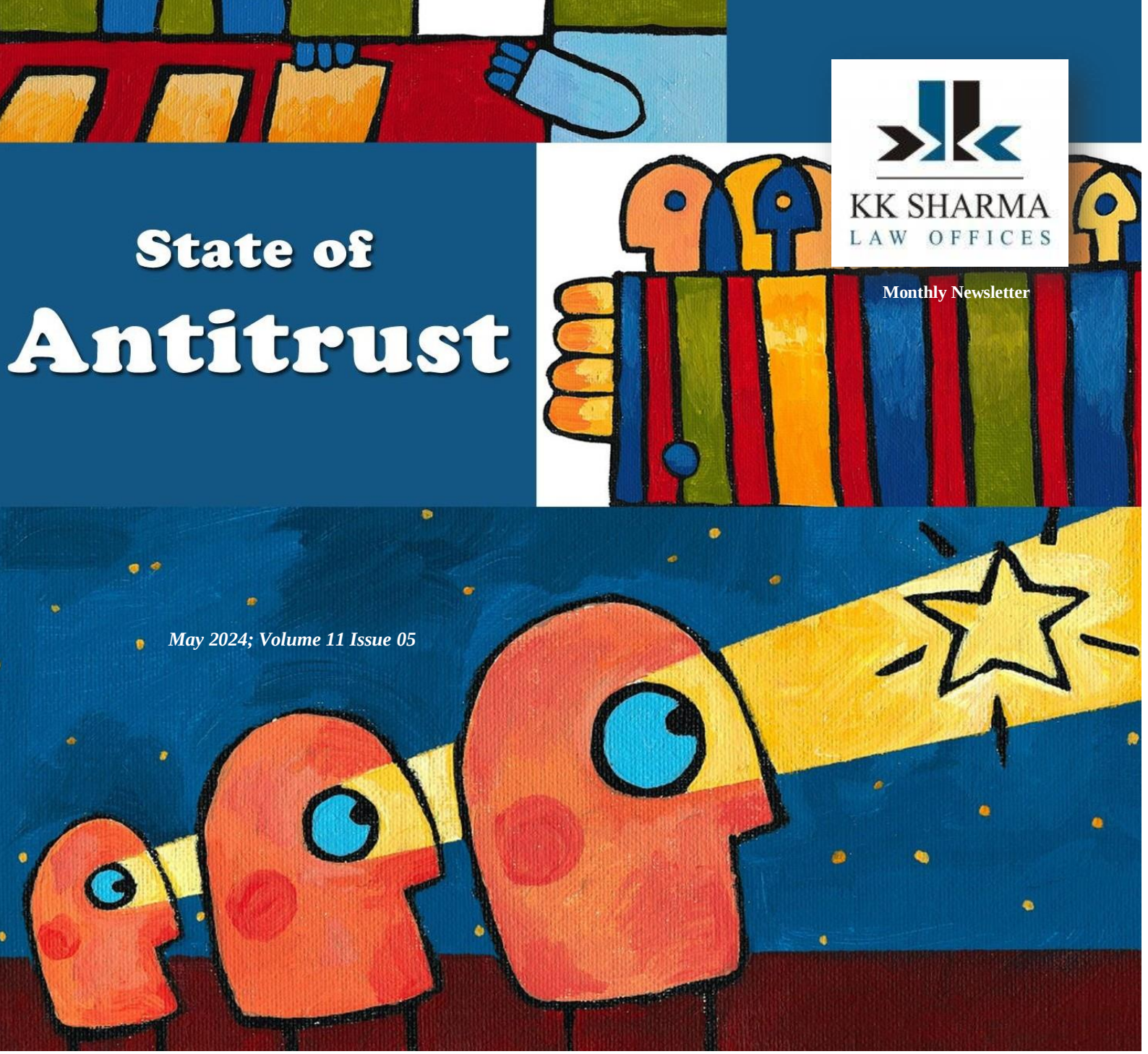

State of Antitrust

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Monthly Newsletter

May 2024; Volume 11 Issue 05

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DHC quashes CCI's order levying interest on penalty imposed on Geep Industries

The Delhi High Court **('DHC')**, in a writ petition filed by Geep Industries (India) Pvt. Ltd. and its directors **('Geep')** challenging the Competition Commission of India's **('Commission'/'CCI')** order dated 18.07.2023 **('impugned order')** *vide* which the CCI directed Geep & its directors to deposit interest on the penalty amount, noting that the impugned order is bereft of the procedure, to be followed, under the Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations, 2011 **('Penalty Regulations')**, has quashed the impugned order.

The impugned order stems from the CCI's order dated 30.08.2018 in "*In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India, Suo Motu Case No.02 of 2017*", wherein Panasonic Energy India Co. Limited & Geep were found to be indulging in cartelization in contravention of Section 3(3)(a) r/w. Section 3(1) of the Competition Act, 2002 **('Competition Act')**. Subsequently, along with directing to cease & desist the conduct, the CCI imposed monetary penalties on Geep & its director. The aforesaid Order was challenged by Geep in appeal before the NCLAT, which stayed the CCI's order dated 30.08.2018 till the conclusion of proceedings. Thereafter, NCLAT *vide* its order dated 31.03.2023 upheld the CCI's order. Following the NCLAT's order, CCI issued Demand Notice **('DN')** directing Geep & its directors "*to deposit the penalty amount with simple interest @ 1.5% for every month or part of a month comprised in the period commencing from 10.12.2018 till the date on which the demand is paid.*" Geep approached the CCI with a request to withdraw the said DN in so far as it relates to imposition of interest on the penalty amount. This request was declined by the CCI vide the impugned order.

Before the DHC, Geep contended that interest on penalty can be imposed only in accordance with the Penalty Regulations. Thus, unless the procedure for recovery of monetary penalty i.e. starting with sending of DN under Regulation 3 of the Penalty Regulations are followed, interest on penalty under Regulation 5 of the Penalty Regulations cannot be imposed on parties. *Per contra*, the Commission contended that liability to pay the penalty amount arose from CCI's order dated 30.08.2018, which was revived after dismissal of Geep's appeal by the NCLAT. The penalty amount was payable within 30 days from 30.08.2018. Further, the penalty amount imposed on Geep was within the knowledge of Geep & its directors. Therefore, there was no necessity of giving a DN. Furthermore, since Regulation 3 is procedural in nature it is only directory which can in no way absolve the obligation of Geep or its directors to pay the penalty amount within the time stipulated. Therefore, any delay in payment within the time stipulated will automatically attract interest on the penalty amount.

However, the DHC upon perusal of Regulation 3(1) of the Penalty Regulations noted that the persons against whom the penalty has been imposed has to be first informed regarding levy of penalty, regardless of the fact that the person was present during the proceedings or when the final order was passed. Thus, DN as set in the FORM I appended in the Penalty Regulations has to be mandatorily issued by the CCI for levy of penalty. A perusal of FORM I also specifies additional payment of interest @1.5% per month, if the person against whom penalty has been imposed fails to pay the penalty within the time stipulated i.e., 30 days.

Thus, the DHC held that a co-joint reading of specific insertion of the said clause intimating that the interest is due & payable on failure to pay the amount of penalty r/w. the mandatory provision of Regulation 3(1) of the Penalty Regulations makes it clear that until & unless a person against whom penalty was imposed is informed by giving FORM I, interest is not leviable. Considering the same, the DHC set aside the impugned order.

(Order dated 26.04.2024)

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NCLAT dismisses appeal filed by Sundaram Brakes in CBB Cartel Case

The National Company Law Appellate Tribunal **('NCLAT')** has dismissed an appeal filed by Sundaram Brake Linings Ltd. **('SBL')** challenging the order passed by the CCI, noting equal involvement of SBL in the cartel.

Earlier, the CCI *vide* its order dated 10.07.2020 **('impugned order')** in Ref. Case 03/2016, found SBL & 9 other Opposite Parties **('OPs')** to be cartelizing to manipulate the bidding process in the tender for procurement of Composite Brake Blocks, by the Ministry of Railways. SBL, before the NCLAT, contended that the CCI erred by wrongly enjoining SBL along with other cartel members who had admitted their involvement in the cartel, meanwhile no such admissions were made by SBL. Further, SBL only placed its bids for 3 tenders for which, as per SBL, no discussions were held with other cartel members. Additionally, SBL also contended that the alleged confession made by one of SBL's employees regarding its involvement in the cartel was made without any authorization & also not supported or corroborated by any evidence.

At the outset, from perusal of the impugned order, NCLAT took note of the common e-mail ID created by one of the employees of the cartel members through which the alleged information exchange i.e., bid price details, details of financial bids uploaded by the cartel members, calculation of quantities shared/allocated for different tenders as per prior agreement etc., used to take place. Similarly, other e-mail communications made from the common e-mail ID to SBL were also taken into consideration.

Statements made on oath by SBL's employees & employees of other cartel members were also taken note of to concede to the fact that SBL was a member of cartel. As per the NCLAT, oral statements and the emails were completely consistent with each other, which were never challenged through cross-examination by SBL.

Furthermore, the NCLAT declined to accept SBL's plea that it had never shared or exchanged information with any cartel members, but rather was only a recipient of some information received from cartel members, thus cannot be held liable. The NCLAT observed that the CCI's order in the *Beer cartel case* & *Corrugated Box Manufacturers case* makes it clear that mere exchange of information is sufficient to construe bid-rigging & thereby attracting Section 3 of the Competition Act.

Noting the fact that SBL continuously received e-mails for over 5 years without any protest & never requested the cartel to stop sending such e-mails, the NCLAT held that there was meeting of mind. Thus, the NCLAT held that SBL was part of the cartel and dismissed the appeal.

{Order dated 02.04.2024 in Competition Appeal (AT) 19/2020}

EC designates Apple's iPadOS as Gatekeeper

After designating Apple's mobile operating system **('OS')**, iOS, its browser 'Safari' & its App Store, as gatekeepers under the Digital Markets Act, 2022 **('DMA')**, in 2023, the European Commission **('EC')** has now designated Apple's iPadOS also a gatekeeper under the DMA. Gatekeepers under the DMA are large digital platforms which provide an important gateway between business users and consumers and who can create bottlenecks in the digital economy due to their position in the digital sector.

The iPadOS did not meet the quantitative thresholds laid down in DMA, therefore, the EC had initiated an open market investigation to assess whether the iPadOS constitute an important gateway despite not meeting the quantitative thresholds. The investigation found that: *"**i)** Apple's business user numbers exceeded the quantitative threshold eleven-fold, while its end user numbers were close to the threshold & are predicted to rise in the near future; **ii)** End users are locked-in to iPadOS. Apple leverages its large ecosystem to disincentivise end users from switching to other operating systems for tablets; **iii)** Business users are locked-in to iPadOS because of its large and commercially attractive user base, and its importance for certain use cases, such as gaming apps."*

Based on the above findings the EC held that Apple holds a firm & durable position with respect to iPadOS and that iPadOS is an important gateway for business users to reach the end users. Now Apple has 6 months' time to fully comply with DMA obligations as specified to the iPadOS.

(Press Release dated 29.04.2024)

NCLAT reduces penalty amount for Godrej & Boyce in Dry Cell Batteries cartel case

The NCLAT in an appeal filed by Godrej & Boyce Manufacturing Co Ltd. **('Godrej'),** challenging the order dated 15.01.2019 passed by the CCI **('impugned order')**, noting the mitigating circumstances like loss making business & miniscule market share of Godrej, has reduced the amount of penalty to 2% of the relevant turnover.

The impugned order was passed by the CCI in "*In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India, Suo Motu Case No.03 of 2017*", wherein Panasonic Energy India Co. Limited **('PECIN')** & Godrej were held to have been indulged in a cartel, in the "*market for institutional sales of dry cell batteries*" from 2012 to 2014, through which both the parties have been able to coordinate prices in the sale of Dry Cell Batteries **('DCB')** market in India. Thus, CCI held that both the parties have contravened Section 3(3)(a) r/w. Section 3(1) of the Competition Act & imposed a penalty @4% of the turnover for the relevant period of infringement.

Before the NCLAT, Godrej did not raise pleas regarding merits of the case rather constrained its contentions on the reduction of amount of penalty imposed. Godrej contended that it's a small player in the DCB market. Further, that Godrej had no bargaining power over PECIN or other DCB manufacturers and it was running into losses & was selling batteries at a lower rate than PECIN. Despite the aforesaid factors, the CCI imposed a penalty of 4% on the overall turnover, rather than the relevant turnover, which according to Godrej is disproportionate. From the impugned order, the NCLAT observed that PECIN was the contract manufacturer of Zinc Carbon DCB for Godrej. The Product Supply Agreement between PECIN & Godrej contained clauses evidencing price monitoring system & maintenance of price parity in the DCB market. Further, the NCLAT noted that Godrej has been suffering losses in the DCB market during the period under investigation. From perusal of the investigation report it was further observed by the NCLAT that the market of DCB in India is concentrated among three major players i.e., Eveready, Nippo & PECIN and that Godrej & Geep Industries **(Geep)** were among the smaller players in the market.

Thereafter, the NCLAT took note of its judgment dated 31.03.2023 in *Competition Appeal (AT) No.87 of 2018*. The NCLAT in that case, being posed with a similar circumstance of cartelization in the DCB market between PECIN-Geep Industries, on considering factors such as lack of negotiating power, insufficient market share to influence price in the market & losses suffered in the said market, had reduced the penalty imposed on Geep.

Therefore, the NCLAT observed that the losses being suffered by Godrej was taken note of by the CCI however, the CCI has declined to accept the same by stating that the losses suffered in the 'economy DCB market', could have been offset against the high profits earned by Godrej in any other product segment. In opinion of the NCLAT, this was a considerable departure from ruling of the Supreme Court in the *Excel Corp. case*. Further, considering comparatively lower prices vis-à-vis other industry players & additional gifting schemes offered by Godrej, as mitigating factors, the NCLAT reduced the amount of penalty to 2% of the relevant turnover.

{Order dated 05.04.2024 in Competition Appeal (AT) No.18/2019}

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