SHRI SHAMSHER KATARIA v. HONDA SIEL CAR INDIA LTD: A COMMENT

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ABSTRACT

The Competition Commission of India, in a path breaking pronouncement recently, held 14 automobile manufacturing companies guilty of anti-competitive practices and imposed upon them a penalty of INR 2544.65 crores. The Commission, while delivering its maiden judgment on vertical agreements, touched upon the issues of relevant market, abuse of dominance, anti-competitive agreements and the intellectual property rights' controversies. The order of the Commission comes as a much needed wake-up call for the Government and the companies in the automobile sector of the country. In the light of the aforementioned aspects, the present case commentary critically analyzes the order of the Commission on the car manufacturing companies. The commentary begins with the appreciation of the facts of the case, the issues involved therein and the order passed by the Commission. The authors then move on to a critical and multi-dimensional analysis of the order, taking into account the hits and misses of the Commission while delivering the same. In conclusion, the authors deal with the implications of the order on the Government, automobile sector and its market players and the market players of other sectors.

Keywords: automobile, anti-competitive practices, vertical agreement, abuse of dominance, intellectual property rights.

1. INTRODUCTION

The Competition Commission of India delivered a landmark decision on August 25, 2014 in the case of *Shri Shamsher Kataria* v. *Honda Siel Car*

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India Ltd. & Ors[1] wherein it found 14 automobile companies[2] guilty of anti-competitive practice, in violation of Section 3(4) and Section 4 of the Competition Act, 2002 and imposed upon them a staggering penalty of INR 2544.65 crores. The Competition Commission of India (hereinafter referred to as '**CCI**') for the first time scrutinized and passed an order on vertical agreements and imposed the largest penalty of the year. The CCI is authorized under the Competition Act to impose penalties on companies engaging in cartel formation, price manipulation or abuse of their dominance to the tune of 10% of their turnover or an amount thrice their annual profit. It is yet to be seen how this judgment is going to impact the auto manufacturing sector in the absence of any specific regulator or governing legislation to implement the CCI's order. Even the penalty imposed is bound to be challenged by the companies as precedents suggest that such high amounts have either been reduced in appeals or stay has been granted on them.[3] The present case comment critically analyses this judgment, taking into account all the major issues involved therein and also its implications on the existing model of interested parties.

2. Facts of The Case

Mr. Shamsher Kataria had filed the information against Volkswagen India, Honda India and Fiat India for violation of Section 3(4) and Section 4 of the Competition Act, 2002. It was alleged by the informant that the aforementioned Original Equipment Manufacturers (hereinafter referred to as '**OEMs**') entered into agreements with Original Equipment Suppliers (hereinafter referred to as '**OESs**') and authorized dealers, which imposed unfair prices on the sale of auto spare parts and restricted the free availability of genuine auto spare parts in the market. These vertical agreements hindered the OESs from selling the auto spare parts directly to the independent car users and repairers in the market. It was further alleged that the OEMs did not furnish the technological information, diagnostic tools and software programs that are required to maintain, service and repair the technologically advanced

[1] Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors, Case No. 03 of 2011 (CCI, 25/10/2014).

[2] Ford India, Tata Motors, BMW India, Toyota, Maruti Suzuki, General Motors India, Volkswagen India, Hindustan Motors, Fiat India, Mahindra & Mahindra, Mercedes-Benz India, Nissan Motor India, Skoda Auto India, and Honda India. The decision against Hyundai India, Mahindra Reva and Premier is yet to be given by CCI.

[3] Cement Cartel or Coal India Cases. However, in DLF Case, the penalty of about INR 6.3 billion has been approved by the Supreme Court of India.

automobiles to the independent repairers in the open market.[4] This led to the OEMs carrying out restrictive trade practices with their authorized dealers and thus denying market access to independent repairers. The OEMs also charged high and arbitrary prices to the consumers for maintenance services and supply of spare parts.

The informant, Mr. Kataria, also stated in the information that the governing authorities on anti-competitive practices of various countries like USA and Europe have dealt with cases of the similar nature and implemented corrective measures in the automobile manufacturing sector.

Following this, the Director General (hereinafter referred to as "**DG**") investigated into the case. The DG sought detailed information from the various OESs, authorized dealers, independent repairers, SPX India Ltd and the automobile industry associations during the investigation. The DG observed that the 14 car manufacturing companies were involved in the violation of Section 3(4) and Section 4 of the Competition Act (hereinafter referred to as the "**Act**"). The DG held that the denial of market access stemmed from the denial to access diagnostic spare parts and tools.

3. Issues Decided

The present case involved four pertinent issues which were determined by the Commission:

i. Whether the automobile market as a whole is a single unified 'systems market' or there exists separate relevant markets at different stages?
ii. Is there any abuse of dominance by the OEMs in the spare parts market?
iii. Whether the OEMs are entitled to the benefits arising out of statutory exemption provided to agreements related to intellectual properties?
iv. Whether agreements entered into by the OEMs with OESs and authorized dealers are anti-competitive in nature?

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[4] Supra, 1.

4. ORDER OF THE COMMISSION

The Competition Commission of India directed the OEMs to cease and desist[5] from anti-competitive practice, to allow the OESs to sell genuine spare auto parts in open market and to formulate an effective system to ensure availability of aftermarket spare parts, diagnostic tools and other relevant information in the public domain.[6] The Commission imposed a penalty upon the 14 car manufacturing companies of 2% of their total turnover in India and ordered them to submit a compliance report within 180 days. The primary motivations of the Commission while granting the order were:

i. to enable the consumers accessibility to spare parts and to exercise their freedom of choice while choosing between independent repairers and authorized dealers and
ii. to enable the independent repairers to participate in the aftermarket and provide services in a competitive manner.

It also held that necessary and reasonable provisions can be made by the OEMs in their agreements relating to the IPR protection. The Commission also directed the OEMs not to impose an absolute condition on the consumers in case of them availing the services of the independent repairers. However, from the point of view of liability and safety, required safeguards may be put in place.

5. A CRITICAL AND MULTIDIMENSIONAL ANALYSIS OF THE ORDER

The present commentary has critically analyzed the order of the Commission in four sub-headings. The first deals with the issue of 'relevant market'. The second heading covers the issue of 'abuse of dominance'. The third and fourth sub-headings deal with the issues concerning 'anti-competitive agreements', and 'intellectual property rights', respectively.

5.1. Relevant Market

Relying majorly on international case laws and findings of the DG, CCI determined the appropriate relevant market. CCI held that in the

[5] Section 27, The Competition Act, 2002.
[6] Supra 1, 22.3.

automobile sector, a primary product cannot be easily switched to another competing product, which makes it difficult to club the primary market and secondary market into a unified 'systems market'. Unified 'systems market' comprise a set of products or services, which cannot be distinguished into two different antitrust markets, since the consumers demand the primary and the secondary products as a 'system' and determining inter-changeability and substitutability of such products when distinguished into different markets are an inefficient determination of competitive market behaviour for such complex durable goods where the competition for the sale of the products exists at the "point of sale of primary goods" (even if consumers are uninformed, have high switching costs and become locked in ex post). Thus, it dismissed the contention of unified 'systems market' as was raised by the OEMs and held that the primary market of "manufacture and sale of cars" and aftermarkets- "sale of spare parts, diagnostic tools etc." and "service of repair and maintenance" are three separate relevant markets.[7] In the present case, there was no engagement of the customers in 'whole life costing' while buying automobiles in primary market and also the price of spare parts have been substantially hiked by the car manufacturers despite reputational factors. The aforementioned reasons signify that there is no existence of a 'systems market'. The theory of 'clusters market' which was raised by the OEMs was also rejected by CCI. Cluster markets are characterized by transaction complementarities between various components of a bundle of products or services.[8] The Commission observed that a 'clusters market' exists for each of the spare parts in every brand of cars, manufactured by the OEMs. Thus CCI held that this forms a part of a separate 'aftermarket' in the Indian automobile sector.

The stand taken by CCI appreciating the fact that a relevant market can be an 'aftermarket' for those primary products which cannot be changed by consumers unless substantial switching cost is incurred is interesting. The Commission took the position that determining whether a market is relevant market or not is a means to determine the strength of a company in that particular market. Thus, before determining the dominance of an enterprise, the Commission has to identify the market as relevant market. This was a circular approach taken by the

[7] Supra 1, 20.5.54.

[8] For a detailed discussion on the same see *Policy Roundtables, Market Definition 2012*, OECD, available at http://www.oecd.org/daf/competition/Marketdefinition2012.pdf, last seen on 05/10/2014.

Commission for determining relevant market. However, the questions regarding CCI's stand on the aftermarkets in other sectors still remain unanswered.

5.2. Anti-Competitive Agreements

On the issue of internal arrangement between the OEMs and the overseas suppliers, the Commission dismissed the findings of the DG and held that such arrangement does not stand in violation of Section 3(4) of the Act. The Commission applied the doctrine of 'single economic entity'[9] to arrive at this conclusion.

On the issue of arrangement between the OEMs and the OESs, CCI was of the view that the eventual choice has to remain at the hands of the consumers to choose either an independent repairer or an authorized dealer of the OEMs for the purchase of genuine auto spare parts. Thus, CCI held that the restrictions placed on the OESs under the agreement between OEMs and OESs are anti-competitive in nature and are violative of Section 3(4) of the Act.

On the issue of arrangement between the OEMs and the authorized dealers, CCI held that the provisions in the agreements, which require the authorized dealers to source the spare auto parts only from the OEMs, are anti-competitive in nature. It further held that the restriction of access of independent repairers to the spare parts and other diagnostic tools, are anti-competitive in nature and violative of Sections 3(4)(b), (c) & (d) of the Act.

The Commission has taken corrective measures by directing the OEMs to train the independent repairers so that the end consumers would be able to approach the independent repairers for spare parts. Without having taken such measures, the effect of the order would not be of much significance because lack of basic training will hinder the independent repairers from repairing the vehicles even if they have the requisite spare parts and diagnostic tools. Similar kinds of measures have been taken by the European Union and by different states of United States of America by passing the "Block Exemption Regulation"[10] and

[9] Agreements between entities constituting one enterprise (Parent & its subsidiary) cannot be assessed under the Competition Act, 2002.

[10] Block Exemption Regulations enable the European Commission to exempt specific categories of State Aid from the requirement of prior notification and Commission approval based on certain conditions (As per the European Commission Legislation, the European

"Motor Vehicle Owners Right to Repair Act"(popularly known as the Right to Repair Act),[11] respectively. The authors are of the opinion that the higher courts/Appellate body may find these measures as being excessive exercise of the Commission's power, because in other jurisdictions, specific legislations have been enacted for the same. The fact that in two major foreign jurisdictions, independent repairers derive the aforementioned authority from a statute, it would be interesting to note as to how CCI's directions will be implemented.

5.3. Abuse of Dominance

On the aspect of abuse of dominance by the OEMs, CCI decided on three major sub-issues namely market access deniability, unfair pricing and leveraging the dominant position.

CCI observed that the OESs were not supplying the spare parts to the Indian aftermarket directly. It was further revealed by the Commission that the agreement between OEMs and the local OESs imposed restrictions on the OESs to supply spare parts directly to the third parties without prior permission of the OEMs. In this aspect, CCI held:

> "*Each OEM severely limits the access of independent repairers and other multi brand service providers to genuine spare parts and diagnostic tools required to effectively compete with the authorized dealers of the OEMs in the aftermarket which amounts to denial of market access by the OEMs under Section 4(2) (c)*."[12]

CCI observed that the OEMs had hiked up the prices of its spare parts substantially (as high as 5000% in some cases), which was disproportionate to the actual economic value of the products being supplied. It was also noted that the margin from car business unreasonably exceeded that of the spare parts business. Thus, CCI held

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Council Regulation No. 994/98 of 7 May 1998 as amended by the Council Regulation No. 733/2013 of 22 July 2013) *Block Exemption Regulations*, European Commission, available at http://ec.europa.eu/competition/state_aid/legislation/block.html, last seen on 05/10/2014.

[11] Right to Repair is an act protecting motor vehicle owners and small businesses in repairing motor vehicles.*Bill H.4362*, The 188th General Court of The Commonwealth of Massachusetts, available at https://malegislature.gov /Bills/187/House/H4362, last seen on 05/10/2014.

[12] Supra 1, 20.5.83.

that this practice was exploitative in nature and all the 14 car manufacturing companies have violated Section 4(2)(a)(ii) of the Act.

The Commission also held that the OEMs abused their dominance in the relevant market of supply of spare parts to protect the other relevant market namely the after sales service and maintenance, thereby, violating Section 4(2)(e). Thus, CCI finally held that the OEMs have abused their dominant position by indulging in anti-competitive activities in violation of Sections 4(2)(a)(i), 4(2)(a)(ii), 4(2)(c) and 4(2)(e) of the Act.

The authors of the present commentary are of the opinion that while deciding the issue on 'dominant position'[13], the Commission has drifted away from the definition of '*dominance*' in this particular case. The Commission has said that an OEM's dominant position will be seen in respect of the products manufactured by it. Undoubtedly, it can be said that either the entire spare products/diagnostic tools is one relevant market and all the players are participating in that one market or it can be said that the manufacturer's specific products are the relevant market. In the first case, it is difficult that there can be 15-20 dominant players in one market and in second case, which has been accepted by the Commission, not only does the automobile sector but also the car/motor manufacturers will enjoy dominant position in respect of their manufactured products. If that would be the scenario, then CCI is duty bound to check each manufacturer for *abuse of dominant position*. Apart from this, the CCI should have voiced its opinion on the DG's findings in relation to the application of *'essential facility doctrine'* in the present case. The DG had held that there was a denial to access 'essential facility' in the present case as the OEMs restricted access to diagnostic tools and spare parts. However, the Commission chose to not comment on this particular aspect.

5.4. Intellectual Property Rights

This is another pertinent issue of the case wherein there existed a direct conflict between the scope of IPR and Competition Law. The period of LPG has given new dimensions to Adam Smith's definition of Economics which is *'Economics is a science of Wealth'*. The economic and cultural importance of the collection of rules of IPRs is increasing

[13] Supra 5, Section 4 Explanation (a).

rapidly.[14] At the same time, Governments need to ensure that the efficiency of manufacturers/sellers should increase, which will ultimately result in the welfare of the end consumers. It would not be an exaggerated statement to say that these two laws are almost two opposite sides of a coin. The jurisprudence of both the laws is at a nascent stage and it is natural to expect a conflict between them. Many scholars of different schools of thought are in agreement that both IPR and Competition Law are the basic need of the ongoing post-modern time period. As Michael Porter, in his highly influential treatise on anti-trust policy,[15] argues favoring competition laws that, strict enforcement of competition law encourages the continual improvement and innovation that drive industries of a nation to lead to economic growth.[16]

Section 3(5)(1) limits the scope of 'anti-competitive agreements' with the insertion of various statutes relating to IPR. It says that Section 3 shall not restrict any person from imposing '*reasonable condition*s', as may be necessary for protecting any of the person's rights in different fields of IPR. In this particular case, the major contention of OEMs was that they invested a significant amount of money into their R&D[17] facilities which helped in the creation of these products; and the restrictions of sales on OESs, of their proprietary parts to third parties without prior consent of OEMs would fall within the ambit of 'reasonable condition to prevent infringements of their IPRs'.[18]

In the investigation conducted by DG, not a single OEM submitted documentary evidence before the DG in order to establish that they have IPRs in India. The Commission is of the view that the phrase *'which have been or may be conferred upon him under'* cannot be neglected while

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[14] William W. Fisher III, *Theories of Intellectual Property*, Originally published in *New Essays in the Legal and Political Theory of Property* (Stephen Munzer, 2001), available at http://cyber.law.harvard.edu/people/tfisher/IP/Fisher_IP_Theories.pdf, last seen on 05/10/2014.

[15] Michael E. Porter, *The Competitive Advantage of Nations*, Harvard Business Review (1990), available at http://kkozak.wz.cz/Porter.pdf, last seen on 05/10/2014.

[16] Dando B. Cellini, *Economic Growth and Consumer Welfare: The Role of Competition Law*, 429, 434 in *Competition Law Today* (Vinod Dhall, 2007).

[17] R&D are the investigative activities that a business entity chooses to conduct with the intention of making a discovery that can either lead to the development of new products or procedures, or to improvement of existing products or procedures. *Research And Development - R&D*, Investopedia, available at www.investopedia.com/terms/r/randd.asp, last seen on 05/10/2014.

[18] Supra 1, 20.6.15.

deciding the case. To enable protection under Section 3(5)(1) it is necessary to either be protected under the specified IPR statutes mentioned under the same Section or to be under the process of being granted protection.

Further, while analyzing *'may be conferred',* the Commission said that the OEMs could not provide sufficient evidence to establish that they have initiated the process of getting their rights secured under relevant statute of IPRs. In both the categorization, *i.e. 'have been or may be',* the OEMs couldn't show that they have registered/applied for registration of specified spare parts to which these correspond. As we have already discussed in the beginning of this part of the commentary that the Commission classified 'aftermarket' or 'individual spare market(s) and diagnostic tool(s)' as 'relevant market', so it is required to be shown by the OEMs that they have IPRs in the 'relevant market'.[19]

While rejecting the 'technology transfer agreement (TTA)'[20] based argument given by some of the OEMs, the Commission said that unless an OEM has *right(s)* under any of the statutes mentioned under Section 3(5)(1), the exception of Section 3 are of no use to OEMs. The reasoning behind rejecting the argument was that some of the IPRs are territorial in nature and since the parent corporations of the OEMs have rights under different jurisdiction, the subsidiary OEMs cannot merely ask for protection of IPRs in India without fulfilling the conditions prevalent here. In relation to this issue, the Commission held that by entering into a TTA, the OEMs have a right to use and exploit a particular IPR but they do not become the owners of that right because the parent company merely authorizes the exploitation of the right and not assignment of the same.[21]

In respect of copyright protection, OEMs had argued that they had protection over the engineered drawings of the various spare parts and the technical manuals. The Commission upheld the findings of the DG that the rights under the Copyright Act are restricted by the same Act

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[19] Supra 5, Section 2(r).

[20] Technology Transfer is the process by which a technology, expertise, know-how or facilities developed by one individual, enterprise or organization is transferred to another individual, enterprise or organization.
Overview of Contractual Agreements For the Transfer of Technology, World Intellectual Property Organization (WIPO), available at http://www.wipo.int/export/sites/www/sme/en/documents/pdf/technology_transfer.pdf, last seen on 05/10/2014.

[21] Supra 1, 20.6.17.

itself, which *per se* mandates the designs to be registered under Design Act, 1911 or if the product has not been registered, then rights shall cease to exist once the concerned design has been applied more than fifty times in industrial process by the owner of the copyright or his licensee.[22]

The Commission didn't go into the merits of the argument given by OEMs in respect of the provisions of the International Copyright Order, 1999, Berne Convention read with Section 33 of the Indian Copyright Act, which extended the scope of copyright protection over the drawings of the OEMs to the territory of India. The Commission took a different stand by saying that even if they have right*(s),* the word '*necessary'* in Section 3(5)(1) has been wrongly used by OEMs to gain undue profit in the 'relevant market'. Citing different practical examples, the Commission conclusively said that these products are finished products and merely selling them in the open market does not necessarily compromise the IPRs belonging to relevant products. Therefore, the OEMs plea to get exemption under Section 3(5)(1) was rejected by the Commission.

In paragraph number 20.6.16[23], the Commission interpreted the phrase '*may be conferred upon him under*' given under Section 3(5)(1) such as that when a person initiates the process of getting protection in relevant statute, then the exemption can be asked for under Section 3(5)(1). However, the Commission could have interpreted the phrase '*may be conferred upon*' differently. Going with the order of the Commission, it would imply that a mere initiation of the process of getting protection under any of the statute(s) specified in Section 3(5)(1) would make a person entitled to claim for exemption under Section 3(5)(1).

In other words, Commission is implying that a person who has filed a form of registration for his product is equivalent to a person who has got protection under that relevant statute. Tomorrow it may so happen that people would misuse the order by asking exemption under Section 3(5)(1) irrespective of whether they get protection under the relevant statute or not, post the examination of the product, by the competent authority as per the conditions given under the relevant statute of IPRs. Further, in the cases of patent(s), if we go with the interpretation of the

[22] Ibid, 20.6.19.

[23] Belaire Owner's Association v. DLF Limited, Case No. 19 of 2010 (CCI, 12/08/2011).

Commission, it implies that the Commission is competent to go into the intricacies of the IPRs related to a product. This approach stands in direct encroachment into the domain of Controller/Patent Agents.

In the opinion of the authors, the intention behind insertion of '*may be'* by the legislators, was that under certain laws of IPR, for which registration of product is not necessary (e.g. Copyright), a person would be entitled to ask for exemption under Section 3(5)(1). In line with the interpretation of the authors in the present commentary, if a person asks for exemption under Section 3(5)(1) for a product having copyright value, it should not be denied just because his product is not registered under the Copyright Act. Needless to mention that if his product is registered under the Copyright Act then the phrase *'have been conferred upon'* would come into force.

6. IMPLICATIONS OF THE ORDER PASSED BY THE COMMISSION

The order by the CCI against the 14 car manufacturing companies holds significance as it is the first case where the Commission has imposed penal provisions on companies violating provisions dealing with anti-competitive agreements[24] and abuse of dominant market position in a vertical market[25]. Though the penalty imposed is the lowest by CCI until the present date, yet the OEMs might face potential claims for compensation by affected consumers. The Competition Appellate Tribunal (COMPAT) had previously in the Aluminium Phospide tablets cartelization case[26], imposed penalty on the 'relevant turnover' and not the 'total turnover'. But however, the CCI in the present case, imposed penalty on the 'total turnover' of the guilty enterprises. This is a departure from the ruling in the preceding case. Thus, this can be raised as a ground for appeal by the OEMs.

It is also to be seen as to how much penalty will the 14 car companies have to actually pay considering the fact that there have been many instances in the other industrial sectors in the past wherein the fines

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[24] Supra 5, Section 3(4).
[25] Supra 5, Section 4.
[26] M/s. Excel Corp Care Ltd v. CCI, Appeal No. 79, 80 and 81 of 2012 (pending n before the Supreme Court of India).

imposed by the CCI have proved to be pending and non-threatening[27]. DLF Limited was held guilty of abusing its dominant market position in the real estate sector, for which CCI imposed 600 odd crores as penalty on DLF Limited but till date no action has been taken against it post-appeal. The High Court of Delhi stayed a penalty amount of Rs 471.14 crores, which was imposed on Maruti Suzuki Ltd, on the ground that the order cannot take effect until the pending litigation before the Madras High Court is disposed off.

The need for an independent regulator in the automobile sector has also been urged by the CCI. CCI had previously given its recommendations to the Government in the DLF Belaire Association case in the same regard. Though, corrective measures have been issued by the CCI to curb the anti-competitive practices by the car manufacturing companies, in the absence of any independent regulator, it would in fact, become a herculean task for CCI to check its compliance orders.

However, if the CCI implements the compliance orders successfully, the judgment will bring about a revolutionary change in the aftermarket of the automobile sector. The August 24 order of CCI is set to be challenged by the OEMs before the COMPAT. The COMPAT might decide on the issues of penalty computation, relevant market determination and IPR protection. It is also a possibility that some of the OEMs might skip appealing before the COMPAT and choose to pay the fine amount instead.

7. CONCLUSION

It can be concluded that this case being India's first landmark judgment on vertical agreements in the automobile sector in an era of competition, has definitely raised some questions and debatable issues. However, it remains to be seen that how the automobile R&D will be affected in the country by the decision and the floodgates of complaints open before the CCI regarding similar anti-competitive practices operating in the aftermarkets of other industries (for e.g. electronic industry, mobile industry etc.). But the present order is definitely going to change the existing scenario. The CCI is determined to bring the companies

[27] CCI, in 2012, issued an order against 12 cement companies for price control tactics but the case is still withheld.

engaged in anti-competitive agreements to task, which is a positive development for the competition law regime in the country.

Nevertheless, whatever the changed scenario would be, corrective measures or lacunae, the consumers are going to welcome the decision whole-heartedly.