
COMPETITION LAW AND AFTERMARKETS

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Introduction

Aftermarkets concerns competition in a sector as it connects a primary and secondary product or service together. When a primary piece has been already acquired which has a relatively long-lasting life expectancy, the need for secondary products or services comes to play to keep the primary product or service sustainable. In these situations, the consumers are in the market to hunt for a compatible secondary piece for their primary product. These primary pieces are generally durable and expensive, owing to lock-in of customers in the aftermarkets rather than switching to alternatives. All these factors come into play when the competition of a primary product is in question.

There's always been a debate of aftermarkets dwelling into the issues of monopolisation and antitrust. This has moulded the legal approaches which concern such market assessing. It addresses key questions of high standard proofs, market definition and power related queries which are to be addressed by the courts. A discussion and justification in relation to traditional antitrust enforcement against aftermarket monopolisation is laid into decisions and remedies under contract law, consumer protection law and all other regulatory framework which keeps the competition restrictions in check.

Aftermarkets concerns when defined are goods and services which are used along with a durable one but purchased once investment has already been made for such an equipment. These may cover any software updates, computer upgrades, repair attachments, training, add-ons etc. In most cases, these durable good manufacturers are the one who massive providers to aftermarket providers. Situations like these arise situations go illegal anticompetitive market practices within aftermarkets by such manufacturers especially in relation to proprietary & non-proprietary items. When considered a situation where a customer wants a maintenance to be conducted, the aftermarkets ties upgrades, attachments, changes manuals etc all to it. In a similar situation, the customer being the plaintiff raises issues about being 'Locked in' to their investment with the manufacturer's brand as only the same brand products would be compatible to one another, limiting their options in the aftermarket.

Such scenarios amount for most antitrust issues which arise within the general standard public.

In a case where the manufacturer ties the availability of proprietary parts to the purchase of service, the standard question which arises: When can a firm with monopoly power over a proprietary product increase its monopoly profits by tying the proprietary product to another product? This question has been extensively addressed elsewhere.¹ When drawn conclusions we find that settled interactions shouldn't be done between different compatible products within the aftermarket but rather between the original investment and the available additional product.

Summing it up, what we try to address is through these pertinent questions:

- Can misuse of power be held as a reason even though the primary product investment market is itself competition? Additionally, effects of imbalance of perfect competition in primary market posing consequences to aftermarket wellbeing?
- Issues for consumers in case of supra-competitive pricing in aftermarket by primary forces?
- If contract law holds in as a proper tool for problems arising out of pricing difficulties in both primary and aftermarket?

Addressing the First question, the manufacturers will in optimal cases pose supra-competitive aftermarket pricing even though in some situations it impacts their primary sales. This strategy is her tight through the view that business will be held for many years affecting their recoveries in the future equipment sales in aftermarket.

Then, in the Second question, even well informed consumers get drawn into the market of long-lived equipment so sellers through them build lasting reputation leading to still worse off situations towards them similar to no market power arenas. Thus, irrespective of conditions for aftermarket power considerations, consumers are expected to experience some or the other harm in almost cases, even though most of them do not file a case for remedy under anti-trust.

¹ Michael Whinston, Tying, Foreclosure and Exclusion, 80 AM. ECON. REV. 837 (1990) (showing how tying can increase profits through strategic entry deterrence). See JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 333-35 (1988), for a textbook discussion of a number of other roles for tying.

Further, in the Third question, when considered from the purview of economic modeling, intensity & effect of contract law in these scenarios are less amenable determining the social return to cost upon the suffered consumer harm and effective remedies provided thereon.

As observed in the landmark case of *Kodak*, the court held information to be costly and necessarily unwinded for such a long-lived equipment in hand. These information imperfections tend to make perfect, complete contracting infeasible and thus make contract law less useful in aftermarket cases.²

An appropriate remedy can be judged for a case of antitrust depends on the extent of exploration done by the power vested within aftermarket. What can be adjudicated over is to formulate a general theory considering economics and pricing to an antitrust violation.

In its decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*,³ the Supreme Court recognized the possibility of rational anticompetitive behavior in aftermarkets when the original equipment market is competitive.⁴ Here, the court weighted out both the profits incurred under long terms profits to be gained already through the locked-in customers and effects of above competitive pricing on lost customers. Outweighing lost future profits against current gains is on which the court didn't base its presumption.

Argumentation of the court was based on the fact that even though competition in the primary market theoretically prevents misuse of power in aftermarket, still the existing market misbalances in particular to information and switching costs defy this theory. If consumers don't have exact information, then a reputation is not as effective because they are un-aware about other available options. In such a case, consumers will be willing to pay even supra-competitive prices in the aftermarket until and unless it is lesser than the switching premium to be vested. While the facts of an individual case may prove that it would not be profitable in a particular instance, the court stated that economic theory alone cannot rule out such behavior.⁵

² Joseph Farrell & Carl Shapiro, *Optimal Contracts with Lock-In*, 79 *Am. ECON. REV.* 51 (1989) (showing that consumers can actually be worse off with a long-term contract than without if the contract does not cover all significant dimensions).

³ *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992)

⁴ 112 S. Ct. 2072 (1992); *see also* *Virtual Maintenance Inc. v. Prime Computer, Inc.*, 113 S. Ct. 314 (1992) (remanded to the Sixth Circuit on the same grounds).

⁵ The Supreme Court was addressing a ruling of summary judgment. Kodak requested summary judgment before discovery was complete, arguing that, based on economic theory, competition in the equipment market precluded anticompetitive behavior in the aftermarket. The Supreme Court ruled that the possibility of anticompetitive behavior (that is, whether an aftermarket can be a "relevant market") is a factual question, and that the issue should go to trial after full discovery. Justice Scalia's dissent also emphasized the role of market

Hence, the court held that presumption and judgments in these cases should be based on facts available between case to case rather than basing it on an economic theory. The Court emphasized that "market imperfections can keep economic theories about how consumers will react from mirroring reality."⁶

There is a plenty availability of alleged monopolistic practices across several scenarios, but here we only will be considering the ones related to proprietary aftermarkets. In a scenario where a manufacture exercises its power by just increasing the prices, then it doesn't amount to any violation. But at a point when an incentive has been induced to exclude competition from the aftermarket, then an allege can be brought up leaded by the anticompetitive behavior which has suddenly arouse.

Lets take a general scenario where a manufacture sells products in both primary and aftermarket, if the aftermarket products are priced highly, then the firm in turn earns more profits from the consumers who have already invested their money on the primary product. But, on the other side it also reduces purchase of even the primary product by potential customers who are aware about the expected aftermarket cost attached with it. Defendants in the Kodak case also argued keeping this as a basis as to why due to such scenario firms will be setting good prices to their products & services, balancing both the levels.

The simple intuition to this could be : may be the manufacturer does not lose profits on new customers because it lowers the equipment price to compensate them for higher aftermarket prices.⁷ Essentially, there can also be an arousal of discrimination within the mental frame of the manufacturer between new customers and existing customer. Such a bias will always lean more towards the existing one as they have already invested their funds with the company.

In a presumption, when we hold quantities purchased of equipment and service unchanged, profit incurred and the new primary product buyer's net profit therein would be same considering the competitive aftermarket pricing. Raising such prices will affect consumer benefits as well as profits on the other side from new equipment sales only if it causes consumers to buy less of the aftermarket products.

imperfections, though in his opinion imperfect information and switching costs were not sufficient to prevent competition in the equipment market from disciplining aftermarkets. 112 S. Ct. at 2097.

⁶ A formal model of pricing in a proprietary aftermarket is presented in Severin Borenstein, Jeffrey MacKie-Mason & Janet Netz, Market Power in Proprietary Aftermarkets (unpublished manuscript 1994).

⁷ New customers are those in the market to buy a piece of equipment. Some of these "new" customers will be customers who have purchased equipment previously and who are now replacing or upgrading old equipment.

In a surrounding of free-entry, complete information and rational foresight, competition similar to this merely ensures that there is absolutely zero existence of excess profits. This fact can only be held true if firms raise their aftermarket prices but still maintain to lower their primary product or service price, combining both of which at a point where the net amounts to a combined zero. Concentrating on the consumer welfare, when we expect competitive prices in both the market fields, that results to lower purchase of aftermarket products, thus leading to lower value usage condensed out from the primary equipment.

One of the most crucial cases concerning the Indian market scenario which lays base of aftermarkets by CCI is *Shri Shamsher Kataria v. Honda Sael Cars India Ltd & Ors (Autocrats Decision)*.⁸ Here, the tribunal found that fourteen car manufactures were dominant in the aftermarket for their own genuine parts & services, leading these narrow aftermarket situations towards Section 4 of this Act. It also rejected aftermarket situations for sectors like bank loans,⁹ water purifiers¹⁰ etc after examining all available economic policies. Additionally, it drew a line between available retail outlets and multiplexes owing to their geographical situations & closed markets.¹¹

The CCI holds extensive powers to impose penalties and remedies to extend to farfetched commercial activities and sectors, for which the tribunal needs to carry out significant extent of analysis on the aftermarkets. Taking in the purview of Section 4, 'False-positive decisions' especially in the case of broad level primary products, represent a narrow complementary existence in the market.

On this background, we would like to throw light on CCI's consistency in applying some economic analysis over healthcare and automobiles sectors. Most of the necessary economic analysis of CCI lies on the Kodak case of 1991 where the U.S Supreme Court found difficulty of customers owning a photocopying machine to be facing issues of lock-in. As there was a high switching cost in this case, customers were encountered with a scenario of unlawful tying & monopolisation in the aftermarket where the products were manufactured by Kodak itself.

⁸ *Shri Shamsher Kataria v. Honda Sael Cars India Ltd. & Ors.*, Case No. 3 of 2011

⁹ *Shri Pravahan Mohanty v. HDFC Bank Limited and Card Services Division of the HDFC Bank*, Case No. 17 of 2010

¹⁰ *Shri Amitabh v. M/s KENT RO Systems*, Case No. 100 of 2014

¹¹ *Consumers Guidance Society Informant v. Hindustan Coca Cola Beverages Pvt. Ltd.*, Case No. UTPE 99/2009

Since this, the U.S courts have primarily defined aftermarket on the basis where there is primary evidence of manufacturers changing their policies soon after customers are locked in through their primary investment.¹² Once defined by CCI regarding the aftermarket, then it devolves a framework to review any kind of exploitative practices such as fairness in pricing, conditions of contract, parity of conduct with customers at similar pedestal and any practices of exclusion such as market access denials etc.

Here, the most important aspect while analysing market of a primary products i.e a coffee machine and a complementing product such as coffee capsules is essentially the economic distinct between them. Their connectivity and closeness can largely be held as factual, making such an economic assessment even more crucial.

In consideration to the minority decisive view held during the *DLF Ltd* decision of court which was suggested, will every person buying a flat from a flat developer will be locked in to them?¹³

Taking a similar scenario, will a person purchasing an air purifier or mobile phone will be locked in with the company they are purchasing?

The answer to such situations lies in the economic assessment of whether a small or a significant difference in pricing of a complementary products will make the customers to switch entirely to a different primary product. Comparing with the example taken before, if in the above scenario customers will be demotivated to buy a coffee machine which takes in the most expensive coffee capsules.

Through most of its decisions held over the years, the CCI has provided clarity on its aftermarket analysis. It takes into account the amount of initial investment done by the customer, the extent of awareness within the customer to know how much they will be spending on its complementing products throughout the lifetime of the primary product and finally the proportion which comes out on the end between the complementary and primary product.¹⁴

To avoid any situation of arbitral disputes, it becomes absolutely essential to examine all the factors in detail before condensing a definition for the aftermarket. Any anti-competitive

¹² Competition Issues in Aftermarkets - Note from the United States (<https://www.ftc.gov/system/files/attachments/us-submissions-occd-other-international-competition-fora/aftermarkets.pdf>)

¹³ *Belaire Owner's Association v. DLF Limited Haryana Urban Development Authority Department of Town and Country Planning, State of Haryana (View of R. Prasad), Case No. 19 of 2010*

¹⁴ *Ibid* [8]

conduct of the complementary product can affect the purchase of the potential buyers of the primary product due to exploitation by manufacturers or switching products with ease. These can also have a dire consequence on the reputation of the primary product company market.

Now, customers seem to be very well-informed. Their purchasing decisions are heavily levied on the extensive information about the product available across various platforms such as search engines, customer forums, mobile applications, review websites etc. Transparency in pricing ensures that there is adequate competition taking place at a combined level and in such a situation the unified system meant both the primary and the complementary product.

Recently due to CCI's analysis over the aftermarket of healthcare sectors to the deeper understanding of its economic assessment at the initial stage, based on the decision taken, steps were made to conduct investigation at all hospitals across Delhi, more importantly to analyse the extent of prying of syringes and other consumable goods which are sold to patients in the hospital surroundings are unfair (*'Hospital Investigation Decision'*)¹⁵. In the preliminary stages it was found that regardless of the quantum of market power which a hospital holds, the patients are in a situation of a lock-in period within the hospital premises which gives the hospital power to behave independent of any competitive pricing. Taking this assumption forwards, the Supreme Court issued guidelines in regards to 'fair pricing' of products which are supplied to already admitted patients on an urgent basis which excludes any type of high degree quality concerns. This initial decision did make some eyebrows raise as to the important consequence such an instance could fetch in the long term. Such an investigation could have taken a different turn if CCI had conducted its examination as to whether patients once admitted to a hospital are really locked in by the traditional sense. Supposedly, the investigation could have been conducted over factors such as :-

- A. Availability of information about all the consumable goods during a patient's admission.
- B. Extent of patients being obliged to opt for pre-packaged cost structures.
- C. Customer's decision process under such circumstance.
- D. Proportional value that consumable products make in its total cost of treatment. Etc

¹⁵ Vivek Sharma v. Becton Dickinson India(P) Ltd. and Ors., Case No. 77 of 2015

All of the above factors would actually give a righteous understanding about the level of informed decisions taken by the consumer and all associated barriers created to receive information between the primary and secondary market.

CCI's similar analysis conducted of aftermarkets in the Automobile Sector & extensive application of the *Autoparts Decision* is one where the court suggested presence of aftermarket without any initial analysis. Hyundai India was imposed a huge penalty by CCI for implementing a 'Discount Control Mechanism' on its dealer which made its distributors maximum permissible discount towards their customers. CCI found such a scheme to cause intra-brand competition which in turn resulted to higher prices for its customers. This can also be inferred from Section 3(4) of the Act which prohibits 'resale price maintenance' i.e. minimum price which a distributor can offer if such a restriction causes deadly effect on the existing competition in India. CCI's provided clarity before to imply such a scheme was only possible when the company holds a significant market share when competing with its available substitutes. But in this however, the CCI sought to satisfy the requirement of 'upstream market' as the market for all passenger cars and the 'downstream market' dealing with dealerships and distributions. So, as can be noted that the potential customers are not locked-in in the showroom as they neither incur any initial investment nor any exit barriers. Through this the dealership would naturally face competition from competing with other dealerships as well. Sometimes, even looking through a view CCI's reliance on this decision seems misplaced. In this scenario, as it is difficult for a car owner to switch the primary product owing to the situations in aftermarket as the initial investment becomes high, the aftermarket definition of spare parts and after-sale services can be based on this.¹⁶

Recently, *the National Company Appellate Tribunal (NCLAT)* set aside the decision of *Hyundai* for defining the market in an inappropriate manner.¹⁷ Even though this a decision which shall be welcomed vividly, the tribunal did not bring to light any particular shortcomings or the real errors in CCI's market definition in *Hyundai* or suggestions to any related issues which were incurred there.

¹⁶ Though CCI did not analyse actual customer behavior or preferences, submission of car manufacturers and empirical evidence convinced CCI that automobile customer aren't able to carry out a sophisticated whole life costing analysis while purchasing a car on account of factors such as frequency of breakdown, degrees of equipment use, future fluctuations of price of spare parts, development of advances features. It also found that reputational concerns in the primary automobile market weren't sufficient enough to dissuade the OEMs from charging supra-competitive prices in the aftermarket.

¹⁷ *Hyundai Motors India Ltd. v. Competition Commission of India and Ors.*, Competition Appeal No. 6 of 2017

These kind of inconsistency in application of the available economic tools necessary for finding and defining aftermarket would lead to emergence of exact complaints in the future. Like, a dealership network of one car manufacturing company may be held to be dominant within itself. This might further lead to possible over regulation within the sectors which the act originally didn't think to thrive on. In the past while the tribunal has issued well comprehensive and reasoned decisions where they refused to define aftermarket for retail outlets, clear guideline should be issued explain all the priorities and assistance of the industry to regulate competition standards within the sector. Existence of aftermarket depends largely on sector and product related factors where CCI seeks international guidance to see how different regulators have acted on a similar situation within a similar market.

In China, an upcoming merger between *Epson Printers*, the project distributors and the repair service providers led to concerns by consumers as the here the substituting options in the aftermarket is substantially low as a consequence to this merger and all the services which was provided to the single head of the company. The court in this case held that there was no market access details in such a scenario for any repair service provider to come up with for the spare parts even after the merger is done.

In *IBM mainframe maintenance case of the European Union*,¹⁸ the Commission after conducting initial investigation of the aftermarket of the computers came to conclusion that it does hold a dominant market position which include certain inputs required to be provided by the hardwares. Thus, it has used this position to impose unreasonable supply conditions to competitor market further leading to monopolisation.

Thus, the dominant positions which certain enterprises hold in aftermarket across various countries show us a clear distinction between primary and secondary market which can be witnessed across various cases. In India, even though we have lesser number of cases in comparison to other countries, but the righteous interpretation and defining of law has led to adequate remedies in cases as provided by the competition commission, along with imposing fine on the defaulting parties who lose the case. Hence, here the elements which become essential are necessity to determine dominance in the available substituting of products in the market and dependence of the consumers on that particular enterprise.

¹⁸ http://ec.europa.eu/competition/publications/cpn/2012_1_1_en.pdf (Last checked on 02 April, 2022)

Aiming to design a framework that helps to formulate a theory which is avail to the types of market. Analysis through *six criteria* are unexpected pricing at the *customer base*, *potential switching cost*, *potential purchases in the sales market along with the reputation*, *asymmetric information available problem*, *agreements of after-sale markets* and the *market structure* found to be as significant parameters in analysis. Here, the *available defences* could be are *intellectual property rights*, *quality control and reputation*, *discrimination as to price within products*.

Issues arising here are regular as the firms in the primary market are most often vertical integrated and supply both the of the primary and complimenting product or service. These independent firms supplying or wishing to supply regarding to the affect the competition leading to manufacturer's unfair dealings and they further supply products to these markets and tools available.

The jurisprudence of competition laws are at a very initial stage in India where it still has not deal with effects of aftermarket abuse in the market as all of these are at a very initial stage. The Indian consumer base comes out to be very different in characteristic from consumers who belong to other jurisdictions. So, it becomes even more difficult to access these consumer with the same factors available with other jurisdiction. Usual concepts like life-cycle costs which is mentioned under other jurisdiction generally do not exist in India due to lack of relevant data and information within the consumer forum with the complex functioning of aftermarket.¹⁹

The prevailing anti-competitive practices in the Indian aftermarket is leading towards serious monopolisation which amounts to become a pertinent concern in both primary and secondary market. A consumer who has already invested in a primary market product will suffer a loss if there's an unavailability of sufficient and compatible secondary services. Market monopolisation by enterprises who are both available in primary and secondary market disturb those who only cater to the aftermarket forcing them to drive out from the market. These practices consulates the aftermarket is different and more complex than the issues which are involved in the primary market where the traditional way of assessment is used to consider its effects.

¹⁹ *Competition Issues in Aftermarkets - Note from India*, OECD (2017), [https://one.oecd.org/document/DAF/COMP/WD\(2017\)11/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)11/en/pdf) (Last checked on 02 April, 2022)

All jurisdictions deal with market monopolisation in their own specific unique manner and we notice no standard approach so far. Unlike traditional antitrust dealing methods. The model framework relies more on economic justification and ensures a balance between both pro and anticompetitive effects of an enterprise in the market. These concerns are generally matters of *Sui generis* in itself and thus courts must deal with every case with a blend of practicability and caution.

The essential parameters discussed throughout give us a complete view as to competitive challenges available of aftermarket monopolisation. Therefore, it is difficult to use same school of thought for all cases. Therefore, such antitrust compilations should be created as to if the consumer had the opportunity to assess the life-cycle cost of a product and looking at the lock-in and bearability of switching cost. So, what is needed is a case-by-case analysis approach to endeavour into best forms of ruling.

In recent years, agencies have found a way to act flexibly in cases of aftermarket as these type of markets are so complex in nature. However, the ever increasing number of cases filed based on this matter gives ways thought to existing alarm within the countries to effectively regulate such market cases and accomplish the sole aim of competition law.

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