

## **Suo Motu Case No. 03 of 2017** ***In Re: Anticompetitive conduct in the*** **Dry-Cell Batteries Market in India**

Through this quarterly publication, CUTS International intends to undertake independent examination of relevant competition cases in India (on-going as well as decided). The objective is to provide a brief factual background of the facts of relevant cases, followed by an analysis of the predominant issues, therein. This publication will expectantly help readers to better comprehend the evolving jurisprudence of competition law in India. The issues have been dealt in a simplistic manner and important principles of competition law have been elucidated in box stories, keeping in mind the broad range of viewership cutting across sectors and domains.

The purpose of this publication is to put forward a well-informed and unbiased perspective for the benefit of consumers as well as other relevant stakeholders. Additionally, it seeks to encourage further discourse on the underlying pertinent competition issues in India.

## Executive Summary

Cartels are the most egregious of all competition law violations. Instead of competing with one another, cartel members rely on each other's agreed course of action, which reduces their incentives to provide new or better products and services at competitive prices. Consequently, their clients (consumers or other businesses) end up paying more for lesser quality products and services. Hence, cartels are illegal and competition authorities around the world usually impose heavy fines on companies involved in a cartel.

Since cartels are illegal, they are generally highly secretive and evidence of their existence is not easy to find. Many competition authorities, therefore, have introduced leniency or amnesty programmes in order to aid cartel prosecutions. By a rough count, leniency programmes have now been adopted by as many as 53 competition jurisdictions around the globe.<sup>1</sup> The introduction of leniency programmes has offered, in most jurisdictions, not only a short-term impact in the discovery of existing cartels, but also a long-term impact in reducing the number of cartels discovered.<sup>2</sup> The latter can be attributed to the leniency programmes' destabilising and dissuasive effects on cartels.<sup>3</sup>

India has been rigorously fighting cartels, which are said to plague many industries, especially markets for consumer goods or inputs and services essential to various sectors of the Indian economy. One such endeavour is a recent *suo motu* case by the Competition Commission of India (CCI) against cartel conducts in the country's dry-cell batteries market.<sup>4</sup> The case highlights the application of anti-cartel provisions of the Competition Act, 2002 (the Act), assessment of fines as well as many features of India's leniency programme under the Lesser Penalty Regulations, 2009.

## Facts

In September 2016, Panasonic Corporation, Japan, along with Panasonic Energy India Co. Limited (hereinafter referred to as 'Panasonic India') filed a leniency application with the CCI disclosing 'a bilateral ancillary cartel' with Godrej & Boyce Manufacturing Co. Limited (hereinafter referred to as 'Godrej') in the market for the institutional sale of dry cell batteries (DCBs) in India. Godrej sells DCBs sourced from Panasonic India under its own brand name. Panasonic India stated that there was a 'primary cartel' between itself, Eveready Industries India Ltd. and Indo National Limited whereby the three of them co-ordinated market prices of zinc-carbon DCB. Panasonic India, having fore-knowledge about the time of price increase to be effected by this primary cartel, used the same as leverage to negotiate and increase the basic price of the batteries being sold by it to Godrej.<sup>5</sup>

Panasonic, India would lead Godrej to believe that the Market Operating Price (MOP) and Maximum Retail Price (MRP) of all major manufacturers of DCBs would increase in the near future and Godrej would be in a position to pass on the increase in the basic price of DCB to consumers in the market because of such increased MOP/MRP.<sup>6</sup> Godrej eventually sold DCBs at such agreed prices under its own brand.

Imposition of prices decided by the Primary Cartel on Godrej was facilitated by a Product Supply Agreement (PSA) concluded between Panasonic India and Godrej. The PSA imposed an obligation on both parties '*not to take steps detrimental to each other's market interest*' (Clause 8.2 of the PSA). To implement this PSA and in particular Clause 8.2, Panasonic India and Godrej would monitor the MOP of each other and of other manufacturers in various regions of India, and inform each other in cases of any discrepancy noticed. The employees of Panasonic India who were in-charge of consumer sales would also regularly update and question the MOPs of Godrej in various regions in India, to the head of institutional sales and Managing Director of Panasonic India. The price parity between Panasonic India and Godrej was coordinated with prices determined by the primary cartel. E-mail communications between Panasonic India and Godrej with regard to such monitoring as well as agreement to maintain price parity were provided in the leniency application along with a copy of the PSA dated January 12, 2012.

The CCI Director General (DG), on investigation, found that there is contravention of the provisions of Section 3 (3) (a) read with Section 3 (1) of the Competition Act 2002.

### **Section 3 in the Competition Act, 2002**

#### **3. Anti-competitive agreements:**

*(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.*

*(2) Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.*

*(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—*

*(a) directly or indirectly determines purchase or sale prices... **shall be presumed to have an appreciable adverse effect on competition***

## Contentions by Godrej

Godrej contended that its relationship with Panasonic India was a 'buyer-supplier relationship'. Therefore, the agreement entered into between them was vertical and not horizontal. The alleged cartel behaviour was, therefore, just the imposition of resale price maintenance upon Godrej by Panasonic India, and therefore the matter should be analysed under Section 3(4) of the Act instead. The DG Report hence does not satisfy the burden of proof required to establish contravention of Section 3 (4) of the Act by proving any appreciable adverse effect on competition in India. Godrej also maintained that it was only a victim inasmuch as it is the DG's own finding that Panasonic India had leveraged its cartel position *vis-a-vis* Godrej in its negotiations.<sup>7</sup>

### Section 3 in the Competition Act, 2002

#### **3. Anti-competitive agreements:**

*(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including:*

*(a) tie-in arrangement;*

*(b) exclusive supply agreement;*

*(c) exclusive distribution agreement;*

*(d) refusal to deal;*

*(e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.*

## CCI's Decision

However, the CCI rejected this contention on the ground that from consumers' point of view, the rebranded DCBs sold by Godrej competed directly with the DCBs sold by Panasonic. The CCI also quoted Clause 17 of the PSA between Godrej and Panasonic India, which records that two companies are '*two independent principals in commercial transactions*'. Furthermore, the CCI rejected Godrej's argument that Clause 8.2 of the PSA was mandated upon it by Panasonic India and any attempt by it to exclude such clause from the PSA would have resulted in a deadlock thereby restricting its entry into market. Quoting from the email communications between the two companies, the CCI held that, though Panasonic India has proposed the insertion of Clause 8.2 in the PSA, Godrej had rather gone ahead with the agreement

*'with open eyes and understanding so as to further its larger business interests', and thus could not say the anti-competitive clause had been 'forced upon it as contended'.*

The CCI ultimately held Panasonic India and Godrej liable for cartelisation. Accordingly, under the *proviso* to Section 27 (b), the Commission may impose upon a cartelising company, penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher. However, the CCI granted Panasonic India a 100 percent reduction in penalty in lieu of the leniency application. Regarding Godrej, the Commission only imposed a penalty of four percent of its turnover for each year of continuance of the cartel, considering that *'[Panasonic India], being the manufacturer of dry-cell batteries and supplier of [Godrej], was in the position to influence and dictate the terms of the anti-competitive PSA to [Godrej] and [Godrej], being a very small player having insignificant market share in the market for dry-cell batteries was not in a bargaining/ negotiating position vis-a-vis [Panasonic India]'.*

Notably, the 'turnover' used for calculating fines is interpreted as the 'relevant turnover' of the company relating to the product in question in respect whereof provisions of the Act are found to have been contravened and not the 'total turnover' of the company covering all its products. This is in line with an opinion of the Supreme Court of India in the case of ***Excel Crop Care Limited v. Competition Commission of India and Others, (2017) 8 SCC 47:***<sup>8</sup>

*"92. When the agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. This is also clear from the opening words of Section 27 read with Section 3 which relate to one or more specified products. It also defies common sense that though penalty would be imposed in respect of the infringing product, the 'maximum penalty' imposed in all cases be prescribed on the basis of 'all the products' and the 'total turnover' of the enterprise. It would be more so when total turnover of an enterprise may involve activities besides production and sale of products, like rendering of services etc. It, therefore, leads to the conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of 'relevant turnover'.*

## Analysis

### **Vertical vs. Horizontal Cooperation**

Cartels are commonly characterised by horizontal conspiracies amongst competitors at the same level of the production chain.<sup>9</sup> Figure below provides a stylised representation of the basic cartel model for two firms: the arrowed lines represent the flow of goods and services, and the dash lines represent strategic interaction. Both firms produce goods for consumers, and strategically interact with each other on the market by setting prices, quantities, quality or service levels. The resulting market outcome depends on how firms strategically interact – that is, whether they compete or form a cartel.<sup>10</sup>

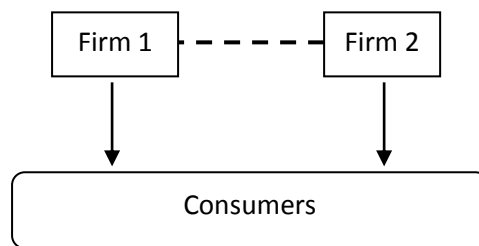
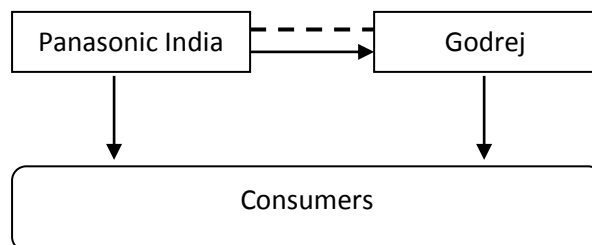


Figure Source: [https://pure.uva.nl/ws/files/1409536/95614\\_05.pdf](https://pure.uva.nl/ws/files/1409536/95614_05.pdf)

In the present case, the matter was complicated by the supply of DCBs by Panasonic India to Godrej (which is a vertical relationship), which in turns marketed the product under its own brand name, in competition with the Panasonic brand. The relationship between the two firms would therefore look as in the Figure below:



The CCI has rightly pointed out that, from the perspective of consumers, Panasonic India and Godrej are competitors, given the parallel existence of the two brands in the market, and thus there had been consumer harms caused by collusive behaviours. This was further reinforced by the letters of the PSA Clause 17, which depicted the relationship between the two companies as ‘two independent principals in commercial transactions’. The *per se* illegality rule was then applied and the

Commission was of the opinion that there was no need to prove whether the agreement resulted in any appreciable adverse effect on competition in India.

This approach is very close to the approach under the European Union competition law, which is strongly driven by the principles of market integration and does not make as strong of a distinction between horizontal and vertical cooperation. Article 101 of the Treaty on the Functioning of the European Union prohibits "all agreements, decisions of associations of undertakings and concerted practices which *may affect trade between Member States...*"<sup>11</sup>

Restraint of competition may take place at different levels of economic activity in the European Common Market; in a vertical or horizontal type of arrangement.<sup>12</sup> The US, on the contrary, often makes a stronger distinction where horizontal arrangement is more readily condemned as *per se* illegal and vertical arrangement is generally subject to the rule of reason. And thus, whenever there are some elements of vertical cooperation involved, the US often accords the case in point with more careful analysis.

One notable point, however, is regarding the balance of power in the further arrowed line between Panasonic India and Godrej, which might unduly affect the resulting market outcome. The Commission themselves acknowledged later on that Godrej had a very small market share, whereas Panasonic India was in a position to influence and dictate the terms of engagement with Godrej. So even though the PSA between the two companies implies that their relation is not a manufacturer-distributorship, and thus the anticompetitive practice is not resale price maintenance, there might have been an element of abuse of power, which should have been taken into account by the CCI while granting full immunity to Panasonic India.

### ***Immunity for Cartel Instigators/Ringleaders***

The two largest and most notable competition jurisdictions in the world, namely the US and the EU, have both introduced a leniency programme for long in their fight against cartels. The European Commission's leniency programme shows many similarities with that of the US Department of Justice (US DOJ), however differs on one important aspect. Under the jurisdiction of the former, each member of the cartel, including ringleaders or instigators, is eligible for immunity if they meet some pre-specified requirements.<sup>13</sup>

Such eligibility rests on the criteria if the party at hand undertook steps to coerce others to join the cartel or to remain in it.<sup>14</sup> However, under the jurisdiction of the

latter, i.e. the US DOJ, the ringleaders or instigators of the cartels are excluded, sometimes only partially, from US leniency policies.<sup>15</sup> As per the U.S. guidelines, a ringleader is only eligible for amnesty if it "*did not coerce another party to participate in the illegal activity and clearly was not the leader in or originator of the activity*".<sup>16</sup>

Many different opinions also remain on the conceptual meaning of the relevant terms such as 'instigators' or 'leaders'. The European Commission, for example, characterises the former as the orchestrator of the establishment and enlargement of the cartel, while the latter is rather defined as the 'operator' of the cartel.<sup>17</sup>

However, most leniency programmes more or less concurred as to the need to apply asymmetrically harsher penalty on those companies that play a more active role *vis-à-vis* the establishment, expansion and continuation of a cartel, including use of coercion. For instance, in Germany the cartel ringleaders and members who coerced others to participate in the cartel cannot claim immunity from fines.<sup>18</sup>

The Australian Competition and Consumer Commission only grants conditional immunity to corporations that are neither leading cartels nor coercing others to participate in the cartels.<sup>19</sup> Ringleaders of a cartel are eligible for immunity in Japan unless they have forced the other(s) to participate in or hindered the other(s) from leaving the cartels.<sup>20</sup> India is very different from most other countries in that its competition law does not make a distinction between ringleaders and other participants of a cartel.<sup>21</sup>

In the present case, Panasonic India was a member of the Primary Cartel with the other two DCB manufacturers in India and was one who leveraged its role in that cartel to orchestrate the ancillary cartel with Godrej. It was also the stronger company and the one in a position to influence and dictate the terms while negotiating with Godrej. Henceforth, we are of the opinion that it might be a little bit 'unfair' to give full immunity to the more likely instigator of a cartel which included only two members, while punishing the other, which is in a weaker bargaining position, as the Commission also acknowledged. The Indian leniency programme, therefore, merits a revision at least in this regard.



## Endnotes

- <sup>1</sup> Borrell *et al* (2019), *25 Years of Leniency Programs: A Turning Point in Cartel Prosecution*, CPI Antitrust Chronicle January 2019, available at: [www.competitionpolicyinternational.com/wp-content/uploads/2019/01/CPI-Borrell-Garc%C3%ADa-Jim%C3%A9nez-Ordo%C3%B1ez-de-Haro.pdf](http://www.competitionpolicyinternational.com/wp-content/uploads/2019/01/CPI-Borrell-Garc%C3%ADa-Jim%C3%A9nez-Ordo%C3%B1ez-de-Haro.pdf)
- <sup>2</sup> *Ibid*
- <sup>3</sup> *Ibid*
- <sup>4</sup> Competition Commission of India, Decision regarding Suo Motu Case No. 03 of 2017, available at: [www.cci.gov.in/sites/default/files/Suo-Motu-03-of-2017\\_0.pdf](http://www.cci.gov.in/sites/default/files/Suo-Motu-03-of-2017_0.pdf)
- <sup>5</sup> *Ibid*
- <sup>6</sup> *Ibid*
- <sup>7</sup> *Ibid*
- <sup>8</sup> Supreme Court of India, Judgement on Civil Appeal No. 2480 of 2014, available at: <https://barandbench.com/wp-content/uploads/2017/05/excel-crop-v-cci.pdf>
- <sup>9</sup> [https://pure.uva.nl/ws/files/1409536/95614\\_05.pdf](https://pure.uva.nl/ws/files/1409536/95614_05.pdf)
- <sup>10</sup> Han, M. A. (2011), *Vertical relations in cartel theory: managerial incentives, buyer groups & antitrust damages*, available at: [https://pure.uva.nl/ws/files/1409536/95614\\_05.pdf](https://pure.uva.nl/ws/files/1409536/95614_05.pdf)
- <sup>11</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E101&from=EN>
- <sup>12</sup> See for example *Consten & Grundig vs. Commission* (<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964CJ0056:EN:PDF>) or *Société Technique Minière vs. Maschinenbau Ulm GmbH* (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61965CJ0056>). Both cases were related to vertical cooperation and condemned by the Court of Justice of the European Union as violations of EU competition law.
- <sup>13</sup> <https://openjournals.maastrichtuniversity.nl/Marble/article/view/187/135>
- <sup>14</sup> See *Commission Notice on Immunity from fines and reduction of fines in cartel cases* at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF>
- <sup>15</sup> *Supra* Note 16
- <sup>16</sup> See the US DOJ Corporate Leniency Programme at: [www.justice.gov/atr/file/810281/download](http://www.justice.gov/atr/file/810281/download)
- <sup>17</sup> Bos, I., Wandschneider, F., (2012), *Cartel Ringleaders and the Corporate Leniency Program*, available at <http://competitionpolicy.ac.uk/documents/8158338/8253131/CCP+Working+Paper+11-13.pdf/9bb116b7-0026-4e48-9bb2-48308f4dad33>
- <sup>18</sup> See [www.bundeskartellamt.de/EN/Banoncartels/Leniency\\_programme/leniencyprogramme\\_node.html](http://www.bundeskartellamt.de/EN/Banoncartels/Leniency_programme/leniencyprogramme_node.html)
- <sup>19</sup> See [www.accc.gov.au/system/files/Immunity%20policy%20for%20cartel%20conduct%20and%20interpretation%20guidelines.pdf](http://www.accc.gov.au/system/files/Immunity%20policy%20for%20cartel%20conduct%20and%20interpretation%20guidelines.pdf)
- <sup>20</sup> See <https://globalcompetitionreview.com/jurisdiction/1002543/japan>
- <sup>21</sup> See the Competition Commission of India (Lesser Penalty) Regulations, 2009 at: [www.cci.gov.in/sites/default/files/regulation\\_pdf/regu\\_less.pdf](http://www.cci.gov.in/sites/default/files/regulation_pdf/regu_less.pdf)

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