2 licensee was restricted by statutory mandate and it had no



सत्यमेव जयते



independence in its decision-making is contradictory. The provisions of the Liquor Wholesale Order granted powers and discretion to OP-1 to decide the manner of carrying out business operations in the entire state which is further evident from the decision of the Hon'ble Uttarakhand High Court when directions were issued to the Excise Department officials. The Commission notes that the OPs enjoyed 100% market share in their respective markets ensuring no competition to the OPs from any other entities. Such regulatory exclusion of competition virtually allowed OPs to enjoy monopoly in their respective functions and also ensured complete dependence of retailers on OP-2 and OP-3, who in turn were dependent on OP-1 for effecting supplies. Based on factors such as market share, barriers to entry, high degree of dependence of retailers and consumers and absence of any alternative option for them, the Commission is of the view that the OPs enjoyed a dominant position in terms of Section 19(4) of the Act in the respective relevant markets as delineated above.

***Abuse of Dominance:***

85. As mentioned above, the DG in its report concluded that OP-1 contravened the provisions of Section 4(2)(c) read with Section 4(2)(b)(i) and Section 4(2)(a)(i) of the Act. The DG, however, stated that it did not find the acts of OP-2 and OP-3 to be in contravention of the provisions of Section 4(2)(c) read with Section 4(2)(b)(i) of the Act, as the investigation brought out that OP-2 and OP-3 were totally dependent on OP-1 for supply and were having no independent authority to procure alcoholic beverages on their own from any other source.
86. In view of the above, as already mentioned, the Commission *vide* its order dated 30.08.2018, issued a Show Cause Notice to OP-2 and OP-3, to provide an explanation as to why the said OPs should not be held in contravention of the provisions of Section 4(2)(b)(i) and 4(2)(c) read with Section 4(1) of the Act, though the investigation had not found any contravention against them.



सत्यमेव जयते



87. The Commission considers the submissions from the Informant and the OPs in response to the Investigation Report, and the Show Cause Notice dated 30.08.2018. These submissions offered by the OPs, as part of the response to the Show Cause Notice dated 30.08.2018, have also been considered by the Commission. Issue-wise analysis of submissions of the OPs is as under:

***Violation of Liquor Wholesale Order and Minimum Stock Requirement***

88. The Informant's main allegation was that consumers were denied brands of their choice due to non-availability of a few brands of USL and Pernod for a short period of time, and such non-availability caused appreciable adverse effect on competition. Also, the Informant alleged that OP-1 did not maintain minimum stock requirements as mandated under the Liquor Wholesale Order.
89. The Commission notes that the Liquor Wholesale Order mandated that OP-1 was required to maintain minimum stocks of all brands of foreign liquor/beer/wine as fixed by Additional Excise Commissioner (Licensing). It also provided that OP-2 and OP-3 shall maintain minimum stocks of all brands of foreign liquor/beer/wine as fixed by the District Collector of the concerned district. Relevant portion of the Liquor Wholesale Order No. 208/XXIII/2015/04(01)/2015TC dated 27.04.2015 is as under:

*“Clause 10: It will be mandatory for Mandi Parishad to maintain minimum stocks of all the brands of foreign liquor/ beer/ wine at FL2s as fixed by the Additional Excise Commissioner (Licensing) and at all sub FL2s as fixed by Collectors of the concerned district.*

*Clause 11: Sub-FL2 licensee of each district will make available all brands of foreign liquor at FL-2 license in accordance with the demands of the retailer licensee of the concerned district. In case the FL-2 license fails to make available the brands in accordance with the demands of the retailer licensee of foreign liquor, the retail licensee will file the*



सत्यमेव जयते



*complaint against FL-2 licensee before the Collector of the concerned district. The Collector of the district, on receipt of the written complaint, shall dispose off the same within 3 days of receipt. Any party would be entitled to file an appeal against the order of the Collector before the Excise Commissioner /Govt. within 15 days in accordance with rules.”*

A plain reading of Clauses 10 and 11 of the Liquor Wholesale Order suggests that OP-1 needed to maintain minimum stocks of all brands of foreign liquor/beer/wine as fixed by Additional Excise Commissioner (Licensing). It also provided that OP-2 and OP-3 shall maintain minimum stocks of all brands of foreign liquor/beer/wine as fixed by the Collector of the concerned district. The Liquor Wholesale Order also provided that where the OPs do not make available the brands in accordance with the demands of the retailer licensees, the retailers may file a complaint before the concerned district Collector who in turn was required to dispose of the complaint within three (3) days.

90. OP-1 has contended that any violation/non-compliance of the Liquor Wholesale Order by alleged arbitrary or discriminatory placing of orders or violation of a minimum stock requirement is an issue for consideration by the writ courts. The issues arising from alleged non-compliance with the Liquor Wholesale Order were adjudicated and remedies were provided by the Hon'ble High Court of Uttarakhand. A writ petition was filed in the Hon'ble High Court of Uttarakhand by the retailers (W.P. (M/S) No. 1677 of 2015) regarding the non-availability of certain brands and an order was passed on 09.07.2015, empowering the Excise Commissioner to ensure availability of all brands, should any demand for such brands not being met.
91. OP-1 also contended that in respect of minimum stock requirement the Hon'ble High Court of Uttarakhand in the writ proceedings [W.P. No. 2932 of 2015(M/S) and 2925 of 2015 (M/S)] filed by USL and Pernod, respectively, provided a remedy in December 2015 itself. The Hon'ble High Court of



सत्यमेव जयते



Uttarakhand had devised an alternate mechanism for procurement and had directed that minimum stock of alcoholic beverages should be maintained. No competition law issue arises out of the same because it cannot be assumed that other alleged statutory violations automatically amount to an abuse of dominant position under Section 4 of the Competition Act. The implementation of the Liquor Wholesale Order thus fell within the jurisdiction of the Government of Uttarakhand and/or the Uttarakhand Excise Department. The issues of sole dependence on OP-1 for procurement of alcoholic beverages, availability of specific brands of alcoholic beverages and maintenance of minimum stock were also effectively settled by a constitutional court.

92. OP-1 also relied on the decision of the Hon'ble Supreme Court in the case of *Competition Commission of India v. Bharti Airtel Limited & Ors.*, [(2019) 2 SCC 521] wherein need to permit specialised bodies and authorities to adjudicate upon specialised matters was recognised, and accordingly submitted that the issues raised in the Information under Section 19 of the Competition Act filed by the Informant have already been adjudicated and settled by the Hon'ble High Court of Uttarakhand. These issues cannot now be considered as competition law issues. Further OP-3 also cited the decision of Hon'ble Supreme Court in the case of *Khoday Distilleries Ltd. and Others v. State of Karnataka and Others*, (1995) 1 SCC 574, wherein it was held that the right guaranteed by the Constitution of India to carry any business would not be available for activities that are inherently immoral or criminal. The right to deal in goods or services that are *res extra commercium* is not absolute. Business in alcoholic beverages has been considered by courts as an immoral activity. OP-3 submits that not only can the Informant's plea not be entertained in proceedings initiated under the Act, but there is also no right to do business in alcoholic beverages that is available to the Informant. OP-3 further submitted that if liquor policies of States and Union Territories cannot be tested for arbitrariness under



सत्यमेव जयते



the Constitution of India because of the inherent nature of the business, then such policies cannot be tested for arbitrariness even under the Act.

93. OP-1 further submitted that *Adhibaar/* MGD (Minimum Guaranteed Duty) is a duty paid by the FL-5 retailers to the Uttarakhand Excise Department for selling alcoholic beverages. The FL-5 retailers approach Excise Department to assess the available stock of alcoholic beverages. On the basis of the available stock, the FL-5 retailers provide an estimate of the total quantity of alcoholic beverages they can sell and pay the duty on their estimates. MGD is a key source of revenue for the Government of Uttarakhand that is fixed by the Uttarakhand Excise Department for the whole year at the time of auctioning of the FL-5 licenses. The Uttarakhand Excise Department also sets targets for MGD for different months of the year. OP-1 was allocated the function of ensuring that the target MGD was being met.
94. OP-1 stated that in the months of May, June and July 2015, USL and Pernod failed to meet orders placed on them which resulted in low sales by FL-5 retailers. This led to low MGD paid by FL-5 retailers, to which the Excise Department issued letters to OP-1 and sub-FL2s highlighting the shortfalls in MGD and stated that MGD targets have to be met. OP-1 submitted that it was under an obligation to ensure that MGD targets are met. OP-1 has placed reliance on the statement of Mr. Dhiraj Singh Garbyal, Managing Director, OP-1 wherein he had admitted that OP-1 procured alcoholic beverages in a manner to ensure that the MGD targets are met. OP-1 has stated that it cannot be faulted for making procurement based on MGD to benefit the State exchequer for greater public good.
95. OP-3 further submitted that USL and Pernod themselves did not follow stipulations of the Liquor Wholesale Order and supplied alcoholic beverages either in excess of the quantity demanded by OP-1 or lower than the quantity



सत्यमेव जयते



demanded. OP-3 further submitted that on 28.07.2015, OP-1 issued a communication to OP-3 to not raise brand-specific indents rather raise indents based on *Adhibaar*/MGD payable. OP-3 contended that it was not obligated to maintain minimum stock requirement rather District Collectors were responsible for fixing the minimum stock. No minimum stock requirement was ascertained by the District Collector for which OP-3 cannot be held responsible under the Liquor Wholesale Order.

96. The Commission notes that a Writ Petition (M/S) No. 1677 of 2015 was filed before the Hon'ble High Court of Uttarakhand by several retailers of IMFL in the State of Uttarakhand wherein OP-1 was made one of the respondents. In this writ petition, the retailers/petitioners submitted that despite raising demands from time to time, IMFL brands demanded by the petitioners were not being supplied to them despite Clause 11 of the Liquor Wholesale Order dated 27.04.2015. While disposing of this writ petition by an order dated 09.07.2015, the Hon'ble High court of Uttarakhand made the following observations:

*“As per Clause of the Policy dated 27<sup>th</sup> April, 2015, every retail dealer on his demand shall be entitled for supply of the demanded brands of IMFL from FL2 licensee. **It is not in dispute that FL2 licence is now with Mandi Parishad Uttarakhand, therefore, Mandi Parishad Uttarakhand is duty bound to supply all the brands as demanded by the dealers at the earliest.**”*

*Present petition, thus, stands disposed of with the observation that Excise Commissioner, Uttarakhand shall personally look in to the grievances of the petitioners. He will ensure that brands demanded by the petitioners from the FL2 licensee, i.e. Mandi Parishad Uttarakhand shall be supplied to the petitioners / dealers preferably within 72 hrs. If Excise Commissioner comes to the conclusion that despite raising demands, retail dealers / licensee are not getting supply of the brands as demanded by them, he shall be at liberty to adopt such policy and to pass such orders permitting the petitioners/dealers to lift the different brands from the distillery directly in accordance with law.”*

*(emphasis supplied)*



सत्यमेव जयते



97. The Commission also notes that the Hon'ble High Court of Uttarakhand while disposing the writ petitions filed by USL and Pernod in their individual capacities *vide* order dated 23.12.2015 upheld the right of the State in deciding the liquor policy of the State and mentioned that the State can also impose restrictions and limitations on the trade or business in liquor as a beverage and made following observations:

*"21 ... When the petitioners are saying that there is sudden drop of supply orders of cases, the respondents are not coming up with a specific case as to why it is so, despite the fact that the retailers, time and again, are writing to the Uttarakhand Agricultural Produce Marketing Board to provide them all brands of IMFL for sale in the open market, as there is demand for the same in the said market. Presuming for the sake of arguments that there is no demand of all brands of IMFL in the market, as contended on behalf of respondent nos. 1 to 3, why retailers are writing to respondent no. 1, time and again, and why the orders are not being placed to the petitioner companies commensurate to the quantity (QPM) month-wise corresponding to the period of last financial year? In any case, the respondents have nothing to lose in it. They will be generating revenue out of it. Then why patronise a particular brand at the cost of the petitioners? The facts speak for themselves (res ipsa loquitur)." [Emphasis Supplied]*

*"27) A direction, is, therefore, issued to Addl. Excise Commissioner (Licensing) and District Collectors to fix minimum stocks (brand-wise) of Foreign Liquor to be maintained at all times by the respondent no.1 to 3, on the basis of orders placed by the retailers and commensurate to the consumer demand in accordance with Paras 10, 11 and 12 of the Communication dated 27.04.2015 and Rule 10, 11 and 12 of the Rules dated 30.04.2015.*





सत्यमेव जयते



*28) Till the aforesaid exercise is completed, it is provided that the orders shall be placed on the petitioner companies for the month of December 2015, corresponding to the sale period of December 2014, for the month of January 2016, corresponding to the sale period of January 2015, and so on and so forth.”*

98. After perusal of the extracts of above provisions of aforesaid Liquor Wholesale Order which provided framework to be adopted by OP-2 and OP-3 in distribution of branded alcoholic beverages, and relevant extract of above-mentioned judgement passed by the Hon'ble High Court of Uttarakhand, the Commission is of the view that Liquor Wholesale Order is formulated in such a manner that OP-2 and OP-3 were required to place demands with OP-1 and seek supply of alcoholic beverages in accordance with the consumer/ retailer demand in the market. The Commission further observes that it was imperative upon OP-2 and OP-3 to regularly raise brand-wise indents/requisitions on OP-1 based on the demands of the retailer licensees of their concerned districts, in accordance with the requirements of the said order and no deviation was provided in the said order
99. The submission of OP-3 indicates that it is not accepting the responsibility of raising indents as per the retailers' demand. Whereas OP-2 has accepted its duty to send indents as per the retailers demand, and the investigation found that OP-2 did raise indents on OP-1 except for months such as November 2015, December 2015, January 2016, March 2016, and April 2016.
100. The Commission notes that the Liquor Wholesale Order empowered the District Collector and the Excise Department to have the jurisdiction to deal with the complaints issued against OP-1. In this regard, OP-1 submitted that complaint letters written by certain retailers to OP-2 and OP-3 could not be treated as complaints within the framework of the Liquor Wholesale Order as they were not addressed to District Collector/ District Magistrate and the Excise



सत्यमेव जयते



Department. Accordingly, OP-1 submitted that when a specific procedure had been provided, it must be adhered to and any issue raised by retailers other than under the prescribed mechanism could not be construed as complaints by retailers. OP-1 further mentioned that during the relevant period, *i.e.* from 27.04.2015 to 19.04.2016, only one complaint had been filed through the proper mechanism and the same had been dealt with appropriately.

101. The Commission notes the observations made by the Hon'ble High Court of Uttarakhand in its order dated 23.12.2015 that a number of retailers wrote to Sub-FL2, OP-2 and OP-3 requesting supply of liquor brand-wise. Despite demand being raised by the retailers, the brands demanded by them were not supplied. It is also observed from order dated 23.12.2015 of the Hon'ble High Court of Uttarakhand that retailers were not using the alternate procurement channel, *i.e.* lifting the brands directly from distillery, to ensure the brand-wise availability of IMFL. In this regard, the Informant submitted that this alternate procurement was not commercially feasible for individual retailers due to transportation and regulatory difficulties.
102. The Commission observes that the State of Uttarakhand formulated the Liquor Wholesale Order in a manner through which State officials were vested with exclusive powers which included discretion to dictate as to what brands of alcoholic beverages were to be procured and distributed to retailers and sold to end-consumers. The State of Uttarakhand, like other states in the country, has created monopolies by canalising liquor procurement. The assertion that the Liquor Wholesale Order and non-compliance of its provisions is a matter under the jurisdiction of writ courts does not in any manner oust the jurisdiction of the Commission to examine if any abusive conduct has taken place. The provisions of the Liquor Wholesale Order and its impact with respect to dominant position and/or abuse thereof, could be scrutinised by the Commission under the provisions of Section 4 of the Act. The Commission notes that recourse to multiple proceedings on the same set of facts is not barred if remedies are



सत्यमेव जयते



available under different laws, and further the parties in the proceedings before the Hon'ble Uttarakhand High Court and before the Commission are not the same. It is also pertinent to point out that the scope of the petitions dealt by the Hon'ble High Court of Uttarakhand and the present proceedings before the Commission are substantially different from each other. The contention of OP-1 that implementation of the Liquor Wholesale Order is the function of State Government is correct, but during such implementation, issues in respect of competition law may arise and can be dealt with by the Commission.

103. The decision of the Hon'ble Supreme Court in the *Bharti Airtel Case* cannot be canvassed by OP-1 to stall the proceedings before the Commission as the facts involved in the said case are completely unrelated to the facts in the present case. In any case the information was filed before the Commission after the decisions rendered by the Hon'ble High Court of Uttarakhand, were not adhered to, as per the Informants. The decisions of the Hon'ble High Court of Uttarakhand were rendered in respect of non-implementation of Liquor Wholesale Order, whereas the proceedings before the Commission relate to abuse of dominant position by the OPs under various provisions of Section 4 of the Act in respect of non-adherence to terms of liquor policy and distorting competition as well as entering into one-sided agreements with certain IMFL manufacturers.
104. In respect of the contention raised by OP-3 that business in alcoholic beverages has been considered by Courts as an immoral activity and there is no absolute right vested with the Informant to do business in alcoholic beverages placing reliance on the Hon'ble Supreme Court's decision in *Khoday Distilleries Case*, the Commission observes that it is the prerogative of each individual State as to how it wants to proceed in respect of trade of liquor/ alcoholic beverages in its territory. However, the decision of the Hon'ble Supreme Court also emphasised that once the State permits trade or business in liquor, it cannot discriminate



सत्यमेव जयते



between the persons / suppliers who are qualified to carry on trade or business.

The relevant portion of the aforementioned judgement is reproduced below:

*“(g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business.*

*(h) The State can adopt any mode of selling the licences for trade or business with a view to maximise its revenue so long as the method adopted is not discriminatory.”*

The decision of the Hon’ble Supreme Court suggests that the State is under an obligation to provide level-playing field to all the players to participate in the trade in liquor. Accordingly, once the State Government, through its fully owned entity, has decided to act as an intermediary responsible for procurement from alcoholic beverages manufacturers and distribute to the retailers then it cannot dictate that there is no right to do business in alcoholic beverages that is available to the liquor manufacturers. The Commission cannot allow the OPs to blow hot and cold at the same time.

105. The Commission notes that the main issue in the present matter is that OP-1 placed orders in a manner that was allegedly arbitrary and discriminatory which resulted in drop in market shares of USL and Pernod. The Commission further notes that the DG upon investigation has also concluded that there was a significant shortfall in the sales volume of IMFL of both USL and Pernod during the period from May 2015 to April 2016 as compared to the corresponding period in earlier years. Upon revocation of the Liquor Wholesale Order, the sales volume of both these companies recorded significant growth in their sales. In comparison to other players, the DG found that sales volume of other companies recorded a significant growth during the period between May 2015 to April 2016.



सत्यमेव जयते



106. The Commission has also taken into consideration the contention of OP-1 that prior to introduction of the Liquor Wholesale Order, the distribution of alcoholic beverages depended entirely on the distribution mechanism of the alcoholic beverages manufacturers. It is contended that Pernod and USL are large established multinational companies with huge resources and market strength, and were able to penetrate the market more deeply than smaller Indian companies with fewer resources. OP-1 has brought to attention that Mr. Dhiraj Singh Garbyal, then MD, OP-1 (also MD of OP-3) in his statement before the DG had stated that prior to introduction of Liquor Wholesale Order, USL and Pernod were making supplies to FL-5 retailers on credit terms. But OP-1 was supplying the products only after receipt of full payment against the supply made to FL-5 licensees, due to which a competitive environment was created in respect of procurement and supply of alcoholic beverages. OP-1 also contended that high sales of particular brands of USL and Pernod were indicative of product push rather than of consumer preference.
107. OP-2 submitted that it regularly raised indents on OP-1 from May 2015 to October 2015 and as it did not receive the intended brands in accordance with such indents raised by it, it stopped issuing indents to OP-1 after October 2015 onwards. OP-2 referred to the letter of the OP-1 dated 28.07.2015 and 03.08.2015 which states that OP-1 had requested OP-2 and OP-3 to place indents based on *Adhibaar* (minimum guarantee duty).
108. The Commission notes that OP-1 in its submissions has stated that there was no incentive for OP-1 to procure specific brands, as it was to receive a fixed commission of ₹ 70 per case. Further, OP-1 has stated that it did not have any prior knowledge or experience in this industry. However, the Commission notes that the Liquor Wholesale Order clearly laid down the manner of procurement and distribution of IMFL in the State of Uttarakhand and the role of OP-1, OP-2 and OP-3. Further, it is evident, as per records, that OP-1 was 'acting' in



सत्यमेव जयते



disregard of such an order issued by the State government, which also vitiated the competitive process to the detriment of the some of the members of the Informant.

109. OP-1 further submitted that the DG's Report as well as the Show Cause Notice order dated 30.08.2018 extensively relied upon the statement of Mr. B.L. Rana, General Manager, OP-2 to show that retailers were aggrieved by OP-1 with respect to non-availability of brands of USL and Pernod. However, OP-1 contended that it had not cross-examined Mr. B.L. Rana, thus, his statement ought to be expunged.
110. In this regard, it is observed that the Commission heard OP-1 on 06.06.2018 on its application dated 22.05.2018 regarding the request of cross-examination of Mr. B.L. Rana of OP-2. The Commission, in the course of proceedings, directed the learned counsel for OP-1 to point out the specific and relevant portion from the statement of Mr. B.L. Rana upon which cross-examination was sought by it. From the submissions of the learned counsel for OP-1, it was noted that the cross-examination of Mr. B.L. Rana, General Manager of OP-2 had been sought with respect to the answers given in response to Question Nos. 13 and 18 of his statement given before the DG. The Commission observes that OP-1 had also sought cross-examination of Mr. B.L. Rana, General Manager of OP-2 before the DG. While rejecting the application of OP-1 for cross-examination of Mr. B.L. Rana, the DG had concluded that the statement of Mr. B.L. Rana was made with reference to the information contained in written submissions made by OP-2. Further, OP-1 had already been confronted with the written submissions of OP-2. Considering these issues, the DG opined that it was not necessary or expedient to grant an opportunity of cross-examination of Mr. B.L. Rana to OP-1. The Commission was of the view that as OP-1 had been confronted with the written submissions of OP-2, it had the opportunity to provide its own explanation upon the submissions made in the above deposition. Thus, the Commission noted that cross-examination of Mr. B.L. Rana, General Manager



सत्यमेव जयते



of OP-2 was neither necessary nor expedient. Accordingly, the request of OP-1 for cross-examination of Mr. B.L. Rana was declined.

111. The Commission also considered the Table 2 discussed in Para 11(f), wherein the percentage increase and decrease in sales of various alcohol beverages manufacturers have been discussed. The Commission notes that there is wide variation in the sales volume of IMFL by USL and Pernod in comparison to sales by other major suppliers in the State of Uttarakhand. For example, sales of IMFL produced by Alcobrew Distilleries India Pvt. Ltd., Jagatjit Industries, India Glycols, *etc.*, witnessed significant high growth during 2014-15 to 2015-16 whereas sales of USL and Pernod declined by more than 50% during the same period. Further, it was seen that there was a significant increase in the sales volume of USL and Pernod during 2015-16 to 2016-17 which coincided with huge decline in sales volume of other major suppliers. The Commission notes that as per aforementioned Table 2, there was significant drop in the sales volume of both USL (-59.32%) and Pernod (-56.98%) in terms of percentage during the financial year 2015-16 as compared to the sales in the financial year 2014-15. However, in case of most of the other major suppliers, there was a huge increase in the sales volume in terms of percentage during the financial year 2015-16 as compared to the financial year 2014-15. On the other hand, during the financial year 2016-17, there was a huge increase in the sales volume of USL (+92.275%) and Pernod (+140.57%) in terms of percentage of sales as compared to the financial year 2015-16. Further, in case of all other suppliers, there was a huge decrease in the sales volume in percentage terms during the financial year 2016-17 as compared to the year 2015-16. This according to the Commission is indicative of the fact that sales were not based on actual consumer demand during the relevant period.
112. The Commission further observes that such sudden variation in sales of IMFL may not occur due to any overnight or sudden change in consumer preferences



सत्यमेव जयते



of certain brands of whisky. This view is supported on the basis of the submissions of OP-2 that OP-1 was not supplying different brands of IMFL as per the demand/indents raised by it. Thus, the Commission is of the view that above-mentioned 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. This is also reflected through the market conditions post-cessation of operation of the Wholesale Liquor Policy dated 31.03.2015 and replacement by a new policy of the State.

113. In regard to the contentions raised in respect of oversupply by USL and Pernod, the Commission observes that in the succeeding year as well as in the preceding year, there was a significant increase in the sale of USL and Pernod, which cannot be attributed to mere coincidence. If this variation had occurred on account of consumer preference, then the same sales pattern would have continued for longer period and in respect of all brands. However, data shows that in the FY 2015-16, the drastic decline in sales happened for brands of USL and Pernod and not in respect of others, and in the FY 2016-17, the opposite occurred wherein brands of USL and Pernod experienced major increase in sales and the opposite happened in respect of other brands. The Commission observes that such fluctuation cannot be merely attributed to consumer preference as such preference cannot be said to be so volatile in nature. The availability of preferred brands of IMFL for consumer as per their demand was the true intent and spirit of the Liquor Wholesale Order which is the true test of a competitive market and depriving the consumer of that choice is indicative of a distorted market. The consumer choice/preference can be evidenced from the complaints/grievances in respect of non-availability of brands as indented by FL-5 licensees/retailers who were in actual interaction with end-consumers and which also forced them to file writ petition before the Hon'ble High Court of Uttarakhand.





सत्यमेव जयते



114. The Commission notes that the arbitrary and capricious procurement undertaken by OP-1 had led to increase in sales of brands of some manufacturers and led to a steep decline in the sales of others, USL and Pernod in the present case. The implementation of the policy in an inappropriate manner by OP-1 led to some brands/players attaining an undue advantage over others and harming the sales of others thereby distorting the competition in the market. The arbitrary action of OP-1 led to a situation where the preferences of the end consumers were not taken into account while placing purchase orders of certain brands of alcoholic beverages, thereby distorting the market to the detrimental of manufacturers of certain brands of alcoholic beverages. OP-1 has not been able to demonstrate any credible argument in favour of efficiency, other than stating that the overall sales of IMFL having increased. The Commission, therefore, holds that the unilateral conduct of OP-1 impacted the inter brand competition of the brands of IMFL being sold in the State of Uttarakhand.
115. OP-1 has also contended before the Commission that the DG's Report does not present any evidence to show that harm was caused to the end-consumer. In fact, during the operation of Liquor Wholesale Order, the total consumption of alcoholic beverages increased as compared to the FY 2014-15. The increase in overall consumption establishes that consumers are brand-agnostic and the allegation of the Informant that OP-1's conduct resulted in consumer harm is baseless. The Commission observes that the argument of OP-1 that consumer demand is brand-agnostic which can be gathered from the overall increase in consumption during the relevant period is not indicative that consumer demand is not brand-specific. Further, mere availability of some brands or their sales by retailers does not justify the stand taken by OP-1 in the face of the fact that their retailers filed a petition before the Hon'ble High Court of Uttarakhand stating that they were not receiving IMFL as per the demand raised. The Commission also notes that the provisions of Liquor Wholesale Order themselves recognised the vitality of brand preferences and called for procurement to be undertaken on



सत्यमेव जयते



brand-wise basis. The Commission does observe that non-availability of certain brands had impacted and distorted consumer choice which is sufficient to prove consumer harm in respect of procurement and distribution undertaken by OP-1. The demand by retailers is derived from demand of consumers. Further, the Commission notes that the provisions of Liquor Wholesale Order had not mandated the OPs to increase overall sales by procuring from few manufacturers at the cost of others rather such policy mandated the OPs to supply as per retail/consumer demands.

116. On the issue of maintenance of minimum stock, the Commission notes the submission of OP-1 which highlights various stances taken by OP-1 on different occasions, such as during the investigation, OP-1 stated that such minimum stock requirement was fixed pursuant to judgement of the Hon'ble High Court dated 23.12.2015. However, the Excise Authority *vide* letter dated 26.05.2015 had issued instructions to maintain minimum stock of each brand. Upon confrontation with such letter by the DG, OP-1 stated that such initial instruction was untenable as OP-1 did not have the capacity to accommodate the task. The Commission herein agrees with the DG that OP-1 did not make any attempt/effort to communicate to the Excise Department about being unable to comply with such requirement of maintenance of minimum stocks, and such explanation of capacity constraints is evidently an afterthought to account for OP-1's unilateral conduct. The Commission notes that Clause 4 of the Liquor Wholesale Order sufficiently provided for OP-1 to make any necessary arrangements to efficiently procure and supply alcoholic beverages. Under this clause, it was also the responsibility of OP-1 to ensure adequate facilities were in place for procurement and distribution of all brands of alcoholic beverages. Upon directions from the Hon'ble Uttarakhand High Court *vide* order dated 23.12.2015, the Excise Commissioner proceeded to fix a minimum stock requirement which was 100 to 120 cases per month for each brand to be maintained at its warehouses on 31.12.2015. The Commission notes that such



सत्यमेव जयते



requirement was not enough to satisfy demands of fast-moving brands of manufacturers such as USL and Pernod. The Commission observes that OP-1 does not appear to have acted in spirit of the orders of the Hon'ble Uttarakhand High Court and of the Excise Commissioner, in the name of fulfilling MGD Targets. OP-1 is enacted under a statute, and accordingly is mandated with certain obligations and responsibilities under its provisions. Nowhere under those provisions of the Liquor Wholesale Order, OP-1 was required to favour few brands over others by discriminating against some brands which had more sales as compared to other brands with lesser sales. Further, the level-playing field was not to be created by worsening the competitive process itself and lowering the supply of brands which were in popular demand with retailers and ultimate consumers, who were an important constituent and beneficiary of the Liquor Wholesale Order. An effective push to competition happens when efficiency of slower moving products is enhanced such that a demand is created for them, not *vice versa* by cutting the supply/distribution of brands which may be relatively doing better *vis-a-vis* others.

117. Coming to the redressal mechanism provided under the Liquor Wholesale Order, OP-1 states that it had addressed the only complaint received as per the mechanism and it cannot be faulted for following such a mechanism. The Commission observes that the existence of a redressal mechanism did not absolve OP-1 from the responsibility of procuring brands in accordance with the demand of different brands of alcoholic beverages raised by the retailers, who were directly selling to the consumers. With regard to the submission of alternate procurement mechanism for sourcing of brands, the Commission observes that the retailers had approached the Hon'ble High Court of Uttarakhand as they were unable to access the brands of their choice/requirement. As there was no policy introduced or steps taken to ensure availability and access pursuant to judgement dated 09.07.2015, OP-1 had not taken any step to resolve this grievance raised by the retailers. The subsistence



सत्यमेव जयते



of such grievance of retailers of being unable to cater to consumer demand and experiencing drop in sales of brands whose demand was more, was taken note of by the Hon'ble Uttarakhand High Court also in its order dated 23.12.2015.

118. The Commission agrees with the DG that OP-1 did not act in a manner which ensured availability of required brands to retailers and instead did not take concrete steps on the complaints, which also tends to show that OP-1 carried out procurement in a manner which adversely affected competition in the market and discriminated between different manufacturers and suppliers of IMFL.

### ***Denial of Market Access***

119. The DG in its investigation, has found OP-1 to be in contravention of the provisions of Section 4(2)(c) of the Act.
120. OP-1 has contended that the material on record has failed to establish any denial of market access to USL or Pernod. According to OP-1, the DG had found that for USL, out of the 7 brands, sales actually increased for 3 brands, and the drop in sales of its 3 other brands was relatively minor. For Pernod, out of 11 brands, for 8 brands the sales increased while there was a drop in sales of 3 brands. OP-1 contended that it is difficult to understand as to how USL and Pernod could be said to have been denied market access when sales increased for many brands and dropped for others. OP-1 submitted that in a market with 290 brands made by 39 alcoholic beverage manufacturers, it is not logical to determine the abuse of dominant position based on 3 brands each of USL and Pernod. OP-1 further submitted that during the relevant period, USL sold alcoholic beverages of at least twenty-six (26) brands in the State of Uttarakhand and Pernod sold alcoholic beverages of at least nineteen (19) brands in the State of Uttarakhand.
121. OP-1 alleged that it appears that the entire case of the Informant rests entirely on the drop in sales of one particular brand of USL, namely McDowell's No.1



सत्यमेव जयते



Reserve Whisky (**McDowells Whisky**), on which it has been stated that no orders were placed and no supplies were made in August 2015, September 2015, December 2015, and in January 2016. According to OP-1, USL supplied considerably more quantities than the orders placed in May, June and July 2015. Thus, non-placing of orders in August or September could not be determinative of denial of market access as orders were again placed in October 2015 for 15,000 cases but USL could only supply 4,500 cases. This according to OP-1 resulted in a glut in the market because of excess supply made by USL during the first part of the year and in the latter part it could not meet with bare minimum requirements.

122. Similarly, for Pernod, the two brands sales of which dropped during the year 2015, were Royal Stag Delux Whisky (**Royal Stag**) and Imperial Blue Super Grain Whisky (**Imperial Blue**). The DG during the investigation found that for Royal Stag, during the year, orders were placed for 94,566 cases while only 81,059 cases were supplied. For Imperial Blue, orders for 92,647 cases were placed but only 80,344 cases could be supplied by Pernod. It is submitted by OP-1 that orders were not placed as Pernod could not fulfill them. According to OP-1, it seems illogical and counter-intuitive for Pernod and USL to argue denial of market access when they could not even complete the orders that were placed on them.
123. OP-1 further contended that the FL-5 retailers had the option to approach the Excise Commissioner for procurement of alcoholic beverages if the demand for particular brands was not met as early as in July 2015, and the manufacturers could have supplied any particular brand. Such situation did not happen despite the allegedly arbitrary procurement by OP-1 is indicative of the fact that the loss in sales could be attributed to market correction rather than an abuse of dominant position. There was no denial of market access as OP-1 continued to procure IMFL from USL and Pernod, *i.e.* there was no complete cessation of placing orders upon USL and Pernod.

124. OP 1 further submitted that during the early months, much more quantity was procured than was indented by the sub-FL-2 licensees. As mentioned in the table below, during the later months, the quantity procured was lesser because of the failure of USL and Pernod to even supply the lesser quantities requested from them. OP-1 and OP-3 both have pointed at the sheer variance in numbers between the cases indented and cases procured to show that the case of the Informant is without basis.

**Table 3: Comparison of indents raised by OP-1 and actual supply by Informant**

S. No.	Name of the manufacturer	Period	No. of indents	No. of cases procured (in round numbers)
1.	USL	May, 2015	86,960	1,31,155
2.	USL	June, 2015	70,390	1,48,247
3.	USL	July, 2015	18,175	1,45,455
4.	USL	Aug, 2015	3,500	929
5.	USL	Sept., 2015	41,060	1,300
6.	USL	Oct., 2015	18,285	6,132
7.	USL	Feb., 2016	2,303	12,953
8.	Pernod	May, 2015	39,700	29,400
9.	Pernod	June, 2015	27,100	45,388
10.	Pernod	July, 2015	8,012	68,182
11.	Pernod	Aug, 2015	-	1539
12.	Pernod	Sept., 2015	37,250	2,561
13.	Pernod	Oct., 2015	11,530	8,022
14.	Pernod	Feb., 2016	1,670	-

125. OP-3 also submitted that alleged non-availability of two brands of alcoholic beverages over a very short period of time cannot be considered as an appreciable adverse effect on competition.
126. In response to such assertions, the Informant has contended that mismatch and complete lack of orders placed on USL and Pernod for several months make the abusive conduct of OP-1 amply clear. The Informant submits that OP-1 arbitrarily placed very large orders for extremely slow-moving products of USL and Pernod. For instance, an order is placed by OP-1 for 25,500 cases for USL's



सत्यमेव जयते



Antiquity Blue Whisky in the month of June when average monthly sale for the same brand was 674 cases in FY-15 and order for 48,500 cases for USL's Signature Rare Whisky in the month of June when average monthly sales for the same brand was 691 cases. For Pernod, order was placed for 500 cases of Glenlivet in June when average monthly sales for the same brand was 15 cases in FY-15. For Absolut Vodka of Pernod in the month of September 2015 and October 2015, orders for 560 cases and 400 cases were placed when the average monthly sales for the same brand in the previous year was 31 cases. The Informant contends that OP-1 was conducting its procurement in an arbitrary manner, whereas members of the Informant had their production and supply chains geared towards supplies based on previous year's sales.

127. The Informant has stated that there was a time lag in supplying certain orders as the products had to be transported into the warehouses in the State of Uttarakhand. The Informant also submitted that both USL and Pernod were commercial entities operating with the intention of making profit and there was no logical reason for them not to undertake sales in the State of Uttarakhand. The entities were also aware that such supplies could also result in losses by way of demurrage charges set out in the agreements entered with OP-1 if such vast orders were also supplied and subsequently held in storage and disposed of eventually.
128. The Informant contended that the explanation of OP-1 that it was an attempt to create a level-playing field for all manufacturers is erroneous, as then it was incumbent on OP-1 to procure the same number of cases of IMFL from all manufacturers and should not have arbitrarily discriminated between different brands. The Commission finds itself in agreement with the assertions of the Informant that OP-1 under the provisions of Liquor Wholesale Order was not required to create any level-playing field for alcoholic beverages manufacturers rather to procure and distribute as per the end-consumer demand, and there is



सत्यमेव जयते



nothing to show based on record that OP-1 did indeed promote any level-playing field as has been asserted by it in its defence.

129. The Commission observes that the provisions of Section 4(2)(c) of the Act state ‘*indulges in practice or practices resulting in denial of market access in any manner*’ resulting in an exclusionary effect. There is no requirement under such wordings that Section 4(2)(c) requires absolute denial of market access. The phrase ‘*in any manner*’ depicts presence of wide scope and any denial of market access, partial or complete will amount to contravention under Section 4(2)(c) of the Act. The Hon’ble Supreme Court in the matter of *CCI v. Fast Way Transmission Pvt. Ltd. & Ors.* (Civil Appeal No. 7215 of 2014) clearly laid down that one of the entities which is at a different stage of production, can also cause denial of market access and be in contravention of the provisions of Section 4(2)(c) of the Act and it was not necessary that such contravention has to be by a competitor *qua* another.
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.
131. The DG examined various provisions of the agreements entered into by OP-1 with USL and Pernod, and found in the present context Clauses 7.1, 7.2, 7.3, 14, 4, 1.1 and 2.6 of USL Agreement and Pernod Agreement to be one-sided, unfair





सत्यमेव जयते



and abusive and accordingly in violation of Section 4(2)(a)(i) of the Act. The DG found that OP-1 had inserted such clauses in agreements entered into by it with members of the Informant, USL and Pernod, in pursuance of abusing its dominant position in the relevant market. The Commission observes that operation of most of these clauses became abusive on account of the arbitrary procurement and distribution of IMFL by OP-1, which as aforementioned was not in accordance with the Liquor Wholesale Order.

132. OP-1 states in its submission that the agreements with USL and Pernod were based on drafts obtained from the Internet based on downloaded agreements with the state agencies in Rajasthan and Maharashtra. It is also clear from the statement of Mr. Vijay Kumar, General Manager, OP-1 that Pernod and USL negotiated the terms with the OP-1 and terms were actually changed based on negotiation. USL and Pernod accepted these terms without demur or complaint while the contract was being negotiated and have accepted such terms in other states. The terms were not challenged as unconstitutional or arbitrary before the Hon'ble High Court of Uttarakhand.
133. OP-1 submits that the Agreements are in line with numerous other agreements entered into by government bodies/ companies. These agreements are accepted market practice and do not contain any competition law element. These agreements are standard and are followed by most government bodies/ companies in the interest of safeguarding the public exchequer.
134. The Commission notes that OP-1 was the only platform/company for procurement of IMFL and the entire process of purchase and eventual sale was done through OP-1 itself. The contention that agreements were standard market agreements and such clauses were not implemented is not relevant for assessment whether such clauses were unfair and one-sided and accordingly, abusive in nature. The Commission places reliance on its earlier decision in the matter of *Surinder Singh Barmi case* wherein it was held that it was immaterial



सत्यमेव जयते



whether inclusion of clause had any anti-competitive effect, rather the unfairness of the clause needs to be seen which could only be imposed by a dominant entity. In *Belaire Case*, the Commission had observed that the competition concern is that a dominant entity (builder/developer in that matter) was in a position to impose such unfair clause in its agreement with customers and bind them into one-sided contractual obligations. The Commission accordingly in the present case, observes that OP-1 being the dominant entity was in a position to impose one-sided contractual obligations.

135. Based on the analysis above, the Commission is of the view that the conduct of OP-1 is in violation of Section 4(2)(c) and 4(2)(b)(i), 4(2)(a)(i) of the Act. With regard to conduct of OP- 2, the Commission based on record, notes that OP-2 did make sincere efforts to discharge its obligations, laid down under the Liquor Wholesale Order, though for some intermittent period, it is not found to have raised indents. However, the Commission is convinced of the explanation given by OP-2 that such duration during which OP-2 did not raise indents was solely on account of OP-1 and it (OP-2) had no intention not to procure in consonance with the Liquor Wholesale Order. With regard to the conduct of OP-3, the Commission observes that though the defence of OP-3, cannot be said to be at par with that of OP-2, but it has stated that indents raised were lost in fire and it was also placing indents over phone. OP-1 has not denied receiving indents from the said OPs. The Commission also notes that OP-2 and OP-3 were entirely dependent on OP-1 for obtaining supplies and they could not directly procure from the IMFL manufacturers. Thus, the Commission in the fact and circumstances does not deem it fit to hold OP-2 and OP-3 to be liable and in complicit with OP-1 in respect of the contraventions of the provisions of the Act.

136. Therefore, the Commission holds only OP-1 to have contravened the provision of Section 4(2)(c), 4(2)(b)(i), 4(2)(a)(i) of the Act. In view of the findings



सत्यमेव जयते



recorded by the Commission, OP-1 is directed to desist from indulging in such anti-competitive conducts which have been found to be in contravention of the provisions of the Act. The directions are given particularly having regard to the fact that the conduct in question as well as the impugned agreement has ceased to exist with effect from 19.04.2016, and all the OPs have ceased to have any role in distribution and supply of IMFL in State of Uttarakhand in the wake of change of liquor policy which operated for a limited period, *i.e.* 27.04.2015 to 19.04.2016.

137. As regards the penalty to be imposed under Section 27 (b) of the Act, the Commission finds that OP-1 being the exclusive FL-2 wholesale licensee had indulged into procurement of alcoholic beverages from manufacturers in an arbitrary manner resulting in denial of market access and had also entered into agreements with members of the Informant (USL and Pernod) containing one-sided and unfair clauses, in the present facts and circumstances, as brought out hereinabove, and hence, responsible for contravention of the provisions of Section 4(2)(c) read with Section 4(2)(b)(i) and Section 4(2)(a)(i) of the Act and are liable to be penalised.
138. On the aspect of imposition of monetary penalty and quantum thereof, the Commission notes that OP-1, submitted that it has generated a revenue of ₹ 10.98 crore during the period of contravention, *i.e.* period of operation of Liquor Wholesale Order when it had the right of procurement of IMFL in the State of Uttarakhand.
139. The Commission notes that OP-1 has contended that it had operated as a FL-2 licensee, for a short period of time and had no profit maximising motives. OP-1 states in its submission that *OP-1 is a functionality of the state that is engaging in key activities which are of general interest to marketing committees operating in the State of Uttarakhand.* Further, in the F.Y. 2020-21 and due to the prevailing economic and social circumstances, OP-1 incurred a significant loss



सत्यमेव जयते



of ₹ 31.81 crore (approx.) and imposing penalty upon a loss-making government enterprise will be detrimental not only to the functioning of the enterprise but the public exchequer as well. OP-1 has also cited the decision in *Cochin Port Trust v. Container Trailer Owners Coordination Committee*, Ref. Case No. 06 of 2014 wherein the Commission refrained from imposing any penalty on the parties based on certain mitigating factors which exists in the present case also. The Commission further notes the submissions of OP-1 that there are other mitigating factors in the present case like the said OP had undertaken the activity for the first time and it was not its core activity of business, also it has suffered significant losses in the financial year 2020-21 and it further had undertaken the procurement and distribution activity of liquor during the relevant period with fulfilment of MGD obligations in mind.

140. The Commission upon due consideration is of the view that every case has to be analysed based on its peculiar facts, in light of the impact of the impugned conduct and taking into account all mitigating as well as aggravating factors. The Commission observes that in the present case the anti-competitive conduct on the part of OP-1 had not ceased of its own accord (as cited in the above case), but on account of change in the policy of Government whereby earlier Liquor Wholesale Order ceased to have any effect and OPs were released from performance of the activity of procurement and distribution of liquor. Further, the Commission also notes that OP-1 acted against the express provisions of the Liquor Wholesale Order, which also entailed violation of the provisions of the Competition Act, 2002. Besides, the conduct was also subject matter of litigations before the Hon'ble High Court, at the instance of affected parties being the retailers as well as manufacturers. There was abject failure in undertaking distribution based on demand, which in fact was the essence of the Liquor Wholesale Order rather than mere fulfilling of MGD obligations as has been countenanced by the said OP. Further, the pleas of OP-2, to supply in accordance with demand, was also given a cold shoulder, thereby resulting in



सत्यमेव जयते



imbalance of brand wise demand and supply of IMFL which adversely affected the market constituents.

141. The Commission thus, in light of the above facts and circumstances, and bearing in the mind the nature and periodicity of the contravention involved and the mitigating factors canvassed by OP-1, decides to impose a penalty of an amount of ₹ 1,00,00,000/ (Rupees One Crore only) on OP-1 under Section 27(b) of the Act. OP-1 is directed to deposit the penalty amount within 60 days of receipt of this order.
142. The Secretary is directed to inform the concerned parties, accordingly.

**Sd/-**

**Mr. Ashok Kumar Gupta**  
**Chairperson**

**Sd/-**

**Ms. Sangeeta Verma**  
**Member**

**Sd/-**

**Mr. Bhagwant Singh Bishnoi**  
**Member**

**New Delhi**

**Dated: 30.03.2021**