

Crime and Punishment - Car Spare Parts' Case before COMPAT

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Quite some time back, an Information was filed before the Competition Commission of India ('Commission' or 'CCI') alleging restriction of supply of spare parts by different car manufacturers or Original Equipment Manufacturers (OEMs) to Authorised Service Providers only. This was on account of the fact that the Original Equipment Suppliers(OESs), who were manufacturing spare parts on behalf of OEMs, were allowed to sell spare parts to OEMs only and not, directly, to independent repairers in the open market. The results of these allegations were supposed to be high price of automobile servicing and spares of these cars. After the Commission formed an opinion that a prima facie case exists, an investigation report by the Director General (DG) was directed to be submitted. On receipt of report from DG, acting on the report of DG, the Commission held that the practice of supplying spare parts to authorised service providers only was indeed anti competitive and, accordingly, a penalty was imposed on the OEMs for violation of competition law. Delivering its order on 09.12.2016 on an appeal, against the order of the CCI, the COMPAT upheld the order of the Commission with slight modifications. It is this order of COMPAT that is the subject matter of this write up.

The author, who drafted regulations for the functioning of the CCI and established the competition law investigation framework for the country as the very first Director General of the functional Competition Commission of India, was also the Head of Antitrust Division, in the beginning, when the CCI was attempting to finalise matters after submission of the report of DG . He is, presently, a practicing advocate as the Chairman of KK Sharma Law Offices. He looks at this order of COMPAT through the lense of his experience- both inside the Commission and now outside.

Usually, when you walk into the show room of any high end cars of well known car manufacturers such as Audi, BMW, Mercedes or even Honda or Toyota, the salesman walks up with great confidence to you and tells you with even greater confidence that, inter alia, these cars are, practically, not stealable. On further inquiry, he would reveal that the systems are so well designed that, in absence of

the key of the car, specifically designed for this very piece of engineered metal and not interchangeable with any other, the car becomes totally unresponsive like a stone and can not either be opened or started if not handled with its own specific key and, therefore, no thief can take your car away from you. For this reason, he would also claim that presence or absence of gear lock, which

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many people consider an addition safety anti theft feature, is really irrelevant in these marvels of high end technology. Sounds really very very reassuring and impressive but is it true ?

In the circumstances, it may really sound odd that a news item² appeared on page 2 of the Times of India dated 18.03.2017, wherein the instances of thieves finding 'smart' key to unlock car had been covered. In the news report, it had been mentioned that these sophisticated and modern car thieves are using kits from United Kingdom(UK) to disable chip control security in high end cars which come with a built in system of security. In normal course, without being armed with such high end technologies, no thief should be able to succeed in stealing such cars having sophisticated lock systems. The news item further goes on to state that these thieves have found a way to get past chip based ignition technology in new cars. To get inside a car's system(or heart as some call it), the thieves use the same technique which is used by 'authorised service professionals', through the authorisedly given diagnostic tool kits to detect fault during repairing. They have been benefiting from imported diagnostic kits and dongles obtained through underhand means, from UK, which costs anywhere around Rs. 3.5 Lakh. After getting it, the car thieves do reverse engineering and the available kit with them is made to read the computer system of the car. Thereafter, it takes control of computer control security and ignition system and disables them. Thereafter, a car can be started with simple tools which are used for traditional car thefts.

The above news item goes on to indicate that, despite the authorised service centres, being less in number and being appointed so after a rigorous selection process, suiting the interests of the car

manufacturers with reference to the safety standards and safeguarding its proprietary technology, and the car diagnostic tools not being available freely across the market, car thieves have found a novel way to deal with full proof security in their nefarious designs of stealing large numbers of cars of different luxury makes. These thieves have been able to manage to get the requisite kits from UK. If there were too many authorised service centres across the length and breadth of the country, with the enhanced probability of such a pilferage of the diagnostic tool kits, not only these thieves have not to make strenuous efforts to get these sophisticated kits from UK as these could have easily been available from the mechanic's shop round the corner but one can also as well imagine the situation wherein such thefts, which by no standards are small, would increase exponentially. This is also only one side of the story. If all the authorised service stations are not of the requisite standards, there is a real possibility of the big automobile manufacturers being sued for millions of bucks in damages. Let us not forget, the frequent news of recall of a large number of cars by reputed car manufacturers for replacement of some part which has been found to be faulty either in design or by practice or experience. All these are the efforts by these car manufacturers themselves to save their reputation and damages through law suits. Availability of their proprietary diagnostic tool kits freely to all and sundry is a threat to all these very efforts.

The above chain of happenings indicates as to how vulnerable the technology being given to authorised dealers, if landing in wrong hands, can be and it can be a big menace to the car owners as well as the

² <http://timesofindia.indiatimes.com/city/delhi/thieves-find-smart-key-to-unlock-cars/articleshow/57696948.cms>

society . However, this is precisely what the order of the Hon'ble Competition Appellate Tribunal (COMPAT), passed on 09.12.2016, directs the automobile manufacturers to do. This Appellate order covered appeal no. 60/2014, appeal no. 61/2014 and appeal no. 62/2014. These appeals were preferred by different appellants against the order of Competition Commission of India ('Commission' / 'CCI') imposing a penalty of Rs. 2544.64 crores on different car makers. These appeals against the order dated 25.08.2014 passed by the CCI in case number 03/2011 against various automobile manufactures such as Toyota Kirloskar Private Limited, Ford India Private Limited and Nissan India Motor Private Limited. This appeal arose on the order by CCI imposing penalty on an information dated 18.01.2011 filed by one Mr. Samsher Singh Kataria before the Commission. The information alleged that genuine spare parts, diagnostic tools, softwares and technological information is not made available by different car manufactures to independent repairing workshops - meaning thereby those workshops which are not among authorised service centres of the car manufactures are not having access to all these technological support. Another grievance of the informant was that these cars companies have limited number of authorised service centres located in big towns only and this makes people uncomfortable while travelling out of station due to concern and fear of break down and the consequential assistance if the car break down on the way. The information provider, in his information, compared the position of Maruti Suzuki wherein all the owners of the Maruti Suzuki vehicles can easily get them repaired at independent workshops because the spares and tools were made available by the company in the open market. Further, the information provider had stated that the cost of getting a car repaired in an independent workshop is

cheaper by 35% to 50% as compared to the authorised service centres of the company. Further, the allegation of the Informant was that the respondent companies charge arbitrary and high price from consumers who are forced to avail the services from their authorised service centres only. Still further, the allegation was that the prices charged for repair, maintenance, services and for spares by these car companies are even higher what they charge in other markets like Europe. The informant further alleged that letters written from some independent service stations to these car companies have met with a response from the companies in which these companies refuse to supply spares and other tools. This ensures that these independent auto service providers, which are not authorised by the original equipments manufacturers(OEMs), are not in a position to provide service to these cars and thus, in turn, provide a competitive constraint to OEMs in after sales service. This, in terms of the information submitted, it was a violation of competition law.

The Commission, after having gone through the information, agreed with the proposition that it indeed was a violation of the competition law and formed a prima facie opinion that a case exists and, accordingly, directed the Director General(DG) to inquire and submit an Investigation Report. The DG investigated and submitted an investigation report to the Commission. The Commission, after examining the whole thing, held that this was a case of aftermarket abuse in which the Client/Customer once he purchases a vehicle of a particular make is having his hands tied as he cannot get the repairs done by the authorised service centre of another car manufacture. This, being the policy of the car manufacturing companies, affects the customer adversely as he is a tied customer and, if number of authorised service stations is less, the customers will have difficulties in getting

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the repairs done. Conversely, if the number of authorised service stations is large that will make the availability of servicing options wide enough to the car owners and their life would be easy.

During the course of investigation, the DG found merit in the claims of the informant. However, the DG realised that this practice was being indulged in not just by the three companies against which allegations were brought in before CCI but by a large number of other automobile manufacturers also. In view of this, on the request of the DG, the investigation was broad based to include a total of seventeen car manufacturing companies after due approval from the Commission. These car companies were, BMW India Pvt. Ltd., Ford India Pvt. Ltd., Hindustan Motors Ltd., Honda Siel Cars India Ltd., Hyundai Motor India Ltd., Fiat India Automobiles Pvt. Ltd., General Motors India Pvt. Ltd., Mercedes-Benz India Pvt. Ltd., Nissan Motor India Pvt. Ltd., Premier Ltd., Mahindra & Mahindra Ltd., Maruti Suzuki India Ltd., Skoda Auto India Pvt. Ltd., Tata Motors Ltd., Mahindra Reva Electric Car Company P Ltd., Toyota Kirloskar Motor Pvt. Ltd. and Volkswagen India Pvt. Ltd.

The complete investigation report submitted by DG was considered by the Commission on 04.09.2012. DG found violations under section 3(4)(b), 3(4)(c) and 3(4)(d) under the provisions of section 3 of the Act. The Commission considered it appropriate to treat this

conduct as a violation of competition law and penalty on all the car manufacturers was imposed. After having discussed the issue over a number of hearings Hon'ble COMPAT, in terms of paragraph 166 of the order, modified the order of the Commission and the modified order was directed to be implemented within a period of one year from the passing of the order. COMPAT further directed the Appellants to adopt the following practices :

1. Remove all restrictions imposed through agreements and practices on original equipment suppliers (OESs) in accordance with the conclusions drawn in this order for selling spare parts including Diagnostic tools etc., in the aftermarket. In our discussion, we have considered situations where OESs may be producing spare parts on the drawings and design of OEMs though all IPRs, knowhow and technology may belong to the OESs. In such situations OEMs shall not restrict the OESs to sell spare parts in the aftermarket with the trademarks of the OESs. If OEMs also want to use their trademark they are free to do so. OES' will be within their rights to certify such product as a product with 'matching quality' with corresponding OEM's spare parts and market them freely in the aftermarket.
2. Open additional distribution channels to the open market for spare parts on a country wide basis. Such channel shall be opened on preference in territories where appellants' automobiles have been sold but adequate servicing/repairs/maintenance network / infrastructure has not been provided. Such channel shall also be operationalized in areas where the sale of appellants' models of automobiles is higher than average.
3. Remove all restrictions on supply of spare parts by OESs to Authorized Dealers in accordance with discussion held in this order. The apprehensions expressed by the

appellants can be addressed through contractual agreements between independent repairers and spare parts suppliers.

4. No restrictions shall be imposed on Original Equipment Suppliers, Authorized Dealers and Authorized Distribution Channels from selling spare parts/diagnostic tools etc. to independent repairers.

5. The Ministry of Road Transport and Highways in the Central Government is directed to develop voluntary standards under Motor Vehicles Act, 1988/Central Motor Vehicles Rules, 1989 with support from Quality Council of India, BIS, IARI etc. for certification of garages/independent repairers. These standards and corresponding conformity assessment and accreditation system shall be developed and notified within one year of this order.

6. The Appellants are directed not to impose a blanket condition that warranties would be cancelled if the consumer avails of services of any independent repairer. While necessary safeguards may be put in place from safety and liability point of view, OPs may cancel the warranty only to the extent that damage has been caused because of faulty repair work outside their authorized network and circumstances clearly justify such action.

7. The Appellants shall develop extensive information system with the objective of removing asymmetry in information on extensive details of automobiles and their spare parts manufactured by appellants so as to facilitate the potential customers make rational choices at the time of buying automobiles. The Central Government under the Motor Vehicle Rules, shall notify the minimum standards of information which should be made available through websites and other means of communications.

8. The Appellants are directed to make available in public domain, and also host on their websites, information regarding the spare parts, their MRPs, arrangements for availability over the counter, and details of matching quality alternatives, maintenance costs, provisions regarding warranty including those mentioned above, and any such other information which may be relevant for full exercise of consumer choice and facilitate fair competition in the market. The Central Government under the Motor Vehicle Rules, shall notify the minimum standards of information which should be made available through websites and other means of communications.

9. The Ministry of Road Transport and Highways in consultation with other relevant Government Departments/Agencies/Industry Organizations shall take up a program for standardization of automobile spare parts.

10. The Appellants shall furnish individual undertakings before the Commission, within 60 days of this order about schedule of compliance with this order, within mandated frame of time. The modified Penalty as imposed in the subsequent paragraph shall be assessed and paid within 90 days of this order.

Interestingly, neither the Commission nor the COMPAT has elaborated on the allegation that the number of authorised service centres of Maruti Suzuki are every where or that these vehicles can be repaired by any independent service centres. It is not yet clear if the situation has arisen as the Maruti Suzuki is now an old established company and the number of authorised service centres are large in ordinary manner, in natural course because of organic growth and there has been huge expansion in dealer network. Or is it because Maruti, unlike other automobile manufacturers, has given the diagnostic tools to any one without caring about the credentials of

the party concerned. Would this also imply that Maruti is not concerned of the potential liabilities which may confront it in damages if some raw hand handles its vehicles and damages result which can be rightly or wrongly, traced back to Maruti. This is a point worth examining.

If we look at these above mentioned modified directions of COMPAT, we find that a full compliance of the order of COMPAT involves not just one enterprise but many agencies. In usual course, in matters involving violations of competition law, the directions are given to the erring enterprises to take some steps to remedy the situation arising out of the indulging in anti competitive conduct. Being straight forward directions, let us look at what these are :

1. OEMs- Removal of all restrictions imposed through agreements and practices on original equipment suppliers (OESs) for selling spare parts and diagnostic tools.

This direction of the CCI, subsequently confirmed by the COMPAT, is easy in which despite the OESs manufacturing parts according to the specification given by the OEMs, instead of supplying all the parts to OEMs, the OESs are also free to sell spare parts and diagnostic tools in the open market or to the authorized service providers.

2. OEMs- Open additional distribution channels to the open market for spare parts on a country wide basis.

It is an established position of law that one(actually held in reference to taxmen) cannot tell a businessman how to do business. Every company comes with an optimum mix of distribution channels. The OEMs which are the automobile car manufacturers in the country would be no exception. It is not clear how these companies can be forced to open additional distribution channels in the open market for a spare part on a country wise basis. Further it is not clear how many additional distributor channels

would be enough. Would be appropriate if one OEM opens one more distribution channel across the country in either West Bengal, Kerla or UP and claim it has fulfilled this condition or the OEMs would be treated to have fulfilled this obligation if the number of distribution channels are doubled or tripled or they enhance by a particular percentage point. Because of this, it looks like a vague mandate which is questionable right in the beginning. Additional is alright but how much additional is the question, doubt and worry.

3. Removal of all restrictions on supply of spare parts by OESs to Authorized Dealers. The apprehensions of OEMs about issues of proprietary technology etc. to be addressed through contractual agreements.

The above directions are for removal of all restrictions on supply of spare parts by OES to authorized dealers. It is a little difficult to understand. When an OES is supplying the spare parts to an authorized dealer directly, it is not clear how the responsibility for defective parts would be dealt with. Would it be transferred to OES, who has manufactured it under the instructions of OEM and may also have a log maintained for manufacturing those parts with proper batch no. etc. or will the responsibility for such defective parts transfer to OEM. The starting point for manufacturing these spare parts is an order from OEM. Will it not be a half hearted effort, if the production takes place under the direction of an OEM but OEM has no control on to whom OES is supplying the spare parts and technology. How the proprietary technology is being dealt with by the OES and other independent repairers perhaps needs to be safeguarded and, perhaps, not been factored into the order. This direction opens more questions than it answers.

4. OEMs- No restrictions on Original Equipment Suppliers, Authorized

Dealers and Authorized Distribution Channels from selling spare parts/ diagnostic tools etc. to independent repairers.

This appears to be still more worrisome. The Authorized Dealers and OESs are supposed to be free to sell spare parts/ diagnostic tools etc. to independent repairers. Who are these independent repairers? Is it anybody who claims he can repair a car of any make or and can deal with the spare parts of any reputed brand. There, as on date, appears no method to figure out the entry barriers for these independent repairers. May be, one of the thieves spoken about in the beginning of this article could claim to be one with the inevitable consequences. While having no control on the quality of these independent repairers, it may really be a worrisome prospect to have such technology being allowed to be passed on to such people.

5. Ministry of Road Transport and Highways, GOI- to develop voluntary standards under Motor Vehicles Act, 1988/Central Motor Vehicles Rules, 1989

- a. with support from Quality Council of India, BIS, IARI etc. for certification of garages/independent repairers.
- b. Within one year

It is not clear how Ministry of Road Transport and Highways will develop voluntary standards under Motor Vehicle Act, 1988 or Central Motor Vehicle Rules, 1989. The buck does not stop here. The Ministry of Road Transport and Highways, Government of India is also to take support from Quality Council of India, Bureau of Ministry Standards, IARI etc. It is not clear which and how many agencies has been included in this 'etc.' for certification of garages/independent repairers. Is it not like a flight of fancy where we do not even know how many agencies are required and we are leaving it to the imagination of the reader or the poor Ministry (just

because, it had no say in drafting of the order) to take help of agencies like QCI, BIS, IARI etc. and then prepare voluntary standards for certification of garages/independent repairers. It is also not clear who would qualify as independent repairers. Whether each and every road side mechanic can claim to be an independent repairer or there would be some cut-off, these are all imponderables whose size is immense, parameters undefined and within a grand and leisurely time period of one year. Whether it is doable at all and whether we exactly know what is required to be done are moot questions crying for answers.

6. OEMs- Non imposition of a blanket condition that warranties would be cancelled if the consumer avails of services of any independent repairer . (Necessary safeguards may be put in place from safety and liability point of view). Cancellation of warranty only to the extent that damage has been caused because of faulty repair work outside their authorized network and circumstances clearly justify such action.

- a. Not Clear who will assess the damage relating to repair etc.

In terms of the order of the Commission, a blanket condition that warranty would be cancelled if services of any independent repairer (read unauthorised service provider) is anti-competitive. The suggestion from the COMPAT is that cancellation of warranty should be limited and that should be to the extent the damage has been caused because of faulty repair work outside authorised network. One can as well imagine the extent of litigation in such a situation for assessing the damage and much damage is attributed to the unauthorised access to the machinery- again a humongous task.

7. OEMs & Central Govt.- removing information asymmetry in information on extensive details of

automobiles and their spare parts by developing extensive information systems

- a. To what extent - so as to facilitate the potential customers make rational choices at the time of buying automobiles.
- b. Central Govt to notify the minimum standards of information which should be made available through websites and other means of communications.

COMPAT has directed OEMs and Central Government should remove information asymmetry by developing extensive management information systems so as to facilitate that the potential customers make rational choices at the time of buying automobiles. Clearly, this is an unending task and nobody except the potential customer can ensure to make rational choices in purchase of car. What is the extent of information dissemination and how much information should be disseminated and despite all the dissemination of right information, if the potential customer still does not make rational choices at the time of buying automobiles, how can anybody be accountable is anybody's guess.

Further which minimum standards of information are to be made available is to be decided by Central Government? Again an adjudicatory body is not having qualms in giving un-quantified work to the Central Government. Who in Central Government will deal with this is not known.

8. OEMs & Central Govt.- make available in public domain, and also host on their websites, information regarding the spare parts, their MRPs, arrangements for availability over the counter, and details of matching quality alternatives, maintenance costs, provisions regarding warranty including those mentioned above,
 - a. and any such other information
 - b. relevant for full exercise of

consumer choice and facilitate fair competition in the market.

- c. Central Government to notify the minimum standards of information which should be made available through websites and other means of communications.

The OEMs and Central Governments are again directed to bring information in public domain about parts, their MRPs etc. and "any other such information". If the competition agencies (CCI/COMPAT), created specifically by the Central Government expecting them to be repositories of domain knowledge, do not know what all information is required, how they can expect OEMs and Central Government to know and disseminate as much information which would facilitate fair competition in the market. Is it not an abdication of responsibility of the competition law enforcement institutions to others who have done their job by creating competition law agencies.

9. Ministry of Road Transport and Highways, GOI- In consultation with other relevant Government Departments/Agencies/Industry Organizations shall take up a program for standardization of automobile spare parts.

Here again all 'relevant' Government Departments, Agencies and Industry Organizations are supposed to take up a program for standardisation of automobile spare parts. Without clarifying who, which department, agencies would be responsible, how this order can be implemented is anybody's guess. There is an old saying 'everybody's responsibility is nobody's responsibility'. In a country where departments and agencies are perceived to be experts in passing the buck from one to the other, without identifying who are these people to do the job, how the order can be implemented has not been explained in the order. A wish list has

been created and the people who are supposed to carry out the wish list are supposed to do it within a year. This reminds me of a joke on management. It goes like this. A lady in a hot-air balloon finds her balloon in an unending desert, she did not know how to get out of the place or which place it is. Suddenly, she spots a gentleman who was walking by and she shouts in desperation where I she was and how could she get out of there. He said that you are on 30 degree longitude and 167 degree latitude and you took off in a balloon and, now, want to get down. The lady was impressed and remarked that he must be an engineer as she could infer from his structured approach to the situation. He nodded in the affirmative. He said " I can tell, for sure, you must be from top management". She asked, how he could be so sure. He said "You do not know what you want, still you are in the driver's seat and you want others to take you to the destination". He further claimed "You get in to problems, not knowing how to get out of problems, and then expect lower people to get you out of the problems". Going by the order of COMPAT and CCI, it appears that CCI and COMPAT are passing the buck without knowing exactly what they want otherwise, the orders would have contained really doable directions having all the details.

10. OEMs - furnish individual undertakings before the Commission, within 60 days of this order about schedule of compliance with this order, within mandated frame of time. The modified Penalty as imposed in the subsequent paragraph shall be assessed and paid within 90 days of this order.

This is the most clear and lucid of directions but how the previous steps can be achieved is left to imagination. So infinite tasks are being sought to be achieved in finiter time.

*Competition law
deals with the situation
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phenomenon*

It is in this context that the direction of Hon'ble COMPAT, which endorsed the view of CCI, ought to be seen. If despite so many restrictions and authorised dealers being very less in number, the car owners are at risk and there is enough technology available in the market which with slight reverse engineering can actually enable the criminally minded to successfully steal the car, please imagine a situation where such kind of diagnostic techniques are freely available in the hands of all and sundry. Further, it is well known across the world that competition law deals with the situation where protection of a 'brand' name is an extremely important phenomenon. Throwing open the doors of repairs and maintenance to all and sundry raises the risk of the quality parameters going down drastically. Is not a big part of the investment in reliable brands goes into 'brand building' by improving quality continuously. Is it appropriate to let these brands become big with huge investment and, thereafter, questioning them if they want to protect their brand image. Therefore, the limited number of authorised service stations also goes on to contribute to a quality product and quality servicing. If these were available, across all the nooks and corners, all over the country the consequences do not require too much of imagination to understand. Competition law has to be enforced on the basis of ground realities. In future, it may be possible that more authorised dealers are able to maintain quality but, at present, there may not be

many people and consequentially less number of authorised dealers.

Even otherwise, when we look at the voluminous mandate given in the order of COMPAT, as extracted above, it is nearly impossible to execute it because it involves many agencies and many ministries. It does appear to be a case of wishful thinking but to believe that all this can be achieved within a year will be too much to expect in the present state of enforcement of law and order.

In any case, at the time of writing, Hon'ble Supreme Court has considered it appropriate to give a stay on the implementation of the order of COMPAT dated 09.12.2016. Thus, the matter is still in sub-judice and let us hope that, in coming times the orders of the competition authorities are well informed of the ground realities and not oblivious of the realities especially if the situations obtaining on the ground is considerably different than what one dreams about.
