IN RE: ANTICOMPETITIVE CONDUCT IN THE DRY-CELL BATTERIES MARKET IN INDIA

Against:

1. Panasonic Corporation, Japan (Opposite Party No. 1)

2. Panasonic Energy India Co. Limited (Opposite Party No. 2)

3. Godrej and Boyce Manufacturing Co. Limited (Opposite Party No. 3)

Suo Motu Case No. 03 of 2017

Date of Decision: 15-01-2019

Keywords: *suo motu*, cartel, vertical agreement, independent competitors

Rule: Section 3(1), Section 3(3)

The present case was initiated by the Commission *suo motu* under the provisions of Section 19 (1) of the Competition Act, 2002 after receiving an application and subsequent submissions ('LP Application') from OP-1 filed by it on behalf of OP-2 under Section 46 of the Act read with Regulation 5 of the Competition Commission of India (Lesser penalty) Regulations, 2009 ('LP Regulations').

In the LP Application, it was disclosed by the Applicants that there existed a bi-lateral ancillary cartel between OP-2 and Godrej & Boyce Manufacturing Co. Limited in the institutional sales of dry cell batteries. OP-2 had a primary cartel with Eveready Industries India Ltd. and Indo National Limited whereby the three of them coordinated the market prices of zinc-carbon dry cell batteries. Hence, OP-2, 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 OP-3. It was further disclosed by OP-1 that OP-2 and OP-3 used to agree on the market price of the batteries being sold by them, so as to maintain price parity in the market. Based on such fore-going facts, the Applicants submitted that contravention of Section 3(3) read with Section 3(1) of the Act has been committed by OP-2 and OP-3.

On the basis of the information and evidence provided in the LP Application, the Commission formed an opinion that there existed a prima facie case of cartelisation amongst OP-2 and OP-3 in the dry cell batteries market, in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act. Accordingly, the Commission referred the matter to the Director

General (hereinafter “the DG”) and asked the DG to cause an investigation into the matter and submit a report thereupon.

Findings of the DG

The DG found that there was a contravention of the provisions of Section 3(3)(a) read with Section 3(1) by OP-2 and OP-3. The agreement entered into between OP-2 and OP-3 had an explicit anti-competitive clause, Clause 8.2, which imposed a mutual obligation on OP-2 and OP-3 to not take any steps detrimental to each other’s market interests in relation of the market prices of dry call batteries.

Analysis of the Commission

The Commission was of the view that the very existence of Clause 8.2 in the agreement in the given form, when put in context by a holistic reading of all the other clauses of the agreement as well, could very well be called anticompetitive. Clause 8.2 was not only a dead letter clause or a ‘mutual comfort’ clause as alleged by OP-3, but was rather a deliberated clause inserted into by OP-2 and OP-3, whereby they had agreed not to undercut each other in the market by offering prices lower than what were agreed upon from time to time.

Further, OP-3 had argued that Clause 8.2 was mandated upon it by OP-2. The Commission found that OP-3 never objected to the presence of Clause 8.2 to OP-2 at all. OP-3 could have refused to enter into the agreement with such anti-competitive clause, but it rather went ahead with the agreement.

From e-mails both written and received by OP-3, its active participation and connivance to engage in a cartel was found to be evident by the Commission. It further noted that phrases like “price parity in the market”, “market rates”, “in line with the industry” have been used in the e-mails. Thus, it was clear that OP-3 was well aware about the larger cartel that existed amongst OP-1, Eveready and Nippo right from at least 2013 itself and despite that, instead of ceasing all direct or indirect contacts with OP-2, it chose to continue to maintain price coordination with OP-2 on the lines of other two players Eveready and Nippo.

Further, OP-3 had also taken the plea that OP-2 and OP-3 were in a vertical agreement with each other and were not ‘two independent competitors’. The Commission, first of all, noted that in Clause 17 of the agreement, OP-2 and OP-3 had themselves agreed that no joint venture, partnership or agency relationship has been constituted between them but rather they would operate as two independent principals in commercial transactions. Thus, in such view, the plea

of OP-3 that Clause 8.2 and the e-mail communications detailed above be read in the context of buyer-seller relationship was rejected by the Commission

In view of the above, the Commission held that there was contravention of the provisions of Section 3(3)(a) read with Section 3(1) by OP-2 and OP-3.