

**IN RE: VIJAY GOPAL (INFORMANT) AND INOX LEISURE LTD. (OPPOSITE PARTY I),
HINDUSTAN COCA-COLA BEVERAGES LTD. (OPPOSITE PARTY II)**

Decision date: 28/02/2019

Keywords: Collusion, exclusive supply agreement, exclusive distribution agreement, appreciable adverse effect on competition, tie-in arrangement

Rule: Sec. 3(1) and 3(4) of the Competition Act, 2002.

The Informant had alleged that many Multiplex Malls including OP-1 have colluded with Beverage Companies including OP-2, to sell water/beverages, within such multiplexes, at higher prices, with a special packing, contrary to the price of the same brand available in retail market. The Informant had also submitted that OP-2 had introduced a slight difference in quantity/volume of said beverages sold at multiplexes, as compared to other retail stores, so as to get around the Packaged Commodity Rules 2011 (As amended on 23.06.2017) which stipulates that identical goods cannot be priced differently by resorting to 'Unfair Trade Practice' or "Restrictive Trade Practice".

Further, as alleged by the Informant, OP-1 only sells OP-2's products and didn't sell products of OP-2's competitors. Similarly, in PVR Cinemas, only products of Pepsi Co and in McDonald restaurants only OP-2's beverages were sold. Moreover, the Informant had stated that OP-1 didn't permit the consumers to carry their own eatables or drinking water inside its movie halls, which had to be purchased at higher prices from OP-1. The Informant had submitted that provision for free water was usually not accessible, as it was placed towards a farthest corner, in seclusion.

On the basis of the above information, the Informant had alleged that there was collusion between OP-1 and OP-2, which falls within the vertical restraint, as defined under the provisions of Section-3(4) (b) and (c) of the Act. According to the Informant, there exist exclusive supply agreement and exclusive distribution agreement. The Informant had thus submitted that the collusion between OP-1 and OP-2 satisfies all the conditions mentioned under Section 19 (3) to prove appreciable adverse effect on competition mentioned under Section 3(4) of the Act.

Analysis of the Commission

The Commission notes that the allegations made by the Informant were two-fold:

Firstly, the agreement between OP-1 and OP-2, for selling some of OP-2's products, to the exclusion of products of competitors, amounts to 'exclusive supply agreement' as well as 'exclusive distribution agreement' *inter se* the said parties which may fall foul of the provisions of Section 3(4) (b) and Section 3(4) (c) of the Act. Therefore, the consumers were forced to buy essential commodities like water by paying a higher price than that was available in other retail stores for the same product which results in consumer welfare loss. Secondly, the Informant had also submitted that though, there was no tie-in arrangement in the literal sense as purchase of beverages was not a pre-condition for watching movies in the multiplexes of OP-1, there exists an implicit condition of tie-in arrangement, whereby the consumer was forced to buy essential goods like water from the OP-1, which was prohibited under Section 3(4)(a) of the Act.

As submitted by Informant, this case was woven around the 'exclusive supply agreement' entered between OP-1 and OP-2 and had the potential to harm competition in the market. However, for any agreement to fall foul of the provisions of Section 3(4) of the Act, it needs to be established that such an agreement causes an AAEC in India.

To examine a matter under Section 3 (4) of the Act, the following points need to be analysed:

- (a) Existence of an agreement;
- (b) Between 'enterprises' or 'persons';
- (c) Engaged at different stages or levels of the production chain in different markets;
- (d) In respect of production, supply, distribution, storage, sale or price of, or trade in goods, or provisions of services;
- (e) Including tie-in-arrangement, exclusive supply agreement, exclusive distribution agreement, refusal to deal, and resale price maintenance; and
- (f) Which agreement causes or was likely to cause an AAEC in India.

The Exclusive Supply Agreements prevent a purchaser from dealing with other suppliers. If a supplier had significant market power and enters into exclusive supply agreement with a purchaser to create entry barrier for other suppliers, the contract can be seen as exclusionary. The Commission observes that in relation to the agreement between the OPs, OP-2 cannot be said to have a significant market power and OP-1 can switch to sell the brands of competitors, if it gets better commercial terms and conditions. The Commission observes that there was presence of other brands in the open retail market as well as inside other multiplexes which makes the market highly contestable. Therefore, it cannot be said that there will be appreciable adverse effect on competition due to the agreements between OP-1 and OP-2.

As regard allegation pertaining to tie-in arrangement, there was no explicit condition that consumers have to necessarily buy these goods to watch the movie. Thus, it cannot be said that there exists a tie-in arrangement because the provision of movie screening was independent of the provision of sale of beverages by OP-1. Further, the Informant himself had submitted that people mostly visit OP-1 with an intent and purpose to watch cinema and not with the sole intention to buy these beverages. These beverages were incidental and not the main driving force to visit the multiplexes of OP-1. Moreover, OP-1 provides free water inside the multiplexes. Hence, it was difficult to sustain the argument that the sale of select beverages by OP-1 at MRP as compared to prices of similar product in open market had the potential to cause AAEC.

The determination of AAEC in the context of section 3(4), based upon the factors provided in Section 19(3) of the Act, needs to be conducted in context of the market where the alleged anti-competitive conduct was being perpetuated. In this backdrop when the factors enshrined under Section 19(3) were applied to the factual position as it exists, it can be seen that conduct of OP-1 and OP-2 of having a supply agreement inter-se, neither creates a barrier to new entrants nor was in the nature of driving any existing competitor out of market. Further, there were no exit barriers as the agreement can be terminated by either of the parties. The Informant had also not brought to the notice of the Commission any facts or evidence to say that existing competitors have been driven out from the market. There was no market foreclosure also as the other brands were easily available in the retail market though not necessarily available inside multiplexes.

Conclusion

The Commission thus holds that no violation of the provision of Section 3(4) read with Section 3(1) of the Act was made out against OPs in the instant case, as the impugned agreement between OPs didn't have the potential to cause any AAEC in the market of retail sale of beverages inside multiplexes, in the facts and circumstances of the case. Accordingly, the matter was ordered to be closed forthwith in terms of the provisions of Section 26(2) of the Act.

