

COMPETITION COMMISSION OF INDIA

Case No. 52 of 2012

Dated: 06/11/2012

IN THE MATTER OF:

Exclusive Motors Pvt. Limited

Informant

v.

Automobili Lamborghini S.P.A.

Opposite Party

ORDER UNDER SECTION 26(2) OF THE COMPETITION ACT, 2002

The present information has been filed by Exclusive Motors Pvt. Limited ('the informant') under Section 19(1)(a) of the Competition Act, 2002 ('the Act') against Automobili Lamborghini S.p.A. ('the opposite party') alleging *inter-alia* contravention of Section 3 and Section 4 of the Act.

2. The informant claimed to be in the business of importing and selling of 'Super Sports Cars' in the territory of Delhi. The opposite party is well known manufacturer of Super Sports Cars. The opposite party is the subsidiary of Audi Ag which in turn is a part of Volkswagen group. Volkswagen group is stated to own majority of luxury car brands such as Audi, SEAT, Lamborghini, Volkswagen, Skoda, Bentley, Bugatti and Porsche.

3. Briefly stated, the informant alleged that it was appointed as the importer and dealer of Super Sports Cars manufactured by the opposite party in 2005 by way of a Dealership Agreement. Thereafter, the informant invested substantial time, efforts and money to develop Indian market for opposite party's cars which was negligible prior to this agreement. Sometime in 2011, the opposite party appointed its own group company, Volkswagen Group Sales Pvt. Ltd. (Volkswagen India) as exclusive importer of opposite party's cars and the informant was requested (through a letter dated 24.01.2012) to terminate the existing dealership agreement with the opposite party and to bring in place a fresh dealership agreement with Volkswagen India. The new agreement entailed a larger deposit amount and the notice period required for termination was sought to be

reduced from 12 months to 3 months. The informant, therefore, did not agree to the new arrangement. In response to this, the opposite party withdrew the new arrangement and served a 12 month's notice to the informant for terminating the existing dealership agreement entered between them in 2005. It is alleged that during the notice period the opposite party had offered its products to the informant at a much higher price than its own company i.e. Volkswagen India thereby adopting discriminatory pricing policy.

4. The informant, therefore, alleged contravention of section 3 and 4 of the Act. The agreements of the opposite party with its group company (Volkswagen India) and its Partner (Auto-Hanger) are alleged to be anti competitive and in contravention of section 3(3)(a) as they directly determine sale and purchase price of the car. Also, the exclusive distribution agreement between opposite party and its group company Volkswagen India is alleged to be in violation of section 3(4)(c) of the Act since it excluded the informant and other prospective dealers to become the importers and dealers of opposite party products. With regard to section 4, the informant considered the relevant market as market for 'distributing super sports cars in India'. The informant stated that the opposite party held 52% share in this market individually while with other group cars of Volkswagen group (Martin and Porsche) its share amounted to 60%. Informant insisted that this showed dominant position of the opposite party which enabled it to impose unfair and discriminatory conditions on the informant. Therefore, the opposite party violated section 4(2)(a)(i) and (ii) by imposing unfair and discriminatory conditions and section 4(2)(c) by denying market access to the informant. On the aforesaid basis, the informant prayed the Commission to direct an inquiry under section 26(1) of the Act into the anti-competitive practices adopted by the opposite party and Volkswagen India.

5. The Commission has perused the information and heard the counsel for the informant at length.

6. To establish a contravention under Section 3, an agreement is required to be proven between two or more enterprises. Agreement between opposite party and its group company 'Volkswagen India' cannot be considered to be an agreement between two enterprises as envisaged under section 2(h) of the Act. Agreements between entities constituting one enterprise cannot be assessed under the Act. This is also in accord with the internationally accepted doctrine of 'single economic entity'. It was averred by the

counsel for the informant that as per opposite parties letter dated April 2, 2011, Volkswagen India was 'not a subsidiary of the Automobili Lamborghini S.p.A but was a separate legal entity owned by Volkswagen Group'. This does not help the informant's case in any manner whatsoever. As long as the opposite party and Volkswagen India are part of the same group, they will be considered as single economic entity for the purposes of the Act. Any internal agreement between them is not considered as an agreement for the purposes of Section 3 of the Act.

6.1 **Relevant Market:** The relevant product market determined by the informant seems correct. Section 2(t) defines relevant product market as '*a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use*'. Market for 'Super Sports Cars' constituted a separate market within the auto industry because of its characteristics, price, intended use etc. The super sports cars are generally 2-door automobiles with high engine capacity and low weight. They differ from other cars in the auto industry because of their use only for sports purposes. Their engine capacity (3500cc or higher), horse power (450 HP or higher) and weight (2000 kg or lower) enable them an exceptionally high speed of at least 250 kmph. The price of these super sports cars is also Rs. 2 crores or above, making these cars exclusively catering to a distinct class of consumers. These features of the super sports cars make them different from other passenger and luxury cars owing to their physical design, price, intended use etc. A consumer desiring to buy a sports car will not buy a normal luxury passenger car and vice-versa. Manufacturers, apart from the opposite party, producing cars falling within this market of super sports cars in India are Aston Martin, Audi, Ferrari, Mercedes, Porsche etc. Therefore, considering their characteristics, price and end use, super sports cars constitute a distinct relevant market within the auto industry which cannot be substituted for other types of cars in the auto industry. Having regard to the foregoing, it may be concluded that market for 'super sports cars' constitute a distinct market, relevant for this case. The relevant geographic market in this case is proposed to be the 'whole of India' which appears to be correct. Therefore, the relevant market is market for 'super sports cars in India'.

6.2 In order to show dominance of Opposite Party, the informant has relied upon the market share of Opposite Party in the relevant market. It is alleged that Opposite Party held more than 50% of market share in the market of Super Sports Car in India and thus was dominant. Section 19(4) of the Competition Act provides that while considering whether an enterprise enjoyed a dominant position, the Commission would have due regard to market share or any of the following factors:-

- (a) market share of the enterprise;
- (b) size and resources of the enterprise;
- (c) size and importance of the competitors;
- (d) economic power of the enterprise including commercial advantages over competitors;
- (e) vertical integration of the enterprises or sale or service network of such enterprise.
- (f) dependence of consumers on the enterprise;
- (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
- (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- (i) countervailing buying power;
- (j) market structure and size of market;
- (k) social obligations and social costs;
- (l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have appreciable adverse effect on competition.

7. The informant had not devolved upon the size of the Opposite Party nor compared the size with the other competitors. The information is silent upon the economic power of the Opposite Party nor had talked of any commercial advantage which the Opposite Party has over the competitors, rather the cause of the informant is that while prior to his becoming importer and dealer of Opposite Party, the competitor was selling more cars than the Opposite Party. He increased the sale of Opposite Party. The information also reveals that the informant was the only agent of the Opposite Party in India till last year and it is only recently that the Opposite Party opened another agency in Mumbai for importing its car. It is also a fact that these cars are made ready only on orders of consumers who place orders considering price, cost of the product of each manufacturers. There is no special liking of the consumers for the opposite party product. There are no entry barriers for other competitors nor cost-wise other products are costlier or cheaper. A consumer can place order according to his pocket. Size of the market in India of the Super Sports Car is minuscule. According to the informant, in the last five years, only 93 cars of all manufacturers had been sold i.e. on an average in one year not even 19 cars in this category have been sold. The other competitors having some presence in Indian market are Aston Martin, Maserati, Bugatti and Gumpert Apolo. Brands like Aston Martin, Ferrari and Lamborghini form part of this market but the presence of these cars in India is at such a small level that none of them can be said to be a dominant as far as market share is concerned. Economic strength wise and resource wise, all the competitors stand at the same footing and none of them has commercial advantage over the other. Thus it cannot be said that the Opposite Party was a dominant enterprise in the market of Super Sports Car in India.

8. Even if the plea of informant that Opposite Party was dominant was considered as correct (though it is not), the informant has failed to show an abuse of any kind on the part of the Opposite Party. The informant was having a dealership agreement dated 16.12.2005 with the Opposite Party. Under this dealership agreement, the informant was appointed as sole dealer for the area of Delhi. However, since there was no other dealer in India, the informant started catering to the needs of people outside Delhi also. The Opposite Party appointed one of its own group company as dealer in Mumbai and right to import its car was given only to its group company and the status of informant was

restricted to that of a reseller of car and not that of importer. The right of an enterprise to appoint its own group company as an importer in a country cannot be assailed on the ground of dominance. A company has a right to open its office in any country and directly import cars through that office or can constitute a subsidiary company to import its car in other country. There is no abuse involved nor any competition issue is involved. Since the number of cars being sold in India is so less, it was not at all necessary for Opposite Party to have many importers and if the Opposite Party itself wanted to import cars in India through its group company that cannot be a cause for initiating proceedings against the Opposite Party, even if the Opposite Party were a dominant player. The Opposite Party gave an offer to the informant of terminating the existing agreement and to execute a fresh agreement with its group company - Volkswagen India. The informant refused this offer and resisted termination of the agreement dated 16.12.2005 on the ground of contractual obligation as stated in the agreement itself. The informant claims that the new agreement which Opposite Party wanted it to execute was altogether different from earlier agreement, while in earlier agreement a notice of 12 months was required to be given for termination, in the new agreement, a notice of only three months was required to be given. Under the new agreement, right to import was not given to the informant, but the import was to be done by Volkswagen India. On refusal of informant to execute new agreement with Volkswagen, the Opposite Party, in terms of earlier agreement, gave 12 months notice to the informant for terminating the contract in terms of the agreement. The informant grievance now is that after Opposite Party had made its own group company a dealer in Mumbai, the informant was being offered product at higher price as compared to the new dealer. The orders placed by it were not being given priority whereas the orders placed by Mumbai dealer, were being delivered and given priority and the deliveries booked by informant were being delayed on false pretext. The informant was being discriminated also in respect of supply of spare parts.

9. On the basis of aforesaid, the Commission is of the view that since the Opposite Party is not dominant, there is no ground for directing DG to investigate the matter.

10. There is no prima facie case either under Section 3 or under section 4 of the Act. The case deserves to be closed under section 26 (2) of the Act and is accordingly hereby closed.

11. The Secretary is directed to communicate the decision of the Commission to all concerned accordingly.

sd/-

(H.C. Gupta)

Member

sd/-

(R. Prasad)

Member

sd/-

(Geeta Gouri)

Member

sd/-

(Anurag Goel)

Member

sd/-

(M.L. Tayal)

Member

sd/-

(Justice S.N. Dhingra) (Retd.)

Member

sd/-

(Ashoka Chawla)

Chairperson