

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

Competition Issues in Aftermarkets - Note from Kazakhstan

21-23 June 2017

This document reproduces a written contribution from Latvia submitted for Item 4 of the 127th 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*

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Kazakhstan

1. Markets of derivative products and services (aftermarkets) are markets that supply goods or services necessary or related to the use of the main product that has already been purchased. As a rule, such goods are called primary goods, and thus its market is called a “primary market.” Additional goods (usually replaceable parts or spare parts) and services related to the use of the primary goods are called secondary goods (and their market is called a “secondary market”).
2. Virtually all researchers analyzing the issues of both primary and secondary markets agree on one thing: the primary goods are the ones that are durable and the ones that in terms of their exploitation period - on professional (industrial) or individual (non-productive) basis - require the use of a number of additional products or services; among the secondary products: after-purchase services and repair, consumables, spare parts, services on improving functional properties of a product, etc.
3. At present, the secondary markets are widely spread in economy. From the perspective of competition, the producer of the primary good, often, is the largest supplier on the secondary market and can use the market power on the secondary market, which raises questions whether this the interference of competition authority on primary and secondary markets is warranted.
4. One of the more relevant questions is the problem of limiting competition on the market of secondary goods, while the intense competition may still be in place on the primary good market.
5. Besides, there are certain problems in balancing the protection of competition and protection of interests of certain players in the market - an issue that is relatively simple in theory, but actually complex and highly relevant in antimonopoly practice.
6. In addition, the principal importance is in the determining the position of a business entity on the market, which, in turn, can be qualified as individually dominant, dominant in the composition of collectively dominant subjects or not dominant at all. The qualification can depend on how the market boundaries are defined. As a rule, the wider those boundaries are, the fewer are the chances to identify a dominant subject on that market.
7. The committee that regulates natural monopolies, protects competition and consumers of the Ministry of national economy of the Republic of Kazakhstan (hereinafter as Committee) often reviews cases related to competition issues appearing on the secondary markets.
8. Taking into account that the Republic of Kazakhstan in terms of the work of the competition authority in enacting antimonopoly legislation of the Republic of Kazakhstan, in accordance with OECD standards, excluded consumer protection from the list of the indicators that might be qualified as violation of antimonopoly legislation, the competition authority of the Republic of Kazakhstan reviews competition solely in terms of violation of antimonopoly legislation without a review of violation of rights and interests of individual participants of the market.

1. The review of the complaint on cochlear implantation, replacement and adjustment of speech processors to cochlear implants.

9. One of the examples on secondary markets out of practice of competition authority of Kazakhstan is the review of the complaint on cochlear implantation, replacement and adjustment of speech processors to cochlear implants.

10. At present, the Committee is reviewing the complaint from the Ministry of Labour and Social protection of population of the Republic of Kazakhstan (hereinafter - Complainant) filed on 6th of February 2017 № 14-1-20-/81-И.

11. The complaint states that the Complainant conducts works in the country on cochlear implantation, replacement and adjustment of speech processors to cochlear implants.

12. For reference: Cochlear implantation is a high-tech operation, in a process of which in the inner ear of the patient the system of electrodes is inserted, which provides perception of sound information via means of electrical stimulation of the preserved fibers of auditory nerve

13. Speech processor is a complex electronic tool, which translated sound waves of mechanical nature into electric impulses. The speech processor is the main and the most complex outer part of the cochlear implant. It is a specialized computer of a small scale.

14. Speech processors to cochlear implants of various firms are not mutually replaceable and later in a case of replacement, the new speech processors have to be produced by the same firm of cochlear implant.

15. Since 2007, 1614 patients with hearing deficiencies in the republic have gone through the operation using the cochlear implantation method. Out of that number, 1233 were treated using the systems of cochlear implantation by the firm «MED-EL Elektromedizinische Geraete GmbH» (Austria) (далее – MED-EL), 373 – «Cochlear Europe Limited» (Australia) (hereinafter – Cochlear) и 8 – by «Neurelek S.A.».

16. In order to provide technical support for disabled children under 18 with cochlear implants, Ministry of Health in 2017 initiated services on purchase, replacement and adjustment of speech processors to cochlear implants.

17. For this purposes, targeted transfers have been allocated from the republican budget for the provision of services for speech processors replacement by local executive bodies.

18. At present, the cost of a speech processors by MED-EL, set by the distributor using currency exchange rate 40,5 tenge for 1 euro, is 3 570 thousand tenge, the speech processor Cochlear is 3 600 thousand tenge.

19. The analysis of informational resources has shown that the prices of above-mentioned producers for retail sales in other countries, namely in Russia and Ukraine, are significantly lower.

20. Official distributors of speech processors in Kazakhstan are

- manufacturer MED-EL-LLP Center of social adaptation and professional - labour rehabilitation of children and teenagers with mental and physical deficiencies “Center SAPR” (hereinafter SAPR)
- manufacturer of Cochlear - LLP “Pharm Express” (hereinafter - Pharm Express).

21. The supplier of speech processors CATP has an authorized right for sales of the product on the territory of the Republic of Kazakhstan (is not an exclusive one, but there are no other suppliers in Kazakhstan at this moment).
22. The supplier of speech processors Pharm Express has concluded distribution agreement on exclusive right for import and further sales of components of cochlear implantation systems, speech processors and other parts produced by the company on the territory of the Republic of Kazakhstan. In addition, the agreement provides that import and sales on the territory of the Republic of Kazakhstan by both residents and non-residents of Kazakhstan of these products by distributors, dealers, and other representatives of Cochlear - is forbidden.
23. Based on above-mentioned, the Complainant affirms that because of the monopolistic position, the two firms have price collusion.
24. Thus, the Committee in actions of LLP “Pharm Express” evidence in violation of subparagraph 1) of the article 174 of the Entrepreneurial code of the Republic of Kazakhstan, namely the abuse of the dominant position in sales of a medical product by setting monopolistically high prices on speech processors of cochlear implantation systems.
25. Today, the Committee is conducting investigation of violation of the legislation of the Republic of Kazakhstan in the realm of competition protection by LLP “Pharm Express”.
26. Also, the competition issues on secondary markets are closely related with issues on intellectual property.
27. In antimonopoly legislation of the Republic of Kazakhstan up to 2017 there were exemptions in anti-competition agreements and anti-competition coordinated actions including agreements on implementation of exclusive rights.
28. So, in the previous edition of article 169 of Entrepreneurial code of the Republic of Kazakhstan, the requirements outlined in this article did not cover the agreements on exclusive rights for results of intellectual activity and other equivalent means of legal entity individualization, means of individualization of goods and services.
29. In addition, in terms of the work completed on enactment of antimonopoly legislation of the Republic of Kazakhstan in accordance with OECD standards, this exemption was excluded and in case if the agreement on implementation of exclusive rights on objects of intellectual property have anticompetitive character and threaten competition, then they are liable under the norms of antimonopoly legislation of the Republic of Kazakhstan

2. Review of the complaints regarding the use of trademarks “Toyota” and “Lexus”

30. The competition authority of the Republic of Kazakhstan has repeatedly reviewed requests from participants of automobile & automotive parts market regarding monopolization of the market of the Republic of Kazakhstan by the rights-holder of “Toyota” and “Lexus”, a foreign legal entity Toyota Jidosha Kabushiki Kaisha, trading as Toyota Motor Corporation (JP)
31. In the course of reviewing the requests, the committee concluded that the rightful owner of the trademark filed in the register of trademarks of the Republic of Kazakhstan

“Toyota” and “Lexus” is Toyota Jidosha Kabushiki Kaisha, trading as Toyota Motor Corporation (JP) (licensor), the right to use the trademark under the contract of non-exclusive license has been granted to LLP “Saryarka AvtoProm” (KZ) (licensee).

32. Wherein, in accordance with point 4 of article 4 of the Law of the Republic Kazakhstan “On Trademarks, Service Marks and Appellation of Origin” (hereinafter as Law), the owner of the trademark has an exclusive right to use and dispose of the trademark he or she owns in relation to the specified goods and services. Nobody can use the protected trademark in the Republic of Kazakhstan without the consent of the owner.

33. In accordance with the point 1 in article 21 of the Law, the exclusive right for a trade mark in relation to all indicated goods or services in the agreement or parts of them can be transferred by the owner to another party under the contract. The transfer of the right on the trademark including its transfer under the contract or by succession should be registered in the authorized agency.

34. Therefore, taking into account the Law, the use of trademark is possible only with right holder’s consent, and the Committee does not see any signs of competition law violation in actions of Toyota Motor Corporation.

35. Thus, considering everything mentioned above, it can be concluded that the issues in aftermarket competition are relevant and demand scrutinous research.