

Information of Findings and Positions of the Commission regarding the Home Appliances Aftermarkets Inquiry

The Commission for Protection of Competition (hereinafter referred to as the ‘Commission’) as the Procuring entity, pursuant to Article 47 of the Law on Protection of Competition (“Official Gazette of the RS”, nos. 51/2009 and 95/2013, hereinafter referred to as the ‘Law’), and Decision of the Commission Council, has conducted a sector inquiry on competition issues in aftermarkets (hereinafter referred to as the ‘Inquiry’). This market encompasses, *inter alia*, provision of guarantees, repair services, turnover and use of spare parts for washing machines and refrigerators, as best-selling items on the home appliances market.

The research was conducted during 2016 by the Institute of Economic Sciences (hereinafter referred to as the ‘Institute’). The main goal of this inquiry was to establish the structure and relations between market subjects, their market shares and market power, with the objective of detecting potential market vulnerabilities, that is, existence of conditions leading to the infringements of competition. To this effect, the Institute has presented a number of research-based conclusions and recommendations submitted to the Commission.

This market holds a significant importance, as is characterized by extremely large number of subjects on the demand-side (end-buyers of products), as well as product repair services on the supply-side. Other characteristics of the market are determined by numerous factors of the primary market: sales volume and structure, age of home appliances used in households, new products failure rates observed at annual level, etc.

According to estimates of the Institute, the largest undertaking on the refrigerator and washing machine sales market holds the market share that exceeds 30%, followed by four undertakings that hold between 6 and 13%. On the home appliances aftermarkets exist approximately 1,500 repair services, while none holds market share that exceeds 5%. This data should be estimated in the light of the fact that aftersales (repair and maintenance of home appliances) are regularly provided in the narrower geographic area, which implies the existence of narrower geographic relevant markets. Analysis of the relevant markets determined in such manner, might indicate to completely different results in regard to the degree of market concentration.

In order to reach more comprehensive outlook of this market, the Institute has analyzed agreements that several manufacturers and importers have concluded with both large and smaller authorized dealers and repairers. Following the submission of inquiry-based findings and provided agreements, the Commission approached the received data processing in order to establish potential existence of restrictive clauses in agreements, that is, potential competition restrictive provisions.

It is established that individual provisions of observed agreements might be considered as restrictive, and to that effect, the Commission expresses the concern as to this fact.

Legal framework

When analyzing concrete agreements and contractual provisions that might represent an infringement of competition, the Commission operated on the basis of the existing legal framework in the Republic of Serbia, composed of the Law and current bylaws.

Pursuant to Article 10 of the Law, restrictive agreements are defined as agreements, certain provisions of agreements, express or tacit settlements, concerted practices between undertakings, as well as decisions of undertakings associations, which as their purpose or effect have a significant restriction, distortion, or prevention of competition in the territory of the Republic of Serbia. The Law does not explicitly lists all forms of restrictive agreements, but states individual categories of behaviors that might represent an infringement of competition.

Pursuant to the Law, restrictive agreements may be exempted from the prohibition in one of the three following manners – either as the agreements of minor importance, or within the exemption from prohibition by categories of agreements, or in the proceedings of individual exemption from prohibition at the request of restrictive agreement participant.

Agreements which manufacturers/dealers of home appliances have with authorized repairers and spare parts dealers are vertical agreements, and the Commission observed them as such in terms of the existing regulations. The Regulation on agreements between undertakings operating at the different level of production or distribution chain exempted from prohibition (“Official Gazette of the RS”, no. 11/2010, hereinafter referred to as the ‘Regulation on vertical agreements’) is implemented in the case of vertical agreements. Keeping in mind that the inquiry conducted by the Institute estimates that market shares of undertakings in the home appliances sector do not exceed 25% (except for the leader), which is established as a threshold envisaged by the Regulation on vertical agreements, there is a possibility that individual restrictive provisions contained in these agreements are exempt pursuant to the regulation.

In terms of further classification of vertical agreements, submitted agreements might classify as agreements within the selective distribution system, that is, distribution system under which the seller undertakes to either directly or indirectly sell contract product only to distributors/dealers selected on the basis of particular (clear and objective) criteria, whereas the distributor undertakes not to sell contract product or provide services to distributors outside the established distribution system. Pursuant to the Regulation on vertical agreements, selective distribution agreements are exempt from the prohibition if they do not contain additional restrictions that are dispensable for the establishment of selective distribution system.

In accordance with statutory regulations, undertakings independently perform the estimate of fulfilment of conditions for exemption from the prohibition by categories of agreements. This further entails the right and liability of individual parties in selective distribution agreements to independently estimate if concrete, additional limitation in each individual case is necessary for the establishment of selective distribution system, and if the agreement that contains such limitation would be exempt from the prohibition in terms of the Regulation on vertical agreements. Due to the failure to fulfil any of the conditions prescribed by the existing Regulation on vertical agreements, the exemption by categories of agreements shall not be applied, and in such case, agreement participants should submit the request for individual exemption from prohibition. In the case that agreement participants do not submit such request, they bear the risk of the Commission’s findings as to the existence of restrictive agreement, which consequently brings the institution of proceedings for investigation of competition infringement in accordance with the Law.

Findings of the Commission

On account of inquiry-based data presented by the Institute and insight into submitted agreements, the Commission has established the existence of clauses that might represent restriction of competition, and particular those relating to:

- obligation of repair service providers to provide repairs of appliances by exclusively using original spare parts, including the period following the expiry of the guarantee period;
- obligation of repair service providers to exclusively procure spare parts and components from the dealer in the case of providing repair services outside the guarantee period (exclusive purchase clause);
- prohibiting service providers to provide repair services during the guarantee period outside the assigned territory, except when requested by the dealer;
- inhibiting disposal of special tools and equipment following the expiration of agreement.

According to the Commission's assessments, some of the listed restrictions could be exempt from the prohibition under the framework of exemption from prohibition by categories of agreements, or could be exempt upon the request of agreement participants in the proceedings of individual exemption of agreement from prohibition in accordance with Article 12 of the Law.

Provisions stipulating the commitment of repair service providers that in all cases when repairing and servicing, including the period following the expiry of the guarantee period, use original spare parts exclusively procured from the manufacturer or dealer, or third parties designated by the manufacturer, represent restrictions that the Commission do not consider to be those that might be considered as necessary for the establishment of selective distribution system.

When observing agreements that manufacturers and/or general dealers have with spare parts dealers and authorized repairers, they cannot be encompassed by the block exemption from the Regulation on vertical agreements due to the exclusive rights that manufacturers/general dealers have on the spare parts market of individual brand. By extension, restrictive clauses in the listed agreements, even when they do not represent restriction of competition "by object", must be evaluated in terms of fulfilment of conditions from Article 11 of the Law, that is, participants of such agreements should submit requests for individual exemption pursuant to Article 12 of the Law.

Conclusion

The Commission herewith expresses the concern due to the existence of listed restrictive provisions in the agreements between undertakings.

Being that the Regulation on vertical agreements is applied on these agreements, it is necessary that undertakings harmonize their business operations if those agreements contain additional restrictions that are dispensable for the establishment of selective distribution systems.

At the same time, the Commission emphasizes that is in the interest of undertakings that restrictive agreements, which cannot be qualified as agreements of minor importance (Article 14 of the Law) or as agreements that are exempt from the prohibition by categories of agreements (so called the "block exemptions" – Article 13 of the Law), are submitted to the Commission as part of the proceedings instituted on the request for individual exemption of restrictive agreement from prohibition (Article 12 of the Law).

The Commission will in the coming period and in accordance with legal competences, with particular attention monitor the state of competition on the home appliances aftermarkets (provision of guarantees, repair services, turnover and use of spare parts for home appliances). In the case of fulfilment of conditions from Article 35 of the Law, that is, when the Commission reasonably assumes the existence of restrictions in agreements which represent sufficient ground for nonexemption, it shall institute proceedings on investigation of competition infringements.