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INDIA AND THE AUTOMOTIVE PARTS CARTEL

*Shri Shamsher Kataria v. Honda Siel Cars Ltd.,
Case no. 03/2011, Competition Commission of India*

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Introduction

In the recent times of globalization and liberalization, there has been a significant increase in the outreach to international markets and free market operations. Thus, it is important to have comprehensive antitrust laws, in order to curb monopolies and anti-competitive agreements. Pursuant to the motive of protection of consumer interest, prevention of economic abuse and ensuring the freedom of trade, the Parliament has enacted the Competition Act, 2002, [hereinafter “the Act”] replacing the Monopolistic and Restrictive Trade Practices Act, 1969 [hereinafter “MRTP Act”], and through it, has also set up the Competition Commission of India [“CCI”], a quasi-judicial body which regulates trade practices.

The car industry across the globe has a small and select pool of key players, who dominate domestic markets. With the increasing demands for cars and the given market structure of the industry, it becomes easy to indulge in restrictive trade practices, the intricacies of which can even go undetected for years. These companies form cartels to reap super-profits at the expense of economic welfare and free and fair competition.

Through this article, the author seeks to examine the automotive parts cartel, focusing on the Indian scenario. The article explains why the car industry is prone to antitrust practices, and how it has spread like a global epidemic. Further, the article discusses the latest case² of the CCI on automotive spare parts in the Indian market. The various provisions of the Act which have been violated have been analysed in detail. Lastly, the

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author gives a criticism of the CCI order³ and concludes with probable solutions for proper implementation.

Cartels: “The Supreme Evil of Antitrust”

A cartel is an explicit, formal or informal agreement among rival firms which are engaged in the trade of similar commodities, not to compete with others on price, product or customers⁴. This is achieved by fixing prices at a high level, dividing the market geographically, limiting output, or devising measures to restrict entry into the industry, thus creating an oligopoly. Bid-rigging, or collusive bidding, where competitors collaborate in some manner to restrict competition in response to a tender, is another form of cartelization.⁵ It, thus, according to Mittal (2011: 92) imposes unreasonable restraint on free trade and distorts competition.

The main aim behind such collusions is to increase collective and individual profits by manipulating the business cycle to their advantage. Low supply and uniform high prices put consumers in a vulnerable position, thus leading economists and experts to believe that cartels are the worst form of antitrust abuses. Hence, competition authorities the world over condemn cartels, as they are presumed to be against public policy, harming consumers and damaging economies.

Section 2(c) of the Competition Act defines cartels. By this definition, there are three ingredients to cartel formation. First, there needs to be an agreement, which includes an arrangement or undertaking. Second, the agreement has to be among parties who trade in similar products. Third, this agreement has to aim to limit, control or attempt to control the price, production, distribution, sale or supply of the said product. In India, cartels are presumed to cause an appreciable adverse effect to competition. This is

³ *Ibid.*

⁴ The term “customer” may be deemed to be same as “consumer” as defined under Section 2(f) of the Competition Act, 2002.

⁵ CUTS International & NLU Jodhpur (2007), “Study of Cartel Case Laws in Select Jurisdictions--- Learnings for the Competition of India”, available at http://www.cuts-ccier.org/CARTEL/pdf/Study_of_Cartel_Case_Laws_in_Select_Jurisdictions-Learnings_for_the_CCI.pdf.

because a cartel prevents consumers and business houses from benefitting from competition, causing a detriment to the economy.⁶

The Global Automotive Parts Cartel

It is needless to say, some industries have an inherent scope over others, to cartelize. The first prerequisite is that the market demand curve faced by the industry should be inelastic in nature.⁷ This essentially means that with a greater increase in price, the subsequent decrease in quantity demanded is not very less. For this to occur, there needs to be homogeneity in the product with very close substitutes, a small number of firms each having a large market share, barriers to entry,⁸ and uniformity in cost or efficiency.⁹ Furthermore, the incentives and expected gains need to be much higher than the cost of establishing and penalty for forming a cartel.

A large number of price-fixing investigations have been launched in the past three years by antitrust authorities around the world targeting industries manufacturing mechanical and electrical automotive parts.¹⁰ Identical sourcing methods across geographical markets make the auto industry the quintessential “global industry”. Auto parts supply contracts are bought through tenders. This makes bid-rigging easy, especially because there are a limited number of competitors in the market. Moreover, the contracts typically last till the car model is completely redesigned, thus creating an entry barrier.

⁶ G.R.Bhatia, “*Combatting Cartel in Markets--- Issues and Challenges*”, Competition Commission of India, [Online: Web] Accessed 26 May 2015, URL: http://cci.gov.in/images/media/articles/cartel_20080409115658.pdf

⁷ See *supra* n. 5.

⁸ Vitamins Case, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004).

⁹ See Mittal (2011)

¹⁰ “*News: Auto Parts*”, *Global Competition Review*, [Online: Web] Accessed 26 May 2015, URL: <http://globalcompetitionreview.com/news/tags/3192/auto-parts/>; See also John M. Connor (2013), “Is Auto Parts Evolving into a Supercartel?”, American Antitrust Institute Working Paper No. 13-06 (2013), [Online: Web] Accessed 26 May 2015, URL: <http://www.antitrustinstitute.org/sites/default/files/AAI%20Working%20Paper%2013-06.pdf>

There is uncertainty as to when exactly the automotive parts cartel began operating. However, in February 2010, three antitrust authorities, namely the United States Department of Justice, the European Commission¹¹ and the Japan Fair Trade Commission conducted coordinated worldwide raids.¹² By 2012, the Canadian Competition Bureau, Mexican Federal Competition Commission, South Korean Fair Trade Commission and the German Cartel Authority were also taking an active part in identifying cartels.¹³ The latest entrants in the investigation are the antitrust commissions of China and India, who suspected foul play in 2013. Transcending political and geographic divides, a large number of separate regional cartels with overlapping corporate membership and direct price fixing in one vertical production-distribution channel, the automotive parts cartel has indeed acquired the distinction of being a super-cartel.¹⁴

The Automobiles Case

In recent times the fast developing economy of India has raised the demand for international cars in the market, as consumers increasingly prefer big brands like Honda, Volkswagen, Fiat and BMW. Hence, India has fallen under the radar of the globally prevalent automotive parts cartel. In a recent case,¹⁵ the CCI has imposed a hefty penalty of Rs. 2544.65 crores, on fourteen major car manufacturers for abusive practice, making it the largest penalty in the year of 2014.

The informant, Shri Shamsher Kataria, filed a complaint with the CCI under Section 19(1)(a) of the Act, against three car companies namely, Honda SIEL Cars India Ltd., Volkswagen India Pvt. Ltd. and Fiat India Automobiles Ltd. He alleged anti-competitive practices, as the companies had entered into agreements with Original Equipment Suppliers [hereinafter “OESs”], restricting them from selling spare parts of automobiles to independent workshops or car users, thus affecting the free availability of these spare parts in the open markets. Moreover, the companies were also allegedly

¹¹ European Commission pertains to the European Union countries.

¹² See *supra* n.10.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ See *supra* n.2.

abusing their dominant position by fixing prices of the spare parts and after sales services, apart from restricting necessary technological information, diagnostic tools and software programs required by independent repair workshops for maintenance and servicing of these automobiles.

Identifying a *prima facie* case, the CCI directed the Director General [hereinafter “DG”] to conduct an investigation for the said matter, who subsequently found truth in the allegations, after extensively questioning a large number of entities involved in the after-sales market for automobiles. The findings of the DG go to show that the conduct of the major players¹⁶ in the automobile industry is in direct contravention to Section 3¹⁷ and Section 4¹⁸ of the Act.

A. Abuse of Dominant Position

By restricting the sale and supply of spare parts and technical knowhow, gaining exclusive dealership and distribution, forcing consumers to pay arbitrarily exorbitant prices at their authorized service centres and ousting independent service workshops from the market, the companies were effectively creating a monopoly. According to the CCI this is sufficient evidence for an abuse of dominant position, and hence a violation to Section 4 of the Act.

There are two distinct product markets for cars. First, there is the primary market, which consists of the manufacture and sales of vehicles. The second market is known as the secondary market, or “aftermarket”. The CCI has defined “aftermarket” to be a special kind of antitrust market consisting of unique replacement parts, post warranty service or other “consumables” specific to some primary product, such as maintenance, upgrades, and replacement parts that may be needed after the consumer has purchased a durable good.

¹⁶ 14 car manufacturing companies have been named by the CCI, which engage in anti-competitive practices. The companies are: Honda Sael Cars India Ltd., Volkswagen India Pvt Ltd., Fiat India Automobiles Ltd., BMW India Pvt. Ltd., Ford India Pvt. Ltd., General Motors India Pvt. Ltd., Hindustan Motors Ltd., Mahindra & Mahindra Ltd., Maruti Suzuki India Ltd., Mercedes-Benz India Pvt. Ltd., Nissan Motor India Pvt. Ltd., Skoda Auto India Pvt. Ltd., Tata Motors Ltd., and Toyota Kirloskar Motor Pvt. Ltd.

¹⁷ Section 3 of the Competition Act, 2002 deals with the prohibition of anti-competitive agreements.

¹⁸ Section 4 of the Competition Act, 2002 deals with the prohibition of the abuse of dominant position.

The case in issue only involves the secondary market, or the “aftermarket” for vehicles. This pertains to all kinds of after-sales products and services, relating to the primary product, which is the vehicle itself. It is pertinent to note that the secondary market is completely dependent on the primary product, making it a complementary market. This is due to the product differentiation which makes spare parts of one brand incompatible with the vehicles of another. Hence, consumers are “locked” into limited and specific aftermarket suppliers, which only include Original Equipment Manufacturers [“OEMs”] of their chosen car model. Moreover, using local spare parts are highly discouraged by the OEMs by imposing adverse implications on warranty validity.

The OEMs submitted that the relevant market in this case is one unified “systems market”, because according to them the consumer engages in a whole-life cost analysis at the “point of sale” of the car. Rejecting the contentions of the OEMs, the CCI opined that the Indian automobiles market does not classify as a systems market, but rather separate and distinctive markets, namely primary market of cars, and secondary markets of spare parts and repair services, both of which are different yet interlinked and interconnected.¹⁹ This aspect is irrespective of the use of the car, whether commercial or personal; or the price segments, whether luxury, mid-level or economy, and the prevalence of dominant position does not differ due to any of these factors.

Switching to another primary product to counter price increases in the aftermarket is ruled out due to high financial costs involved. The cost effectiveness of buying a new car is much lower than maintenance and repair costs. This is because post registration, the price of a car drastically depreciates. The owner has to sell his existing car at a price much lower than the purchase price. Consumer behaviors indicate that when a consumer sells his car in order to purchase a car from the second hand market, he typically opts for a superior model. The resultant loss coupled with high investments in both primary and secondary markets of the new brand make an owner unlikely to switch to another brand.²⁰

At times the practical impossibility of estimating the aftersale costs to be incurred on the vehicle also works as a deterrent for the customer to determine whether it is more beneficial to invest in the aftermarket or opt for a new car. The difficulty to estimate life costs occurs as it is dependent on several factors including, but not restricted to, driving

¹⁹ *Supra* n.2 Para 8.1.3.

²⁰ PO Video Games, PO Nintendo Distribution, Omega Nintendo [2003] OJL 255/33.

expertise, geographical conditions, road conditions etc. In most cases the OEMs themselves have no estimate of these costs. Even in the rare occasion when they do, they are reluctant to reveal such data to the present and prospective consumers, labeling them to be confidential.

Trends show that consumers tend to focus on the immediate lump-sum cost of the capital purchase, rather than the future expenditures on repair and maintenance, which is why in practicality, according to Dermot (1980), Hausman (1979), and Hausman and Joskow (1982), the average consumer never estimates life costs.²¹ All these factors constitute repair and maintenance services into a distinct relevant product market.²²

The OEMs also contended that “reputation effects” deter suppliers from quoting supra-competitive prices, as it would affect future sales in the primary market. Reputation effects simply mean that if the car companies increase the aftermarket prices too much, then the demand for the cars would drastically fall as they would incur a bad reputation. The CCI, however, believes that this effect gets neutralized once the consumer gets “locked in” the aftermarket.²³ Coupled with information asymmetry and high switching costs, the lock in is intensified and the demand for customers in the primary market is not affected.

An automobile being a highly technical product with superior electrical and engineering features, the services of a specialized technician becomes a necessity in case maintenance works, as a consumer does not have the requisite expertise. With the sole exception of Maruti Suzuki India Ltd., all other OEMs prevent authorized dealers to sell spare parts to independent service providers. However, even for Maruti this is not of much benefit, since independent technicians are denied access to repair manuals and other technological knowhow which are needed to install the spare parts.

²¹ See: Gately, Dermot. (1980), “Individual Discount Rates and the Purchase and Utilization of Energy- using Durables: Comment”, 11 *Bell J. Econ.* 373 (1980); Hausman, Jerry A. (1979), “Individual Discount Rates and the Purchase and Utilization of Energy-using Durables”, 10 *Bell J. Econ.* 33 (1979), Jerry A. Hausman and Paul L. Joskow (1982), “Evaluating the Costs and benefits of Appliance Efficiency Standards”, 72 *Am. Econ. Rev.* 220 (1982).

²² Section 2(t) of the Act states: “*relevant product market*” means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use”.

²³ *Supra* n.2 para 20.5.38.

Through restrictive agreements with tools and equipment suppliers, and extensive intellectual property rights (IPRs), the companies are the sole controllers of the supply chain with respect to the aftermarket. The OEMs essentially leverage their dominant position in the spare parts market to enter into and control the maintenance services market. This accords each of them a 100% market share over their respective car brand products and related services, making each OEM a monopolist holding a dominant position. This is not only detrimental to independent repairers, who are denied market access, but also leads to an imposition of unfair condition on car users, who are forced to avail the services of only authorized dealers. Entry barriers are present for other OEMs as well, due to the technical incompatibility of spare parts.

A dominant position, in turn, makes the OEMs price makers in the market. They reap the benefits for a service which they are alone in a position to provide.²⁴ The DG's findings indicate an average of 100% markup, with instances up to 5000%, which the consumers are forced to accept as competitive forces no longer govern the market.²⁵ As per a test laid down in the case of *United Brands Company and United Brands Continental BV v. Commission*,²⁶ if there is a large difference between the production costs and the final selling price, resulting in an excessive profit margin, it denotes an abuse of dominant position.

As a result of all the above anti-competitive practices, the CCI has concluded that the OEMs have violated 4(2)(a)(i), 4(2)(a)(ii), 4(2)(c) and 4(2)(e) of the Act.

B. Anti-Competitive Agreements

Investigations of the DG reveal a number of written as well as implied contracts between the OEMs and OESs. These exclusive distribution agreements restrict the sale of spare parts in the aftermarket, in the name of protecting IPRs and controlling quality. The clauses state that without "prior consent" spare parts cannot be sold in the open market.²⁷ It has been observed that there has not been even a single instance where

²⁴ General Motors Continental NV v. Commission [1975] ECR 1376.

²⁵ *Supra* n.2 para 20.5.54.

²⁶ [1978] ECR 207.

²⁷ *Supra* n.2 para 3.9.31.

permission was granted, thus indicating anti-competitive practices in contravention to Section 3(4) of the Act. This is a means to prevent consumers from availing the services of independent repairers.

To meet quality controls and IPR protections, it is not necessary to restrict sale in the open market as it does not compromise with IPR laws. It can be easily achieved through contractual agreements with the OESs, and collaboration schemes between independent repairers, multi-brand operators, OEMs and OESs. Moreover, the OEMs are not entitled to protection under Section 3(5) as there is no sufficient evidence regarding the acquisition of the IPRs under Indian IPR statutes. Furthermore, IPR protections do not apply on diagnostic tools and manuals.

There are also incidences²⁸ of exclusive supply agreements with authorized dealers, which contain clauses restricting dealings in competing car brands, thus creating an entry barrier detrimental to business expansion. Often, dealerships are cancelled if they attempt to seek dealership of competing brands. Moreover, the massive sunk costs involved in retracting an existing dealership deter them from contravening the harsh conditions imposed by the OEMs.

The reasoning provided by the OEMs for such restrictive agreements, it to protect the consumers from counterfeit and spurious spare parts, and the service of untrained and unskilled technicians and repairers. According to the CCI, restrictions of access cannot be excused just for the “greater public good”, as it interferes with the freedom of choice of consumers regarding whose services they want to avail: the authorized dealers or the independent repairers.

The CCI has also analysed that the OEMs are indirectly responsible for the rise of spurious parts by restricting the supply of genuine parts manufactured by them, and hiking up the prices by a large extent. Most customers shift to the unauthorized network of repairers after the end of the warranty period, due to this very reason. OEMs are also responsible for jeopardizing the safety of the car and customer by restricting access of technological knowhow to the independent repairers. This not only leads to higher emissions and damage to the car, but also is harmful for the car owners.

²⁸ *Supra* n.2 paras 4.12, 5.2.13, 6.2.13, 7.2.12, 8.2.13, 9.2.13, 10.2.12, 11.2.13, 12.2.13, 13.2.13, 14.2.13, 15.2.14, 16.2.13, 17.2.14, 20.6.42.

The long term effects of restrictive agreements, by far outweigh the short term benefits of improving the production and distribution networks. As per the TFEU,²⁹ when this occurs, it is indicative of deliberately creating entry barriers and foreclosing the aftermarket, thus leading to an Appreciable Adverse Effect on Competition. Hence, the CCI is of the opinion that the OEMs have violated Sections 3(4)(b), 3(4)(c) and 3(4)(d) of the Act.

C. Analysis and Criticism of the Final Order

In the light of the above discussed violations, the CCI has given a detailed order, so as to enable consumers the freedom of access to spare parts and freedom of choice of service provider; and to enable independent repairers the freedom of access to spare parts and technical information. The order aims to mitigate the problem of anti-competitive agreements in the auto spare parts industry and uphold competitive practices in the market.

However, a large number of problems may arise during the implementation of this order. The car manufacturers can take advantage of their IPRs to charge heavy royalties which may not be feasible to independent repairers. They may also object to the standardization of spare parts by stating that it hampers with the unique design and compatibility of their cars. There is also the practical difficulty of providing training and technical knowledge to the thousands of repairers, especially in the unorganized sector. Moreover, due to the high costs of spare parts, a market for fake parts at cheaper rates has been created as shown by Kothekar (2015) and Baggokar (2014) and this harms the OEMs on one hand and creates problems for the regulatory bodies on the other hand.³⁰

The reasoning behind the penalty of 2% of the total turnover of the company is not clear, as this turnover is calculated on the sale of cars in the primary market and not on after sales, and as we know, the primary market is not of any concern in the present issue. Moreover, the manufacturers may try to control the primary market for the vehicles, which can negate the effect of the order, as the market for spare parts is

²⁹ Article 101, Treaty for the Functioning of the European Union [*pari materia* to Section 19 of the Act].

³⁰ Kiran Kothekar (2015), "Fighting Fakes in Auto Parts", March 24, 2015 [Online: Web] Accessed 26 May 2015, URL: <http://auto.economictimes.indiatimes.com/autologue/fighting-fakes-in-auto-parts/545>, Swaraj Baggokar (2014), "40% of Auto Parts Sold are Fake", *Business Standard* (June 14, 2014), 2015 [Online: Web] Accessed 28 May 2015, URL: http://www.business-standard.com/article/companies/40-of-auto-parts-sold-are-fake-114061200885_1.html

directly linked to the primary market. If the net outcome results in more harm than good, the very essence of the order gets diluted. Moreover, the oligopolistic market structure of this industry gives requisite leverage to OEMs, as it gives them a substantial market share over their products. As the absolute cost advantage is high, it discourages new competitors in the market and hence the sheer economics of demand and supply tilt towards the car companies.

The only way to mitigate the issue is by price regulation. For instance, in the case of medicines, The National Pharmaceutical Pricing Authority (NPPA) has been entrusted with the job of monitoring the prices of medicines.³¹ The NPPA sets the guidelines for retail & wholesale margin in case of medicines as per their approved list of drugs. A similar mechanism may be adopted for auto spare parts while finalizing the prices for the most required spare parts, while keeping other items outside the list of price ceiling.

The CCI should set price ceilings on various spare parts and services related to the same, after an intensive study of the market. In this regard, it is advisable if the products of each OEM are studied separately, and all of them are factored into the final calculation for determination of the price ceilings. Price regulation would also solve the ancillary issue of fake spare parts in the market.

Conclusion

The Indian Automobiles Case is merely the regional picture of the larger global issue. With the involvement of a number of multi-national companies operating across multiple countries and investigating authorities spanning various jurisdictions, it is important to undertake effective international antitrust enforcement. The need of the hour is to foster international cooperation between enforcing agencies, for the speedy identification of cartels; and formulating unified regulations so that the companies do not escape their liabilities by resorting to loopholes in the law. At the same time, authorities should take care that innocent companies do not face undue harassment due to stringent rules.

³¹Drugs (Prices Control) Order, 2013, S.O. 1221(E), Ministry of Chemicals and Fertilizers (May 15, 2013).

Corporations are economic actors, run by people who respond to incentives, both positive and negative.³² If the governments of various countries regulate spare parts prices and give incentives such as tax-cuts and ready licensing, car manufacturers would respond to the same, instead of being forced by regulating authorities through heavy penalties and fines. Antitrust laws are not only to foster fair competition, but also for the growth and development of the economy and corporations are primarily instrumental towards this. With the right balance of law, positive impetus and vigilance the problem of the automotive parts cartel is not difficult to mitigate.

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