AUTOMOBILE INDUSTRY: 2ND STAGE AFTER BUYING A CAR BECOMES COMPETITION/CONSUMER FRIENDLY

ABSTRACT

To a consumer, buying a car is not a simple task. A great deal of thought, price-comparison, cross-brand research and several other factors go into buying a car; not to mention the high costs of buying and maintaining it. What happens when the costs of car-repair eventually outweigh the cost of buying a car? What happens when the consumer has no option but to pay the high-costs of repair, because the spare-parts and repair services are unavailable anywhere else in the market except from the seller of the car? Is the customer locked-in, in an unfavorable market, which cannot be escaped from? Can the consumer afford to sell the new car at a significant loss and purchase again in the market? It ~~is~~ was the stark reality of the Automobile Industry in India, which has taken a turn for the better, on the guidance of the Competition Commission. Herein analyzed, is the growth of the Automobile Industry since its infancy and how, with unfettered growth, eventually the aftermarket of spare parts and services was essentially crippled by actions of the Car Companies. Hereinbelow, the recent landmark Order of Competition Commission is discussed, in view of the similar issues faced by developing and developed countries whereby the correctness of the said Order is seen in light of what is being, and what has been, done. The present essay attempts to broadly understand the situation of the Automobile Industry before the aforementioned landmark Order and how the Order changes the Automobile Industry.

No. of words in the Abstract: 250 words.

No. of words in the Essay (excluding footnotes): 3507

No. of words in the Footnotes: 335 words.

Details of the Author:

Name: Nitish Chaudhary.

Pursuing V-Year Law Course for B.L.S. LL.B. degree.

Vth Year Student, Government Law College, Mumbai.

Address: A-45, Ashok Vihar, Phase-I, Delhi – 110052.

E-mail: nitishcy@gmail.com

Mobile: +91-9810575121

I. AUTOMOBILE INDUSTRY: GROWTH AS A MARKET

To become what it is today, the automobile industry had to crawl before it could run. Automobile industry, in its infancy, was heavily regulated and laden with restrictions, whereby the output growth rate of the entire automotive industry in India was a mere 3%. Thereafter, as a result of liberalization and the entry of Maruti-Suzuki as a major player, the face of the automobile industry changed completely, showing a growth rate of 17%. A greater difference was brought about by the change in Government of India's automobile policy in June, 1993; notably bringing about de-licensing and upto 51% foreign holding in Indian companies, among others.[1] The de-licensing in 1993 effectively jump-started the crippled automobile industry, which has yet seen entry of renowned international players, and several local players that have been nurtured by this industry. After the removal of crutches, the booming automobile industry currently accounts for 22% of the Indian manufacturing gross domestic product (GDP).[2]

As is with any successful business, every player has to vigilantly and constantly evolve and persevere, or it should lose its place on the table; the same analogy draws itself to the table that is the automobile industry. Of the several players in the industry, by virtue of their market share, there are some that stand atop of others viz. Maruti Suzuki, Hyundai, Honda Siel, Mahindra & Mahindra, Toyota, Tata Motors etc[3]. The spirit of competition dictates that it is good and shall bring about change for the better; in as much as more competitors, more competing products, and more choices to the consumers, higher quality, competing prices, benefit to the consumers and ultimately growth of the industry

---

[1] World Economic Forum: The Global Competitiveness Report (2002-2003) 161.

[2] Automobile Industry in India, *available at* http://www.ibef.org/industry/india-automobiles.aspx (Last visited on November 15, 2014).

[3] Enerdyne: Indian Automotive Market Report (July, 2014), *available at* http://enerdyne.in/news/wp-content/uploads/2014/pdf/IndianAutoReportJuly2014.pdf (Last visited on November 15, 2014).

as a whole. More often than not, higher competition can result in the players trying to seek an advantage over the others, by means that are not wholly intrinsic. In situations like these, the Competition Act, 2002, and the Competition Commission of India (CCI) come into play, thereby regulating the relevant market and the competition behavior thereof. The Competition Act, 2002, and the CCI have been introduced in India with a view to regulate the anti-competitive behavior of the competitors in the relevant markets throughout India.

II. RELEVANT MARKET

A relevant market in any industry refers to the specific market that is referred so by virtue of either the Relevant Product i.e. a market made up of goods/services that are interchangeable/substitutable in nature by virtue of their intended use, price and characteristics, or the Relevant Geography i.e. an area in which the supply of goods/services is governed by conditions that are distinctly homogenous, and distinguishable from conditions in neighboring area; or both.[4] Hence, to delve into, and understand, the anti-competitive behavior within the periphery of the automobile market, an analysis of the relevant market is necessary. The Competition Act, 2002, provides for certain factors to look for while determining the relevant market; being the relevant product market[5] or the relevant geographic market[6].

The present question, with respect to the automobile industry, was also brought before the CCI in *Shamsher Kataria* v. *Honda Siel & Ors.*[7], whereby it was the case of the

[4] Section 2(r), Competition Act, 2002; Relevant Market.
[5] Section 19(7), Competition Act, 2002; Inquiry into certain agreements and dominant position of enterprise.
[6] Section 19(6), Competition Act, 2002; Inquiry into certain agreements and dominant position of enterprise
[7] Case No. 3/2011.

Opposing Parties (OPs) that there exists a single indivisible and unified 'systems market' instead of various separate relevant markets. That the 'systems market' constituted of the automobile and the spare parts thereof; and since they were required to be used in tandem so as to complement each other, they were two (2) distinct parts of the single 'systems market'; which was entered by the consumer at the time of purchase of car and the spare parts that might be required in the future.[8] It was the view of the OPs that the consumer engaged in whole-life cost analysis while purchasing an automobile, and with the availability of all the information relating to the vehicle and the spare parts; makes a rational choice based on the prices and availability of the spare parts and services. It was the finding of the CCI, contrary to the submissions of the OPs, that in fact there existed three (3) different relevant markets:

> *"The Commission is of the opinion that there exist three separate relevant markets; one for manufacture and sale of cars, another for sale of spare parts and another for 'sale of repair services'; although the market for 'sale of spare parts' and 'sale of repair services' are inter-connected."*[9]

In arriving at the aforementioned conclusion, the CCI relied on the fact that it was incorrect that the consumer engaged in whole-life cost analysis or that the consumer even had access to proper information and data to make a rational choice based on availability and prices of the vehicle and the spare parts. The CCI was further of the opinion that, in fact the consumers had high sensitivity to upfront prices/costs and were inclined to be swayed by the superficial prices and not undertake a whole life cost analysis. In other words, consumes tend to buy cheaper models with high operating costs than those that

[8] *Shamsher Kataria* v. *Honda Siel & Ors* (Case No. 3/2011) 64.
[9] *Shamsher Kataria* v. *Honda Siel & Ors* (Case No. 3/2011) 135.

would be efficient in terms of maintenance and after sale service costs[10]. Therefore, it was the conclusion of the CCI that, within the periphery of the automobile industry, there exist three (3) separate relevant markets with the primary market being the sale of cars, and the aftermarkets being the sale of, spare parts and, repair services.

III. ANTI–COMPETITIVE BEHAVIOR

Anti-Competitive behavior can be understood to mean the kind of behavior that harms or seeks to harm the market or the process of competition among businesses, and that has no legitimate business purpose.[11] The foundation of the Competition Law exists on battling anti-competitive behavior in the various markets that exist throughout India. The Competition Act, 2012, broadly categorizes the anti-competitive behavior as between players under anti-competitive agreements[12] and abuse of dominant position[13]. Under the ambit of anti-competitive agreements, the CCI scrutinizes actions, amongst others, such as cartelization, price-fixing, bid rigging, limiting supply of goods, allocating of markets and those that have an appreciable adverse effect on competition (AAEC) in India; whereas under the ambit of abuse of dominant position, the CCI looks into the actions of a dominant entity who abuse their dominant position, including dominance in resources or wealth, to gain an unfair advantage in the market such as creating entry barriers, imposing unfair conditions for sale/ purchase etc. Essentially, when any player in the market involves in actions which are solely for the purpose of gaining an unfair advantage by either causing a significant adverse effect on the market or using their

[10] *Shamsher Kataria* v. *Honda Siel & Ors* (Case No. 3/2011) 128.
[11] Black's Law Dictionary, Standard Ninth Edition 109.
[12] Section 3, Competition Act, 2002; Anti-Competitive Agreements.
[13] Section 4, Competition Act, 2002; Abuse of Dominant Position.

dominant position in the relevant to further overpower and oust other players, who can't defend themselves effectively from such actions.

Most notably, the working of the entire automobile industry and the actions of fourteen (14) major players such as Maruti Suzuki (OP 9), Honda Siel (OP 1), Mahindra & Mahindra (OP 8) etc. were called into question by the watchdog of Competition Law in *Shamsher Kataria* v. *Honda Siel & Ors.*[14], wherein the Informant made allegations against the OPs, among other actions of anti-competitive nature, such as refusing to sell/supply spare parts and limiting the supply of technical know-how to independent repairers, creating entry barriers to entrants in the aftermarkets and abusing their dominant position in the aftermarkets. It was the finding of the CCI that the OPs acted in contravention of the Competition Act, 2002, and were given appropriate orders, and levied fine, therefor, discussed hereinbelow.

It is interesting to note that while it was the crux of the allegation against the OPs that they acted under a common intention to monopolize the aftermarkets in the automobile industry, by engaging into anti-competitive agreements and abusing their dominant positions, and essentially behaved almost identically to each other, even then no allegation of cartelization was made against them. Albeit it was alleged that the OPs acted in almost identical anti-competitive manner, there was a lack of conspiracy or agreement between each other and as such an intentional cartel wasn't formed; but it can be seen from the facts of the case that the fourteen (14) OPs had unassumingly formed a system resembling a cartel present with ample common intention, but lacking the element of conspiracy.

[14] Refer to *supra* Note No. 7.

IV. INDIA

At the cost of reiteration, the case most worthy of mention, while discussing the state of automobile industry, is the Shamsher Kataria Case[15]. In the said landmark Order, it was the case of the Informant that the OPs 1-3 therein were engaging in anti-competitive behavior, in contravention of the Competition Act, 2002, and thereby prayed before the CCI to investigate and look into the actions of the OPs 1-3 and *other contravening vehicle manufacturers*[16], whereafter the investigation of the Director General (DG), the contravening actions of the OPs 4-14 were also discovered.

It was the case of the Informant that the OPs and their authorized dealers purposefully restricted the supply of spare parts and related technical know-how to the open market, and not only did they not supply it themselves but also prevented the supply thereof by entering into anti-competitive agreements; thereby effectively creating a monopoly over the aftermarkets of spare parts and services; and took advantage thereof by charging arbitrarily high prices since they were the only providers in the market for the spare parts and services. It was the opinion of the CCI that the automobiles sold by the OPs needed custom-made spare parts and services, specifically for the vehicle, and the spare parts and services available in the open market could not satisfy the requirements of repair. It was further discovered that the said spare parts were manufactured by independent original equipment suppliers (OESs) but they were restricted by the OPs to sell those spare parts into the open market, and even the authorized dealers were restricted to sell the spare parts over-the-counter without the prior consent of the respective OP, consent which had pragmatically never been given even once in the past. It was the opinion of the CCI that

[15] Refer to *supra* Note No. 7.
[16] *Shamsher Kataria* v. *Honda Siel & Ors* (Case No. 3/2011) 7.

by doing as aforementioned, the OPs became a dominant entity in the aftermarket, where the consumer was essentially locked-in by virtue of his purchase in the primary market. The CCI did not fail to notice that the consumer was definitely locked-in, since the consumer did not have the option of switching the primary product i.e. the vehicle at this stage without suffering a significant financial loss, and since the spare parts and services are vehicle-specific, therefore the 100% market of the respective aftermarket for the respective automobile was monopolized by the respective OP i.e. seller of the vehicle.

While the Competition Law does not frown upon dominance in any market, what is frowned upon is the abuse of the dominant position. It was the finding of the CCI that each of the contravening OP, being the dominant entity in the aftermarket of the car sold by them, abused their dominance by restricting entry of any new repairer or provider of the spare parts or services. The OPs purposefully did not allow the OESs to sell the spare parts and services in the open market and even the authorized dealers were virtually forbidden to sell the same over-the-counter; thereby preventing any entity other than the respective OP to provide spare parts and services. Hence, in an apparent full-proof manner, the OPs had created a system of markets whereby they sold the cars in the primary market at reasonable rates, even suffering losses in the primary market in many cases[17], and thereafter became the sole suppliers of the spare parts and repair services required for those cars in the aftermarkets, and provided the same at a markup of 100-5000%[18] to the original cost of the spare parts and services. In view of the foregoing, it hardly comes as a surprise that approximately 55% of the profit is generated by the OPs, not from the primary market of car sales but from the aftermarket of spare parts and

[17] *Shamsher Kataria* v. *Honda Siel & Ors* (Case No. 3/2011) 165.
[18] *Shamsher Kataria* v. *Honda Siel & Ors* (Case No. 3/2011) 162.

services. Therefore, in light of the above, it was the finding of the CCI that the OPs did in fact contravene the provisions of the Competition Act, 2002, and engaged in anti-competitive agreements and abuse of dominant position. Thereafter, among other directions to the OPs, the CCI fined each OP 2% of their annual turnover, a total of Rs. 2544.64 crores. As it stands, the said Order of the CCI attempts to change the automobile industry as the consumer knows it.

V. DEVELOPING COUNTRIES

One of the arguments made by the OPs in the Shamsher Kataria Case was that, while deciding the case, the CCI took guidance from the judgments and antitrust legislation of countries such as Europe and USA i.e. developed countries and hence it was unfair of the CCI to do so since the conditions and stages of the antitrust law are dependent on different factors for developing and developed countries, and therefore it was incorrect to base the Order on such mis-guidance.

It is most notable that a similar situation is currently pending before Brazil's Administrative Council for Economic Defense (CADE), whereby investigating is ongoing in a case brought by Association of Independent Auto-Parts Producers (ANFAPE) against auto-makers namely Fiat SA, Ford Motor Company Brazil Ltd. and Volkswagen do Brazil Ltd., for abuse of their dominant position in the relevant market. It is the case against the OPs therein, among other issues, that the OPs were dominant in the respective aftermarkets and abused their dominance, that consumers faced a market lock-in, that the automakers had essential monopoly in the aftermarkets by virtue of their IPRs and that there were entry barriers to other players in the market. While it was the stand of

the OPs therein that the IPRs owned by them were certified and legal in nature thereby justifying their actions in the market and making them completely legal as well, it was sent for investigation on the opinion of the Reporting Commissioner; whereby CADE promoted the conversion of the preliminary investigation into Administrative Process bearing Administrative Proceeding No. 08012.002673/2007-51. The investigation for the same is still ongoing and the case is still pending adjudication.[19] [20] It is of further importance to note that a similar case was brought before the CADE against Helibrás, the exclusive distributor in Brazil for a certain brand of helicopter, alleging that the said company did not make available spare parts and technical manuals to the companies who wished to enter into maintenance contracts for the said helicopters i.e. the relevant aftermarkets; which was held to be a contravention of the antitrust law of Brazil. Thereafter, the issue was rectified by an agreement by Helibrás in 2004 sharing the spare parts and the technical know-how with the companies who wished to enter into the relevant aftermarkets.[21]

In a similar case pending in China before the National Development and Reform Commission (NDRC), an investigation is ongoing against the automobile manufacturers of luxury cars, where amongst other anti-competitive behavior, there was restriction on competition by the players in the market, monopoly on the after-sales market, price-fixing in the horizontal after-sales market, low availability of repairing technology and technical know-how, so much so that the price of the finished products is approximately

---

[19] The Antitrust Review of the Americas: Brazil: Case Law On Abuse of Dominance, *available at* http://www.demarest.com.br/Documents/Artigos/Brazil%20Abuse%20of%20Dominance.pdf (Last visited on November 15, 2014).

[20] Preliminary Investigation No. 08012.002673 / 2007-51, *available at* http://www.cade.gov.br/Default.aspx?d367b741d046da58a2af80d062 (Last visited on November 15, 2014).

[21] *Shamsher Kataria* v. *Honda Siel & Ors* (Case No. 3/2011) 207.

twelve (12) times the price of the original components i.e. a 1200% markup. The NDRC is thereby strictly investigating the anti-competitive behavior of the automobile manufacturers and it has been hinted that the NDRC may force several automobile makers to pay penalties for aforementioned contravention. [22] The NDRC has unequivocally made clear its stand against the monopolistic behavior in the past by penalizing ten (10) Japanese Auto Manufacturers a total fine of $201.6 million (Rs. 124.88 crores) for colluding and fixing prices of automobiles, auto parts, and bearings thereof.[23]

Hence, even in the developing countries, the Competition Law guard-dogs are facing the same situation as was faced by the CCI in Shamsher Kataria Case and they have taken the stance of vigilance and coming-down severely on the anti-competitive behavior harming the market and the interests of the consumers.

VI. DEVELOPED COUNTRIES

The only way to avoid repeating history is to learn from it. As a developing country with an infant experience in Competition Law, it is incumbent upon India to look at the antitrust law in developed countries, who have faced similar situations in the past and have discovered a solution for themselves.

The situation of the after-market and the competition in the automobile industry in Europe was governed by the Automotive Block Exemption Regulation 1400/2002 until

---

[22] T&D Associates: Monthyl Anti-Trust Report, China, July, 2014, *available at* http://uschinatradewar.com/files/2014/08/TD-Monthly-Antitrust-Report-of-July-2014.pdf (Last visited on November 15, 2014).

[23] The US-China Business Council: Competition Policy & Enforcement in China, September, 2014, *available at* https://www.uschina.org/sites/default/files/AML%202014%20Report%20FINAL_0.pdf (Last visited on November 15, 2014).

June 1, 2010, and has effectively been replaced by the New Automotive Block Exemption Regulation 461/2010. The New Block Exemption Regulation is accompanied with corresponding guidelines whereby it is provided, amongst many other rules, that the players shall not cause the customers in aftermarkets to be locked-in, warranties and their validity shall not be made contingent on the basis of use of branded spare parts, independent operators shall have access to the tools and technical know-how for repair and services and also contains provision for supply of the spare parts to the open market. Hence, clearly transforming a situation faced in the Shamsher Kateria by use of 'block allocation'.

In USA, many states have already adopted the 'Right to Repair Act' to resolve the anti-competitive behavior in the automobile industry and even in other states, there are certain regulations in place for ensure that emissions related diagnostic tools and information is available to independent vehicle repair shops; thereby successfully curbing the issues of monopoly and abuse of dominant position in the aftermarkets of the automobile industry.[24]

In developed countries, such as European Commission and USA, as has been mentioned in the foregoing paragraphs, the anti-competitive behavior has been tackled and effectively controlled by specific regulations and legislations that are custom-made for the same. It can be clearly averred from the law enforced in the developed countries, that the developed countries faced the same problem as are being faced in the developing countries today[25] and they have come up with different solutions to tackle the anti-

[24] *Shamsher Kataria* v. *Honda Siel & Ors* (Case No. 3/2011) 6.
[25] Refer to *Supra* Notes No. 7 and 20.

competitive behavior; and as developing countries, it allows us to learn from the developed countries; a chance that we should seize efficiently.

VII. AFTERMARKETS' AFTER-MATH

It comes as no surprise that the landmark judgment in the automobile industry by the CCI jolted the defaulting OPs to appeal against the Order. While many OPs have decided to approach the Competition Appellate Tribunal (COMPAT), some OPs have opted to approach the High Court requesting a stay on the Order of the CCI and to argue the objections and defenses raised by the OPs in the Shamsher Katarai Case before the CCI. [26] Also, in a Writ Petition (WP)[27] filed by Maruti Suzuki (OP 9), the Hon'ble Delhi High Court was pleased to stay the effect of the Shamsher Kataria Order on the OP 9 till the disposal of a related WP[28] in Madras High Court or till the next date of matter's hearing in Hon'ble Delhi High Court.[29]

Hence, the law as it stands, unless overturned by a higher authority, governing the automobile industry is such that the Automobile Companies cannot enter into agreements with OESs or Original Equipment Manufacturers (OEMs) to limit or restrict the supply of spare parts into the aftermarket or enter into agreements with authorized dealers to limit or restrict the sale or supply of spare parts to buyers, since the foregoing should be anti-competitive in nature and in contravention of the Competition Act, 2002. The Automobile Companies cannot restrict the supply of spare parts and the technical know-

---

[26] Economic Times: Why Carmakers Are Joining Hands Against CCI Charge, *available at* http://economictimes.indiatimes.com/why-carmakers-are-joining-hands-against-cci-charge/articleshow/44913617.cms (Last visited on November 15, 2014).
[27] W.P. (C) No. 5145/2014, Delhi High Court.
[28] W.P. (C) No. 31808/2012, Madras High Court.
[29] Order dt. 3/9/2014 in W.P. (C) No. 5145/2014, Delhi High Court, *available at* http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=172942&yr=2014 (Last visited on November 15, 2014).

how so as to create a monopoly and create entry barriers to the new entrants in the aftermarket, whereby also allowing the OESs and the authorized dealers the freedom to sell and supply spare parts and technical know-how in the market, effectively breaking the entry barriers. The question of the prices should automatically assume its conclusion since with the entry of independent players in the aftermarket of automobile industry the open competition should cause the appropriate prices, for the optimum growth of the aftermarket and the benefit of the consumers, to be realized.

The CCI has carefully looked into the anti-competitive behavior of the Automobile Companies and have ordered them to, thereafter cease and desist from such behavior. The OPs have been directed to improve and impose standardization amongst the spare parts so that they can be used across different brands and are not restricted to a single brand. The CCI has further directed the OPs to not impose blanket warranties with the threat of nullification if the services of any independent repairs have been availed. Also, the OPs have been directed to host on their websites, and publically make available, relevant and required information relating to the spare parts, their prices, availability etc. The CCI has built a reputation for being a watchdog that comes down severely on defaulters of Competition Law and has again stayed true to its title, by giving a landmark judgment, in the face of Shamsher Kataria Case, causing significant progress to be made for the automobile industry and the Competition Law in India.