

COMPETITION COMMISSION OF INDIA DISMISSES 'REFUSAL TO DEAL' ALLEGATIONS AGAINST BRITANNIA AND PARLE

1. BACKGROUND

- 1.1. On June 16, 2022, and July 06, 2022, respectively, the Competition Commission of India ("CCI") dismissed separate allegations of refusal to deal against Britannia Industries Limited ("**Britannia**") and Parle Products Private Limited ("**Parle**") (Britannia and Parle are collectively referred to hereinafter as "**Companies**"), in the market for biscuits in India.¹ The allegations against the Companies were made by Hiveloop Technology Private Limited ("**Complainant**"), who operates a business-to-business ("**B2B**") trade platform/marketplace under the brand name 'Udaan', for sale and purchase of fast moving consumer goods ("**FMCG**"), electronics, pharmaceuticals, lifestyle, home, and kitchen appliances, fruits and vegetables, etc., between manufacturers, wholesalers, retailers and distributors under a single platform.

2. ALLEGATIONS BY THE COMPLAINANT

- 2.1. The Complainant submitted that one of the core functions of Udaan, as a B2B intermediary, is listing manufacturers/wholesalers/distributors on its platform to meet the demand of the retailers on the other side of the platform. Accordingly, in order to establish itself, it must list the majority of the brands in all categories, especially the brands of leading manufacturers. As such, the Companies are the leading biscuit manufacturers in India and certain products of the Companies drive significant demand for biscuits in India.
- 2.2. Given the brand loyalty commanded by Britannia's brands such as, 'Good Day' and 'Marie Gold' and Parle's brand 'Parle-G' (Good Day, Marie Gold, and Parle G are collectively referred to hereinafter as "**Relevant Products**"), the Complainant submitted that they are a 'must-stock' product for the retailers and distributors and thus, warrant delineation of a narrower product market. Accordingly, the Complainant delineated the relevant markets as: (i) 'market for mid-premium segment biscuits in India' and (ii) 'market for glucose biscuits in India' in relation to Britannia and Parle, respectively. As such, the Complainant submitted that in their respective markets, the Companies possess market power owing to their high market share (i.e., more than 25%)² and high demand for the Relevant Products.
- 2.3. The Complainant alleged that even after making numerous attempts to procure the Relevant Products, the Companies refused to deal with the Complainant at all or on discriminatory terms vis-à-vis the Companies' existing distributors. As such, the Complainant was forced to procure these Relevant Products from the open market, which increased its input costs and the final costs to the retailers, thus placing the Complainant at a significant competitive disadvantage vis-à-vis the other distributors of the Companies. Thus, the Companies' conduct impacted the Complainant's trade margins leading to significantly low profit margins for retailers.

¹ Case No. 18 of 2021, *Hiveloop Technology Private Limited v. Britannia Private Limited*, order dated June 16, 2022, available at: <https://www.cci.gov.in/antitrust/orders/details/1039/0> and Case No. 28 of 2021, *Hiveloop Technology Private Limited v. Parle Products Private Limited*, order dated July 06, 2022, available at: <https://www.cci.gov.in/antitrust/orders/details/1047/0>.

² The Complainant submitted that in the financial year 2019-20: (i) Britannia held a market share of approximately 32.1% in the biscuits market and 'Good Day' and 'Marie Gold' contribute up to 80% of its revenues; and (ii) Parle held a market share of approximately 83% in the glucose biscuits market.

- 2.4. While the allegations against the Companies were broadly similar, the key difference between the two allegations were: (i) the nature of the Complainant's relationship with the Companies; and (ii) the Companies' conduct with the Complainant. While Britannia had a short-term business relationship with the Complainant,³ Parle did not have any business relationship/ agreement with it. Further, the Complainant alleged that Britannia refused to supply a sufficient quantity of its 'must-stock' products to the Complainant, thereby, indulging in constructive refusal to deal, whereas Parle outrightly refused to supply its 'must-stock' product to the Complainant and also prevented its distributors from dealing with the Complainant.⁴

3. SUBMISSIONS BY THE COMPANIES

- 3.1. At the outset, (i) Britannia submitted that the Complainant had no *locus standi* to file the information as Britannia only dealt with Granary Wholesale Private Limited ("**Granary**") (a group company of the Complainant who was the exclusive seller of Britannia's products on Udaan); and (ii) Parle submitted that it had no pre-existing relationship/ agreement with the Complainant nor has it mandated its current distributors to not deal with the Complainant. As such, in the absence of an alleged 'anti-competitive' agreement, the allegations are meritless.
- 3.2. In relation to the relevant market, Britannia submitted that given the high degree of demand side substitutability of its products with other sweet and savoury food items, such as, biscuits, cakes, dairy products, and chips and in line with the CCI's decisional practice,⁵ the relevant market should be: (i) 'market for manufacturing of packaged snack items in India' at the broad level; and (ii) 'market for biscuits in India' at the narrow level. Parle submitted that given the substitutability of biscuits based on physical characteristics and taste, the relevant market should be: (i) 'market for biscuits in India' at the broad level; and (ii) 'market for sweet biscuits in India' or 'market for non-sweet/savoury biscuits in India' at the narrow level. The Companies submitted that they did not possess market power in the relevant markets as they faced competitive constraints from other significant players. Further, Parle submitted that 'Parle-G' held low market shares (i.e., less than 20%) in different categorisations of the biscuits market.⁶
- 3.3. Additionally, the Companies submitted that: (i) they have the freedom to choose their business partners in conformity to their requirements; and (ii) there was no refusal to deal as they have objective justifications for their conduct. As such, Britannia submitted that: (a) supply of its 'must-stock' products to the Complainants was based on objective criteria and Granary's past performance; (b) it is not obligated to adhere to the onerous demands⁷ of the Complainant for the supply of its 'must-stock' products; and (c) any supply of its 'must-stock' products to the Complainant in excess of its ability would have prejudiced Britannia's objective of making its products readily available to its final consumers. Further, Parle submitted that the Complainant did not meet Parle's requirements, owing to its unviable and incompatible business model⁸ and there has been no foreclosure of the market for the Complainant.

³ The Complainant alleged that it had a business arrangement with Britannia since 2019, which was followed by a pilot project and further discussions on developing their business arrangements.

⁴ Parle terminated the distributorship of one of its agencies in Uttar Pradesh, which was found to be dealing with the Complainant (which was revealed by the Complainant during the course of the proceedings).

⁵ Case No. 106 of 2015, *Tamil Nadu Consumer Products Distributors Association v. Britannia Industries Limited*, order dated March 29, 2016, available at: <https://www.cci.gov.in/antitrust/orders/details/434/0>.

⁶ Parle submitted that 'Parle-G' had a low market share in: (i) the relevant markets; (ii) category of affordable biscuit packs; (iii) mass and premium biscuit segments; and (iv) category of consumers belonging to children age group.

⁷ Without any credible demand projection and with the intent of disrupting existing distributorship channel.

⁸ Parle highlighted that it is particular about appointment of distributors and they are expected to have certain attributes such as: (i) management of inventory, dispatching goods in small quantities to local shops, collection of cash, etc.; (ii) providing value added services to the company; (iii) compliance with rules and regulations on behalf of the company; (iv) assistance in buying decisions; and (v) anticipating needs of the retailers and the customers. Parle submitted that as the Complainant did not satisfy these requirements, it could not be appointed as a distributor as it could disrupt Parle's distribution chain.

4. FINDINGS OF THE CCI

- 4.1. Based on the Supreme Court of India's judgment in *Samir Agarwal v. CCI and others*,⁹ the CCI observed that the *locus standi* of the Complainant is immaterial to the proceedings before the CCI, given that any person, whether such person is personally affected or not, can approach the CCI. However, the CCI in both cases highlighted that the Complainant while approaching the CCI must disclose all the relevant and material facts affecting the outcome of the investigation at the time of filing the information itself.¹⁰
- 4.2. While rejecting the relevant market delineated by the Complainant, the CCI observed that delineating a narrow product market merely on the factor of the popularity of a few brands may not be appropriate. Accordingly, based on its decisional practice,¹¹ the CCI delineated the relevant market as the '*market for biscuits in India*'. In relation to the Companies' market power, the CCI observed that although the Companies hold some degree of market power¹² in the relevant market, they faced significant competitive constraints as: (i) the Companies compete fiercely *inter se*; and (ii) the Companies face competition from: (a) presence of other biscuit manufacturers, such as, ITC, Patanjali, Cremica, etc.; and (b) entry of new players, such as, 'Unibic' and 'McVitie's'.
- 4.3. At the outset, the CCI highlighted that an enterprise has the autonomy to choose its business partners and the CCI cannot substitute the commercial wisdom of the enterprise with its regulatory wisdom unless such commercial wisdom falls foul of the provisions of the Competition Act, 2002 ("**Act**") (i.e., the criteria laid down is unfair and/or discriminatory and designed to eliminate competition on merits). Thus, an enterprise which is yet to be accepted as a business partner cannot claim equality with an existing business partner. Even for existing business partners, the obligation to treat them equally arises only when they are equally placed, and different terms of trade may be offered based on sound commercial logic.
- 4.4. On merits, the CCI observed that the Complainant did not provide substantial evidence to support its allegations against the Companies. Further, it observed that there was no imposition of a vertical restraint and in turn, no actual or likely appreciable adverse effect on competition, given that: (i) the Relevant Products were not indispensable and their absence from the Complainant's platform would not pose any existential threat to the Complainant in the biscuits market; (ii) the Complainant was not foreclosed, as it is an online B2B platform catering to multiple product segments and is not significantly dependent on the Companies' products; (iii) there are no entry barriers, since a large number of biscuit manufacturers and distributors are present in the market for biscuits such as ITC, McVitie's, Patanjali, Cremica, etc.; and (iv) there is no evidence that the Companies' conduct impeded competition in their distribution chains. Hence, the CCI refrained from ordering an investigation against the Companies as it was of the *prima facie* view that the Companies' conduct did not amount to refusal to deal.

5. **INDUSLAW VIEW**

- 5.1. By way of the instant orders, the CCI has rightly held that mere popularity of a particular brand in a product category neither warrants: (i) a narrow delineation of the relevant market; nor (ii) an inherent right to demand supply of such a brand. As such, delineation of a relevant product market must be based on its characteristics, price, and, intended use in terms of the provisions of the Act.

⁹ Civil Appeal No. 3100 of 2020, *Sameer Agarwal v. CCI and others*.

¹⁰ The CCI observed that the Complainant should have disclosed: (i) Granary, a group company of the Complainant, was directly dealing with Britannia to procure their brands of biscuits and listed itself on the Complainant's platform, as an exclusive seller; and (ii) alleged termination of distributorship of one of Parle's agencies in Uttar Pradesh owing to supply of Parle-G biscuits to the Complainant, in the information itself and not during the proceedings before the CCI.

¹¹ Case No. 106 of 2015, *Tamil Nadu Consumer Products Distributors Association v. Britannia Industries Limited*, order dated March 29, 2016, available at: <https://www.cci.gov.in/antitrust/orders/details/434/0>.

¹² The CCI observed that Britannia and Parle: (i) held a market share of approximately 32% and 27%, respectively; (ii) had the discretion to choose their business partners; and (iii) had a wide reach throughout India and a robust distribution and sales network.

- 5.2. While in the past, the CCI had implicitly recognized selective distribution arrangements as it has upheld the freedom of enterprises to: (i) choose their business partners;¹³ and (ii) terminate an agreement with its business partner based on an objective justification;¹⁴ these orders also gain prominence as the CCI has now explicitly recognized selective distribution as an industry practice and a valid business strategy. However, the CCI refrained from providing much-needed guidance in relation to the qualifying conditions for a selective distribution arrangement to be competition law compliant. As such, the explicit recognition of selective distribution arrangement will provide much-needed assurance to the enterprises and will allow them greater control over the distribution model for their products.

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¹³ Case No. 66 of 2010, *Flyington Freighters Private Limited v. Airbus S.A.S*, order dated April 28, 2011, available at: <https://www.cci.gov.in/antitrust/orders/details/964/0>. The CCI observed that everyone has a right to carry on business and freedom of trade including the right to choose their trade and business partners.

¹⁴ Case No. 20 of 2015, *Shri K. Rajarajan v. Mahindra & Mahindra Limited and others*, order dated June 30, 2015, available at: <https://www.cci.gov.in/antitrust/orders/details/568/0>. The CCI recognized an enterprise's right to terminate a dealer agreement owing to its failure to adhere to the prescribed criteria.