

## Inter-Brand vs Intra-Brand Competition in the Automotive Sector

Direct sales in the automobile sector have gained significant recognition in the B2C segment of sales, this year. Automobile manufacturers have announced their intent to do away with the conventional form of distribution of new cars through dealerships, and are now exploring the prospect of entering into the market of direct sales. The key notion behind the overhaul is to facilitate the Original Equipment Manufacturers (OEMs) to autonomously make decisions about how to design their distribution systems based on their business considerations and consumer demand. Accordingly, this move could pave the way for OEMs to unilaterally and unconventionally navigate the competitive pressure in the Indian market.

The Competition Law provisions of India, in consonance with the provisions of European Union and United States of America, encourage consumer favoritism behavior while prohibiting agreements in respect of production, supply, distribution, storage, acquisition or control of goods and services which are likely to cause an appreciable adverse effect on competition (“AAEC”) within in India. The Competition Commission of India (“CCI”) has, on several occasions, discussed the sanctity of such arrangements involving pricing and distribution restrictions imposed on dealerships by OEMs.

### Positive and Negative Factors

While determining AAEC in the automotive sector, the regulatory arm has considered factors such as creation of entry barriers<sup>1</sup>, likelihood of exit by competitors<sup>2</sup>, foreclosure of markets<sup>3</sup>, improvements of production or



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<sup>1</sup> Vishal Pande v. Honda Motorcycle and Scooter India Private Limited (Case No. 17/2017)

<sup>2</sup> Automobiles Dealers Association, Hathras U.P. v. Global Automobiles Limited (Case No. 33/2011)

<sup>3</sup> Id.

distribution of goods and services<sup>4</sup>, promotion of economic development<sup>5</sup>, and accrual of benefits to the consumers<sup>6</sup> under Section 19(3) of the Competition Act 2002 (“**Competition Act**”). Interestingly, while the first three factors restrict the competitive process (*negative factors*), the latter three factors enhance the efficiency of the distribution process and contribute to consumer welfare (*positive factors*).<sup>7</sup> Hence, it becomes imperative for the CCI to assess all 6 factors for optimal legal and economic analysis of competition law cases. Therefore, one cannot ignore the adverse effect that direct sales have on intra-brand competition (*competition amongst dealers of the same OEM*). Opponents of the overhaul argue that consumers benefit from intra-brand competition between the dealers of the same make. Rival dealerships compete for business which can result in improvement of price or non-price (e.g. quality of after-sale service) factors, or both. Accordingly, with the overhaul, opponents argue that manufacturers would not be forced to ‘compete’ anymore.

However, the argument may be rebutted by relying on the observation made by the CCI in the case of *Ghanshyam Dass Vij v. Bajaj Corp Ltd. & Ors.*<sup>8</sup> wherein the CCI observed that restrictions on competition may be objectively justified on grounds such as protection from ‘free riding’<sup>9</sup>, efficient management of sales of products, economic efficiencies etc. Similarly, it has further been argued by the Foreign Trade Commission (the competition regulatory arm of the United States America) that OEMs, in a competitive market, face acute pressure to keep the prices low to keep consumers shifting their purchases to a competing OEM (*inter-brand competition*). Direct sales, FTC further argues, would de-limit competition amongst existing OEMs and promote experimentation with new and different methods of sales by current OEMs and also future entrants to the market.

The solution to the conundrum of restriction of intra-brand competition to further inter-brand competition (or vice versa) may be found in the balance of the ‘negative’ and ‘positive’ factors, discussed earlier. Any time CCI has held that lessening of intra-brand competition (either by way of discount control<sup>10</sup> or allocation of markets<sup>11</sup>) is anti-competitive, it has usually held so on account of the overall effect on increase of prices for the consumers. Proving of negative and positive factors for any enterprise is especially crucial wherein situation of anti-competitive behavior under Section 3 of the Competition Act is already presumed by the CCI. If the enterprise successfully discharges its onus to rebut

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<sup>4</sup> In re Fx Enterprise Solutions India Private Limited and Hyundai Motor India Limited (Case Nos. 36 & 82 of 2014)

<sup>5</sup> Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors (Case No. 03/2011)

<sup>6</sup> In re Fx Enterprise Solutions India Private Limited and Hyundai Motor India Limited (Case Nos. 36 & 82 of 2014)

<sup>7</sup> Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors (Case No. 03/2011)

<sup>8</sup> Case No. 68 of 2013

<sup>9</sup> ‘Free-riding’ occurs when one dealership benefits from the act of other without paying or sharing the costs. For example, dealerships may bank on the quality of pre-sale services of one dealership without sharing the costs of the other only to maintain its reduced costs and have the customers free ride on the goodwill of the other for its own benefit.

<sup>10</sup> In re Fx Enterprise Solutions India Private Limited and Hyundai Motor India Limited (Case Nos. 36 & 82 of 2014)

<sup>11</sup> Ghanshyam Dass Vij v. Bajaj Corp Ltd. & Ors (Case No. 68 of 2013)

such presumption, then the burden would then shift on the competition regulatory authority to evaluate the application of the factors, in this case, on the direct sales model.<sup>12</sup>

### **Tilting the scale to a pro-competitive horizon**

Although the CCI is yet to investigate conduct concerning elimination of intra-brand competition, based on the factors mentioned above, international jurisprudence and literature, it may be argued that the vertical integration in the distribution process is pro-competitive for the following reasons:

- 1. Price Transformation:** Inefficient distribution methods, such as sale through dealerships, results in high retail costs and significant dealership margins, thereby increasing the price of the cars for the customers. The direct to consumer model will not only help in cutting the costs of dealer margins but shall also enable full transparency of pricing including aligned discounts, stabilization of price levels, and end-to-end price governance. The pricing strategy is likely to compete with the extant indirect distribution model which is likely to exert competitive pressure in a pro-consumer manner.
- 2. Promotes inter-brand competition:** The D2C model could also encourage other OEMs to respond to the competitive pressure by choosing to vertically integrate, benefiting consumers with higher quality and customised sale services. By entering the market of direct sales, the OEMs would encourage and incentivize other manufacturers to respond to consumer preferences by choosing the most effective distribution method for their brands.

### **Conclusion**

Although an official statement, SOP, or investigation is yet to be instituted by the CCI with regard to OEMs doing away with their authorised dealers, there are numerous factors one has to bear in mind while entering into the market of direct sales. OEMs are advised that after considerably eliminating intra-brand competition, they shall not take undue advantage of the increased profit margin and shall further strive to improve efficient, effective and consumer-friendly management of sale of cars while maintaining strong after-sale/aftermarket services. While attempting to balance efficacy gains with foreclosure of intra-brand competition, OEMs shall also ensure that short term efficiency gains must not be outweighed by longer-term losses stemming from the elimination of such competition.

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<sup>12</sup> Eros International Media Limited and Ors. vs. Central Circuit Cine Association, Indore and Ors. (Case No. 52 and 56 of 2010)

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