

## **Information of Findings and Positions of the Commission regarding the Motor Vehicles**

### **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 motor vehicles.

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, and its main characteristic is a great number of consumers on the demand-side, while the feature of procurement of these types of products is perceived as a capital procurement (purchase of a motor vehicle, goods vehicle, bus, etc.), distinguished by a large amount of funds necessary for the procurement, relatively long product lifespan, and significant share of product maintenance/servicing costs.

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 related findings by the Institute, 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 agreements, 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 motor vehicles 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 motor vehicles sector do not exceed 25%, 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.

Existing regulations in the Republic of Serbia do not include separate regulation that would regulate the subject of exemption from prohibition of agreements on distribution of spare parts for motor vehicles and provision of repair services of motor vehicles, as existing in the EU *acquis communautaire* (EU Regulation 461/2010), but restrictive elements of these agreements, under specified conditions, might fall under the existing Regulation on vertical agreements. Among recommendations of the Institute is to enact a regulation that would regulate the issue of exemption of agreements in the motor vehicles sector, whereas the research team opinion was that future regulation should not contain additional prohibitions and conditions imposed against agreement participants operating in that sector, beside those envisaged by the EU Regulation 461/2010.

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:

- price fixing in further sales;
- territorial restraints, via prohibition of exports and via restriction of active and passive sales;
- repairing with original spare parts outside the guarantee period;
- single branding/exclusive dealing;
- exclusive procurement of spare parts from manufacturer or third parties designated by the manufacturer;
- limiting the number of points of sale;
- prohibiting or limiting the assignment of contractual rights to sub-dealers;
- obligation of using the assigned industrial property rights in accordance with the manufacturer's instructions.

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.

Price fixing in further sales and territorial restraints within the Republic of Serbia where buyers may sell or resell the contract goods are restrictions of competition "by object", and are considered prohibited and void pursuant to Article 10 of the Law and Regulation on vertical agreements, and are contrary to Article 73 of the Stabilization and Association Agreement.

Provisions stipulating the commitment of dealers that in all cases when repairing and servicing, including the period following the expiry of the guarantee period, solely use original spare parts exclusively procured from the manufacturer or third parties designated by the manufacturer, represent restrictions that would fall outside the "allowed" restrictions in the European Union, as envisaged by the EU Regulation 461/2010. Contract provisions committing dealers to exclusively procure the complete set of original parts necessary for the aftersales services, and foreseeing the obligation of dealers to use only single-brand parts for repairs and servicing outside the guarantee period, represent provisions that could not be exempt from the prohibition pursuant to the Regulation on vertical agreements, as well as pursuant to the future regulation on agreements in the motor vehicles sector that would be aligned against the EU Regulation 461/2010, as per recommendations issued by the Institute. The Commission believes that such restrictions are dispensable for the establishment of selective distribution system.

Analyzed agreements also contain clauses on exclusive procurement and single branding. Dealers and authorized repairers are committed to procure spare parts from the manufacturer or third parties designated by the manufacturer, as well as to provide repairs using original spare parts. Disputable clauses may also be those where authorized repairers are requested not to allow third parties to benefit from the manufacturer's investments, because they may be interpreted as a manner of disabling independent repairers to access technical information and know-hows necessary for repairing individual brands, which is contrary to the practice established in the similar cases in the EU countries, because such behavior is limiting access to potential repairers operating outside the selective distribution system. Depending on the manufacturer's guidelines and instructions, and behavior of agreement participants as evidenced in the practice, there is a possibility that the Commission can establish the above-mentioned provisions as disputable.

Also, although individual undertakings in the motor vehicles sector have distribution systems within which members of the identical group of companies appear, and are exempt from the prohibition pursuant to Article 5 of the Law due to the lack of restrictive agreement from Article 10 of the Law (because affiliated parties are considered to be a single undertaking, while restrictive agreement is considered as an agreement between several undertakings), depending

on the definition of relative market, they may be viewed in the light of Article 16 of the Law – abuse of dominant position.

When observing agreements that motor vehicles 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.

Specificity of the subject and legal framework, particularly in the light of provisions of the EU Regulation 461/2010 concerning exemption from the prohibition of agreements on distribution of spare parts for motor vehicles and provision of services for repairing motor vehicles, requires that undertakings on the relevant market harmonize their business operations against relevant regulations in the shortest possible time. In consideration thereof, the Commission expresses the concern arising from the possibility that if a failure to harmonize business operations against relevant regulations occurs, the outcome may include damages for the consumers in terms of considerable reduction in selection of spare parts, increased prices of repair services, reduction in selection of repair stations, etc. Being that the Regulation on vertical agreements is currently applied on these agreements, the Commission believes that is necessary for undertakings to harmonize their business operations if agreements contain additional restrictions that are dispensable for the establishment of selective distribution systems. The Commission recommends that during repair services performed outside the guarantee period, consumers be enabled with the selection in regard to the use of original spare parts or parts that match the quality, as well as that when making such decisions consumers be informed on the price and performances of both types of parts.

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 motor vehicle aftermarkets (provision of guarantees, repair services, turnover and use of spare parts for motor vehicles). 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.