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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 58 of 2015

In Re:

M/s Sri Rama Agency

**#3, Sai Deepanjalee, JP Colony, 9th Cross,
Tulasi Theater Road, Marathalli, Bangalore**

Informant

And

**M/s Mondelez India Foods Private Limited
Mondelez House, Unit No. 2001, 20th Floor,
Tower-3 (Wing C), India Bulls Finance Centre,
Parel, Mumbai, India**

Opposite Party No. 1

**M/s Mondelez International Inc.
100, Deforest Ave, East Hanover,
New Jersey, USA**

Opposite Party No. 2

CORAM

**Mr. Ashok Chawla
Chairperson**

**Mr. S. L. Bunker
Member**

**Mr. Sudhir Mital
Member**

**Mr. Augustine Peter
Member**



Mr. M. S. Sahoo
Member



Justice (Retd.) Mr. G. P. Mittal
Member

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

1. The information in the present case has been filed by M/s Sri Rama Agency (hereinafter referred to as the 'Informant') under section 19(1)(a) of the Competition Act, 2002 (the 'Act') against M/s Mondelez India Foods Private Limited ('OP 1') and M/s Mondelez International Inc. ('OP 2') alleging, *inter alia*, contravention of the provisions of sections 3 and 4 of the Act.
2. As per the information, OP 1 is a wholly owned subsidiary of OP 2. OP 2 is engaged in the business of snacks, dairy and cheese, grocery, biscuits, chocolate confectionary and convenient meals in 150 countries around the world. OP 1 came into existence upon acquisition of M/s Cadbury India Limited ('CIL') by Kraft Foods Inc in 2010 and it is primarily engaged in the business of chocolate confectionaries, beverages, candy, sugar confectionary and biscuits among other products in India. It has several brands of products in India including Cadbury Bournvita, Cadbury Dairy Milk ('CDM') Silk, Cadbury Choclairs, Gems, 5-Star, Perk, Bournville, Celebrations, Halls, Oreo, Tang and Toblerone.
3. The Informant is stated to be a proprietorship firm engaged in the business of stocking and distribution of products of various brands, including the products of OP 1. Its major business is generated from stocking and distribution of the products manufactured by OP 1. The Informant, a super-stockist of OP 1, has been engaged as a distributor of OP 1 in rural areas near Bangalore since 2004. The Informant is primarily aggrieved by the alleged conduct of OP 1 in its treatment with the super-stockists in contravention of the Act.



4. The Informant has submitted that OP 1 has devised an area specific mechanism to protect and expand its reach in the market. It has differentiated between the market in urban areas and rural India. Urban area, comprising of metropolitan and other major cities, is said to stand on a different footing than the rural areas, which comprises of smaller towns and villages. As the chocolate market in rural areas is largely untapped, OP 1 has allegedly shifted its focus towards penetration in such market and, therefore, has devised a more aggressive distribution mechanism.
5. As per the Information, OP 1 has one Carry and Forwarding Agent ('CFA') in every state who is responsible for ensuring adequate inventories of Shop Keepers Unit ('SKU') and the same is supplied to channels downstream in a timely manner. It is stated that the supply chain for rural and urban areas is similar till the level of a CFA and subsequently it is bifurcated. The distribution model of OP 1 is stated to be completely different in the rural segment consisting of 'direct distributors' for larger towns and a set of 'super-stockists' who cater to small and mid-size towns.
6. In small and mid-size towns, OP 1 has appointed multiple 'super stockists' in every state who in turn caters to a sub-stockist in every town. The super stockists are to get their supply from CFA and they are expected to cater to the needs of the sub-stockists in their geographical region. The super-stockist interacts on a one-on-one basis with the Sales Executive ('SE') of OP 1 who in turn manages the operations with the support of the Territory Sales In-Charge ('TSI'). The TSI interacts with the sub-stockist and the TSI, under the supervision of the SE, instructs super-stockist to place orders for the sub-stockist.
7. The Informant has contended that as per OP 1's policy, a super-stockist is only permitted to supply to the registered sub-stockist. However, if any super-stockist



is directly approached by a sub-stockist who is not registered with OP 1 then the super-stockist can approach OP 1 and get the said sub-stockist registered.

8. The Informant has proposed the relevant product market to be considered in the matter as 'the market for supply of non-premium chocolate confectionary' and the relevant geographic market to be considered as 'small or mid-sized towns in India'. It is submitted that there is a clear demarcation with respect to the distributors who can function in large towns and those who can function in small or mid-sized towns. Accordingly, the Informant defines the relevant market as 'the market for supply of non-premium chocolate confectionary in small or mid-sized towns in India'
9. The Informant has alleged that OP 1 is dominant in the relevant market as defined above and has abused its dominant position by imposing unfair terms under the 'Dealership Agreement'. As per the Informant, at the time of entering into the 'Dealership Agreement', OP 1 neither takes into consideration the requirements of the distributor nor does it indulge into any consultation process with the distributor. It is alleged that the 'Dealership Agreement' is one sided and the Informant as well as other super-stockists are forced to sign on the dotted lines in the 'Dealership Agreement'.
10. Further, it is alleged that as per the 'Dealership Agreement', the Informant was required to deposit pre-signed crossed 'A/c Payee' cheques drawn in favour of OP 1, which were to be filled up by OP 1 as per the orders placed by the Informant. The 'Dealership Agreement' further stipulated that in case any cheque is dishonored, the dealer will have to revert to payment by demand draft for all future payments. Subsequent to entering into the 'Dealership Agreement', the Informant used to place order as per its requirement and demand for the products in the market however, in May 2008, OP 1 introduced the concept of 'NORMS', as per which each super-stockist was supposed to maintain a fixed quantity of



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stock for each product as decided by OP 1, implies the super-stockist was required to maintain the maximum limit of the NORMS. In the initial period, OP 1 complied with the NORMS and used to replenish the quantity to meet the maximum limit of the NORMS. However subsequent to the acquisition of CIL by OP 1 in 2010, the practices adopted by OP 1 changed drastically leading to disregarding of the NORMS.

11. It is alleged that OP 1 kept on using submitted pre-signed cheques of the Informant to release money towards the excessive supplies made by it to the Informant. Thus, the Informant was forced to pay even for those products which were not required by it, due to its already existing stock or low demand in the market. The Informant has stated that on 26.03.2013, OP 1 issued an invoice for certain products without informing it and accordingly deposited a cheque for an amount of Rs. 10,05,924.29/-.
12. Again OP 1 deposited a cheque for a value of Rs. 5, 96,044.55/- for an invoice about which the Informant was not informed. Since the products which were to be delivered in furtherance of the said invoice were already in stock with the Informant, it directed its banker, *vide* letter dated 26.03.2013, to not to honour the cheque deposited by OP 1 and also registered its protest before OP 1 *vide* an email dated 26.03.2013 and requested it to not to continue with such a practice and to adhere to the NORMS. Since the cheque deposited by OP 1 was dishonoured by the Informant's bank, OP 1 strongly objected to it and threatened the Informant of harsh actions if such a practice is repeated and, *vide* its email dated 8th April 2013, directed the Informant to make an RTGS transfer of Rs. 5, 96,044.55/-, the amount that was blocked by the Informant.
13. The Informant has further alleged that OP 1 has forced it to make delivery of the products to the sub-stockists to whom the Informant is not willing to supply as they are not clearing their pending dues. Further, it is alleged that OP 1 does not



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refund the value of the damaged goods and replenishes with the products of its choice without honouring the time line. The Informant alleged that the said conduct of OP 1 amounts to imposition of unfair conditions under section 4(2)(a)(i) of the Act. It is also contended that OP 1 has used its dominant position in the relevant market of non-premium chocolates in rural areas to enter the market of Instant fruit flavoured drinks and biscuits and to protect the market of chocolate malt beverage in contravention of section 4(2)(e) of the Act.

14. In light of above submissions, the Informant has prayed the Commission to issue order under section 26(1) of the Act to initiate an investigation by the Director General ('DG') in the matter.

15. The Commission has considered the information available on record. At the outset, the Commission notes that the 'Dealership Agreement' between the Informant and CIL was entered into on 14.06.2004 *i.e.*, before the relevant provisions of the Act came into force. Thus, the same cannot be looked into under the provisions of the Act unless its effect is continuing post 20.05.2009. The Commission has accordingly examined whether the alleged conduct of OP 1 post 2009 holds weight. Since, there are no specific allegations against OP 2; no analysis has been made in respect of it.

16. It is the case of the Informant that OP 1 has abused its dominant position, *inter alia*, by imposing unfair terms under the 'Dealership Agreement' without consultation with the super-stockist, forcing them to supply to defaulting parties, manipulating the damage settlement policy and entering into the market of instant fruit flavoured drinks & biscuits by leveraging its dominant position in the market for non-premium chocolates *etc.*

17. For examination of the alleged contravention of the provisions of section 4 of the Act, the relevant market is to be delineated first to assess the position of



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dominance of OP 1 and then to examine the alleged conduct of OP 1 in case it is found to be in a dominant position in the relevant market as defined.

18. Section 2 (r) of the Act defines the relevant market as “*the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets*”. The dispute in question in the instant case, *inter alia*, relates to imposition of unfair conditions on the super-stockists, including the Informant, by OP 1 through the ‘Dealership Agreement’ in distribution/ sale of chocolate. Thus, ‘the market of chocolate’ appears to be the relevant product market in the present case wherein OP 1 and the Informant/ super-stockists are operating at different levels of same production chain. The Commission is of the view that ‘the market of chocolate’ is a distinct market and it is distinguishable from the market of other related products in terms of the nature of product, consumer preference, prices, *etc.* It may be noted that because of its peculiar taste and craving induced demand, chocolates are not irreplaceable by other confectionary items or eatables. The Commission does not agree with the suggestion of the Informant that premium and non-premium chocolates constitute separate relevant product markets. With regards to the relevant geographic market, it is observed that the Informant operates in the state of Karnataka and it appears that the conditions of competition are homogeneous across Karnataka so far as distribution of chocolate is concerned. Hence, the relevant geographic market may be considered as “*Karnataka*”. Accordingly, the Commission defines the relevant market in the instant as the “*market for chocolate in Karnataka*”.

19. On the issue of dominance of OP 1 in the relevant market as defined above, it is observed that OP 1 is the leading seller in chocolate market in India. As per the data furnished by the Informant and available in public domain (<http://business.mapsofindia.com/top-brands-india/top-chocolate-brands-in-india.html>), the market share of OP 1 in 2014 was 55.5% whereas the market



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shares of its nearest competitors such as Nestle SA and Ferrero Group in the same year were 17% and 5% respectively. Further, its flagship 'CDM' brand of chocolate is a household name and a preferred choice of the consumers because of its taste and brand loyalty. Based on the above, the Commission is of the *prima facie* view that OP 1 appears to be in a dominant position in the relevant market.

20. The Informant has alleged that OP 1 is compelling it to maintain excess supply over and above the NORMS agreed between them and has been taking payments for the same by presenting the cheques that the Informant has given to OP 1 in advance. From the face of the allegation, it appears that it is the case of business feud and breach of contract between them. There is nothing on record which can suggest that OP 1 has imposed conditions on the Informant or other super-stockist which can be considered as unfair in violation of the provisions of section 4 of the Act.

21. The Informant has alleged that OP 1 has forced it to supply the products to those sub-stockists who have defaulted in making payments. On perusal of alleged communications of OP 1 to the Informant, asking it to supply to shopkeepers/ sub-stockists who are allegedly the defaulters, it appears that OP 1 only requested the Informant to supply to the shopkeepers and assured it to resolve the payment issue with them. Moreover, *prima facie*, the emails show that OP 1 was willing to help the Informant with clearing of the dues from defaulting sub-stockists. Also, the Informant has refused to supply to such stockist *vide* its email dated 22.06.2014. This issue *prima facie* does not seem to raise any competition concern. It appears more to be a business dispute between the manufacturer and distributor.

22. The Informant has also alleged that OP 1 has used its dominant position in the relevant market to enter the market of 'instant fruit flavoured drinks and biscuits' and to protect the market of 'chocolate malt beverage'. An allegation of tying-in



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has also been raised. The Informant has also mentioned that to facilitate the said objective, OP 1 has introduced 'Performance Linked Incentive Program' ('**PLIP**') and has linked 1 % of the commission to be given to the super-stockist. The Commission is of the view that the said conduct can at most be termed as a business strategy adopted by a market player. It is not the case of the Informant that OP 1 is forcing it to buy the new range of products or is making the supply of chocolates conditional on the purchase of such other products. If the Informant fails to supply adequate quantities of such products to the sub-stockist, it will lose the additional 1% commission linked to the target. The normal commission will be paid to the Informant in any case. *Prima facie*, PLIP is not in the nature of tying-in arrangement but only a business strategy which seems to be aimed at triggering the growth of new range of products by OP 1.

23. Also, the Informant has alleged that OP 1 has terminated its dealership *vide* its email dated 13.05.2015. The Commission has perused the said email and also other emails that were exchanged between the Informant and OP 1 during that time period. As per the complete reading of the documents available on record, the termination of the Informant appears to be partial and the Informant will remain OP 1's dealer in Anekal & Atibele (5L Area) whereas for other areas, OP 1 has appointed a new distributor. Further, OP 1 has justified the said termination on the ground of Informant's unsatisfactory performance.

24. With regards to allegations under section 3(4) of the Act, though the Informant and OP 1 are operating at difference levels or stages of production chain, the alleged conduct of OP 1 does not appear to be covered under any of the provisions of section 3(4) of the Act. Further, there appear to be no appreciable adverse effect on competition (AAEC) in chocolate market. OP 1 neither imposes any anti-competitive conditions nor restricts the supply in the chocolate market. Therefore, the Commission is of the *prima facie* opinion that there is no violation of section 3(1) read with section 3(4) of the Act by the OP 1.



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25. In view of the foregoing, the Commission is of the opinion that the alleged conduct of OP 1 does not appear to be abusive in terms of section 4 of the Act. Also, no case under section 3(1) read with section 3(4) of the Act is made out against OP 1. Accordingly, the case is hereby closed down under section 26(2) of the Act.

26. The Secretary is directed to inform all concerned accordingly.

Sd/-

(Ashok Chawla)
Chairperson

Sd/-

(S. L. Bunker)
Member

Sd/-

(Sudhir Mital)
Member

Sd/-

(Augustine Peter)
Member

Sd/-

(M. S. Sahoo)
Member

Sd/-

(Justice (Retd.) G. P. Mittal)
Member

New Delhi

Date: 11.08.2015