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COMPETITION COMMISSION OF INDIA
Case No. 17 of 2018

In Re:

Khemsons Agencies

Shop No. 4, Parsram Co-operatives Housing Society,
Furniture Bazaar, Ulhasnagar
Thane, Maharashtra- 421002.

Informant

And

Mondelez India Foods Private Limited

India Bulls Finance Centre
Tower-3 (Wing C),
Unit No. 2001, 20th Floor,
Senapati Bapat Marg,
Lower Parel, Mumbai,
Maharashtra- 400013.

Opposite Party

CORAM

Mr. Sudhir Mital
Chairperson

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. Justice G. P. Mittal
Member

Present:

For the Informant

Mr. Aniruddha S. Deshmukh, Advocate

Mr. Gobind Karamchandani, Partner of the Informant

For the OP

Mr. Samir Gandhi, Advocate

Mr. Akshat Kulshreshtha, Advocate

Ms. Nikita Agarwal, Advocate

Ms. Rajshree Sharma, Advocate

Mr. Ranbir Basu, Senior Legal Counsel (In-house)

Mr. Santosh Mishra, Sales Operation Manager



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

1. The present information has been filed under Section 19(1)(a) of the Competition Act, 2002 (hereinafter the “Act”) by Khemsons Agencies (the “**Informant**”) against Mondelez India Foods Private Limited (the “**OP**”) alleging contravention of the provisions of Sections 3 and 4 of the Act.
2. As per the information, the Informant is a partnership firm which was engaged in business of stocking and distribution of products of the OP and its predecessor Cadbury India Limited in Ulhasnagar, Thane, Maharashtra for around 40 years till 2017.
3. It is stated that the OP is a wholly owned subsidiary of Mondelez International Inc. The OP came into existence upon acquisition of Cadbury India Limited by Kraft Foods Inc. in the year, 2010. The OP is primarily engaged in the business of manufacturing and sale of chocolate confectionaries, beverages, candy, sugar confectionary and biscuits among other products in India. It has several brands of products in India including Cadbury Dairy Milk (CDM), CDM Silk, Cadbury Bournvita, Cadbury Choclairs, Gems, 5-Star, Perk, Bournville, Celebrations, Halls, *etc.*
4. The Informant has further stated that the OP is in dominant position in the chocolate market in India and controls over sixty five (65) per cent market share in a market of around Rs. 8,000 crore. The Informant has also stated that the market share of the OP in the year 2014 was fifty five point five (55.5) per cent while that of its nearest competitors such as Nestle SA and Ferrero Group was mere seventeen (17) per cent and five (5) per cent, respectively. The Informant has further stated that brand names such as Cadbury Dairy Milk chocolate is a household



name and is a preferred choice of consumers because of taste and brand loyalty.

5. The Informant has made the following allegations against the OP:
- i. that the OP terminated the distribution agreement (the “**agreement**”) entered into and between the Informant and the OP on frivolous and false grounds after the Informant had raised the issues of abuse of dominance and anti-competitive practices by the OP. The Informant stated that the agreement between the parties was extended from time to time, the most recent being the one signed between the parties in the year 2010 which remained in effect until its termination by the OP in 2017. It is alleged that in the year 2010, the Informant was made to sign a standard agreement by the OP wherein it had no option of negotiation. It is further stated that the agreement provided that the products were to be sold at a price that was non-negotiable and could not be brought down by the Informant. That the agreement was one sided and the Informant and other distributors were forced to sign on dotted lines. With the information, the Informant has enclosed a copy of the agreement executed by and between the parties in 2004 instead of the 2010 agreement, stating that its copy of the 2010 agreement was destroyed in a fire.
 - ii. that the OP imposes unfair conditions in the purchase and sale of products and has made it mandatory for the distributors to use a software for purchasing and selling its products. The OP has categorised distributors and retailers into various categories and the same is fed into the software being used by the distributors including the Informant. The software is used to create artificial restriction and through this the OP decides as to which retailer will receive which products. It is averred that this has resulted in creating barriers to free flow of products in the relevant market. Further, if a new retailer is desirous of picking up stock, the software does not allow any sale to



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such a party until the same is registered with the OP. Therefore, this creates a huge barrier for the Informant and other similar distributors to grow in the market. It is also averred that the quantity of products to be sold varies from one distributor to another and one distributor could be favoured by the OP over another as a distributor is appointed on a non-exclusive basis in a given territory by the OP.

- iii. that the OP has various incentive schemes and in order to be eligible for such schemes, the retailers are required to purchase 'visi-cooler' from the OP and to display the products of the OP prominently. It is further contended that though the OP can insist on the products to be stored at particular temperature to avoid degradation but to force that the products be kept only in 'visi-cooler' and be displayed prominently is a sheer abuse of dominance.
- iv. that the products to be sold by the distributors are pre-determined by the OP as they are required to issue post-dated signed account payee cheques in favour of the OP. It is alleged that the OP used to send the Informant product orders at its own will (sometimes without the Informant's consent) and takes payment from the Informant's bank account by encashing the said post-dated cheques. The agreement further stipulated that in case any such cheque is dishonoured, the distributor has to revert payment by way of demand draft for all future payments.
- v. that the OP off-loaded products that are close to expiry dates and saddled the Informant with such stocks. That, the OP also did not lift back the expired goods within the stipulated time.
- vi. that the OP not only controls the resale price of the products but also the discount or schemes upon the same. That the Informant has no power to offer any scheme or discount of its own to the customers and the OP has on several occasions stated that if the dealers do so, strict



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actions shall be taken against them. Further, it is alleged that maintenance of resale price affects the consumers directly and distorts the market forces adversely.

6. In view of the above, the Informant has alleged that the conduct of the OP amounts to violation of Section 3(4)(e) read with Section 3(1) of the Act. The Informant has also alleged that the OP has abused its dominant position in the relevant market and has contravened the provisions of Section 4(2)(c), 4(2)(d) and 4(2)(e) read with Section 4(1) of the Act.
7. The Commission has perused the information filed by the Informant, the material available in public domain and heard the respective learned counsel for the parties on 31.07.2018. The Commission notes that the present case has certain similarities with an earlier case filed in the Commission *i.e.* Case No. 58 of 2015, *Sri Rama Agency vs. Mondelez India Foods Private Limited*. The Informant in the said case was a super stockiest and dealer of the OP's goods and had alleged that the dealership agreement was one-sided and the stockists were forced to sign on dotted lines. Other allegations relating to pre-signed post-dated account payee cheques were also raised but no allegations relating to issues such as resale price maintenance and visi-coolers as in the present case, were raised in that case.
8. The Commission observes that the Informant has alleged that the agreement entered into between the Informant and the OP is one-sided and that the Informant was forced to sign on dotted lines. The Commission notes that the copy of the agreement annexed with the information is an old one executed in 2004 *i.e.* prior to 20.05.2009 on which date the relevant provisions of the Act came into effect. Thus, the same cannot be examined under the provisions of the Act unless the effects of such agreement is shown to have continued post 20.05.2009.



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In the present case, though, the Informant claims that another agreement was executed in 2010 which was in subsistence at the time of its termination in 2017 but the copy of the said 2010 agreement has not been annexed with the information stating that the same was destroyed in a fire. Further, the Commission notes from the record that the correspondences exchanged between the parties suggest that the Informant had been a distributor of the OP till late 2017. Thus, the Commission has accordingly examined the alleged conduct of the OP post 20.05.2009. The Informant has stated that it was desirous of becoming a distributor of the OP and hence, signed the said agreement with the OP. Therefore, it is obvious that the Informant was fully aware of the terms and conditions of the agreement. Hence, the plea of the Informant that it was made to sign on dotted lines by the OP does not hold. Further, the Commission has perused the annexed copy of the termination notice dated 20.11.2017 issued by the OP for terminating the agreement and other email correspondences exchanged between the parties. From the documents available on record, it is observed that the termination was done on the grounds of Informant's unsatisfactory performance, not providing sufficient storage space and non-maintenance of hygienic conditions, *etc.* When such grounds for termination have been provided by the OP, it cannot be said that the termination was done in an unjustified manner or without any reason.

9. The Commission notes that certain allegations raised by the Informant are regarding violation of the provisions of Section 4 of the Act. Therefore, it would be appropriate to first delineate the relevant market as per Section 2(r) of the Act and then assess the dominance of the OP in the said relevant market. Only if dominance is made out the question of examining the alleged abusive conduct arises. The Informant has submitted that the relevant market in the present case should be the market for distribution, sale and purchase of chocolates in India. It is however observed that in Case No. 58 of 2015, the Commission had



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delineated the relevant product market to be '*the market for chocolate*'. It was the view of the Commission that the market for 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, price, *etc.* It was noted that because of its peculiar taste and craving induced demand, chocolates are not substitutable with other confectionary items or eatables. Accordingly, the Commission is of the view that the relevant product market in the present case will be '*the market for chocolate*'.

10. It may be noted that the Informant has submitted that with the introduction of GST, chocolates can be purchased across India at the same price and the alleged conduct of the OP has pan-India effect. Hence, the relevant geographic market should be the whole of India. It may be noted that in the earlier Case No. 58 of 2015, the relevant geographic market was delineated as '*State of Karnataka*'. However, from the facts of the instant matter it appears that the conditions of competition in the above stated relevant product market are similar across India. The Commission notes that there exists no proof of any barriers to trade in the purchase or sale of chocolates from one place to other in the country either in the information or in the public domain. Thus, the Commission delineates the relevant geographic market as *India*.
11. Accordingly, the relevant market in the instant case is delineated by the Commission as '*market for chocolate in India*'.
12. With regard to assessment of dominance of the OP in the said relevant market, the Commission observes that the OP has sixty five (65) per cent market share in the chocolate market in India and has been able to keep its market share more or less constant for the last 5 years (as per an interview given by Mr. Deepak Iyer, MD, Mondelez India Foods Pvt. Ltd. that appeared in the Economic Times dated 21.08.2017). The



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market share of the OP in the year, 2014 was fifty five point five (55.5) per cent while that of its nearest competitors such as Nestle SA and Ferrero Group was seventeen (17) per cent and five (5) per cent respectively¹. On the basis of these figure, the Commission is of the view that the OP is in a dominant position in the relevant market for chocolate in India.

13. The Commission observes that the Informant has alleged that the requirement of the OP that its software be mandatorily used by the distributors for distribution of its products is clearly restricting the sale of products and amounts to abuse of dominance. In this regard, it was argued by the learned counsel for the OP that the said software is simply an inventory management tool to track stocks instead of manual inventory management and the products may be sold by the distributors to anybody after due registration with the software. In fact, the Commission notes that it is mentioned in the information that the goods are sold only to such parties who are registered with the OP. Thus, the said condition appears to be an organised set up for data and inventory management. In view of the above, the Commission holds that the said condition is not abusive in nature.

14. With respect to insistence on using 'visi-cooler' for storing the goods of the OP, it was argued by the learned counsel for the Informant that tagging of visi-coolers with the software of the OP and providing certain incentives to retailers with visi-coolers amounts to abuse of dominance by the OP. In this regard, the learned counsel for the OP submitted that the visi-coolers are procured and offered by the OP to retailers free of cost on voluntary basis. The visi-coolers remain property of the OP and its tagging with the software is to maintain a data of the location of visi-coolers of the OP. He further submitted that

¹ <http://business.mapsofindia.com/top-brands-india/top-chocolate-brands-in-india.html>
(accessed on 21.08.2018)



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visi-coolers were insisted only for certain products especially CDM 'Silk', Bourneville, *etc.* which are more sensitive and improper storage of such products would jeopardise the experience of the customer. Thus, visi-cooler is not tied with the sale of chocolates. The Commission observes that such practice of the OP to store the temperature sensitive perishable goods in a cool and safe place in order to retain the requisite quality does not appear to be in violation of the provisions of the Act.

15. With regard to the issue of pre-signed post-dated cheques, it was argued by the learned counsel for the OP that instead of being a constraint, it is a facility extended for the convenience of the distributors such as the Informant and they are free to use other payment instruments such as demand drafts or RTGS also. Further, the learned counsel also argued that the amount of consignment to be sent to a distributor is based on performance during the previous three months by that particular distributor and expired/damaged goods are taken back by the OP. The Commission is of the view that the said arrangement for payment between distributor and the OP is simply a payment mechanism and does not amount to contravention of the provisions of the Act.
16. With regard to the allegation on the OP of saddling the Informant with close to expiry products and not lifting the expired products within the stipulated time, it was submitted by the learned counsel for the OP that expired/damaged goods are taken back by the OP. The dispute in this regard appears to be a case of business feud and a contractual issue between the parties. Existence of serious business disputes between the parties was also accepted as a fact by the learned counsel for the Informant during the hearing before the Commission on 31.07.2018. The learned counsel also submitted that the Informant is also seeking remedy at appropriate forum by way of proceedings.



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17. Regarding the other allegations such as resale price maintenance by the OP, restriction on distributors to come up with their own discount schemes *etc*, it is observed that no supporting evidence or communication to these effect has been furnished by the Informant to substantiate such allegations. Further, resale price maintenance is not a *per se* violation of the provisions of the Act and there is nothing to suggest that the conduct of the OP has an appreciable adverse effect on competition in the market. Therefore, no *prima facie* case of violation of the provisions of Section 3 of the Act is made out on this count also.
18. Based on the above analysis, the Commission holds that no contravention of either Section 3 or Section 4 of the Act is made out against the OP in the instant matter.
19. In view of the foregoing, the matter is ordered to be closed forthwith in terms of the provisions of Section 26(2) of the Act.
20. The Secretary is directed to inform the parties accordingly.

**Sd/-
(Sudhir Mital)
Chairperson**

**Sd/-
(Augustine Peter)
Member**

**Sd/-
(U. C. Nahta)
Member**

**Date: 27.08.2018
Place: New Delhi**

**Sd/-
(Justice G. P. Mittal)
Member**