COVER LETTER

Name of Participant – Geet Sawhney

Name of College – Government Law College, Mumbai

Course and year of Study – BLS LLB, Currently in IV year of V year law Course

Postal Address – Room No. 253, Government Colleges Hostel, C Road, Church gate, Mumbai - 400020

Mobile No. - 9930085499

Email id. – geetsawhney93@gmail.com

Title of Essay – Competition in Automobile Sector: Challenges and Remedies
Competition in Automobile Sector: Challenges and Remedies

Abstract

In the past four decades the number of players in the Indian automobile industry has grown from mere six to more than fifty due to liberalization of the Indian economy. In the Financial Year ending 2012, 65 companies were present in the organised sector and there are over 10,000 in unorganised sector of Automobile and spare parts Industry. In the absence of sectoral regulator it has become increasingly important that free and fair competition prevails in the industry since the interest of various stake holders like dealers, suppliers, manufacturers, consumers and corporate firms are to be protected. Competition Commission of India in the recent landmark ruling in Shamsher Kataria v. Honda Siel Cars India Limited and Ors. unveiled the anti-competitive practices prevalent in the industry especially in the distributorship agreements and the auto mobile spare parts after market. This article highlights trends across various mature jurisdictions like EU and US where international cartels in auto parts industry and vertical restrictions in dealership agreements have suffered the worst penalty and criminal sanctions. In order to make Indian automobile industry less restrictive and more open, better regulatory reforms and guidelines are required. Indian automobile industry due to its different characteristics of Indian consumers and complex nature of aftermarkets cannot be subjected to stereotype remedies of mature jurisdictions. For market forces to tackle the inefficiencies in the industry, more structural and behavioral commitments need to be imposed by the Commission.
I. INTRODUCTION

The Indian automobile industry has grown from license raj to completely free market. Till the eighties, the Indian automobile market was purely driven by very few players. The industry was opened up for global players in eighties and nineties. As a result, in the past four decades the number of players in the Indian automobile industry has grown from mere six to more than fifty, out of which forty emerged only in the last two decades.¹ The entry of multinationals made the industry more competitive as Original Equipment Manufacturers (“OEMs”) introduced newer models and acquired new technology through partnerships and investment in Research and Development² (“R&D”). The competitiveness in this sector largely depends on the capacity of the industry to innovate and upgrade³. In context of globalization and emergence of multinational players in the Indian market, the Government enacted the new competition law to replace the Monopolies and Restrictive Trade practices (“MRTP”) Act, 1969, which had become obsolete in many aspects. The Indian Competition Act (“the Act”), 2002 came into force in a phased manner with

provisions relating to anti-competitive agreements (Section 3) and abuse of dominance (Section 4) coming into force on May 20, 2009.

II. JURISDICTION

(A.) **CONSUMER AND CONTRACTUAL DISPUTES** - Competition Commission of India (“the Commission/ CCI”) has taken up the cause of Indian consumers where the consumer protection laws are not effective. However every unfair trade practice or abuse is not covered under the Competition Act. In cases of dealership agreement, between OEMs and their authorised dealers Commission dealt with number of issues which appeared to be contractual disputes and consumer complaints. Cases where manufacturer refused to reimburse the advertisement expenses borne by the dealer under the contract\(^4\) or where the contracts were wrongfully terminated\(^5\) did not raise any competition concern. A lot of cases affecting the end consumers were also brought before the commission alleging abuse of dominant position. Issues like OEM hiking the vehicle price despite of cut in excise duty of vehicles given in the interim budget of 2014-15 by Government; non delivery of vehicle in spite of registered booking\(^6\); manufacturer’s decision to sell vehicles only in metropolitan cities; or imposition of arbitrary charges; or refusal to supply internal report; or hiding the deficiency in services by OEM and refusing to repair the car while acting in collusion\(^7\) appeared to be purely consumer/contractual dispute to the Commission\(^8\) In all these cases the Commission was of the view that the informant had misunderstood the Act and confused it with the Consumer Protection Act, 1986 (“CPA”). While the Competition Act is aimed to curb anti-

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\(^4\) M/s. Mittal Auto Sales & Services & Others vs Global Automobiles & Others (Case No. 14 of 2010).
\(^5\) Tristar Trading Private Limited & Ors. vs M/s Nissan Motors India Private Limited & Ors. (Case No. 98 of 2013)
\(^6\) Sanjeev Pandey vs Mahendra & Mahendra & Ors. (case No. 17 of 2012)
\(^7\) Mr. Samundra Sain vs M/s Hyundai Co. Ltd. & Ors. (Case no. 13 of 2014)
\(^8\) Shri Sanjay Kumar vs Ford India Pvt. Ltd. & Ors. (case No. 44 of 2014)
competitive practices whereas the CPA is aimed to protect the interest of consumers from the unfair trade practices prevalent in the market. Since then, in the past five years, the Commission has dealt with number of cases in the automobile sector and tried to maintain free and fair competition in absence of sectoral regulator.

III. CARTELS – SECTION 3(3)

Section 3 of the Act deals with anti-competitive agreements including cartels. A cartel are essentially agreements between independent companies or associations, concluded for a joint purpose of altering the market conditions by price fixing, customer or territorial allocation and bid rigging. The automotive parts industry is subject to one of the largest global cartel investigations in recent history. The regulators investigating the alleged cartel conduct include, at this stage, the US’ Department of Justice (“DOJ”), the Canadian Competition Bureau (“CCB”), the European Union’s DG Competition (“DG Comp”) and the Japanese Fair Trade Commission (“JFTC”). The automotive parts cartel investigation is an example of how effective international cooperation (especially in field of information sharing and conducting coordinated dawn raids) between antitrust regulators has become over the last decade. Table - 1 shows some of the recent cartels in auto parts industry prosecuted by EU Commission. Cartel investigations are going on in exhaust system,

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thermal system\textsuperscript{11} (air conditioning and engine cooling products) and automotive occupant safety systems\textsuperscript{12} (including seatbelts, airbags and steering wheels) used on cars.

**TABLE 1: LIST OF CARTELS IN AUTOMOBILE SECTOR PURSUED BY THE COMMISSION**

<table>
<thead>
<tr>
<th>S. NO.</th>
<th>DATE</th>
<th>DETAILS OF INVESTIGATION</th>
<th>PARTIES</th>
<th>FINES IMPOSED</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>19 March 2014</td>
<td><strong>Car Part:</strong> Automotive bearings - used by car to reduce friction</td>
<td>Two European companies (SKF and Schaeffler) and Four Japanese companies (JTEKT, NSK, NFC and NTN with its French subsidiary NTN-SNR)</td>
<td><strong>Fine Amount:</strong> € 953 306 000</td>
</tr>
<tr>
<td></td>
<td>(Automotive Bearing Cartel\textsuperscript{13})</td>
<td><strong>Duration:</strong> More than seven years, from April 2004 until July 2011</td>
<td></td>
<td><strong>Immunity:</strong> JTEKT under 2006 Leniency Notice</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Place:</strong> In the whole European Economic Area (EEA)</td>
<td></td>
<td><strong>Reduction:</strong> NSK, NFC, SKF and Schaeffler for cooperation under leniency programme.</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Activities:</strong> Secretly coordinate their pricing strategy, Requests for Quotations and for Annual Price Reductions from customers and exchanged commercially sensitive information</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td>29 January 2014</td>
<td><strong>Car Part:</strong> Flexible polyurethane foam – used for car seats</td>
<td>Vita, Carpenter, Recticel and Eurofoam</td>
<td><strong>Fine Amount:</strong> € 114 077 000.</td>
</tr>
<tr>
<td></td>
<td>(Foam Cartel\textsuperscript{14})</td>
<td><strong>Duration:</strong> Nearly five years from October 2005 until July 2010</td>
<td></td>
<td><strong>Immunity:</strong> Vita under 2006 Leniency Notice</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Place:</strong> In 10 EU Member States (Austria, Belgium, Estonia, France, Germany, Hungary, the</td>
<td></td>
<td><strong>Reduction:</strong> Eurofoam (JV between Recticel and Greiner Holding)</td>
</tr>
<tr>
<td>S. NO.</td>
<td>DATE</td>
<td>DETAILS OF INVESTIGATION</td>
<td>PARTIES</td>
<td>FINES IMPOSED</td>
</tr>
<tr>
<td>--------</td>
<td>------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------</td>
<td>---------------</td>
</tr>
<tr>
<td></td>
<td>10 July 2013 (Wire Harness Cartel(^\text{15}))</td>
<td>Activities: Colluded to coordinate the sales prices of various types of foam, AG, Recticel and Greiner for cooperation under the Commission's leniency programme.</td>
<td>Sumitomo, Yazaki, Furukawa, S-Y Systems Technologies (SYS) and Leoni.</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td></td>
<td><strong>Car Part:</strong> EU Wire harnesses - conducts electricity in cars</td>
<td>Sumitomo, Yazaki, Furukawa, S-Y Systems Technologies (SYS) and Leoni.</td>
<td><strong>Fine Amount:</strong> € 141 791 000</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Duration:</strong> Most of cartels operated between 2000 – 2009</td>
<td></td>
<td><strong>Immunity:</strong> Sumitomo under 2006 Leniency Notice</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Place:</strong> Japan and European Economic Area (EEA)</td>
<td></td>
<td><strong>Reduction:</strong> All other companies for their cooperation in the investigation.</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Activities:</strong> Five cartels for the supply of wire harnesses (involved bid rigging)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In USA, as of 2014, DOJ Antitrust Division investigation has resulted in charges against 26 companies and 29 individuals and more than $2 billion in criminal fines for participation in conspiracies to fix prices of and rig bids on automobile parts, including safety systems such as seat belts, air bags, steering wheels, and antilock brake systems, and critical parts such as anti-vibration rubber, instrument panel clusters, starter motors, and wire harnesses. Twenty-three of the individuals have pleaded guilty or agreed to plead guilty and have agreed to serve prison sentences ranging from a year and a day to two years. The Division continues to cooperate on this investigation with its counterparts in Japan, South Korea, the European Union, and Canada, among others\(^\text{16}\).


In India, two cases have come up before the Commission alleging cartelisation in auto parts industry (bearings and tyre). However, due to lack of direct and circumstantial evidence no conclusive proof of cartel could be established. In *All India Tyre Dealers Federation v. Tyre Manufacturers*, (Case No. RTPE 20 of 2008), where it was alleged that the tyre manufacturers have formed a cartel to regulate the price and the supply of tyres, the Commission did not find sufficient evidence to prove any violation by the Automobile tyre manufacturers or their association.

**IV. VERTICAL AGREEMENTS - SECTION 3(4)**

In a recent landmark ruling, *Shamsher Kataria v. Honda Siela and Ors.*[^18^], CCI imposed a fine totaling INR 2544 Crore Rupees (USD 420 million) on 14 (fourteen) car manufacturers (OEMs) for restricting the sale and supply of genuine spare parts in open market thereby violating Section 3(4) & Section 4 of the Competition Act, 2002. The decision has brought some new concepts in light which have been discussed under various heads in this article.

**EXCLUSIVE SUPPLY AND DISTRIBUTION AGREEMENT – SECTION 3(4)(b) AND 3(4)(c)**

(A.) **PRIMARY MARKET** - Exclusive dealing arrangements are commonly defined as arrangements that require a buyer to purchase all of its requirements or a large extent thereof from one (dominant) seller, or a supplier to sell all of its products or services or a large extent thereof to the dominant firm. Some automakers currently do not allow their dealers to open


[^18^]: Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors. (Case No. 03 of 2011)
additional outlets for other OEMs citing conflict of interests. Such an agreement would have to be assessed in the context of the considerations provided in section 19(3) and if it causes or likely to cause an Appreciable Adverse Effect on Competition ("AAEC") in the market, it would be seen as an anti-competitive agreement.

**Territorial Restrictions:** In case of Kanwal Jit Singh vs India Yamaha Motors Pvt. Ltd. OP (Manufacturer) appointed another distributor in Ambala in violation of exclusive distribution agreement with the Informant. The Commission took the view that such conduct cannot be stated to be anti-competitive rather it promotes intra brand competition between the dealers of the same brand resulting into consumer good. The European Commission recognizes that exclusive distribution agreements (containing territorial exclusivity) do not produce serious foreclosure effects as long as they are not combined with single branding, i.e., the distributor is not required to make all purchases of the same type of product from a single supplier.

**Non Compete Obligations:** Some distribution agreements include a non-compete clause that prevents the distributor from selling or reselling products, or manufacturing or purchasing

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20 Kanwal Jit Singh vs India Yamaha Motors Pvt. Limited. (Case No. 22 of 2013)

21 Exclusive Distribution agreements are exempted by the VBER provided the market shares of the supplier and the buyer in their respective markets do not exceed 30% (of each party, not combined market share)

22 American bar Association – Antitrust Division, “The Newsletter of distribution and Franchising Committee” Vol. 17, No. 1 – February 2013, available at: [http://www.mwe.com/files/Publication/5364395a-5e08-4144-ba70-c83f838c9dea/Presentation/PublicationAttachment/495a7cc4-a8e7-4ee9-a9e6-d1ea58cb4bc8/A%20Comparison%20of%20the%20Competition%20and%20Distribution%20Rules%20of%20China%20and%20the%20European%20Union.pdf](http://www.mwe.com/files/Publication/5364395a-5e08-4144-ba70-c83f838c9dea/Presentation/PublicationAttachment/495a7cc4-a8e7-4ee9-a9e6-d1ea58cb4bc8/A%20Comparison%20of%20the%20Competition%20and%20Distribution%20Rules%20of%20China%20and%20the%20European%20Union.pdf) (Last Modified February 2013).

products, that compete with the supplier’s products. Dealers argue that car manufacturers might foreclose competing manufacturers from the market through the widespread use of non-compete obligations which prevent or otherwise restrict dealers from selling competing brands. Foreclosure risks should however be balanced against the possibility that multi-brand sales may bring about free-riding and lead to sub-optimal levels of investment. In the leading case of *Tata Engineering and Locomotive Co. Ltd. v. The Registrar of Restrictive Trade Agreement*25 (‘Telco’), the Supreme Court was of India was of the view, that the term in exclusive dealership agreement that “the dealer will not sell commercial vehicles of other manufacturers”, did not amount to a restriction in competition because other manufacturers can appoint other persons to deal in their commercial vehicles. Therefore, there will be competition between the manufacturers of different commercial vehicles and as far as exclusive dealership of Telco commercial vehicles is concerned, it will be in public interest and not be a restriction in competition.

However, in *Hindustan Lever Ltd v The Monopolies and Restrictive Trade Practices Commission*26, the Supreme Court took a contrary view and struck down certain clauses of a stockist agreement as being restrictive trade practices. Their Lordships distinguished the judgement in Telco on the basis that the latter case was related to exclusive stipulations whereas the stipulations in the case at hand were ‘wholly unreasonable’.27

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24 *Supra* note 22.
25 Tata Engineering and Locomotive Co. Ltd. v. The Registrar of Restrictive Trade Agreement, 1977 AIR 973.
In EU a manufacturer could no longer force its dealers to operate multiple brands under separate legal entities and separate management. Under the earlier Block Exemption Regulation 1400/2000 (now replaced) a ‘non-compete obligation’ meant any obligation on the buyer to purchase from the supplier more than 30% (now 80%) of the buyer’s total purchases of the goods. Under the new and current general regime, single branding may be used, subject to three main limits. Firstly, only manufacturers with a market share of less than 30% can impose single-branding obligations within the scope of the block exemption. Secondly, suppliers with a market share of below 30% may impose single-branding obligations for a maximum of five years, following which dealers must be free to terminate the tie. Thirdly, single-branding obligations specifically designed to exclude newcomers or smaller brands that are currently sold in existing multi-brand outlets will not be exempted.

In China, such a non-compete clause is prohibited if the supplier is dominant in the market and there is no justification for the clause.

(B.) **AFTERMARKET** - India is poised to overtake Japan as Asia’s No. 2 vehicle market by 2016 according to new estimates by The Wall Street Journal. Car sales in India are projected to

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30 In practice this regulation guaranteed that the dealers are able to sell at least three different brands (but if all manufacturers impose 30 per cent purchase requirement a dealer would effectively be able to sell only three brands).


32 Supra note 22.

33 Supra note 31.


35 SAIC Regulation 54/2010, art. 5 (China).
rise to 4.88 million vehicles by 2016. According to reports, only one-third of the cars go back to the dealerships post warranty and rest search for other good workshop. There is huge potential in after-market for multi-brand workshops. Small car workshops serve multi brands. Normal servicing and running repair is possible at any service station but arrangement of genuine parts is not easy for everybody. Car manufacturer recommends genuine spares. Availability of genuine spare parts difficult for multi brand workshops and customers prefer dealer workshop.

### TABLE 2: FUNCTIONING OF AUTOMOBILE SPARE-PARTS INDUSTRY IN INDIA

<table>
<thead>
<tr>
<th>Overseas Suppliers - supply spare parts</th>
<th>Local Original Equipment Suppliers (&quot;OESs&quot;) - manufacture spare parts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Original Equipment Manufacturers (&quot;OEMs&quot;)</td>
<td></td>
</tr>
<tr>
<td>Sold in aftermarket through 'Authorised Dealers'</td>
<td></td>
</tr>
</tbody>
</table>

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Therefore, OEMs enter into three types of agreements:

1. **Agreements with Overseas Suppliers (“OS”)** - Such kind of internal agreements/arrangement between an enterprise and group/parent company (‘single economic entity’) is not within purview of the mischief of Section 3(4) of the Act.

2. **Agreements with Original Equipment Suppliers (“OES”) and local equipment suppliers**

   - In India the OES cannot supply spare parts directly into aftermarket without seeking prior consent of the OEMs. In Europe, the Under EU under Block Exemption Regulations 461/2010 lists three hardcore clauses describing restrictions of competition rules on the spare parts market. These concern restrictions placed by car manufacturers on a) the sale of original spare parts by authorised repairers to independent garages, b) the ability of independent manufacturers of spare parts to supply to authorised or independent repairers, and c) spare parts’ manufacturers’ ability to put their trade mark or logo on their products.

**IPR Exemption** - Most of the world’s leading automobile companies actively protect their Intellectual Property Rights (“IPR”) in India. All the key players in the automobile space are actively filing patent applications in India. OEMs in India believe that the above restrictions are necessary in the absence of any quality certification process in India, and for protection of IPR rights held by the OEMs. However, mere selling of the spare parts, diagnostic tools, manuals and catalogues in the open market does not necessarily compromise upon the IPRs.

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38 Commission in Exclusive Motors v. Lamborghini (Case 52 of 2012).
41 General Motors filed 1383 patent applications in India during the period of 2005-2009, followed by Honda (including 2-wheeler and 4-wheeler segments) at 577, Tata Motors at 326, Toyota at 216, Hyundai at 59, Suzuki at 56, and Ford at 19.
held by the OEMs in such products. Therefore, the Commission was of the view that the restrictions imposed upon the OESs form selling spare parts directly into the aftermarket were not ‘necessary’ within the purview of the exemption of section 3(5)(i) of the Act.

“Repair Clause” - In Europe, vehicle manufacturers and their component suppliers have significant monopoly power in the market for visible replacement parts, because they can, in many Member States, invoke design protection to stop others producing them. Ironically, twelve European Member States out of the twenty eight have liberalized through the provision of a “repairs clause”, allowing design protection on new products but leaving the possibility for alternative parts in repair or replacement in the aftermarket. In 2012 and 2013, the Romanian Competition Council (“RCA”) and French Competition Authority (“FCA”) published its final report on the results of its sector inquiry into the automotive spare parts market and suggested amending the law by introducing a so-called “repair clause” which would remove the protection in respect of spare parts destined for repairs. On 23rd May, 2014, European Commission’ failed in its past 10 year long attempt and withdrew its proposal to introduce a Europe-wide Repairs Clause. Germany, alongside France, the Czech Republic, Sweden and Romania are amongst the countries which would refuse this proposal for a directive. They are not alone - all the major countries competing with Europe:

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42 Para. 20.6.21, Shri Shamsher Kataria vs Honda Siel Cars India Ltd. & Ors., (Case No. 03 of 2011)
44 Belgium, Estonia, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Latvia, the Netherlands, Spain and United Kingdom.
47 Id.
USA, Japan, Korea and the BRIC countries (Brazil, Russia, India and China) protect car body parts under design rights\textsuperscript{49}.

And

3. **Agreements with Authorized Dealers** – Different kinds of such agreements (shown in Table - 2) restrict/prohibit sale of spare parts, diagnostic tools and repair manuals by authorised dealers to independent repairers. There are clauses in agreements entered by OEM with authorised dealers requiring the former to source spare parts only from the latter or their approved vendors. The rationale given by OEMs for such restrictions, such as, (i) the independent operators may not possess the skills required to replace the parts and undertake repairs thereby causing health hazards, (ii) widespread availability of counterfeit parts, (iii) parallel resale network if established would conflict with the distribution network etc.

**TABLE 3: REMEDIES OTHER THAN RESTRICTION ON SALE OF SPARE PARTS IN INDIAN AUTOMOBILE AFTERMARKET INDUSTRY**

<table>
<thead>
<tr>
<th>Alternative measures available to OEMs in their agreements with OES and local equipment suppliers.</th>
<th>To prevent violation of intellectual property rights in spare parts</th>
<th>To ensure the quality of spare parts</th>
</tr>
</thead>
<tbody>
<tr>
<td>- OEMs requiring OESs to ensure that intellectual property rights are not compromised and are protected.</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>- OEMs requiring OESs to produce finished products</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>- OEMs licensing their safety check</td>
<td>✓</td>
<td></td>
</tr>
</tbody>
</table>

spare parts in compliance with applicable industry standards. methodology to their OESs for a royalty fee

OEMs incentivizing consumers to avail authorized dealer network for purchasing spare parts and availing other after sale repair services with extended warranty commitments and other post sales consumer benefits.

OEMs requiring the OESs to label the genuine spare parts sold by them with appropriate labels.

Through this OEMs can then safeguard their brand image and to protect their consumer goodwill.

OEMs in their contracts with their customers can limit their warranty against the use of faulty or defective spare parts sold by their OESs.

OEMs allowing spare parts to be sold in open market while charging royalty for intellectual property rights on spare parts.

Spurious and Counterfeit Spare Parts in Aftermarket - Counterfeit components account for as much as 45 percent of passenger car aftermarket sales and 15 percent of commercial vehicle aftermarket sales. Although customers are usually unable to distinguish between an original and a spurious part, the use of these products is impacting Component Manufacturer (“CM”) and Vehicle Manufacturer (“VM”) revenues. The Commission is of the view, the presence of spurious parts/health hazards should not be used as an argument to deny consumer choice. The choice of ‘whether to go to an Independent Repairer or Authorised Dealer’ should not be taken away in guise of consumer protectionism. Over the long term, the threat of spurious parts should diminish as stricter legal penalties are implemented, and CMs and VMs work to

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increase customer awareness in collaboration with independent repairers, multi-brand operators, the OEMs and their OESs.

**TABLE 4: CLASSIFICATION OF AGREEMENTS BETWEEN OEMs AND OVERSEAS SUPPLIERS/OESs/AUTHORISED DEALERS**

<table>
<thead>
<tr>
<th>Classification of Agreements between OEMs and Overseas Suppliers/ OESs/ Authorised Dealers</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Section 3(4)(c) and Section 3(4)(d) - Exclusive Distribution Agreements and Refusal to Deal</strong></td>
</tr>
<tr>
<td>• OEMs (except Maruti and Hindustan Motors) internal arrangement with Overseas Suppliers restricting supply of spare parts directly to the Indian aftermarket.</td>
</tr>
<tr>
<td>• OEMs agreement/ arrangement with OES not to supply spare parts directly into aftermarket without seeking prior consent of the OEMs.</td>
</tr>
<tr>
<td>• OEMs agreements/arrangements with their Authorised Dealers restricting sale of spare parts over the counter.</td>
</tr>
<tr>
<td>➢ Fiat, Skoda, Nissan and Mahindra - have specific clauses restricting/prohibiting sale of spare parts over the counter</td>
</tr>
<tr>
<td>➢ BMW, Ford, Honda, Maruti, Tata Motors, Volkswagen, Hindustan Motors and Toyota - though no specific clauses restricting sale, however spare parts are not in open market</td>
</tr>
<tr>
<td>➢ General Motors and Mercedes – Benz, allowing sale of spare parts only to limited extent but not provide diagnostic tools and repair manuals to the independent repairers</td>
</tr>
<tr>
<td>• OEMs arrangement/understanding with Authorised Dealers regarding non-sale of spare parts over the counter to independent consumer or independent repairers.</td>
</tr>
</tbody>
</table>

| **Section 3(4)(b) - Exclusive Supply Agreements** |
| • OEMs (such as Fiat, Skoda, Nissan, Mahindra) agreements with Authorised Dealers requiring them to source spare parts only from them or approved vendors. |
(C.) **ASSESSMENT OF AAEC**— The Commission found all the above agreements to be either in the nature of exclusive supply agreements or exclusive distribution agreements and refusal to deal in terms of Section 3(4)(b); 3(4)(c) and 3(4) (d) of the Act. While assessing AAEC in light of factors mentioned in Section 19(3) the Commission made following observations: (i) consumers do not have access to any competitive products because the exclusive dealers are the only dealers selling specific OEMs’ brand of spare parts and diagnostic tools. (ii) these spare parts are unique and are not exchangeable with spare parts made by other OEMs; (iii) all the OEMs have warranty policies that deprive the owners of automobiles of any warranty on their vehicles if such owners use the services of the independent service providers. The efficiencies of the selective distribution system claimed by the OEMs are outweighed by the foreclosure effects and barriers to entry in the market created by the restrictive clauses. Therefore such restriction is very likely to cause an AAEC.

V. **ABUSE OF DOMINANCE**

The new Act conforms closely to the principles of modern antitrust economics. The emphasis has shifted from size to behaviour and effect on the market concerned. Section 4 of the Act prohibits abuse of dominant position by an enterprise or group, as defined in the Act. The important issue is whether the dominant undertaking is using its dominant position in an abusive way. The prohibitions or the abusive conducts including both ‘exclusionary’ and ‘exploitative’ practices are set out in Section 4(2) (a), (b), (c), (d) and (e) of the Act\(^5\). A finding of abuse involves a three stage process.

(A.) **Defining a Relevant Market** - Market Definition is one of the most important analytical tools to examine and evaluate the competitive constraints that a firm faces and the impact of its behaviour on competition. There is no straight jacket formula to decide the contours of a relevant market. In India “For determining whether a market constitutes a ‘relevant market’ the Commission shall give due regard to the ‘relevant product market’ and the ‘relevant geographic market’”.

**TABLE 5: SEGMENTING RELEVANT MARKET IN INDIAN AUTOMBILE SECTOR**

(B.) **Establishing a Dominant Position** - Dominance position in explanation (a) to Section 4 of the Act inter alia means *enjoying position of strength in the relevant market in India enabling the enterprise to operate independent of the competitive forces prevailing in the relevant*.

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54 Section 19 (5), The Competition Act, 2002
market or affect its competitors or consumers of the relevant market in its favour. Holding a
dominant position in relevant market in itself does not fall foul of the Competition Act. It is
not the dominance, but its abuse which is prohibited by law.\textsuperscript{55}

Antitrust analysis cannot simply assume that anticompetitive behavior is absent in
aftermarkets (spare parts) for goods and services when the primary market (automobile) is
considered competitive. The US Supreme Court in the case of \textit{Eastman Kodak Co. vs. Image
Tech.}\textsuperscript{56} found that in aftermarket Kodak enjoyed monopoly power. The Court also held that
customer is locked in after purchase of equipment as switching costs are high. The customer
can then be subject to abuse. On these facts the Supreme Court held the behaviour of Kodak
as anti-competitive. In \textit{Shamsher Kataria case}, the Commission noted that due to the high
degree of technical specificity both inter-brand and intra-brand substitutability of spare parts
was greatly diminished. Moreover, each OEM entered into a network of contracts, pursuant
to which, they had become the sole supplier of their own brand of spare parts and diagnostic
tools in the aftermarket. Hence, each OEM was shielded from competitive constraints in the
aftermarket from the competitors in the primary market. Moreover, each OEM is a 100%
dominant entity in the aftermarket for its genuine spare parts and diagnostic tools and
correspondingly in the aftermarket for the repair services its brand of automobiles. Therefore,
OEM was in position to exploit the lock-in of consumers in the aftermarket by charging a
price substantially in excess of the competitive price, this would constitute evidence of
market power.\textsuperscript{57}

\textsuperscript{55} Para 16.1, Neeraj Malhotra vs Deustche Post Bank Home Finance Ltd. & Ors. (Case No. 06 of 2009)
\textsuperscript{56} Eastman Kodak Co. vs. Image Tech.SVCS., 504 U.S. 451(1992).
\textsuperscript{57} Supra note 52 at page 46.
(C.) **ASSESSMENT OF ABUSE OF DOMINANT POSITION**

(i) **Unfair Condition Section - 4(2)(a)(i) and Denial of Market Access – Section 4(2)(c)**

The auto components industry in India is currently around two-thirds the size of the OEM segment. This proportion is around one to two times in the mature markets of Europe, America and Japan. Thus, structurally, the current size of the Indian auto components replacement market in relation to auto parts supplies to the OEM segment is much smaller than that in mature markets\(^{58}\).

➢ **Access to Spare Parts denied** - Every new model in automobile industry results in 2500-3000 parts added to the existing master list of the aftermarkets parts. Naturally not all parts can be forecasted. In fact only 5% of the total parts in the master list can be forecasted leaving the rest 95% to be procured based on replenishment. The suppliers of the aftermarket business are usually the same as that of OEMs. An OEM has at least 100 suppliers and few of them even more than 1000\(^{59}\). In order to secure supplies for its Automobile segment and its own aftermarket business, OEMs have placed restrictions on the local OES from supplying parts directly in open market to independent repairers. Similarly no case can be seen where overseas suppliers sell spare parts directly into Indian aftermarket. The Commission’s investigation has revealed that for most of the relatively late entrants in the Indian market,

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\(^{58}\) ICRA Reseach Services, Indian Automobile Industry, “CCI’s proposed penalty on Passenger Vehicle OEMs not materially credit negative”, *available at: http://icra.in/Files/ticker/S1-2014-Q3-3-ICRA-Automobiles.pdf* (Published on September 2014)

parts are not available (on pan-India basis)\(^60\). Hence each OEM becomes the only source of supply of these spare parts for the aftermarket requirements. Such practices amounts to denial of market access by the OEMs under section 4(2)(c) of the Act. OEMs claim spare parts and diagnostic tools, workshop manuals to be their proprietary materials and therefore accessible only to the authorized dealers network of each OEM. However unlike section 3(5) of the Act, there is no exception to section 4(2) of the Act.

- Access to Technical information denied - Cars are becoming increasingly complex, and even basic repairs require qualified technicians with brand-specific technical information. Independent repairers are important as they increase choice for consumers and keep the price of repairs competitive by putting pressure on car manufacturers' authorised repair networks. However, independent repairers can only compete effectively if they have access to both technical information and spare parts, which are key inputs for performing repair and maintenance work\(^61\).

*Technical Information* includes all information provided to authorised repairers for the repair or maintenance of cars\(^62\). The investigation by the Commission in Shamsher Kataria case revealed that all the OEMs restricted the availability of the diagnostic tools/repair manuals etc. to the independent service providers and the multi brand retailers. In 2007, EU Commission adopted four decisions where it found DaimlerChrysler, Toyota, Fiat and General Motors had failed to release technical repair information to independent repairers.

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\(^{60}\) Table No. 7, Shri Shamsher Kataria vs Honda Siel Cars India Ltd. & Ors. (case No.03 of 2011)


\(^{62}\) Technical Information includes software, fault codes and other parameters, together with updates, parts catalogues, working solutions resulting from practical experience and relating to problems typically affecting a given model or batch, and recall notices as well as other notices identifying repairs that may be carried out without charge within the authorised repair network.
The Commission came to the preliminary view that the agreements between OEMs and authorised repairers were unlikely to benefit from the provision of Article 4(2) of the regulation. The defaulting car manufacturers offered commitments to the Commission in order to meet the competition concerns addressed in the preliminary assessment.63

- **Remedies offered by the Commission** - On the same lines, the behavioral and structural commitments imposed by CCI have three core elements. Firstly, to put in place effective system for manufacturing and availability of spare parts. Secondly, place no restrictions on operation of independent repairers/ garages. This shall be accompanied with development of appropriate systems by OEMs to provide training to independent repairers/ garages. And lastly, the commitments ensure that independent repairers and consumers can obtain information regarding the spare parts, their maximum retail prices ("MRPs"), arrangements for availability over-the-counter, maintenance costs, provisions regarding warranty and such other information which may be relevant for consumer to exercise full choice.64 Moreover the Commission has suggested that in order to avoid parts complexity growing exponentially; the OEMs should try and standardize as many components as possible between models. Naturally this standardization is more in commercial vehicles and farm equipments as compared to two wheelers and cars.65

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64 Para. 22.3, Shamsher Kataria case, *Supra* note 18.

65 *Supra* note 59.
(ii) Unfair price - Section 4(2)(a)(ii)

Section 4(2)(a)(ii) of the Act, provides that there shall be an abuse of dominant position, if a dominant enterprise, imposes unfair and discriminatory price in purchase or sale (including predatory pricing) of goods and services.

Excessive Pricing - As per CII, Mckinsey Report\(^{66}\) aftermarket business of Indian auto spare parts contribute modest 24 percent of revenues to OEM, however, a sizeable 55 percent of profit is derived from this segment. For OEMs in mature markets such as Europe and the US, profit margins for spare parts are 76 percent higher than that of the conventional finished product business\(^{67}\). Such sizeable revenue from the spare parts is possible because of the fact that the OEMs are able to mark up prices of spare parts without any competitive constraints. The Commission’s investigation have revealed that in spite of reputational factors each OEM has substantially hiked up the price of the spare parts (usually more than 100 percent and in certain cases approx 5000 percent) in the Indian aftermarket\(^{68}\). In the absence of sectoral regulator\(^{69}\) and price regulation policy, excessive prices motivate the potential competitors to enter into the market and are therefore self correcting. However under the existing structure of Indian automobile aftermarket, OEMs are not subjected to any competitive constraints.


\(^{68}\) Para 20.5.54, Shamsher Kataria case, Supra note 18.

\(^{69}\) In India sectors such as Electricity, Petroleum and Natural Gas, Telecommunication, Insurance, Airports, Airlines are regulated by independent sectoral regulators which are driving forces for creation of enabling environment for competition and free play of market forces.
either from other OEMs (due to 100 percent dominance of each OEM in the aftermarket for their brands spare parts) or independent repairers (due to denial of market access to aftermarket of spare parts an diagnostic tools) to self correct the pricing abuses. The identification of high/excessive prices does not imply that a natural remedy is to regulate prices. The remedy available in such cases is to structurally modify the competitive nature of Indian automobile market by enhancing consumer choices and access of independent repairers to effectively compete in Indian aftermarket.

In China, National development and Reform Council (“NDRC’s”) high-level investigations revealed European luxury car-makers Audi, BMW, Daimler and Fiat-owned Chrysler, abused their dominant market position and imposed vertical restraints involving resale price maintenance of parts and after-sales services. In September 2014, FAW-Volkswagen, Audi's Chinese Joint venture, and Chrysler's local sales units had a combined fine of $46 million imposed, with other firms expected to be fined too.

(iii) **Leveraging – Section 4(2)(e)**

In India, the users of car wanting to purchase the spare parts have to necessarily avail the services of the authorized dealers of the OEM. It is therefore found that such OEMs use 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) of the Act. Even in case of OEMs where the spare parts are available in open market, the independent repairers are still foreclosed because none of the OEMs allow their diagnostic tools, repair

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70 *Supra* note 51 at page 341.
manuals etc., to be sold in the open market. This is evident from ACMA Report 2011, where 94.99 percent of the total service providers in the Indian automobile aftermarket industry are denied effective access to Indian aftermarket on competitive terms. Further, all the OEMs (except BMW) have warranty clauses which effectively deny any warranty to the owners of automobiles if such owners avail the services of the independent repairers or other multi brand service providers. The Commission directed that the OEMs could not impose any blanket condition such as “that warranties would be cancelled if consumer avails services of independent repairer”\textsuperscript{72}. However, a vehicle manufacturer may legitimately refuse to honour warranties on the grounds that the situation leading to the claim in question is causally linked to a failure of a specific spare part provided by an alternative supplier\textsuperscript{73}.

VI. CONCLUSION

In Shamsher Kataria case, penalty of 2 percent imposed by the Commission might seem to be unjustified since the according to the concept of ‘relevant turnover’\textsuperscript{74} penalty should have been imposed on the aftermarket business of spare parts and not the primary business of cars. In the absence of draft penalty guidelines no reasons have been provided by CCI on imposition of penalty. However the Commission needs to be prepared, for a lot is yet to come on its plate looking at the worldwide figures of penalty and sanctions imposed in automobile industry: whether any whistle blower comes forward with leniency application in auto parts cartel or a

\textsuperscript{72} Supra note 67.


\textsuperscript{74} Excel Crop Care Limited v. Competition Commission of India &Ors. (Appeal No. 79 of 2012 dated October 29, 2013.)
class action suit is filed under Section 53N before the Appellate Tribunal. After all, how long will the Commission remain in its infancy!!!