

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Competition Issues in Aftermarkets - Summaries of Contributions

21-23 June 2017

This document reproduces summaries of contributions submitted for Item 4 of the 127th meeting of the OECD Competition Committee on 21-23 June 2017.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/aftermarkets-competition-issues.htm

JT03416218

Competition Issues in Aftermarkets - Summaries of Contributions

This document contains summaries of the various written contributions received for the discussion on Competition Issues in Aftermarkets (127th Competition Committee meeting, 21-23 June 2017). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Table of Contents

Business and Industry Advisory Committee (BIAC)	3
Chile*	5
Croatia*	6
European Union*	7
France*	8
India*	9
Israel	10
Italy*	11
Japan	12
Kazakhstan*	13
Korea*	14
Latvia*	15
Romania	16
Russian Federation	17
Singapore*	18
South Africa*	19
Spain	20
Sweden	21
Chinese Taipei*	22
Turkey*	23
Ukraine*	24
United States*	25

Business and Industry Advisory Committee (BIAC)

To examine the issues relating to aftermarkets, we focus on the evolution of economic thinking, followed by the case law that reflects this thinking. First, we present the so-called single monopoly profit principle, which emerged as a critique out of the Chicago school and which asserts that aftermarket monopolization generally should not be considered harmful and, in any event, is preventable through ex ante contractual solutions. In response to this principle, a so-called post-Chicago approach has emerged that pinpoints the characteristics of the primary market and aftermarket through which the aftermarket monopolization could in fact cause harm. Both of these schools of thought are relevant in considering the potential for harm in aftermarket cases and offer serious ground for evaluation of the issues.

The Chicago Critique and the Single Monopoly Profit Principle: The crux of the Chicago school single monopoly profit critique is as follows: a firm holding market power on one product cannot increase its profits by tying it to a complementary product in an attempt to make monopoly profits on the second product as well. There is a single demand for the “system” composed of the two complementary products, and thus a single source of profit to be made; hence, whatever profit the firm can earn from exploiting this demand can be achieved simply by selling its primary product at the appropriate price. Under this line of thought, entering the secondary market can even be a lossmaking strategy, if other firms are more efficient. The Chicago critique has also developed an analysis specific to aftermarkets, which holds that competition on the equipment market is sufficient to eliminate any possibility of excessive pricing on the aftermarket. Thus, according to the Chicago school, anticompetitive behaviour on the aftermarket for equipment goods cannot arise, even if the firm has market power in the primary market, because this so-called installed-base opportunism is extremely unlikely to be profitable. The reasoning behind this conclusion relies on two main assumptions: (1) customers are perfectly informed and farsighted; and (2) customers view the primary and secondary goods as a system.

A firm with control over an important input for a secondary market is likely to benefit from competition in the aftermarket. Exploitation is possible only because the firm has control over a necessary input for the aftermarket. In this framework, monopolization of the aftermarket and exclusionary practices directed against aftermarket actors, such as maintenance providers relying on the spare parts provided by the upstream firm, cannot be motivated by the will to increase profits—it must be explained by other factors, such as reputation or quality control. Monopolization can mitigate inefficiencies in the replacement of equipment as well as make investments in the quality of primary goods profitable.

Post-Chicago Analysis: Aftermarket Monopolization Can Be Harmful: The post-Chicago analysis argues that aftermarket monopolization can be harmful to customers, and tries to assess under which circumstances such harm is likely to occur. It relies on theories which find that, under fairly general conditions including a competitive primary market and fully informed customers performing lifecycle cost analysis, installed-base opportunism—made possible by the existence of locked-in customers and switching costs—is likely to be profitable for a firm, even if it induces losses on the primary market.

Some of the bases for the post-Chicago observations include surprise, limited commitment, and costly information theory.

Evaluating the Potential Magnitude of Harm: There is now a general consensus in the economic community and literature that aftermarket monopolization is both possible and profitable for a firm under certain fairly general assumptions. However, there is less consensus on the magnitude of this harm: no empirical studies have managed to measure the impact of the identified anticompetitive effects in general. The Chicago critique considers the impact generally to be small and thus discards the notion that antitrust is appropriate for dealing with such cases. But there are a series of factors that tend to make harm from market monopolization more likely and severe. Coppi provides a checklist that “can be used to evaluate the likelihood that aftermarket monopolization results in significant anticompetitive effects (consumer harm) in a specific case.” Some key elements of this checklist include high switching costs, low competition on the primary market, significant information asymmetries, a large aftermarket, weak reputation effects and high discount rates.

Legal Analysis of Aftermarket Cases: In 1992, the U.S. Supreme Court reviewed the *Kodak* case and concluded that, even with a competitive primary market, anticompetitive behavior could arise in the aftermarket. The case rests on the post-Chicago “Surprise Theory,” since Kodak unilaterally decided to stop supplying spare parts to ISOs after having supplied them regularly in the past. However, a number of lower courts have limited *Kodak* to situations in which the manufacturer has changed its policy on supplying aftermarket parts and service and have held that when the aftermarket policy is generally well-known that aftermarket concerns are unlikely to exist. But other courts have interpreted *Kodak* more broadly, finding that when customers are unable to determine the range of conditions that would apply to the aftermarket at the time of contracting, a lock-in and exploitation could occur.

In the European Union, market definition in aftermarket cases has been addressed both in the European Commission’s Market Definition Notice and in EU Courts’ case-law. The Notice suggests that the EC considers that two criteria should be taken into account when examining aftermarket products, namely: (i) the importance of the aftermarket product’s compatibility with the primary product; and (ii) the characteristics of the primary product, and in particular its price and lifetime. According to the EC, a separate aftermarket would exist when compatibility with the primary product is important, the price of the primary product is particularly high, and the primary product has a long lifetime. The EU Courts have held that the existence of economic operators specialized and active solely on the aftermarket of a primary market, among other factors, reflect an indication of the existence of a separate aftermarket. Several cases have addressed the specific factors that indicate the potential for a separate aftermarket, including the *CEAHR* case and the *EFIM* case.

*Chile**

The Chilean competition law (DL 211) does not contain any provisions regarding aftermarkets and the Competition Court (TDLC) hasn't specifically dealt with aftermarket cases so far.

Nevertheless, the Economic National Prosecutor's Office (FNE) did carry out investigations concerning aftermarkets, where it acknowledged that there can be three configurations for market definition in aftermarkets: dual markets, system markets and multiple markets.

According to the FNE, the main concern in aftermarket cases arises with the presence of multiple markets, where each secondary product is compatible only with a certain primary product.

In order to assess the market configuration of a specific case, the FNE has considered a variety of elements, such as the relative costs of the aftermarket product, the lifecycle cost of the product, consumers' degree of sophistication, and switching costs.

In the last few years, the FNE has had at least three investigations dealing specifically with problems in aftermarkets. In all of the three cases the final decision was to close the investigation, for different reasons. In the 2010 case, in the automobile industry, competition in the primary market was found to be able to constrain pricing decisions in the aftermarket. In another case in 2010, complaints against a tying conduct were dismissed in that the relevant market was found to be a single system market and not two separate markets, requirement for a tying conduct. Finally, in the most recent case, the secondary market for maintenance and repair services for elevators was found to be competitive.

*Croatia**

The contribution describes developments in the practice of the Croatian Competition Agency (CCA) on aftermarkets in medical equipment and motor vehicles sectors. All the cases were terminated by commitment decisions.

In 2012 the CCA adopted two commitment decisions against Primalab, exclusive distributor of spare parts and authorised repairer of laboratory equipment of Metrohm brand in Croatia. First decision concerned the restrictive provisions in distribution agreements. The case was opened based on the complaint by Ohm Lab, an independent service provider for Metrohm products, alleging that restrictions imposed by Primalab on Ohm Lab prevented from offering maintenance and repair services for Metrohm products. The CCA defined the primary market as laboratory equipment distribution market and the secondary markets as; i) distribution of spare parts for Metrohm laboratory equipment; and ii) repair and maintenance services for Metrohm products after the validity period of manufacturers guarantee. The CCA accepted commitments proposed by Primalab whereby it terminated the exclusivity.

In the second case, the CCA concluded that Primalab's conditional delivery of Metrohm spare parts directly to the buyer when the repair and maintenance service was done by Ohm Lab would give rise to competition concerns. The CCA accepted proposed commitments whereby Primalab will publish a notice stating that all interested buyers have the right to buy all spare parts for Metrohm products necessary for the repair under certain conditions.

The CCA initiated proceeding against Peugeot Hrvatska d.o.o. Zagreb for the alleged abuse of dominance in the repair and maintenance services and sales of spare parts for Peugeot motor vehicles in Croatia. Peugeot Hrvatska applied selective criteria for authorising repairers for Peugeot motor vehicles in a non-transparent manner and unjustifiably denied access of Auto Maksimir d.o.o to the authorised Peugeot repairer network. In 2015 the CCA adopted the commitments offered by Peugeot Hrvatska whereby it ensured that Auto Maksimir is a long-term authorised dealer of Peugeot and remains in the network of authorised repairer.

Similarly, the CCA opened the proceeding against Grand Auto following a complaint by the car dealer Karlo for Grand Auto's alleged abuse of dominance in the repair and maintenance services and the sales of spare parts for Land Rover and Jaguar motor vehicles. Karlo ceased to be an authorised repairer for these cars when Grand Auto became an authorised dealer for them. The CCA concluded that Grand Auto did not abuse its dominant position in the said markets, due to the negligible importance

*European Union**

The EU contribution reports how there are divergent views regarding aftermarkets, summarised in the XXVth European Commission Report on Competition Policy (1995), and how neither of these approaches reflected reality sufficiently.

This prompted the need for a case-by-case analysis based on an in-depth fact-finding exercise. This was notably done in the Pelikan/Kyocera case (1999), where the Commission developed a dedicated analytical framework, based on economic thinking, which led to the elaboration of a test, known as the 'EFIM' test, which is still applicable today.

Since Pelikan/Kyocera, there have been a number of cases dealt with by the Commission, where it was found that companies may have abused their dominant position on an aftermarket. All of these cases were resolved by the investigated parties offering commitments. These were the Novo Nordisk case (1996), the Digital case (1997), and the IBM Mainframes Maintenance case (2011).

In contrast, the Commission has in other cases found that there was no abuse of aftermarket dominance where there were sufficiently strong links between primary and secondary markets and the primary markets were competitive. This led to rejections of complaints in the cases Pelikan/Kyocera (1999), Info-Lab/Ricoh (1999), EFIM (2009) and Luxury Watches (2007/2014).

Faced with a growing number of complaints about infringements in aftermarkets, the Commission confirmed in its 2005 Discussion Paper on Exclusionary Abuses that it would define aftermarkets following the same methodology as used for the definition of a primary market – i.e. without regard to sales of the primary products to which they relate. The effects of the 'overall system' (i.e. whether markets are interdependent) would, according to the Discussion Paper, be taken into account in the dominance analysis.

The criteria for assessing dominance on aftermarkets were developed in cases concerning the printer cartridges market, starting with the Pelikan/Kyocera case and confirmed by the General Court in EFIM, which lent its name to the EFIM test. The questions to be answered under the EFIM test are:

1. Can customers make an informed choice, including lifecycle-pricing, between the various manufacturers in the primary market?
2. Are they likely to make such choice accordingly?

If prices were raised significantly in the aftermarket,

3. would a sufficient number of customers adapt their purchasing behaviour at the level of the primary market,
4. within a reasonable time?

The EFIM test provides step-by-step guidance to assess whether or not sufficient interdependence and a timely reaction on the primary market exists that can affect aftermarket dominance.

France*

The submission of the French Competition Authority discusses various aspects of aftermarkets, including the issue of market power and characteristics of secondary market foreclosure.

Aftermarket issues are not subject to any specific regulation under French consumer law. This law provides for a general obligation to provide information on the principal features of the product or service offered. Nevertheless, some products and services are subject to a stricter French regulatory framework because of the cost of the ancillary services and their lack of price transparency. Overall, the difficulties raised by secondary markets are better addressed by competition law.

With this regard, the two most common categories of anticompetitive practices cited in the decision-making practice are refusing access to sale and tying. In several cases, the *Conseil* or the *Autorité de la concurrence* has interpreted secondary market foreclosure as a refusal to allow access to an essential facility. However, the *Autorité de la concurrence* has not, at the moment, condemned a refusal of access that could lock sales on a secondary market, either because the practice was not established, or because of efficiency gains.

On the whole, foreclosure practices judged to be anti-competitive or potentially anti-competitive remain relatively rare in the case law of the *Autorité de la concurrence*.

Nevertheless, in some cases foreclosure consists in tying the primary product (of which the targeted operator is the dominant supplier) to the sale of the secondary product, and is done with no visible justifications, in terms either of investment or quality. In addition, in the case of tying, the effect on the market can be greater because of the weight of the operator dominant in the primary market, nearly all customers in the market are impacted. The *Autorité de la concurrence* has intervened on two occasions (see the TDF and Nespresso Decisions) to stop such behaviour.

Lastly, in its consultative role, the *Autorité de la concurrence* has recommended that some practices of aftermarket foreclosure should be softened, by reducing their duration, or by allowing the primary and secondary goods to be sold unbundled, or by improving the openness of the secondary markets.

India*

In *Shamsher Kataria v. Honda Siel Cars India Ltd.* Case (‘automobile case’) in 2014, the Competition Commission of India (CCI) issued an order against 14 car manufacturers in which the CCI laid down principles to address competition issues in aftermarkets. The CCI found that the conduct of Original Equipment Manufacturers (OEMs) violated Section 3(4) and Section 4 of the Competition Act 2002, with respect to their respective agreements with local Original Equipment Suppliers (OESs) and authorised dealers.

In this automobile case, the CCI defined the relevant markets as a market consisting of unique replacement parts, post warranty service or other consumables for a primary product of a specific brand, taking into account the possibility of customers’ whole life costing and reputation effects. And the CCI established dominant positions of the OEMs on the basis of various circumstances such as the low level of competition constraints in the aftermarket from the competitors in the primary market due to low compatibility of spare parts.

The CCI found that the OEMs imposed restrictive covenants in the agreements with OESs and authorised dealers and foreclosed the aftermarket for supply of spare parts and other diagnostic tools. The CCI also found that the OEMs abused their dominant position in the aftermarkets for their respective brands through i) exclusionary conduct; i.e. by denying independent repairers’ access to the aftermarket by refusing access to branded spare parts and diagnostic tools, and through ii) exploitative conduct; i.e. by charging arbitrary and high prices for their spare parts.

Besides the automobile case, the CCI had several occasions to examine the competition issues in the aftermarkets in real estate, banking, and financial sectors. The cases were closed at the preliminary stage.

Israel

The Israeli Antitrust Authority ("IAA") has recently grappled with the unique competitive questions raised in aftermarkets in its investigation of service for modern "kit" elevators. The IAA's analysis of this market was based on its general policy and tools for market definition; however, the IAA also considered the need to examine the link between the aftermarket and the primary market (elevator installation) to determine whether it was appropriate to define a systems market, dual markets or multiple markets.

In terms of primary market restraint, the IAA's preliminary findings raise questions about the ability of the primary market to effectively restrain market power in the secondary market, due, *inter alia*, to the fact that the elevator is chosen by a contractor who will not bear the costs of service. In terms of substitutability for those who have already purchased an elevator, the IAA considered that a literalistic implementation of the hypothetical monopolist rule might mean that every elevator should be defined as a separate relevant market. However, this would seem to lead to absurd conclusions that would not help to understand the competitive situation in any meaningful way. Therefore, in its analysis the IAA grouped together elevators with similar competitive characteristics, in terms of the inputs required to service them. According to the IAA's preliminary findings, this would lead to a market definition based on elevator manufacturer, as this seems, *prima facie*, to be the factor that determines the unique spare parts and technical information necessary for service. In other words, the characteristics of demand in the aftermarket seem to be determined by the product and manufacturer chosen in the primary market.

Under such a market definition, market power in the service sector would be examined based on the barriers to entry and transfer between service providers, without considering the primary market. The IAA's preliminary findings seem to indicate that the affiliation between each installation company and the elevator manufacturer may give the installer a significant advantage in terms of access to specialized spare parts and technical information, creating high barriers to entry and transfer and granting the company significant market power in the service market.

At the beginning of its investigation, the IAA considered declaring the largest installation companies to be monopolies and issuing them instructions to take various steps to remedy the competitive issues. However, the IAA is currently considering whether the problems are sectoral in nature, as well as whether enforcement would require ongoing expert oversight, which might indicate that an alternative course of action is preferable. The IAA is therefore currently considering the possibility of publishing a report outlining the competitive issues and recommending sectoral regulation that would be enforced by the relevant government ministries and the Consumer Protection Authority. At the same time, the IAA continues to monitor complaints of refusal to supply spare parts, which, where appropriate, may be able to be enforced with the traditional antitrust tools applicable to monopolies.

*Italy**

The Italian Competition Authority has dealt with very few cases involving aftermarkets in the course of its activity. Only the most recent decision involved an abuse of dominant position. The other two cases tackled anti-competitive agreements between the main competitors active in the primary market.

Furthermore, in an opinion issued in 2016, the ICA dealt with the interplay between aftermarkets and competition from a different perspective: public procurement. An opinion to the Anti-Corruption Authority in 2016 concerning Guidelines for negotiated procedures without tender for procurement of non-substitutable products or services gave the ICA the opportunity to set out some key principles to ensure competition in public tenders involving aftermarkets.

In this regard, the ICA supported the Anti-Corruption Authority's view that direct award of contracts shall be exceptional and strictly limited to cases in which the specific nature of the product or service in question inevitably restricts the number of potential suppliers. In cases where standardized or fully interoperable products or services are not available, the ICA suggested comprising in the public tender the entire life-cycle of the product or service, including, e.g., spare parts, maintenance and ancillary services. Furthermore, the ICA advised that, when evaluating the different bids, public procurement bodies should carefully consider switching costs and might even introduce the size of switching costs as a specific award criterion in the tender.

Japan

In Japan, there are no guidelines specialized for violations of the Antimonopoly Act (hereinafter “AMA”) in the aftermarket. Meanwhile, there are some cases where violations were found by the Japan Fair Trade Commission (hereinafter “JFTC”) taking into account the relationships between the so-called primary market and the aftermarket, such as relationships between machine and its maintenance. Also there are cases of business combinations where the JFTC defined markets in consideration of the aftermarket.

1 Violation Cases

The JFTC found that following conducts violated the provision of Article 19 of the AMA (Prohibition of Unfair Trade Practices).

- Tokyu Parking Systems Corporation (hereinafter “Tokyu Parking Systems”) was engaged in the distribution and the maintenance services of parking garages and distribution of service parts. Tokyu Parking Systems unreasonably interfered with transactions between property management companies of parking garages and independent maintenance companies.
- Mitsubishi Electronic Building Techno-Service Co., Ltd. (hereinafter “MEBT”) was engaged in the maintenance service of elevators and the distribution of dedicated replacement parts. MEBT unfairly interfered with the transactions between the owners of elevators and independent maintenance companies.
- Radio Meter Trading Co., Ltd. (hereinafter “Radio Meter Trading”) was engaged in the distribution of blood gas analyzers and solutions for the analyzers, such as cleaning solutions (hereinafter “reagents”). Radio Meter Trading unfairly interfered with transactions between wholesalers of parallel imported reagents and importers.

2 Case example of business combination

In the case of integration in thermal power generation system businesses of Mitsubishi Heavy Industries, Ltd. and Hitachi, Ltd., the JFTC defined the geographic market on products and services subject to the review based on the demands for the maintenance services.

*Kazakhstan**

The contribution from the competition committee of Kazakhstan (Committee) provides two recent examples in which competition issues involving aftermarkets were reviewed.

The Committee is now reviewing the complaint from the Ministry of Labour and Social protection of population of Kazakhstan filed in 2017, with regards to cochlear implantation and replacement and adjustment of speech processors to cochlear implants. Based on the fact that almost all of the patients with hearing deficiencies have gone through the operation using the cochlear implantation by the two companies and that the cost of speech processors by the distributor of the two companies are close, the complaint affirms that the two companies have reached price collusion. The Committee is investigating if there is any violation of competition law, taking into account issues on intellectual property.

The Committee has repeatedly reviewed complaints from companies engaging in automobile and automotive parts markets, which allege monopolization of the markets for Toyota and Lexus brands by Toyota Motor Corporation. In the course of reviewing the complaints, the Committee concluded that Toyota Motor Corporation is the rightful owner of the trademark of Toyota and Lexus in Kazakhstan and the right to use the trademark has been granted to Saryarka AvtoProm LLP. In Kazakhstan, the owner of the trademark has an exclusive right to use and dispose of the trademark it owns in relation to the specified goods and services. The Committee, taking into account the Trademark Law which stipulates that the use of trademark is possible only with right holder's consent, concluded that there was no sign of competition law violation in regard to actions of Toyota Motor Corporation.

*Korea**

The Korean Fair Trade Commission (KFTC) has reviewed two cases on abuse of market dominance involving aftermarkets, including auto parts and software maintenance services. There has been no case on exploitative behaviours in aftermarkets in Korea; instead, exclusionary behaviours were the main concern.

In 2009, the KFTC had imposed corrective measures on Hyundai Mobis for abusing market dominance. Hyundai/Kia Motors had a market share of 75% in the finished car market and Hyundai Mobis, an affiliate supplier of auto parts, had a market share of 77% in the auto repair parts market in Korea. The KFTC defined repair parts only for Hyundai/Kia Motors as a relevant market since most of the parts of other cars are not compatible with Hyundai/Kia cars. Hyundai Mobis controlled its own distribution channels through exclusive dealings whereby it prohibited components dealers from selling generic (non-authorised) parts to third parties, withdrew existing discount benefits and cancelled the contracts with the dealers who violated it. The KFTC concluded that such practice amounted to an abuse of market dominance, issued an order to discontinue the practices at stake and imposed fines. In addition to the measures by the KFTC, the Ministry of Land, Infrastructure and Transport has introduced the Replacement Part Certification System to address the problem of information asymmetry on parts safety. Under this system, government-accredited certification agencies verify the quality of competing parts that are not verified by the manufacturers of finished cars.

In 2016, the KFTC examined an alleged abuse of dominant position by Oracle. The issue was whether or not Oracle's strategy to combine DBMS (Data Base Management System) maintenance service with the next version of DBMS restricted competition in the DBMS market. The discussion was whether or not the maintenance service and the next version of the DBMS could be seen as individual products, and therefore their combined sale be considered as a tying arrangement. Considering the substitutability of the product in terms of supply and demand, the general purchasing patterns of consumers, and the uniqueness of software maintenance, the KFTC concluded that DBMS and DBMS maintenance services are not separate products. Consumers tended to purchase the DBMS considering the total cost of ownership, based on the idea that it is a system combining the DBMS license, maintenance services, and upgrades to the next version, which was why the KFTC defined the relevant market as the DBMS system market.

Latvia*

In 2012, the Competition Council of Latvia (CC) conducted a market inquiry in the market for household electronics markets. The market inquiry analysed the availability of warranty repair services for consumers that purchased goods in another geographic area or through parallel distribution channels; it also focussed on the restrictions for warranty for the goods that had not been purchased from the official distribution channel and the agreements between the manufacturers/official distributors and the warranty repair providers. The CC preliminarily concluded that such restrictive clauses were likely to restrict competition in the market and sent recommendations to dealers to abandon such restrictions in the future.

The market inquiry also drew conclusions on market definition. When warranty is paid by the manufacturer or the seller, such expenses are reasonably foreseen and likely to be included *ex ante* in the product price. In such circumstances warranty is complementary service for the product and cannot be regarded as separate from the primary product. However, there could be situations where a separate aftermarket can be defined, for example when voluntary contractual warranty is offered by a retailer and consumers are entitled to choose to take or refuse when buying the primary product.

The CC also received complaints about actions of contracting authorities and restrictions in procurement documents. Concerning the market definition in cases involving public procurement, the CC pointed out that in public procurement bids demand side usually influences the way in which the relevant product is offered. In cases where bidding requirements request to submit a proposal including aftermarket services, it is appropriate to define a market for “system”. Only in cases where a separate procurement tender is organized for the secondary market services (for example, maintenance of IT software) a separate aftermarket may be defined.

The CC has taken up several aftermarket cases in the automotive sector with regards to warranty conditions. In *KIA* case, the KIA car importer AS KIA Auto and local KIA authorised dealers agreed on warranty terms and conditions for the KIA motor vehicles and infringed the Competition Law of Latvia. In this case three relevant aftermarkets were defined: i) warranty repair market for the KIA motor vehicles; ii) repair and maintenance not covered by warranty for the KIA motor vehicles; and iii) motor vehicle spare parts distribution market. To preserve warranty the KIA motor vehicle owners were obligated during the warranty period to carry out all repair and maintenance work that is determined by the manufacturer and use only original KIA spare parts. The information given to owners made them think that they might lose warranty if they carry out repair and maintenance work outside the KIA network.

Romania

The Romanian Competition Council has investigated two particular cases that are relevant to the roundtable topic related to aftermarkets and the possible implications of the relationship between primary and secondary markets and/or products,. These cases relate to the distribution of mobile communication prepay products and consumable printer-related products. Each section that follows will provide information and details that will show how both cases have been dealt with and some particularities with regards to the Romanian distribution systems' markets. By examining the data provided in the present paper, we could safely argue that the analysis regarding aftermarkets should be conducted by taking into consideration the complexity and particularity of each individual case.

Russian Federation

he experience of competition law enforcement by the FAS Russia in the aftermarket covers the use of traditional and soft forms of competition protection, including in regional markets.

Most recent enforcement experience of the FAS Russia on aftermarket concerned the market of complex technological devices when in 2016, the FAS Russia initiated a case in relation to Apple Rus Ltd. The company violated Part 1 Article 10 of the Law on Protection of Competition through failure to ensure the possibility of using the company's goods during their term of service. The case was initiated based on a complaint from an individual who noted that in the Russian Federation's territory there is no possibility of replacing / repairing a damaged display on Apple iPhone 6 Plus smartphones, Apple iPhone SE, which is explained by the lack of supply of display modules to Russia. After receiving the FAS Russia's warning requesting the company to perform necessary actions so that services for repair (replacement) of screen modules on all models of Apple Inc. smartphones sold in Russia could be provided, as of the end of April 2017 the Apple Rus Ltd. complied with the warning.

The FAS Russia has also successfully participated in the investigation of representatives of Caterpillar dealers in cooperation with the Eurasian Economic Commission during its investigation of the case on the refusal by Caterpillar and its dealers to deliver products, including equipment and spare parts, to the Kazakhstani market. As a result of the interaction with the Eurasian Economic Commission and the FAS Russia, Caterpillar amended the international agreements regulating distribution issues so that they became consistent with the principles of EAEU, including the principle of fair competition and the national antimonopoly legislation.

The «soft» regulation on the auto parts market was introduced in 2013 when the Code of Conduct of Automobile Manufacturers was created by the FAS Russia jointly with the Association of European Businesses. The document aims at establishing good business practices in the Russian automotive sector, including ensuring non-discriminatory access to spare parts. Nowadays discussions are launched by business representatives whether the Code's provisions may acquire a binding nature.

*Singapore**

The Competition Commission of Singapore (CCS) has looked at several cases involving aftermarkets, mainly in relation to refusals to supply spare parts or tying conduct by a dominant company. The CCS considers that each case needs to be assessed on its merits and that commitments can be useful in cases where conduct gives rise to both harm and benefits. The contribution describes two recent examples to illustrate CCS's approach to this issue in practice.

In refusal to supply lift spare parts case, the CCS has been investigating allegations that several companies were refusing to supply to third-party lift maintenance contractors lift spare parts for the maintenance, servicing and repairs of lifts installed in Housing & Development Board estates, Singapore's public housing authority. On market definition, CCS looked into several factors such as whether buyers of lifts considered the whole-life costs of the lifts, whether lifts are switched frequently, and whether there are brand-specific spare parts. While the CCS has not concluded its investigations, evidence suggested that the supply of proprietary lift spare parts for each brand of lift may be in a separate market, and the supplier for each brand of lift could be abusing its dominant position by refusing to supply proprietary lift spare parts. To address CCS's concerns, one of the parties subject to the investigation came forward to provide commitments with the CCS, whereby it committed to supply lift spare parts of its brand to third-party lift maintenance contractors. The CCS accepted the commitments following a public consultation, while it is still continuing its investigations against other branded lifts.

The CCS received in 2015 a notification concerning the merger between two global suppliers of airfield lighting systems. The merger parties accounted for a significant market share of more than 80% in the supply of airfield lighting systems in Singapore and may be each other's closest competitor. During the phase 1 assessment, the CCS identified several potential concerns that may arise from the merger, including the possibility that the merged entity could raise prices of both the primary product (the airfield lighting systems) and the secondary product (spare parts). The CCS found that customers for airfield lighting systems were likely to consider the cost of spare parts when procuring airfield lighting systems, i.e., they considered the whole-life cost of the product. The supply of airfield lighting systems and the supply of spare parts were therefore likely to form a systems market. The merger parties submitted commitments to address the competition concerns identified by the CCS and committed to sell airfield lighting systems and spare parts at the pre-merger prices, and to continue to supply spare parts for a specified period. As the commitments addressed the concerns identified by the CCS, it did not find a substantial lessening of competition and cleared the merger.

*South Africa**

In its submission the Competition Commission of South Africa (CCSA) focusses on its experiences in the automotive sector.

The CCSA is currently in the process of developing a code of conduct to regulate original equipment manufacturers (OEMs) and other players in the automotive aftermarket. The authority has received more than 20 complaints and has reviewed various mergers in the automotive aftermarket. However, a large number of complaints received have not been prosecuted to date. Similarly, there has been no merger that has been blocked on the basis that there is substantial lessening of competition in an aftermarket. The CCSA's approach in various automotive aftermarket cases has been to define the primary and the aftermarket as separate markets.

The anticompetitive concerns identified by the CCSA emanate from the vertical arrangements and/or agreements between OEMs and various automotive aftermarket industry participants.

In order to address anti-competitive effects in the automotive aftermarket, the CCSA has decided to follow the approach of various competition authorities in other jurisdictions and to regulate the conduct of OEMs through a code of conduct to be developed with industry players.

In this regard, the CCSA conducted a scoping study, completed in 2015, which highlighted how the automotive aftermarket works and identified various competition issues to be addressed. The scoping study was as a result of multiple complaints received by the CCSA between 2011 and 2014, in relation to the automotive aftermarket.

Overall, the CCSA's view is that the best outcome for the industry can be achieved through advocacy and the development of a code of conduct. These interventions in the automotive aftermarket are likely to have far reaching benefits, in terms of opening it up to more competition and thus benefit consumers. However, if the code of conduct does not address the concerns identified, the CCSA still intends to pursue anti-competitive conduct through enforcement.

Spain

The CNMC shared six aftermarket cases reviewed in the last few years, which included cases on anticompetitive agreements, abuse of dominance and unfair competitive practices, and for which market definition was an essential exercise.

When there is a specific and differentiated demand for just aftermarket services the CNMC has opted for a narrow definition of secondary markets. In such circumstances, the CNMC has defined the manufacturer's original spare parts or support services for each manufacturer's products as a separate relevant product market. A common feature of these cases is the nature of the product/service provided by the operator in the primary market, which was found to be an essential input to compete effectively in the secondary market.

The use of a narrow product market definition has allowed the CNMC to identify high market shares in the secondary market, which made it easier to justify an establishment of market power, a very relevant element in the analysis of the anticompetitive effects in each case.

With regard to the abuse of dominance cases, the CNMC could establish that the dominant company had engaged in abusive conduct in the secondary market based on a number of factors: i) the primary product/service was essential to compete; ii) no alternative sources of supply existed; and iii) there was no objective justification for the exclusionary practices.

The authority's approach in these cases took into account the potential effects of the exclusionary conduct. According to the applicable case law in Spain, it is sufficient to demonstrate that there is an anticompetitive effect which may potentially exclude competitors (or make the entry or the expansion of competitors in the concerned aftermarket more difficult) leading to probable consumer harm.

Sweden

An aftermarket can be defined as a market for the provision of products and/or services for use with a previously purchased durable good. The latter is referred to as primary product. The market for the primary product is called the primary market.

Aftermarkets typically involve follow-on sales of spare parts, repair and maintenance services, and complementary consumables. Examples of primary products and aftermarkets include razors and replacement blades, coffee machines and capsules, printers and cartridges, cars and spare parts, computer software and updates, etc.

This submission begins by summarizing the theoretical framework within which aftermarkets can be assessed, considering market definition and then potential anticompetitive motives and effects of unilateral conduct in aftermarkets. The submission then turns to the legal framework in Sweden for assessing aftermarkets, describing the circumstances in which aftermarket cases would be likely to be prioritised for enforcement by the Swedish Competition Authority (SCA). Finally, Swedish cases involving aftermarkets are presented.

*Chinese Taipei**

The types of aftermarket cases handled by the Chinese Taipei Fair Trade Commission (FTC) include abuse of dominance in maintenance and repair service for elevators and auto parts/accessories and a vertical merger between the sales and maintenance services of printers and copiers.

Common conduct whereby enterprises extend its market power in their primary product to aftermarkets includes tying and exclusive dealing and the FTC adopts the “rule of reason” standard for such vertical non-price restraints. It established guidelines on “Elevator Enterprise Sales and Maintenance” and on “Reviewing Cases Involving Auto Parts Transactions”.

In the vertical merger between Epson printer and projector distributor and repair service provider, the FTC defined the repair parts and consumables for Epson printer and projector as a separate aftermarket. The FTC found that parts of copiers and projectors of different brands have low substitutability and it is difficult and costly for consumers to obtain information on the prices of parts within the product life cycle, which raises the concerns of consumers being locked in after having made a purchase. On competition analysis, there was no concern about market foreclosure because repair service providers would be still able to acquire genuine Epson parts, OEM parts, and renewed parts after the merger.

The FTC investigated whether or not the restriction on the sales of parts by automobile dealers was a violation of competition law. The FTC found that such sales restrictions (e.g., automobile dealers sell certain types of genuine parts only after verifying the vehicle registration, car owner’s ID, and serial number on the automobile chassis) were all related to theft prevention, safety of drivers and mechanics. Currently, the guideline on Reviewing Cases Involving Auto Parts Transactions requires automobile manufacturers or dealers to disclose important trading information, including a list of parts with sales restrictions, the method used for acquiring the parts, and reasons for the restriction. These requirements aim at preventing manufacturers or dealers from damaging consumers’ interests by exploiting information asymmetry.

*Turkey**

Turkish Competition Authority (TCA) has rendered many decisions concerning aftermarkets. These are mostly abuse of dominance cases and the main discussions were on relevant market definition and dominance. The typical infringements were excessive pricing for after-sales and/or exclusion of rivals from the aftermarkets either by requiring the consumers (contractually or technically) to obtain after-sales from the primary goods supplier or its authorized distributors. Contracts often contain these after-sales provisions and consumers are obliged to comply with such provisions in order to secure benefit from guarantee provided by the manufacturer. Technical restrictions, on the other hand, are generally in the form of denying compatibility either by encryption or other technical specifications which are often linked to proprietary rights.

A significant case of the TCA is the Medical Devices decision in 2009 in which it investigated hi-tech medical device suppliers for alleged excessive pricing and refusals to deal in aftermarkets. The Turkish Competition Board (Board) concluded that brand-specific aftermarkets constituted the relevant product markets in the case and each supplier was dominant in its aftermarket. The suppliers were found to have used encryptions and not supplied spare parts to independent service providers. The Board adopted an interim decision whereby it obliged the primary product suppliers to provide the encryption key for the maintenance of the equipment and supply necessary spare parts to repair and maintenance service providers.

The Medical Devices decision took into account the nature of the products, which are directly linked to human health and their well-functioning and the suppliers' brand-image are of particular importance. For these reasons the request for the encryption key could only be possible by the hospitals that would be able to estimate the quality of the after-sale services and make proper decisions. The decision also showed a need for a regulation concerning independent service providers' training and certification for adequate and explicit provision on after-sales by obliging the producers to deal with its rivals on a selective basis.

Based on the Medical Devices decision above, the TCA engaged in successful competition advocacy efforts for the medical devices sector. It was observed in the Siemens decision in 2016 that the number of independent service providers has increased in the sector and that the primary product suppliers or their distributors have begun to provide spare parts with rivals in the secondary market. The TCA also observed that the level of price transparency in aftermarkets had increased which facilitates the accuracy of life cycle cost calculations and enables customers to make informed purchase decisions.

*Ukraine**

In 2016 the Antimonopoly Committee of Ukraine initiated an inquiry in the markets of equipment and consumables for haemodialysis and peritoneal dialysis. The case was opened following numerous complaints on the public procurement of consumables for dialysis.

Due to the operating conditions of the markets, the primary market is the market for equipment, while the aftermarket is the market of consumables, which directly depends on the available products in the foremarket and the behaviour of market participants.

In recent years, producers of equipment have been using similar approaches in order to promote their products. Through donation agreements, free-of-charge use contracts, free-of-charge rent or sublease contracts, producers have been providing free-of-charge supply of equipment to hospitals. Such agreements could include provisions that de-facto establish control of the equipment suppliers over the hospital's procurement process for consumables necessary for the provided equipment.

To better address issues in these markets competition advocacy measures are preferred. In particular, these advocacy measures could be implemented by providing proposals to the Government, focused on the development of competition between market participants through the implementation of:

- Reference pricing for equipment and consumables
- A single dialysis area in Ukraine (funding treatment of patients regardless of the place of their residence and the location where the procedure is performed), ensuring equality of all economic entities in the delivery of medical care services on haemodialysis procedures.

*United States**

The paper submitted by the U.S. Federal Trade Commission (“FTC”) and the Antitrust Division of the U.S. Department of Justice (“DOJ”) (together, “the antitrust agencies”) describes the evolution of federal case-law and antitrust analysis in the U.S. regarding aftermarket. The antitrust agencies analyse aftermarket in a similar fashion to other antitrust issues, applying economic analysis to determine likely competitive effects. Consideration of such issues also requires a fact-intensive analysis grounded in protection of the competitive process and an understanding of the potential procompetitive nature of such behaviour. This is consistent with modern U.S. antitrust approach.

In recent years, the U.S. antitrust agencies have not challenged original equipment manufacturers’ use of unilateral aftermarket restrictions on products or services, in the absence of actual lessening of competition for locked-in customers. This approach aligns with the development in jurisprudence in the U.S., which has narrowed the scope of liability for aftermarket restraints since the Kodak decision in 1992. First, when a purchaser signs a contract containing aftermarket obligations regarding parts or servicing at the time of an initial sale, U.S. courts are unlikely to find antitrust liability where the manufacturer lacked market power in the foremarket and consumers had other pre-purchase choices. Second, if aftermarket costs are clear to customers at the time of their initial purchase, purchasers have likely engaged in rational “lifecycle” pricing analysis and courts are unlikely to intervene. Third, where there is no change in policy or where any changes are predictable to customers, U.S. courts are unlikely to impose antitrust liability. Fourth, manufacturers whose aftermarket parts are protected by patent or copyright may obtain dismissal of antitrust claims at an early stage.

Besides enforcement by the antitrust agencies, consumer demand, whether revealed through market demand or complaints to companies about their aftermarket policies, also can change supplier behaviour. Moreover, common law in U.S. states may offer remedies to consumers harmed by a manufacturer’s conduct. Under appropriate circumstances a consumer or a company might bring a private action that alleges breach of contract or tortious interference in state court.

Other laws in the U.S. may apply to unilateral conduct related to aftermarket. For example, most U.S. states have unfair competition laws that may be broader than the federal antitrust statutes, and state attorneys general may enforce those laws related to conduct in their own states.

Policymakers should be mindful that the regulatory process may be used to establish rules limiting aftermarket competition. They should be cautious of regulatory approaches that impose overly broad restrictions on aftermarket competition, or that are not narrowly tailored to address legitimate public policy concerns.