COMPETITION COMMISSION OF INDIA

***Suo Motu* Case No. 03 of 2017**

***In Re*: Anticompetitive conduct in the Dry-Cell Batteries Market in India**

Against:

1. **Panasonic Corporation, Japan**
2. **Panasonic Energy India Co. Limited**
3. **Godrej and Boyce Manufacturing Co. Limited**

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Present:

For Panasonic Corporation, Japan, Panasonic Energy India Co. Limited and Mr. Parimal Vazir:	Mr. Karan Singh Chandhiok, Ms. Kalyani Singh and Mr. Mohith Gauri, Advocates
For Mr. S.K. Khurana of Panasonic Energy India Co. Limited:	Mr. Akshit Mago, proxy counsel for Mr. Ashish Mohan, Advocate
For Godrej & Boyce Manufacturing Co. Limited, Mr. Sorab Parekh, Mr. Sunil Patil, Mr. Rakesh A. and Mr. Rajiv Jhangiani:	Mr. Somasekhar Sundaresan, Mr. Rahul Rai and Mr. Gaurav Bansal, Advocates alongwith Mr. Sunil Patil and Mr. Rakesh A. Krishnan in person and Mr. Sherazad Doonila, Associate Manager at Godrej & Boyce Manufacturing Co. Limited

ORDER UNDER SECTION 27 OF THE COMPETITION ACT, 2002

Facts:

1. The present case was initiated by the Commission *suo motu* under the provisions of Section 19 (1) of the Competition Act, 2002 (hereinafter, "**the Act**"), pursuant to receiving an application dated 07.09.2016 and subsequent submissions dated 22.09.2016 (hereinafter "**LP Application**") from Panasonic Corporation, Japan (hereinafter, "**OP-1**") filed by it on behalf of

itself, the enterprises controlled by it *i.e.* Panasonic Energy India Co. Limited (hereinafter "**OP-2**" or "**PECIN**"), and their respective Directors, officers and employees (hereinafter "**the Applicants**"), under Section 46 of the Act read with Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 (hereinafter, "**LP Regulations**").

2. 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 (hereinafter "**OP-3**") in the institutional sales of dry cell batteries (hereinafter, "**DCB**") from at least 2012 till November 2014. OP-2 was the supplier of batteries to OP-3, as part of its institutional sales. OP-2 had a primary cartel with Eveready Industries India Ltd. (hereinafter "**Eveready**") and Indo National Limited (hereinafter "**Nippo**") whereby the three of them co-ordinated the market prices of zinc-carbon DCB. 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. OP-2 would lead OP-3 to believe that the Market Operating Price (hereinafter "**MOP**") and Maximum Retail Price (hereinafter "**MRP**") of all the major manufacturers of DCB would increase in the near future and OP-3 would be in a position to pass on the increase in the basic price of DCB to the consumers in the market because of such increased MOP/ MRP.

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. They used to monitor the MOP of each other and of the other manufacturers in various regions of India, and inform each other in cases of any discrepancy noticed. Even the employees of OP-2 who were in-charge of consumer sales, regularly updated and questioned the MOPs of OP-3 in various regions in India, to Shri Parimal Vazir, head of institutional sales of OP-2 and Mr. S.K. Khurana, Managing Director of OP-2. Such price parity was in consonance with the prices determined by the primary cartel. E-mail communications between OP-2 and OP-3 with regard to such

monitoring were provided by the Applicants alongwith their LP Application and also, copy of the agreement entered into between OP-2 and OP-3 on 12.01.2012 was given, Clause 8.2 of which had recorded such understanding between the two OPs.

4. It was also disclosed by OP-1 that as per Clause 5 of the afore-said agreement, OP-2 used to pack the batteries in accordance with the instructions of OP-3 and make supplies. Such packaging had to be changed whenever the MRP of OP-3 increased. The dates on which the packaging was changed by OP-2 for OP-3 when compared with a corresponding list for OP-2's own products also shows that price increase in OP-3's products were even within one month of the price increase in OP-2's products. It was stated that such simultaneous price increase is also evident of a pre-meditated arrangement between OP-2 and OP-3.

5. 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.

6. 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 DCB market, in contravention of the provisions of Section 3 (3) (a) read with Section 3 (1) of the Act. Accordingly, *vide* order dated 08.02.2017 passed under Section 26 (1) of the Act, 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.

Investigation by the DG:

7. The DG submitted the confidential version of the investigation report on 22.09.2017 and non-confidential version of the report on 15.02.2018. The DG framed two issues and gave its findings thereupon as under:

a) Whether OP-2 and OP-3 indulged in cartelisation in the DCB market in India in contravention of the provisions of Section 3 of the Act?

DG's Finding: The DG, on investigation, found that there is contravention of the provisions of Section 3 (3) (a) read with Section 3 (1) by OP-2 and OP-3. The Product Supply Agreement (hereinafter, "**the PSA**") entered into between OP-2 and OP-3 had an explicit anti-competitive clause *i.e.* Clause 8.2, which imposed a mutual obligation on OP-2 and OP-3 not to take any step detrimental to each other's market interests with respect to the market prices of DCB. This clause, when seen in light of Clause 17 of the PSA which stated that the agreement between OP-2 and OP-3 was "*not of joint venture, partnership or agency relationship*", exhibits existence of concurrence of intention between "*two independent principals in commercial transaction*" to protect each other's interests in the market. Further, from the e-mail communications on record exchanged between Mr. Parimal Vazir of OP-2 and Mr. Rakesh A., Mr. Sorab Parekh and Mr. Sunil Patil of OP-3, it can be observed that OP-2 and OP-3 exchanged commercially sensitive pricing strategies to maintain price parity of DCB in the market in line of the prices jointly determined by the other major players Eveready and Nippo. OP-2 and OP-3 had a price monitoring system in place whereby they would point out each other's deviations from the agreed price levels prevailing in various towns/ cities and ask for corrective action so as to reduce or even eliminate competition in the market. The period of cartel was from 12.01.2012 when the PSA was signed till November 2014 when OP-3 stopped taking supplies of DCB from OP-2.

b) In case answer to Issue No. 1 is yes, who were the 'individuals' of OP-2 and OP-3 involved in such contravention (directly or indirectly) at the relevant time and what were their respective roles?

DG's Finding: As the answer to Issue No. 1 is in affirmative, the following 'individuals' of OP-2 and OP-3 are found to have been

involved in the contravention (directly or indirectly) of the provisions of the Act at the relevant time, who are liable for such contravention under the provisions of Section 48 of the Act:

(i) Mr. Parimal Vazir of OP-2 – General Manager, Institutional Sales of OP-2;

(ii) Mr. S. K. Khurana of OP-2 – Managing Director of OP-2 from 2006 to 2012 and Chairman and Managing Director of OP-2 from 2012 to 31.07.2016;

(iii) Mr. Sorab Parekh of OP-3 – Associate Vice-President of Godrej Prima;

(iv) Mr. Sunil Patil – Associate General Manager and Head of Battery Business of Godrej;

(v) Mr. Rakesh A. – Product and Marketing Manager of OP-3; and

(vi) Mr. Rajiv Jhangiani – Executive Vice-President and Business Head of Godrej.

Consideration of DG Report:

8. After receiving the non-confidential version of the DG Report, the Commission, *vide* order dated 11.04.2018, obtained from the OPs and their above-stated persons found liable by the DG under the provisions of Section 48 of the Act (hereinafter, "**the Parties**"), undertakings to the effect that the information or material supplied to them in the matter will only be used for the purposes of the Act and will not be disclosed or shared with any third party. Thereafter, *vide* order dated 12.06.2018, the Commission forwarded to the Parties, electronic copy of the non-confidential version of the DG Report, in response to which, as directed, objections/ suggestions as well as financial statements/ income details from 2011-12 to 2017-18, were received from the Parties. Further, oral hearing in the matter took place on 22.11.2018 wherein detailed submissions on behalf of the Parties were made by their respective learned counsel.

Submissions of the OPs on the DG Report:

9. OP-1 and OP-2, in their written submissions as well as during the oral hearing, did not dispute the conclusions of the DG. However, OP-1 in its written submissions stated that since it is not engaged in the manufacture and sale of DCB in India directly and the DG has also found no involvement of OP-1 in the matter, its name should be struck off from the present case proceedings under Regulation 26 of the Competition Commission of India (General) Regulations, 2009 (hereinafter '**General Regulations**'). As per OP-1, the same approach was adopted by the Commission in the previous case also *i.e. In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India Suo Motu*, Case No. 02 of 2016 decided on 19.04.2018. Further, OP-1 and OP-2 pleaded that since they are the Lesser Penalty Applicants and the present cartel was detected by the Commission only upon their LP Application, they ought to be granted the benefit of 100% reduction in penalty (including to their Directors, officers and employees). They stated that the DG has relied extensively upon the information/ documents provided by them and they have provided full, true and vital disclosures to the Commission.

10. OP-3, on the other hand, in its written submissions as well as through the oral submissions made by Mr. Somasekhar Sundaresan, their learned counsel, denied and challenged the conclusions reached by the DG. OP-3 contended that:

    (i) OP-2 and OP-3 were not 'two independent competitors' as stated by the DG. They were rather engaged in a vertical agreement with each other. The DG has misread the evidence which specifically reflects imposition of resale price maintenance upon OP-3 by OP-2. The DG has arrived at an incorrect finding of violation of Section 3 (3) of the Act by OP-2 and OP-3 instead of analysing the present matter under Section 3 (4) of the Act. The DG Report also 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 (hereinafter, "**AAEC**") in India.

(ii) OP-3 was only a victim inasmuch as it is the DG's own finding that OP-2 had leveraged its cartel position *vis-a-vis* OP-3 in its negotiations. The very reason for OP-2's insistence on incorporating Clause 8.2 in the PSA was to restrict OP-3 from undercutting the prices and requiring OP-3 not to act as a competitor of OP-2 in the market for Economy DCB. OP-2 did not perceive OP-3 as its competitor but rather only its institutional customer. The import of Clause 8.2 of the PSA read with termination Clause 13.1 (iii) of the same was clearly to restrict OP-3 from taking any steps, specifically by way of pricing of Economy DCB supplied by OP-2, that would undermine OP-2's interests. Accordingly, OP-3 lacked the operational independence so far as the (re) sale of Economy DCB was concerned.

(iii) The DG has incorrectly observed that the very existence of Clause 8.2 in the PSA leads to a violation of Section 3 of the Act. If such a proposition were to be accepted by the Commission, it would lead to wide-ranging implications for any supply agreement in India which may have a generic 'mutual comfort' clause. The only reason as to why OP-3 had to agree to the inclusion of Clause 8.2 in the PSA was that any attempt by OP-3 to exclude the same from the PSA would have resulted in a deadlock leading to breakdown of negotiations, ultimately restricting the entry of OP-3 in the economy segment of AA DCB.

(iv) The e-mail communications on record have been grossly misinterpreted by the DG. The same only show that OP-2 and OP-3 were engaged in constant negotiations and cross-examination of facts, as would happen in any commercial relationship. Such e-mails were exchanged by OP-2 with OP-3 only in the context of trying to procure a lower Basic Price for the DCB from OP-2.

(v) OP-3 never had any communication with either Eveready or Nippo in relation to prices, clearly because OP-3 did not share a buyer-seller relation with them. Despite being invited to join the Association of Indian Dry-Cell Manufacturers (AIDCM), OP-3 decided not to take such membership. OP-3 had been resisting the pervasive threat from OP-2 of stopping supplies to OP-3, and in turn was looking to explore other modes of procurement of such batteries due to the fraught relationship with OP-2.

(vi) OP-3 had specifically complained about the possibility of a cartel in DCB market to the Directorate General of Anti-Dumping and Allied Duties (hereinafter, "**DGAD**") *vide* letter dated 25.11.2015. OP-3 also did not renew the PSA with OP-2 precisely for this reason. OP-3 stopped procuring batteries from OP-2 in November 2014 on account of commercial unviability of the terms of PSA.

(vii) OP-3 consistently suffered losses in the Economy DCB market during the period of investigation. OP-3's cost of procurement of batteries in comparison to its net revenue during the relevant time was significant.

11. In rebuttal to the above submissions of OP-3, Mr. Karan Singh Chandhiok, the learned counsel for OP-1 and OP-2, during the oral hearing, stated that he fully agrees with the analysis done by the DG of the evidences provided by them and in fact, cartelisation by OP-2 and OP-3 had indeed occurred. The learned counsel stated that OP-1 and OP-2 had no motive to file a false LP Application before the Commission as filing of such an application causes reputational harm. Further, he stated that Clause 8.2 of the PSA which imposed a mutual obligation on OP-2 and OP-3 not to cannibalise each other very clearly shows the nature of the anti-competitive agreement which OP-2 and OP-3 had and the same is a negotiated clause which OP-3 adopted in the agreement with open eyes and the same was not a clause thrust upon OP-3 by OP-2. Also, relying on the "*Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-*

operation agreements" (hereinafter, "**EU Guidelines**"), the learned counsel stated that though OP-2 was indeed the supplier of batteries to OP-3, it does not mean that OP-2 and OP-3 were vertically related as OP-3 was not the distributor of OP-2 but it was rather selling DCB in the market under its own name. Hence, the distribution arm of OP-2 was horizontally related to OP-3 and from a demand side perspective, the two were independent competitors. Regarding the e-mail communications on record, the learned counsel submitted that the same reflect discussions on MOP/ MRP of DCB in the market and not discussions on the procurement/ basic price of DCB to be charged by OP-2 from OP-3. Also, he stated that since there was transparency in the DCB market, gaming, as contended by OP-3, was not possible.

Analysis:

12. The Commission has perused the LP Application filed by OP-1 on behalf of itself and OP-2, the investigation report submitted by the DG, the written submissions filed by the OPs, the other material available on record and also heard the oral arguments of the respective learned counsel representing OP-1 and OP-2 and their individual officers/ employees, on the one hand, and OP-3 and its individual officers/ employees, on the other.

13. The Commission notes that the present case emanated out of the LP Application filed by OP-1. OP-1 had filed this application on behalf of itself, its Indian subsidiary OP-2, and the Directors, officers and employees of both OP-1 and OP-2. Hence, while referring the matter to the DG, both OP-1 and OP-2 were made Opposite Parties in the present case. In *Suo Motu* Case No. 02 of 2016 (*supra*) upon which OP-1 places reliance, OP-2 was only the Lesser Penalty Applicant who applied for marker status and not OP-1, as is the situation in the present case. In that case, from the very first instance, OP-1 was never made an Opposite Party in the matter. It was not the situation in that case that OP-1 was first made an Opposite Party in the proceedings and later its name was struck off under Regulation 26 of the General Regulations. In the present case, though OP-1 might not be engaged in the manufacture

and sale of DCB in India directly and the DG has also not made any investigation against OP-1 or found the involvement of OP-1 in the matter, yet, since OP-1 itself was the Lesser Penalty Applicant in the present matter, its contention that on these grounds its name should be struck off from the present case proceedings under Regulation 26 of the General Regulations cannot be accepted. However, in view of the fact that no evidence, either in the LP Application or in the DG Report, is available against OP-1, the Commission does not deem it appropriate to make any analysis and/ or finding in respect of OP-1.

14. Clarifying such position, the Commission now proceeds to examine the matter on merits. From the report, it is noted that OP-2 was the contract manufacturer of zinc carbon DCB for OP-3. A PSA dated 13.01.2012 was entered into between them whereby it was decided that OP-3 would procure DCB 'R-6 UM-3-UM 'AA' Size (Economy)' and 'R-6 UM-3-UM 'AA' Size (Premium)' from OP-2 to sell in the market. OP-2 and OP-3 also agreed on other specific details by way of Supplementary PSAs dated 13.01.2012 and 23.03.2013. Clause 8.2 of the PSA, which is reproduced below, has been found by the DG to be anti-competitive:

> "*Either party herein agrees and undertakes that it will not take any steps which are detrimental to the other party's market interests*."

15. Opposing the DG's above conclusion, OP-3 has argued that the DG has wrongly observed that the very existence of PSA would lead to a violation of Section 3 of the Act. If such proposition of the DG were to be accepted by the Commission, it would lead to wide-ranging implications for any supply agreement in India which may have a generic 'mutual comfort' clause. Further, it was argued that the sole reason as to why this clause was agreed to by OP-3 was that any attempt by OP-3 to exclude Clause 8.2 from the PSA would have resulted in a deadlock, and consequently led to break down of the negotiations, ultimately restricting the entry of OP-3 in the Economy segment of AA DCB.

16. At the outset, the Commission notes that evidently, the language of Clause 8.2 of the PSA is not such that the same can be termed as a mere 'mutual comfort' clause as contended by OP-3. Rather, the clause imposed specific obligations on both OP-2 and OP-3, who as per Clause 17 of the PSA were independent principals in commercial transactions, to not take steps which may be detrimental to the other party's market interests or in other words, to protect each other's market interests. Clause 17 of the PSA reads as follows:

> *"This Agreement has been entered into on a principal-to-principal basis and nothing contained in this Agreement shall be deemed to constitute a joint venture, partnership or agency relationship between PECIN and G&B. The parties hereto shall not represent as an agent of the other Party under any circumstances and at any place and at any point of time and shall fulfil their obligations strictly in terms of this Agreement as between two independent principals in commercial transactions and none of the terms and conditions of this Agreement of their context shall be read or meant to be otherwise.*" (emphasis supplied)

17. Therefore, the Commission is of the view that the very existence of Clause 8.2 in the PSA in the given form, when put in context by a holistic reading of all the other clauses of the PSA as well, can very well be called anti-competitive. However, from the DG Report, it is noted that the DG, on its part, has not found the mere existence of Clause 8.2 in the PSA to be anti-competitive as has been contended by OP-3. It is rather the implementation of Clause 8.2 in an anti-competitive manner that has been observed by the DG to be in contravention of the provisions of the Act. The DG, in Para 6.7.5 of its report, has concluded that:

> "*Clause 8.2 of the PSA exhibits the existence of concurrence of intention between the two OPs to protect each other's interest. It has been established in the later part of the report that this clause was not a dead letter and rather duly implemented. When two independent operating competitors agree for taking actions to protect each other's interests in the market, it by no stretch of imagination can be considered as pro-competitive. The objective of inclusion of the said clause has been to restrict or even eliminate the fair competition in the market.*

Thus, the mutual obligation of the OPs of not (sic) taking any steps which were detrimental to the other party's market interest, as contained in the clause 8.2, is inherently anti-competitive on nature and a clear contravention of the provisions of Sec. 3 (1) read with Sec. 3 (3) of the Act." (emphasis supplied)

18. The above conclusion of the DG, when read in light of the e-mail communications on record which were exchanged between OP-2 and OP-3 between October 2012 and February 2014 (which have been analysed later), clearly show that Clause 8.2 of the PSA 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 the PSA 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. Therefore, OP-3 contention on this count, cannot be accepted.

19. Further, OP-3 has argued that Clause 8.2 of the PSA was mandated upon it by OP-2 and any attempt by it to exclude such clause from the PSA would have resulted in a deadlock thereby restricting the entry of OP-3 in the Economy segment of AA DCB. However, the Commission notes from the e-mail correspondences placed on record by OP-3 of negotiations between OP-2 and OP-3 in November-December 2011 regarding the clauses of PSA that OP-3 never objected to the presence of Clause 8.2 in the PSA to OP-2 at all. OP-3 could have refused to enter into the PSA with such anti-competitive clause, but it rather went ahead with the agreement with open eyes and understanding so as to further its larger business interests. The major negotiations, as can be seen from the e-mails, were done in regard to Clause 12 (Indemnification) of the PSA. Regarding Clause 8.2, the only mention thereof is in the e-mails dated 07.12.2011 and 12.01.2011 written by Mr. Sunil Patil of OP-3 to Mr. Parimal Vazir of OP-2 wherein it is stated that "*Point no. 8.2 regarding price parity is modified for both the parties {OK AS REVISED}.*" This clearly shows that Clause 8.2 of the PSA was modified and agreed to voluntarily by OP-3 and not forced upon it as contended.

20. Further, the DG, from the e-mails dated 09.10.2012, 11.10.2012, 04.01.2013, 06.02.2013, 07.02.2013, 17.04.2013, 23.04.2013, 16.10.2013, 06.02.2014 and 26.02.2014 exchanged between Mr. Parimal Vazir of OP-2 and Mr. Rakesh A., Mr. Sunil Patil and Mr. Sorab Parekh of OP-3 and the statements of the representatives of OP-2 and OP-3 upon the same, has concluded that the MOP of OP-3's products was decided jointly by OP-2 and OP-3 keeping in line the prices decided collectively by OP-2, Eveready and Nippo. As per the DG, the contents of these e-mails clearly reveal that commercially sensitive information about prevailing and desired market prices of DCB in various regions of India was regularly exchanged between OP-2 and OP-3 and they had a price monitoring system in place. Whenever either of their prices fell below the agreed rates, the other would complain and demand corrective action. They would strive to maintain their market rates in line with the market rates of the larger cartel between OP-2, Eveready and Nippo.

21. Against such conclusion of the DG, OP-3 has argued the e-mails dated 09.10.2012, 17.04.2013 and 23.04.2013 were only in the context of negotiations for basic price at which OP-3 would buy batteries from OP-2. OP-2 would quote a high procurement/ basic price to OP-3 claiming that the market price was going up and assuring OP-3 that OP-3 must accept a price hike and that OP-3 would still make money on the product, while OP-3 would call the bluff of OP-2 by gathering market intelligence on the price prevailing in the market, and would often confront OP-2 with such information, which OP-2 would then seek to rebut. On the other hand, the e-mails dated 04.01.2013, 06.02.2013 and 26.02.2013 where OP-2 expresses its disappointment over OP-3's low prices and directs OP-3 to increase its MOP/ MRP clearly indicate that OP-2 was aggrieved by the fact that OP-3 was offering batteries to its distributors at lower rates than OP-2 and rest of the industry. The tone and tenor of these e-mails clearly demonstrate OP-2 had directed OP-3 to increase its MOP on many occasions but OP-3 did not do the same. OP-3 simply adopted a placatory approach with its supplier to avoid a situation of cessation of supply of DCB from OP-2. Facing constant

pressure from OP-2 to increase OP-3's MOP, OP-3 used to simply revert the situation by posing similar requests to OP-2 to avoid receiving such requests as a negotiation strategy which explains the e-mails dated 17.04.2013 and 23.04.2013. OP-3's MOPs in 2013 January and February show that OP-3 did not actually implement the request to increase its MOP rates made by OP-2 despite reassuring OP-2 that corrective action had been taken.

22. The Commission has analysed the contents of the afore-said e-mails exchanged between OP-2 and OP-3 during the tenure of the PSA and the statements given by the representatives of OP-2 and OP-3 to the DG regarding the same. A bare reading of the said e-mails clearly shows that not even in a single e-mail, the term 'basic price' or 'procurement price' has been used. Rather all communications are in the background of maintaining price parity of DCB in the market. Hence, the argument of OP-3 that such e-mail communications were in the context of negotiations for basic price stands unsubstantiated. Detailed analysis of the said e-mails are as follows:

    (a) In the e-mail dated 09.10.2012, Mr. Rakesh A. of OP-3 complains to Mr. Parimal Vazir of OP-2 about the lower prices offered to certain distributors, specifically in Rajasthan, by OP-2 than what had been discussed between OP-2 and OP-3. In reply, Mr. Parimal Vazir states that the same is not possible; anyhow, he will confirm with his consumer teammates. Thereafter, on 11.10.2012, Mr. Parimal Vazir writes to Mr. Rakesh A. that the rates shown are of Panasonic PVC AA and of the same type battery, OP-3 is offering even lower rates.

    (b) In the e-mail dated 04.01.2013, Mr. Parimal Vazir of OP-2 complains to Mr. Rakesh A. of OP-3 that OP-3 is offering some gifting schemes for its DCB which has been viewed seriously; therefore, pricing in line to the MOP may kindly be corrected. On 06.02.2013, Mr. Parimal Vazir again writes to Mr. Rakesh A. that OP-2 is receiving many complaints regarding the lower rates offered by OP-3 (specially in MP, Maharashtra and Rajasthan), and that the situation may be corrected. Mr. Rakesh A., instead of objecting to the same, replies that the

scheme was only till 31.01.2013 and stands concluded. *W.e.f.* 01.02.2013, prices of OP-3 have been increased. Thereafter, *vide* e-mail dated 07.02.2013, Mr. Parimal Vazir thanks Mr. Rakesh A. for the corrective action.

(c) On 17.04.2013, Mr. Rakesh A. of OP-3 complains about the lower prices of OP-2's DCB in Madhya Pradesh and Chhattisgarh to Mr. Parimal Vazir of OP-2 stating that upon complaint from OP-2, OP-3 had revised its prices in Madhya Pradesh and Chhattisgarh *w.e.f.* 01.02.2013 "*so as to maintain price parity in the market*", but now OP-2 itself is offering very low prices in the market, especially in Madhya Pradesh and Chhattisgarh.

(d) On 23.04.2013 also, Mr. Rakesh A. of OP-3 writes to Mr. Parimal Vazir of OP-2 that the MOP of OP-2 in Jaipur is very low and that corrective action needs to be taken to maintain price parity in the market.

(e) On 16.10.2013, Mr. Sorab Parekh of OP-3 writes to Mr. Parimal Vazir of OP-2 that only if there is price increase by at least 0.4 paise (retail landed around ₹4.90/-), OP-3 would review its price (MRP ₹7/-). In reply, Mr. Parimal Vazir assures Mr. Sorab Parekh that the market rates would indeed increase by 0.4 paise to MRP ₹7/-.

(f) On 06.02.2014, Mr. Parimal Vazir of OP-2 sends to Mr. Sunil Patil of OP-3, an OMR sheet containing MOP of OP-3 all-over India and writes that it is visible that OP-3's ₹7/- MRP is moving up in certain areas and that he is looking forward to OP-3 gradually stabilising its rates in line with the industry.

(g) On 26.02.2014, Mr. Parimal Vazir of OP-2 writes to Mr. Sunil Patil of OP-3 that OP-2 has received complaints from Nippo *etc.* about OP-3's below par rates prevailing in Kerala and that co-operation from OP-3 is required.

23. From the above e-mails, it is clear that on multiple occasions, OP-2 complained about OP-3's rates to it and OP-3 indeed revised its rates. It did not adopt a simply placatory approach as it has contended which is evident from the e-mail dated 06.02.2013 whereby Mr. Rakesh A. of OP-3 assures Mr. Parimal Vazir of OP-2 that the discount scheme offered by OP-3 was only till 31.01.2013 and stands concluded and *w.e.f.* 01.02.2013, the prices of OP-3 have been increased as well as from the trailing e-mail dated 07.02.2013 written by Mr. Parimal Vazir of OP-2 to Mr. Rakesh A. of OP-3 thanking him for the corrective action. Anyhow, at the relevant time, due to the existence of the larger cartel between OP-2, Eveready and Nippo, the market was very transparent. OP-2 being a bigger player with stronger sales network, would have been in a position to detect any sort of pricing behaviour. Had OP-3 not adhered to any message or agreed-upon price, such issue would have come up for discussion later between OP-2 and OP-3. As there is no such correspondence placed on record by OP-3, the argument of OP-3 that price communication was unilateral in nature and OP-3 independently determined its prices adopting simply a placatory approach cannot be accepted.

24. Further, the e-mails also show that multiple times, OP-3 itself complained about OP-2's rates to it. Such complaints were not in the nature of OP-3 telling OP-2 that since its MOP/ MRP is reduced in that region, its assurances to OP-3 are false and now OP-2 should give OP-3 a lower basic price. The same were rather in the nature of OP-3 stating that upon OP-2's asking it to increase the rates, OP-3 has increased the same, but now OP-2 is selling at a lower rate than OP-3 or that OP-2 needs to increase its rates to maintain 'price parity' in the market (reference to e-mails dated 17.04.2013 and 23.04.2013).

25. From such e-mails both written and received by OP-3, its active participation and connivance to engage in a cartel is evident. It is not a case where OP-3 was merely a recipient of some commercially sensitive information sent by OP-2; but rather a case where OP-3 actively responded to such e-mails and

also itself wrote similar e-mails to OP-2. Hence, OP-3's plea of victimisation by OP-2 also cannot be accepted.

26. It is further noted that phrases like "*price parity in the market*", "*market rates*", "*in line with the industry*" have been used in the e-mails dated 23.04.2013, 16.10.2013, 06.02.2014. Thus, it is 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 co-ordination with OP-2 on the lines of other 2 players Eveready and Nippo. Further, the Commission notes that the DG in its report has stated that anti-dumping duties imposed on AA DCB by the Government of India expired in April 2013 and thereafter, OP-3 was free to make cheap imports of DCB from Hong Kong. To the Commission, this seems to be the reason why OP-3 did not renew its PSA with OP-2 and not because OP-2 was a part of cartel with Eveready and Nippo. OP-3 remained in cartel with OP-2 with a view to enhance its sales and network in the market till it could find cheaper alternate source of import and only thereafter, it severed ties with OP-2 and wrote the letter dated 25.11.2015 to the DGAD. Hence, the said complaint by OP-3 is of no avail and the same seems to be only an afterthought.

27. Regarding OP-3's contention that the actual rates of DCB of OP-3 as shown in a table placed on record by OP-3 of the net landed prices of the top distributor of OP-3 in Madhya Pradesh, Maharashtra, Rajasthan and Kerala shows that OP-3 did not cartelise and its prices were lower, the Commission notes that in the absence of OP-2 and other DCB manufacturers' net landed prices for comparison with OP-3's such rates, no conclusion from such table placed on record can be drawn. Once explicit unambiguous e-mails between OP-2 and OP-3 discussing each other's MOPs and asking for corrective action to maintain price parity are read alongwith Clause 8.2 in the PSA, and in view of the fact that the existence of such cartel has been accepted by OP-2, the contention of OP-3 that its rates shown in the table prove otherwise does not seem acceptable. The Commission finds merit in the submission put

forth by the learned counsel for OP-2 that OP-1 and OP-2 had no motive to file a false LP Application before the Commission as filing of such an application causes reputational harm.

28. Further, OP-3 has 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 DG has completely misconstrued the buyer-supplier relationship between OP-2 and OP-3 and arrived at an incorrect finding of a violation of Section 3 (3) of the Act. All the e-mails have been exchanged between OP-2 and OP-3 only in the context of buyer-seller relationship. The PSA alongwith the information exchanged pursuant to it should have been viewed by the DG as a vertical arrangement. Even Clause 8.2 in the PSA qualifies as a vertical restriction. As per OP-3, the DG has misconstrued the very clear statements of Mr. Parimal Vazir and other evidence which specifically reflects the imposition of resale price maintenance upon OP-3 by OP-2 and instead of analysing the present matter under Section 3 (4) of the Act, the DG has wrongly proceeded to establish a violation of Section 3 (3) of the Act.

29. In this regard, the Commission first of all notes that in Clause 17 of the PSA as extracted above, 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 of the PSA and the e-mail communications detailed above be read in the context of buyer-seller relationship cannot be accepted.

30. Secondly, the Commission notes that it is the admitted position of OP-3 that it though procured DCB from OP-2, it sold the same under own its brand name and not as a distributor of OP-2. Thus, from the demand side perspective *i.e.* when seen from the eyes of the consumers, OP-2 and OP-3 were competitors of each other who competed in the market of distribution and/ or sale of DCB in India. Even the EU Guidelines placed on record state that vertical agreements *e.g.* distribution agreements, concluded between

competitors, may have effects on the market and possible competition problems similar to horizontal agreements; therefore, such vertical agreements between competitors also have to be assessed according to the principles given in those Guidelines. The Commission, in view of the fact that the distribution arm of OP-2 was horizontally related to OP-3 and from the demand side perspective, the two were independent competitors, is of the opinion that the evidence placed on record cannot be viewed as communications between a seller and a buyer and there is no case of imposition of resale price maintenance by OP-2 upon OP-3. The acts of OP-3 were voluntary in nature and it entered into the PSA and agreed to be a part of a cartel to further its own commercial interests.

31. In view of the above evidences *i.e.* Clause 8.2 of the PSA and the e-mail communications between OP-2 and OP-3 evidencing existence of a price monitoring system and maintenance of price parity in the market, the Commission holds that there is contravention of the provisions of Section 3 (3) (a) read with Section 3 (1) by OP-2 and OP-.

32. OP-3 has raised another contention before the Commission that since it was never involved in the manufacture of zinc-chloride DCB but could only participate in the market by procuring supplies from OP-2 and selling, it was impossible for OP-3 to inflict any supply constraints or cause any AAEC in the market. In this regard, the Commission notes that in cases of violation of Section 3 (3) of the Act, there is a presumption of AAEC being caused. Also, the DG by analysing factors stated under Section 19 (3) of the Act, has clearly established AAEC been caused by such cartelisation of OP-2 and OP-3. Such anti-competitive arrangement between OP-2 and OP-3 led to an increase in the prices of zinc carbon DCB to a very high level causing loss to consumers, foreclosed competition in the market as consumer choice was compromised and did not result in accrual of any benefits to the consumers or promotion of any technical, scientific or economic development. Therefore, such contention raised by OP-3 is not acceptable.

33. Another contention raised by OP-3 is that it consistently suffered losses in the Economy DCB market during the period of investigation which can be seen from its financial statements. However, the Commission notes from the DG Report that Godrej is a multi-product company. It has 14 business units, one of which is Godrej Prima. Godrej Prima has 4 business units – Godrej AV Solutions, Godrej Vending Machines, Godrej Vending Services and Godrej Batteries (OP-3). OP-3 itself is in the business of sale of multiple products *i.e.* consumer batteries and allied products such as chargers, torches (flashlights) and portable power banks. In view of the Commission, even if OP-3 did consistently sustain losses in the Economy DCB market, it could have offset the same against the high profits earned by it in any other product segment. Further, though usually the motive behind cartelisation is earning of supra normal or high profits; however, in view of the clear evidences on record of cartelisation in the present case, mere absence of profits by one entity can be of no consequence.

34. Therefore, the Commission holds that there is contravention of the provisions of Section 3 (3) (a) read with Section 3 (1) by OP-2 and OP-3 and a cartel between them existed from 13.01.2012, when the PSA was entered into till November 2014, when OP-3 stopped procuring supplies from OP-2.

35. Once contravention by enterprises who are companies *i.e.* OP-2 and OP-3 is established, the Commission now proceeds to analyse the conduct of the Directors, officers and employees of these companies, who would be liable for such anti-competitive acts of the companies, in terms of Section 48 of the Act.

36. The DG has found the following 'persons' of OP-2 and OP-3 to be liable under Section 48 of the Act:

Table 1

S. No.	Opposite Party	Persons Identified by the DG
1.	OP-1	None
2.	OP-2	Mr. S. K. Khurana
		Mr. Parimal Vazir

3.	OP-3	Mr. Sorab Parekh
		Mr. Sunil Patil
		Mr. Rakesh A.
		Mr. Rajiv Jhangiani

37. The Commission agrees with the DG, and holds the following persons of OP-2 and OP-3 liable under Section 48 (1) of the Act, as they were, at the relevant time, in-charge of and responsible to their respective companies, for the conduct of the respective businesses:

Table 2

S. No.	Name of the Person	Role of the Person
1.	Mr. S. K. Khurana of OP-2	Managing Director of OP-2 from 2006 to 2012 and Chairman and Managing Director from 2012 to 31.07.2016, who played a pivotal role in communicating to Mr. Parimal Vazir, the cartel agreement between OP-2, Eveready and Nippo and asking him to arrive at a similar understanding with OP-3.
2.	Mr. Rajiv Jhangiani of OP-3	Executive Vice-President and Business Head of Godrej who signed the PSA on behalf of OP-3.

38. Further, the Commission, agreeing with the DG, holds the following persons of OP-2 and OP-3 liable under Section 48 (2) of the Act for their specific anti-competitive acts, committed on behalf of the respective companies:

Table 3

S. No.	Name of the Person	Role of the Person
1.	Mr. Parimal Vazir of OP-2	E-mails containing commercially sensitive information were exchanged by him on behalf of OP-2 with OP-3. He was also a signatory to the PSA.
2.	Mr. Rakesh A. of OP-3	E-mails containing commercially sensitive information were exchanged by them on behalf of OP-3 with OP-2.
3.	Mr. Sunil Patil of OP-3	
4.	Mr. Sorab	

	Parekh	
5.	Mr. Rajiv Jhangiani of OP-3	He signed the PSA on behalf of OP-3.

Conclusion:

39. In view of the foregoing, the Commission holds that OP-2 and OP-3 have contravened of the provisions of Section 3 (3) (a) read with Section 3 (1) of the Act by indulging in cartelisation and for such contravention, Mr. S. K. Khurana and Mr. Parimal Vazir of OP-2 and Mr. Sorab Parekh, Mr. Sunil Patil, Mr. Rakesh A. and Mr. Rajiv Jhangiani of OP-3 are also liable under Section 48 of the Act.

40. Therefore, in terms of Section 27 (b) of the Act, the Commission is empowered to impose upon such companies as well as their persons/ officers, appropriate penalties. Under the *proviso* to Section 27 (b), the Commission may impose upon a cartelising company, penalty of upto 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. Further, in the case of *Excel Crop Care Limited v. Competition Commission of India and Others, (2017) 8 SCC 47,* the Hon'ble Supreme Court has held that 'turnover' for the purposes of Section 27 (b) of the Act is 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. In this regard, the Hon'ble Court has observed as under:

> *"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'."

41. In the present case, the duration of cartel was from 13.01.2012 to November 2014. Thus, calculations of the amounts of relevant turnover and profits are as under:

Table 4

(In ₹)

S. NO.	PARTY	YEAR	RELEVANT TURNOVER (13.01.2012-30.11.2014)	PROFIT (13.01.2012-30.11.2014)	10 % OF RELEVANT TURNOVER	3 TIMES THE PROFIT
1.	PECIN	2011-12[1]	38,38,75,678[2]	6,39,770[3]	3,83,87,568	19,19,311
		2012-13	1,94,69,32,000	(8,10,000)	19,46,93,200	*NIL*
		2013-14	2,09,02,35,000	7,77,24,000	20,90,23,500	23,31,72,000
		2014-15[4]	1,48,59,46,630[5]	13,33,44,997[6]	14,85,94,663	40,00,34,992
	Total				**59,06,98,931**	**63,51,26,303**
2.	Godrej and Boyce Manufac-turing Co. Ltd.	2011-12[1]	*NIL*	*NIL*	*NIL*	*NIL*
		2012-13	7,21,02,000	(1,76,89,000)	72,10,200	*NIL*
		2013-14	11,95,35,000	(2,25,94,000)	1,19,53,500	*NIL*
		2014-15[4]	2,08,97,096[7]	(51,07,000)	20,89,710	*NIL*
	Total				**2,12,53,410**	*NIL*

(Figures in brackets indicate loss)

42. In view of the above calculations in Table 4, it can be seen that in case of OP-2, as per the *proviso* to Section 27 (b), penalty of upto three times of its profit for each year of the continuance of the cartel may be imposed as the

[1] 79 out of 366 days.
[2] ₹1,77,84,62,000 for 366 days.
[3] ₹29,64,000 for 366 days.
[4] 244 out of 365 days.
[5] ₹2,22,28,30,000 for 365 days.
[6] ₹19,94,71,000 for 365 days.
[7] ₹3,12,60,000 for 365 days.

said figure is higher while in case of OP-3, penalty of upto ten percent of its turnover for each year of the continuance of the cartel may be imposed as the said figure is higher.

43. Thus, the Commission decides to impose upon OP-2, penalty @ 1.5 times the profit for each year of the continuance of the cartel which amounts to ₹31,75,63,152/-.

44. On the other hand, with regard to OP-3, keeping in mind that OP-2, being the manufacturer of dry-cell batteries and supplier of OP-3, was in the position to influence and dictate the terms of the anti-competitive PSA to OP-3 and OP-3, 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* OP-2, and the fact that after cessation of cartel with OP-2, OP-3 had complained to the DGAD about the possibility of a cartel in DCB market *vide* letter dated 25.11.2015, the Commission decides to impose upon OP-3, penalty @ 4% of the turnover for each year of the continuance of the cartel which amounts to ₹85,01,364/-.

45. As far as the persons held liable under Section 48 of the Act are concerned, under Section 27 (b), the Commission may impose upon them, a penalty of upto ten percent of the average of their income for the three preceding financial years. Keeping all the factors in mind, the Commission, in the present case, deems it appropriate to impose penalty @ 10 % of the average of their income for the three preceding financial years, upon such persons, which is calculated as under:

Table 5

(In ₹)

S. NO.	PERSON	YEAR	INCOME
1.	Mr. Parimal Vazir of OP-2	2012-2013	13,78,727
		2013-2014	10,41,678
		2014-2015	14,11,753
		Total	38,32,158
		Average	12,77,386
		Penalty	**1,27,739**
2.	Mr. S. K. Khurana of OP-2	2012-2013	41,43,949
		2013-2014	46,32,851
		2014-2015	65,13,951
		Total	1,52,90,751
		Average	50,96,917
		Penalty	**5,09,692**
3.	Mr. Sorab Parekh of OP-3	2012-2013	40,91,885
		2013-2014	41,20,098
		2014-2015	45,86,352
		Total	1,27,98,335
		Average	42,66,112
		Penalty	**4,26,611**
4.	Mr. Sunil Patil of OP-3	2012-2013	20,11,408
		2013-2014	19,12,067
		2014-2015	21,42,408
		Total	60,65,883
		Average	20,21,961
		Penalty	**2,02,196**
5.	Mr. Rakesh A. of OP-3	2012-2013	11,15,115
		2013-2014	11,58,730
		2014-2015	13,17,250
		Total	35,91,095
		Average	11,97,032
		Penalty	**1,19,703**
6.	Mr. Rajiv Jhangiani of OP-3	2012-2013	76,38,213
		2013-2014	77,44,587
		2014-2015	85,28,184
		Total	2,39,10,984
		Average	79,70,328
		Penalty	**7,97,033**

46. At this stage, the Commission takes into account the fact that OP-1, on behalf of itself, OP-2 and their Directors, officers and employees had filed an LP Application in the matter. The Commission observes that in the LP Application, vital disclosures had been made by submitting evidence of the alleged cartel which enabled the Commission to form a *prima facie* opinion regarding existence of the cartel. At the time the LP Application was filed, the Commission had no evidence to form such an opinion. Further, through the application, the Commission could get vital evidences which disclosed the *modus operandi* of the cartel such as the PSA and the e-mail communications exchanged between OP-2 and OP-3. These evidences were found crucial in establishing contravention of the provisions of Section 3 of the Act in the matter.

47. The Commission finds that OP-2 and its representatives had provided genuine, full, continuous and expeditious cooperation during the course of investigation. Thus, full and true disclosure of information and evidence and continuous co-operation so provided, not only enabled the Commission to order investigation into the matter, but also helped in establishing the contravention of the provisions of Section 3 of the Act. On the basis of the foregoing, the Commission decides to grant 100% reduction in the penalty amount leviable under the Act, to OP-2 and its Directors, officers and employees identified above liable under the provisions of Section 48 of the Act.

48. Therefore, in terms of Section 27 of the Act, the Commission passes the following

Order

49. The OPs and their respective Directors, officers and employees identified in Table 5 are directed to cease and desist from indulging into any act of cartelisation henceforth, in the Dry Cell Batteries Market in India.

50. Further, under the provisions of Section 27 (b) of the Act, the Commission imposes the following amounts of penalty upon OP-3 and its Directors, officers and other employees identified above under the provisions of Section 48 of the Act:

Table 6

(In ₹)

S. No.	Name of the Party	Penalty Imposed	Penalty Imposed in Words
1.	Godrej & Boyce Manufacturing Co. Ltd.	85,01,364/-	Rupees Eighty Five Lacs One Thousand Three Hundred and Sixty Four
2.	Mr. Sorab Parekh	4,26,611/-	Rupees Four Lacs Twenty Six Thousand Six hundred and Eleven
3.	Mr. Sunil Patil	2,02,196/-	Rupees Two Lacs Two Thousand One Hundred and Ninety Six
4.	Mr. Rakesh A.	1,19,703/-	Rupees One Lac Nineteen Thousand Seven Hundred and Three
5.	Mr. Rajiv Jhangiani	7,97,033/-	Rupees Seven Lacs Ninety Seven Thousand and Thirty Three

51. The Commission directs OP-3 and the above-stated persons to deposit the respective penalty amount within 60 days of receipt of this order.

52. The Secretary is directed to inform the parties accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

New Delhi
Date: 15.01.2019