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A case against the stay against the order passed by the Competition Appellate Tribunal in *Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors*

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As part of any antitrust/competition analysis, one pertinent question that arises is the decision whether there is a single market that includes both, the equipment and its complimentary products and services, or separate markets, ergo, “primary market” for equipment and one or more “aftermarkets” or “secondary markets” for complementary products or services supplied by both manufacturers and Independent service organisations. Such animosity among both legs of the conglomerate market arises when the Original Equipment Manufacturers (hereinafter OEMs) adopt the defence of owning rights over the research and the development of the diagnostic tools, thus, providing them with exclusive rights over its repair and servicing. Such antagonism is conspicuous in the automobile industry of India, in which Independent Service Providers (ISPs) including unauthorised dealers and providers have created a sizeable market share by selling spare parts and diagnostic tools at 1/5000th the price of OEM products[1].

Recently, the **Competition Appellate Tribunal (COMPAT)** imposed an aggregate penalty of Rs. 25.54 Billion on fourteen OEMs [2] for creating anti-competitive effects through agreements for spares and after sales services which worked towards the complete foreclosure of independent services. The OEMs were found to be dominant in the markets for their respective brands and had abused their dominant position under Section 4[3] of the Act. A few days ago, the Supreme Court stayed an order of the Competition Appellate Tribunal that held the Indian units of three carmakers guilty of adopting anti-competitive practices in the market for spare parts.

An appraisal of the order of the CCI in this matter draws one’s attention to certain issues that are central to the debate on the adoption of a system market-based understanding-

Whole Life cost analysis

The main contentions of OEMs that the primary market as well as the spare parts aftermarket form a single system market is essentially based on the principles of life

cost. It assumes that not only does the consumer know the price and the value of the secondary products, but s/he is also fully capable of making a utilitarian and informed choice. It would go without saying that in a complex industry such as that of automobiles, expecting the consumer to possess knowledge the most cost-effective option amongst so many when even car makers may not possess such information regarding price and availability at the time of sale.

For this reason, the possibilities of a whole-life costing analysis may fluctuate depending upon the nature of customers. Courts have broadly classified customer groups based on sophistication and knowledge of technical know-how, along with access to the same[4]. This has resulted in the presumption that various ancillary factors affect such a kind of analysis, which may more often than not, depend on the whims and fancies of the consumer group. It is one's opinion that the ruling in the Shamsher Kataria case was able to unravel the ulterior motive the OEMs of capturing the sizable market share held by the nearly 900 ISOs by claiming an IPR defence yet, maintain a 5000% excessive mark-up of 'authorised' secondary market products. Additionally, it was also noticed that many of the OEMs companies did not reveal the prices of the products in the aftermarket. It is therefore seen, that the Indian market context, a bid to integrate primary and secondary markets is inimical to consumer welfare, as it may closely boast of the sole motive of improving a dwindling market share of an OEM through anti competitive means[5].

IPR Defence

It may be identified that invocation of a refusal to deal on part of OEMs seems frustrated with the sale of spares and diagnostic tools in the open market by the OEMs. It may be observed that the unwarranted protection claimed by the primary market manufacturers under s. 3(5) of the Competition Act[6] did not cover those rights that were not within Indian legislation. Additionally, the aforementioned sale of parts in the open market reduced the '**necessary**' and '**reasonable**' clauses for restrictions imposed by the OEMs to frivolities.

The justification provided by the companies for placing such restrictions is that the independent service providers might not have adequate technical and mechanical skill to service the automobiles and the presence of several counterfeit spare parts in the market might not synchronise with the automobile's working and might end up damaging it permanently. The COMPAT was right in ruling that the companies must not use such arguments and take away the choice given to the consumer between an authorised seller and an independent service provided. Therefore these restrictions are not justified and are anticompetitive in nature. With the secondary market seen as the relevant market, with a separate market share, it is clear that an integration of the two would only result in the OEMs usurping the former's market share, while charging 5000% the original price and disrespecting the ideals of consumer welfare. One argues that the nuanced understanding of such a situation on part of the Competition Commission of India (CCI) as well as the COMPAT, through its intermediary orders was welcomed and the staying of this order takes away from the paramount role of the consumer in any industry.

[1] Rohan Venktaramakrishnan, How car makers are fleecing Indian drivers on spare parts (but may no longer be able to do so), Scroll.in (20th August 2016), <http://scroll.in/article/676227/how-car-makers-are-fleecing-indian-drivers-on-spare-parts-but-may-no-longer-be-able-to-do-so>

[2] Shri Shamsher Kataria vs Honda Siel Cars India Ltd. & Ors, Order dated 25th of August 2014

[3] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[4] **Rajender Kumar Gupta v. Samsung India**, 2014 CCI 76, the party alleged lack of access to service centres, thus resulting in lack of adequate knowledge to perform whole-life costing analysis.

[5] Jude Sannith, Nissan targets 5% + market share, Moneycontrol.in (24th of August 2016), http://www.moneycontrol.com/news/cnbc-tv18-comments/nissan-targets-5+-market-share-india-by-2020_4935641.html

[6] (5) Nothing contained in this section shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under:

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);

(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

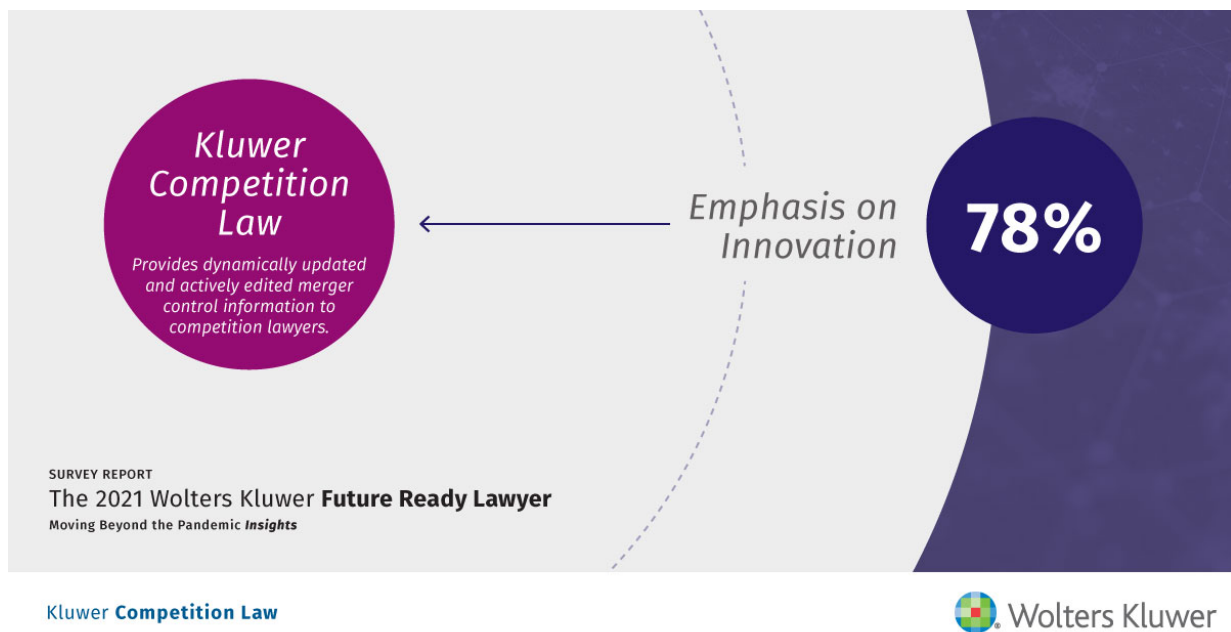
(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

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