Problems of Resale Price Maintenance in the Automotive Industry-Theory and facts in Slovakia

Bachelor Thesis for Obtaining the Degree

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Affidavit

I hereby affirm that this Bachelor's Thesis represents my own written work and that I have used no sources and aids other than those indicated. All passages quoted from publications or paraphrased from these sources are properly cited and attributed.

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Abstract

The automotive industry has recorded a dramatic increase in the importance of Europe's economy. This sector is currently generating 4% of the EU's GDP and employing over 12 million people which give this industry the leadership among EU employers. The automotive industry became a key industry in Central and Eastern Europe. Among European countries this leadership without a doubt equally applies to Slovakia which is currently holding the biggest car producers (Volkswagen, PSA Peugeot Citroen and Kia Motors and expecting in the upcoming year Jaguar). The purpose of this study is to focus on resale price maintenance, the role of Block exemption regulation in the automotive industry, particularly in Slovakia, the importance of free trade and trade policy as well as free movement of goods, Article 101 TFEU, regulations (and Commission Guidelines and Supplementary Guidelines) in the automotive industry. Especially, to illustrate how the EU competition authorities regulate the market and which regulations affect the trade between the Member States. The further research will support the argument that based on the common historical background, current development and certain shared characteristics of the automotive industry, the EU countries are facing different obstacles with regards to implementation of the EU competition law. The main goal of this research paper is to demonstrate based on the collected data and on the interview with two major dealers on the market which are IMPA a.s. and Inter Porsche Auto that RPM is a crucial problem among the EU Member States in the automotive industry, particularly in Slovakia. Dealers are dramatically losing their freedoms/power and are pushed by the importers to collaborate in contrary with the EU competition law. The purpose of this study is mostly informative and should rather provide valuable knowledge for further discussion of the position of the automotive industry and its elements in the European Union.

Table of contents

1 Economic background of the automotive industry

Over the last few years, the automotive industry became a crucial sector for Europe's economy as well as future. Over 12 million people are employed in this industry, which gives this industry the leadership among EU employers.

The automotive industry is currently generating 4% of the EU's GDP, which is showing us the importance of this industry on the market. The European automotive market is among the world's markets the biggest producer of the motor vehicles as well as the largest investor in research and development, which is the crucial focal point of the EU's investors. In order to enhance the competitiveness of the market and support the global technological leadership the European Commission has implemented some specific rules and supports the R&D. The automotive industry has a very crucial effect on the economy because it is connected with several other industries, which are the suppliers and distributors in the chain. For instance steel, chemicals, and textiles, as well as other industries such as ICT, repair, and mobility services.[1]

Regarding the history of the automotive industry, the key automotive market around 1913 became the United States of America. Other significant impulses in development were the introduction of the assembly-line production of Ford another innovation was brought by Toyota that came with the new so-called lean production system. US automakers have held leadership on the world market until the early 80s until Japan automobile manufacturers did not overtake them. Japanese automakers began gaining prominence in the '60s. In the 70 years they were able to overtake the German producers, and in the 80s and 90s have produced more cars than the United States. In the 90s, however, it began to develop production in China and India. Today, China is currently the largest car market in the world.

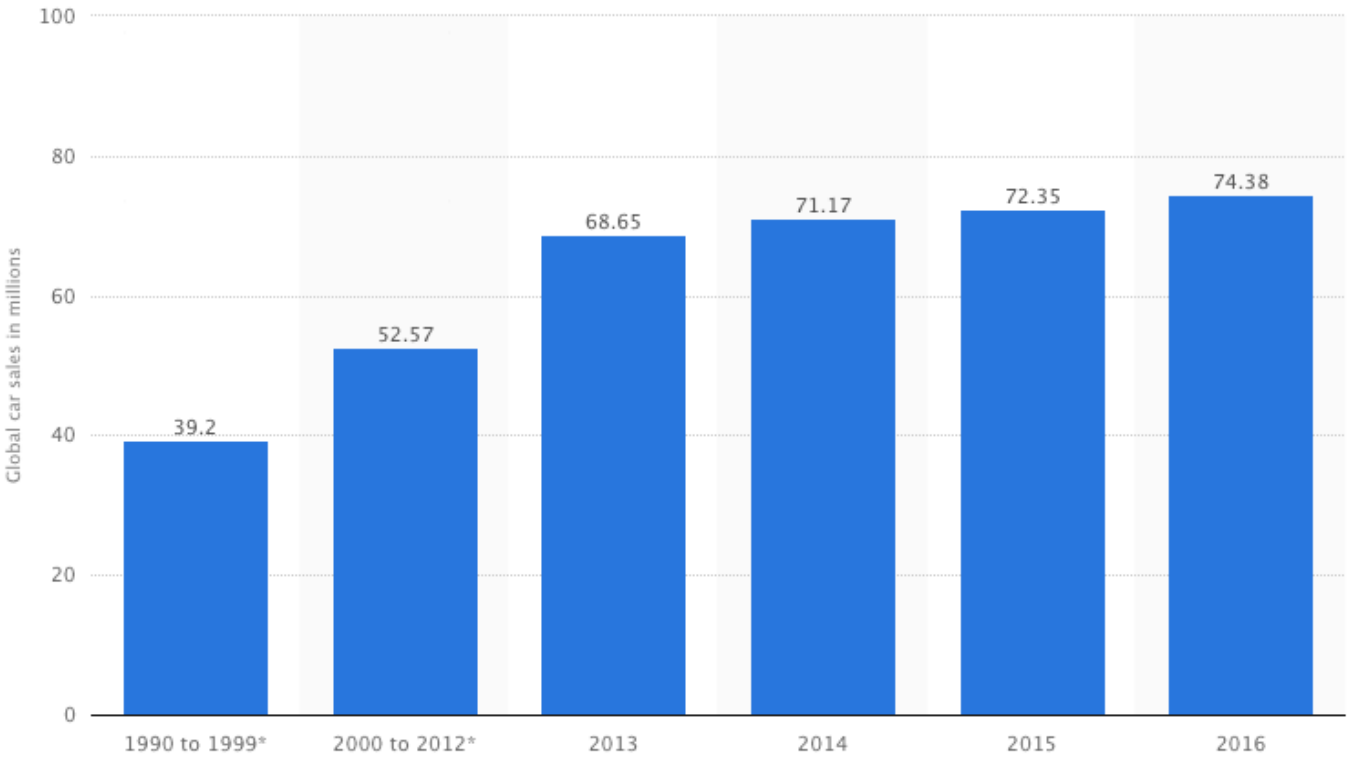
According to the most recent data, in Europe, car production fell by 0.4%. Global production of automotive industry was significantly affected by the crisis in 2009. The production this year fell on all continents except Asia and Oceania. Globally, production recovered until the following year and has recorded an annual increase. The production after the crisis in 2009 increased only on continents Asia and America as well as in Africa. On the European continent car production in 2010 and 2011 grew, but in 2012 and 2013 declined from year to year, as well as the registration of new vehicles decreased.

Global sales of PKW are forecasted to reach a peak of 73, 9 million cars in 2016. As already mentioned China and the United States of America are representing the biggest number among other markets both in production and sales. According to

[1] The European Comission,Internal Market, Industry, Entrepreunership and SMEs, 2014.

Statista 7.7 million cars were sold on the US market in 2015 and 4.25 million cars were produced in the US. Volkswagen, Toyota, and General Motors Group are ranked as the major car producers. However, companies such as Bosch, Continental, Denso and Magna lead the automotive supplier industry.[2]

Global car sales in millions



Source: Statista 2016

Moreover, the automotive industry is currently recording an increasing trend in global sales. The estimates for the future seem very optimistic and executives are expecting that by 2020 the global sales will reach the peak of 100 million.

Slovakia has become one of the leading car manufacturers in Central Europe, mainly due to the presence of three world-class automotive companies: Volkswagen Slovakia, Bratislava; PSA Peugeot Citroen Slovakia, Trnava and Kia Motors Slovakia, Žilina. The automotive industry is a key sector of the Slovak economy. Since the final product needs to be composed of different components, the automotive industry is closely linked with many other sectors of the economy. The growth of car production, therefore, creates growth of the economy and jobs in these areas. Slovak development into one of the world's most important automotive hubs began

[2] Statista. (2014).*Automotive Industry Statistics&Facts.*

in the early 90 years when the German Volkswagen decided to establish a factory for car production near Bratislava. Since then, Volkswagen has become the largest industrial concern and its leading exporter (accounting for about 19% of total export in 2009). In May 2007, the company passed an important milestone in the number of VW cars produced in Slovakia. Since the start of production is now produced more than 2 million cars. Volkswagen's entry into the Slovak market has also attracted other companies and has contributed to strong growth in the production of automotive components. Supply industry in the country that increases its value of production of 621.4 million. Euros in 1998 to 8294.6 million. Euros in 2007.[3]

Further impetus for growth and development of the automotive industry in Slovakia was supported by the emergence of strong automakers PSA Peugeot-Citroen from France and Kia Motors from South Korea, both of which started production in 2006. PSA Peugeot-Citroën entered Slovakia in 2003 after signing an investment agreement with the Ministry of the economy. 300,000 cars a year leave the Kia Motors in Zilina, which proves the importance of this sector to the economy.

Suppliers of automotive components contribute significantly to the increase the market share of the automotive industry. Suppliers are constantly shifting their production to Slovakia, industrial parks in proximity to Bratislava, Trnava, Zilina, Martin, Kosice.

As follows from total revenues of the industry, the share of automobiles in total increased from 11.5% in the year 2000 to 26.5% in 2014. It is twice as much as it was previously which is mostly made by all the inflow of foreign investment, particularly after 2000 and the related development of subcontracting in global value chains. The number of cars produced per year has increased from 182 thousand to more than 970 thousand. The average number of employees working in production sector since 2000 has doubled. In 2014, 65,833 employees were working in the automotive industry. The share of the average number of employees working in this sector in the total number of employees in industrial production over the same period increased from 6.9% to 14.6%.[4] Over the recent years, export of Slovak auto producers played a significant role in the economy. The proportion of exports of passenger cars to its total volume increased up to 17.4%.

According to the official data provided by Infostat, more than 970 000 cars were produced in Slovakia. The past year brought the Slovak market annual growth in sales and registrations of new vehicles by more than 9 percent. The total number of newly registered vehicles has climbed to a level of 81,972 units, of which 72,249 were passenger cars. Slovakia has for several years maintained a position of a world leader in the number of automobiles per thousand inhabitants. In 2014, it was 179

[3] Sario. (2014).*Automotive Innovation Slovakia.*
[4] KPMG. (2014).*Automotive Innovation Slovakia Survey.*

vehicles per thousand population, which exceeds the results of other countries by tens of units to thousands of inhabitants.

Slovakia is currently the third largest car manufacturer in Central Europe. The automotive industry has a huge impact on the development of the Slovak economy. The industry has significant growth potential, given its high production standards and access to both markets - West European and Eastern European.

Growths in the production of passenger cars is reflecting the growing demand in the domestic market and in key export destinations such as Germany. Slovakia is a net exporter of cars, with the automotive sector, which is a major contributor to its external accounts. The Czech Republic and other EU countries are major export destinations.

2.1 History and development of European fundamental rights and fundamental freedoms

Development of European fundamental rights and fundamental freedoms has begun after World War II. Between the most important milestones of international human rights protection, is the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948, the European Convection for the Protection of Human Rights and Fundamental Freedoms on 4 November 1950. Additionally, two 1966 contracts on Human Rights developed within the United Nations: the International Covenant on Civil and Political Rights and the International Covenant on Economics, Social, and Cultural Rights.[5] Development in international law after World War II was flawed by very famous French Declaration of 1789, the American Declaration of Independence of 1776 as well as the bills of rights within the New England States. CH.Walter (2007) demonstrates that the international protection of human rights is an ongoing process formed from a legal culture, which originated in national constitutions.

In Europe after World War II many of the international organizations were found with different goals. Three organizations come into importance, which is very different from each other. Namely, the Council of Europe, the Organization for Security and CO-operation in Europe (OSCE) and the EC/EU. The main focus of these

[5] D.Ehlers.(2007). *European Fundamental Rights and Freedoms*.

organizations differs. The Council of Europe was founded in 1949 and is the oldest among these three organizations and the main task according to article 1 of its Statue is to increase collaboration between its members to recognize the ideal and principles which are their heritage. The Council of Europe became so-called 'guardian of human rights, the rule of law and democracy'.[6] On the other hand, OSCE in the 1970ies mostly focused on political obligations than on legal obligations. Since 1 November 1993, the situation changed rapidly and the three European Communities fall under one roof of the European Union.

2.1.1 The importance of free trade and trade policy

The benefits of free trade can be very easily understood. Free trade is an economic theory, which is made by analysis of exporting and importing goods without any government restrictions or tariffs. According to Catherine Bernard (2010), free trade allows firms for specialization, which leads to a comparative advantage, and comparative advantage leads to economies of scale, which maximize the competition and ensure the most efficient use of any resources. As Adam Smith stated in his well-known treaties *Wealth of Nations* 'It is the maximum of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy…What is prudence in the conduct of every private family, can scarce be folly in that of great kingdom.'[7] Free trade allows nations to focus on products in which they are specialist since countries are similar to each other in terms of natural resources, climate or workforce; specialization gives each country an opportunity to have a comparative advantage over other nations in the same product. Free trade within European Union member states allows members to efficiently maximize its productivity and increase consumer demand. Another benefit from free trade is the cut of the prices and also a great variety of products for consumers to satisfy the demand for goods.

[6] Wording in the declaration of The German Bundestag 50 Jahre Europarat: 50 Jahre europäischer Menschenrechtsschutz BT-Drs 14/1568 of 9 September 1999, p 2.
[7] A.Smith, *The Welath of Nations* originally published in 1776, Bk IV, Ch. II cited in P.Kenen, *The International Economy*, 4th edn (Cambridge:CUP,2000),9.

According to the journal "The European Union explained" the main aim of free trade agreements:

- Open up new markets for goods and services
- Increase protection and opportunities for investment
- Cut customs duties to make the trade cheaper
- Customs clearance
- Create clear rules
- Sustainable development and transparency

The EU's trade policy is becoming very crucial. As globalization is changing the international environment, the trade policy over the past years has become a focal point. Products are not anymore made in one place from start to finish. By opening up new markets better job opportunities were recognized and also open markets generate more economic growth. The EU's economy is the largest economy in the world with the greatest number of imports and exports. The European Union has become over the past years the leading investor and recipient of foreign investments. [8] The main aim of the EU is to provide the single market with free movement of goods, services, capital, and establishment. This will increase the opportunity and ability to trade with another country. The EU is responsible for this market. Therefore, the policy is very import to efficiently regulate and manage this international trade. Moreover, the aim of the EU's trade policy is to increase employment and to create a modern, sustainable and diverse economy. Free trade became one of the most important factors for economic growth and job opportunities.

EU trade in numbers:

- -EU share of world exports and imports:
  16.4% - 2013
- -Foreign direct investment in EU:
  € 3 947 billion - 2012

[8] The European Union explained: *Trade* published in 2014.

- -EU outbound foreign direct investment:
  € 5 207 billion - 2012
- -Manufacturing trade surplus, oil excluded:
  more than € 400 billion - 2013
- -Services trade surplus: € 110 billion - 2013
- -EU development aid: € 56.5 billion - 2013

Source: European Commission.

2.1.2 Free movement of goods

The free movement of goods is the first freedom out of four fundamental freedoms of the internal market and is ensured by eliminating custom duties and the prohibition of measures having an equivalent effect. At first glance, free movement of goods has been perceived as a part of a custom union between the EU Member States. The major aim was to cancel custom duties, quantitative restrictions on trade (export/import) and all measures having equivalent effect, which shall be prohibited between member states.[9] Furthermore, the objective was to eliminate any crucial issues or barriers to providing the Member States with free movement of goods, which means creating the internal market without borders. Therefore, the goods can freely circulate through the Member Stats as on a national market. On 1 July 1968, the cancellation of customs duties and quotas on exports and imports between the Member States was successfully accomplished.

This section will provide an overview of the rules, restrictions, and prohibitions on free movement of goods, focusing on how different agreements and provisions interrelate within the EU on an international scale. 'Free movement of goods' is one of the biggest successes of the European Communities/EU. This freedom allows circulation of goods without any restrictions and tariffs within the EU. Article 28 TFEU (ex Article 23(1) EC) contains the core of the rules on goods.

[9] Maciejewski.M.(2016).*Fact Sheets on the European Union, Free movement of goods.*

The Union shall compromise a customs union which shall cover all trade in goods and which shall involve the prohibition between the Member States of customs duties on imports and exports and all charges having an equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

The first paragraph of the article 28 TFEU (ex Article 23(1) EC) shows that the free movement of goods has two dimensions. Products originating within the European Union have the rights to be transferred within the Member States without custom duties. However, goods with the origin outside the EU can be imported within the EU only once they have paid the common customs tariff (CCT).

Article 34 and Article 35 TFEU (ex Article 28 and 29 TEC) provide the information about quantitative restrictions on imports and exports and that all measures having equivalent effect shall be prohibited between the Member States

According to Article 36 TFEU "the provision of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States."[10]

2.1.3 What are goods?

The concept of goods is defined as tangible assets (movable and immovable properties, electricity, gas, water, heat, cold, banknotes and coins sold for collection purposes), where there is a transfer of the right to dispose of the tangible property as owner.

Article 34 and 35 of TFEU focuses on all types of imports and exports of goods and products. Goods are also defined as products which 'can be valued in money and

[10] Free movement of goods, Article 36 TFEU.

which are capable, as such, of forming the subject of commercial transactions.[11] As Advocate General Fennelly put in *Jägerskiöld*[12], goods 'possess tangible physical characteristics'. Therefore,the court has found products very diverse. Paintings and other works of arts, petroleum products,[13] animals, coins which are no longer legal tender,[14] and waste (whether recyclable or not, even though it has no market value)[15] to constitute goods. Moreover, it has defined electricity and natural gas to be a good by quoting to its treatment as goods in Union law and in the laws of the Member States as well as in the Union's tariff nomenclature. On the other hand, the television signal is not a good. It is just a service which is provided by the provider. Goods can be imported either for commercial or personal use.[16] Examples mentioned above underline the importance to distinguish between goods and services. Where goods are in secondary use to the main activity, the other provisions of the TFEU will apply. If it is not possible to recognize the main focus point on the national measure'[17] the Court will apply the goods provisions as well as the provisions on services. It is crucial to understand, whether to apply rules for free movement of goods or freedom to provide services.

[11] Case 7/68 Commission v. Italy ((1968) ECR 423,428-9.
[12] Case C- 97/98 Jagärskiöld v. Gustafsson (1999) ECR I-7319. Para. 20.
[13] Case 72/83 Campus Oil Ltd and others v. *Minister for industry and Energy and others* (1984) ECR 2727, para 17.
[14] Case Thomprson (1978) ECR 2247. Cf. donations in kind which are not goods: Case C-318/07 Persche (2009) ECR I-359, para. 29.
[15] Case C-2/90 Comission v. Belgium (1992) ECR I-4431, para. 28; Case C-221/06 *Stadtgemeinde Frohnleiten v. Bundersminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft* (2007) ECR I-9643,paras. 36-8.
[16] Case 218/87 Schumacher (1989) ECR 617.
[17] Commission guide, above n. 1, 47.

2.1.4 Cross-border/territorial element

According to issues in trade between the Member States, Article 34 TFEU will apply. A cross-border element is a requirement for any of the Treaty provisions on goods to apply. In other words, there must be trade between the Member States, which cover the members of the EU,[18] together with the states of the EEA. Only national measures, affecting only domestic goods are not within the scope of Articles 34-36 TFEU. Overall, Union law cannot be applied where there is no movement of goods between the Member States. Basically, Member States can more favorable than domestic goods treat imports. This principle is known as reverse discrimination.[19]

Regardless of whether goods have EU origin or are manufactured outside the EU, once they are in 'free circulation' in the EU, they benefit from the principle free movement of goods.

2.1.5 Addressees of the treaty provisions

According to Articles 34-36 TFEU, the provisions on goods apply to the Member States. However, by the term 'Member State' it is directed to all the authorities of a country, including governmental authorities, as well as other authorities regardless in what capacity they are acting (e.g. legislative, or executive). Moreover, the Treaty provision on goods is also applicable to all public bodies established under public law. The consequence is that the Treaty provision of goods is not applicable to private authorities acting only in private capacity.

2.2 EU competition law

The Treaty of Rome in 1957 established the European Community. Firstly, it consisted of six Member States. While the Treaty of Lisbon entered into force on December 2009, the EC Treaty was renamed, called Treaty On Functioning Of The

[18] It also applies European territories for whose external realations a Member State is responsible and to overseas territories dependent on or otherwise associated with a Member State.
[19] Bernard.C. (2010).*The Substantive Law of the EU*

European Union (TFEU), which is one of the two primary Treaties of the European Union. According to the legal text of Article 1 (1) TFEU: "This Treaty organizes the functioning of the Union and determines the areas of, delimination of, and arrangements for exercising its competences." Moreover, Article 1 (2) TFEU states that: "This Treaty and the Treaty on the European Union constitute the Treaties on which the Union is founded. These two Treaties, which have the same legal value, shall be referred to as 'the Treaties'."[20]

The European Union consists of 28 Member States: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK. The main achievement and focus of the EU is to create a single, or common market within Europe. The main aim is to allow people, goods, services and capital to circulate freely among the EU Member States. In order to make sure that consumers are treated fairly and recourses are used efficiently, competition law prohibits certain business practices which are included in Articles 101 and 101 under TFEU.

According to UK Competition Commission, competition is defined as 'a process of rivalry between firms seeking to win over time'. Competition on the market force companies for efficiency, a greater variety of products on the market and competition between companies also helps to increase the quality of products provided and decrease prices. The main aim of the competition is to provide citizens of Europe with higher quality goods with reduced prices.

As opposed to that a monopolist or competitors under collusion may decrease output or increase prices without facing the risk to lose customers to his competitors.

[20] Consolidated version of the Treaty on the Functioning of the European Union.2012. Article 1, para.1,2

The main task of EU competition law is to regulate the market, behavior of firms on the market. Below is illustrated the full text of Article 101, which is very crucial for the competition in the automotive industry and in a competition as a whole.

Article 101 (ex Article 81 TEC)

The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

According to Article 101 TFEU (ex Article 81 EC), competition law prohibits price fixing cartels among competitors and any other agreements that are against competitors and prohibits monopolies from setting/charging not regulated prices (Article 102 TFEU (ex Article 82 EC) which can be also called abuse of dominant market position. Firms that do not comply with their rules may be fined by the Commission. This indicates that competition law is designed to prevent any monopoly power and focus on maintaining market competition by regulating firms with regulations. Competition law also observes Member States regulations of markets and can directly prohibit legislation, which is against fair competition. Furthermore, competition law monitors mergers to avoid gaining the competitive advantage when it is obvious that by merging, a newly formed entity gain power over the others. When the EEC Treaty was signed in Rome in 1957, a pressure occurred from Americans but also from other European authorities to include

competition law in the Treaty.[21] In contrast, most of the Member States did not introduce competition law to its legislation but rather favored arrangements between firms (cartel arrangements) and promote national monopolies.[22] In some Member States competition law was introduced in the 1990s. The main aim of implementing competition law into the EEC Treaty was to keep internal market rules and regulations and to support competition across borders.[23] However, competition law is nowadays widely accepted.

The European Commission is responsible for the correct implication and application of EU competition rules. The European Commission has a great variety of authorities to investigate practices, which do not fall under EU competition law.

This includes anticompetitive agreements, abuse of dominant position on the market, mergers and acquisitions and government support.

2.2.1 Aims of EU competition law

There is an ongoing debate every day between the Member States and EU regarding competition law. Generally, competition law should be compulsory for firms which are acting against consumers. There are two type of perspective. One is that competition law should not be connected to efficiency but rather to maintain competition. On the other hand, there is another perspective which focuses on implementing competition law to promote economic and non- economic indicators, such as promoting national industries, regulating employment and protecting the market. According to Mr.Mojsejevas, the objectives of EU competition law are maximizing efficiency, promoting fairness and equality, facilitating privatization and

[21] D.J.Gerber, *Law and Competition in Twentieth Century Europe* (Oxford University Press, 1998).
[22] H.G. Schröter, Centralization and Decentralization in Europe, 1870-1995: Rise and Decline of an Economic Institution(1996) 25 *Journal of European Economic History* 129. An exception was West German's Competition law drafted in 1957.
[23] G.Marenco, The Birth of Modern Competition Law inEurope in A. Von Bogdandy, P. Marvroidis and Y. Mény, *European Integration and International Coordination:* Studies in Transactional Economic Law in Honour C-D Ehlermann (The Hague, Kluwer, 2002).

market liberalization, promoting competitiveness in international markets.[24] Another important aim is the integration of the internal market. R.Wesseling claimed that conditions of EU competition law were implemented considering Article 28 and Article 30 of the EC Treaty.[25](ex Articles 34 and 36 of the TFEU)[26]. According to the Court of Justice Article 101 of the Treaty on the Functioning of the European Union is the most important provision for the proper functioning of the internal market. However, when the agreement has a restriction of competition implemented in it, no anti-competitive effects need to be provided regarding the application of Article 101 (1) TFEU.[27] Moreover, very important point is the protection of the consumer and effective competition. They are the main objectives of EU competition law, national competition authorities, and the European Commission. The effective competition was mentioned by the EU Commission, which stated that in the internal market, they want to ensure that a business holding a dominant position on the market do not eliminate other competitors in the process of competing with each other. In order to create a free market economy and enhance economic development the freedom to compete is another very important aspect. The freedom to compete might help to decrease or eliminate the power of the market leaders. Lastly, R.Moisejevas mentioned the protection of the competitors and protection of small and medium sized businesses as objectives of the EU competition law.

2.2.2 Economics in competition

Consumers are all different. They perceive products with different values, have different income and also have different preferences regarding the product; consequently, they will be willing to pay different prices for different products.

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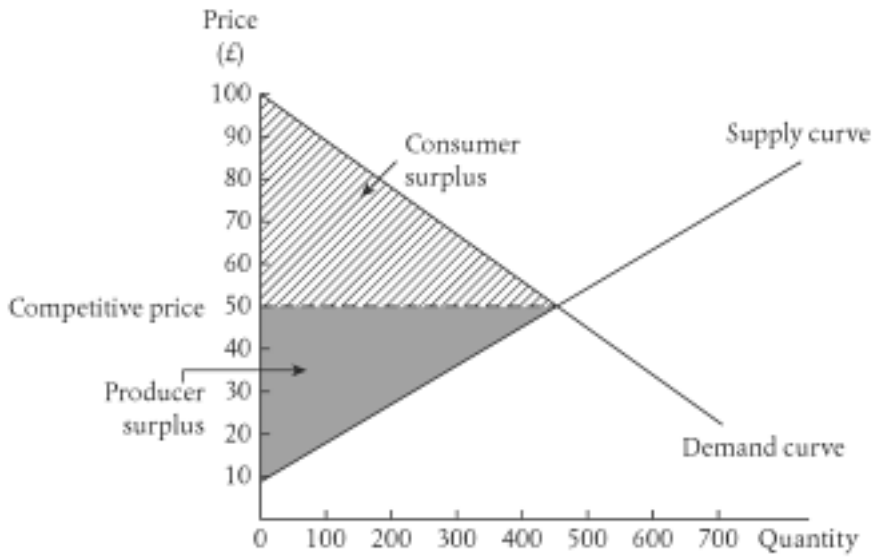
[24] Raimundas Moisejevas. (2013).Some thoughts concerning the main goals of competition law.

[25] Wesseling.R.(2000) *The modernisation of EC antitrust law*. Hart Publishing.
[26] Treaty on the Functioning of the European Union 2010 OJ C 83/47.
[27] Comission, Notice, Guidelines on the Application of Article 81 (3) of the Treaty, (2004/C 101/08), para.20.

In economics, the term reservation price is crucial to be understood. Generally, it shows the maximum amount which consumer is willing to pay for a particular product. The relationship between price and supply is illustrated by market demand curve.



Demand curve and consumer and producer surplus

Source: European Union Law 2010

From an economic point of view, competition law shall prohibit commercial practices that can harm the operation of markets and promote decision that leads to economic benefits. According to economists, there is a very strong correlation between market's structure and its economic performance. Moreover, there are two extreme structures; perfect competition is when firms producing mostly the same product, where new enterprises can enter the market and existing enterprises exit the market easily. The other extreme is when there is only one supplier in monopoly industry, which has the greatest market share, and it is very hard for another firm to enter the market.

2.2.3 Fines for breaking competition law

Prevention of breaking the law is issued by the Commission's policy. It is a guideline how to comply with the law. There are two objectives of the Commission, which are to deter and to punish. Not complying with the competition rules means profit for

enterprises if the infringement is not punished. Commission fining policy is mostly based on the size of the breach or value, which is an output that leads to harm the economy. Once the Commission recognizes the infringement, it has a great variety of powers, which may be set into two categories. First, the Commission has the power to end the infringement and to remedy the anti-competitive practice.

Regulation 1/2003/EC, article 7(1)

Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article (101 TFEU) or of Article (102 TFEU), it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioral or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioral remedy or where any equally effective behavioral remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.[28]

Generally, in cases regarding cartels, the Commission mostly force undertakings to bring the agreements to an end, consequently, the damage will no longer occur. On the other hand, the Commission is not allowed to raise any obligations that are not necessary to bring the infringement to an end.[29] The starting point of setting fine is the annual turnover occurred by breaching competition law during the last year of the infringement. The fine might be up to 30% of the company's sales, depending on the size of infringement, which depends on several factors, such as abuse of dominant position, price fixing, market sharing, geographic scope and whether the breach of competition law occurred. For cartels, the fine tends to be in the range between 15%-20%. Fines not exceeding 1% of firm's turnover might be forced for

[28] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[29] D.Chalmers,G.Davies,G.Monti *European Union Law* (Cambridge University Press,2010)

procedural infringements.[30] The overall limit of fines set by the European Commission is limited to 10% of the annual turnover of the company.

3 The general antitrust rules

The general rules of EU competition law are set out in Article 101 TFEU and 102 TFEU. Article 101 TFEU (ex Article 81 TEC) prohibits all agreements between undertakings, decisions by the association of undertakings and concerted practices which may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

Prohibitions:

1) Agreements between undertakings/Concentrated practices with restrict competition (cartels). This is viewed as serious harming infringement which will be always attacked by the court.
2) Other agreements between businesses with the main objective to restrict the competitors which are dissimilar conditions to equivalent transactions with other trading parties.

Article 102 TFEU (ex Article 82 TEC) prohibits any abuse by one or more undertakings of a dominant position with the internal market which may affect trade between the Member States.

These European competition rules apply to agreements entered outside the EEA if they have any effects within the EEA (the effects doctrine).

In addition to articles 101 TFEU and 102 TFEU, the merger control regulation allows the European Commission to regulate certain mergers, acquisitions in order to avoid abusing a dominant position.

[30] Regulation 1/2003, Article 23(1)

3.1 Anticompetitive agreements

Prohibited are in particular agreements restricting competition that involves, the direct or indirect fixing of prices or other trading conditions, a commitment to limit or control production, markets, technical development or investment, the allocation of markets or sources of supply, a commitment from parties to the agreement to respect each entrepreneurs, they will be in identical or comparable fulfillment nom apply different conditions which are or may be disadvantaged for entrepreneurs in the competition, signs of collusive behavior, the result of which undertakings coordinate their bids in the procurement process. Moreover, restriction of competition by the cumulative effect of agreements restricting competition which contain a similar type of restriction of competition and lead to similar effects in the relevant market and their combined share exceeds 10% of the total shares for goods in the market.

Horizontal agreements are agreements between undertakings operating at the same market level (two or more competitors, more problematic).

Vertical agreements are agreements between undertakings operating at different market levels (producer and supplier) e.g. resale price maintenance. Anti-competitive effect not only has the agreements between direct competitors (horizontal agreements) but also vertical agreements between undertakings which operate at other stages of the distribution chain, for example, related supplier - customer. The precise definition of prohibited agreements is contained in the EU competition law. This could include exclusive distribution agreements or agreements whose conclusion is conditional on further commitments by nature or according to commercial usage, have no connection with the subject of such contracts. Not all vertical agreements are contrary to the law on protection of competition, either because the market impact is negligible or positive effects outweigh the negatives.

Vertical agreements are understood as agreements or concerted practices entered into between two or more undertakings each of which operates for the purposes of the agreement or concerted practice at a different level of the production or distribution chain and which relate to the conditions under which the parties may

purchase, sell or resell certain goods or services. The fact that entrepreneurs each operating at a different level of the production or distribution chain is for example one entrepreneur produces a raw material which the other entrepreneur uses as an input, or that an entrepreneur is a manufacturer, the second a wholesaler and the third a retailer of goods.

Vertical relationship, therefore, means that the entrepreneur is a supplier of another entrepreneur, respectively, equivalently; one entrepreneur is another entrepreneur's customer. A market in which the supplier is operating is called the upper market (upstream market) and the market in which the customer is operating is called lower market (downstream market).

3.2 Cartels

The cartel is an agreement between undertakings, which are competitors. The term cartel may refer either to only so-called hard-core restrictions (particularly price fixing, market sharing, output restrictions, and bid rigging) or to any form of a restriction of competition (not only hard-core restrictions but also any other form). Some agreements that are prohibited under Article 101 (1) may fulfill the conditions under Article 101 (3). This can be made when efficiencies of those agreements outweigh anti-competitive effects and also the benefit from these agreements is proportionally distributed between consumers.

However, cartels will be always seen as harmful/ have negative effects on the market. Cartels are among the most serious violations of competition rules, from which benefit only its participants. Cartel agreements remove the competition between the competitors, resulting in a significant increase in prices, less choice of goods and services. The negative impact on the consumer is ultimately reflected in the economy as a whole. Therefore, it is impossible that cartel agreements would satisfy the rules of Article 101(3). As already provided the full length of Article 101 TFEU in the passage EU competition law, the Article 101(3) TFEU is not applicable to hard-core restrictions.

3.2.1 Other legal aspects of EU competition law

Abuse of dominant position:

Dominant position in the relevant market is when the entrepreneur or several entrepreneurs who are not exposed to substantial competition, or based on their economic strength can behave independently. Abuse of dominant position in the relevant market is particularly:

- directly or indirectly imposing unfair trading conditions
- the threat of restrictions or limiting production, markets or technical development
- applying different conditions to conforming or comparable performance to individual entrepreneurs who are/or they might be disadvantaged entrepreneurs in the competition
- binding to the agreement of the contract on condition that the other party will also adopt additional obligations which by their nature or according to commercial usage have no connection with the subject of that particular contract
- temporary abuse of economic power to exclude competition

Antitrust authorities in order to preserve competition affects, among other things, intervenes undertakings that abuse their dominant position. The purpose is to ensure that by dominant firms to prevent the use of their strong market position while the authorities focus on those types of conduct that are most damaging to consumers. Cases of abuse of a dominant position must stand on the so-called. "Damages theory" that is, the economically logical and consistent explanation of how the proceedings considered a negative effect on consumers.

A prerequisite for the process of the competition act is to prove the existence of a dominant position in the relevant market. The dominant undertaking exists if the undertaking has scope for independent conduct in relation to competitors, customers, and consumers, which allows it to influence the market parameters, such as price, output, innovation, and so on. In determining dominance is based on the market share of the undertaking in the relevant market and its evolution, taking into

account, however, other factors such as market structure, barriers to entry and countervailing buyer power. It is obvious that the determination of dominance is assessed on a case by case basis taking into account the characteristics mentioned above.

Generally, a dominant position is not in itself prohibited. Entrepreneurs are naturally trying to "conquer the market" by increasing efficiency, innovation, improving quality and reducing prices. Entrepreneurs shall not abuse its dominant position, and thus limit the competitive pressure and impede the entry of competitors.

Article 102 TFEU prohibits any abuse of dominance by one or many undertakings on the market. It strictly prohibits taking an advantage of monopoly power within the internal and external market which can affect trade between the Member States. As previously mentioned it is not prohibit holding a dominant position, but these businesses have special rules and guidelines how they shall behave on the market having no effect on the development of competition. It is in contrary to the EU competition rules if the dominant position is abused. Fidelity discounts, predatory and excessive pricing, refusal to supply and discrimination are types of abuse that are in breach of the EU competition law. These actions strongly affect the competition. Only a few companies enjoy their position on the market that they at risk of being investigated under Article 102 TFEU. This means that markets should be defined for these purposes. Moreover, when a business is holding a dominant position on the market without being abusive to the market it still shall be suspected if its agreements and behavior are not in contrary with Article 101 TFEU. A few Member States already implemented some regulations to national laws to avoid an abuse of dominance on the market, so to eliminate monopoly power and increase the competition.

According to the European Commission[31] examples are:

- the dramatic increase of prices (unreasonable prices)
- depriving smaller competitors of customers by selling at artificially low prices

[31] European Commission (2013*). Antitrust procedures in abuse of dominance (Article 102 TFEU cases).*

they can't compete with

- obstructing competitors in the market (or in another related market) by forcing consumers to buy a product which is artificially related to a more popular, in-demand product
- refusing to deal with certain customers or offering special discounts to customers who buy all or most of their supplies from the dominant company
- making the sale of one product conditional on the sale of another product.

Merger control:

The merger is the process of economic combining of undertakings through merger of two or more independent undertakings or acquiring direct or indirect control by one entrepreneur or more undertakings of the business or part of another undertaking's business.

The European Union merger regulation (Regulation 139/2004) is the major instrument to control mergers and acquisitions at the EU level. The EU merger regulation gives the Commission jurisdiction to control transactions between undertakings. Before the merger will come to existence, the Commission has to be informed and approved such a transaction.[32] When a merger does not fulfill the criteria, it may be subject to breach of national merger control rules. It is important to keep in mind that merger control regulation is also very relevant for several joint venture transactions (JV). For example, two or more companies can decide on establishing a new JV company which is controlled by its parent company. This company may either take over some already existing activities or could be also a newly made JV. If this JV has an 'EU dimension' than the Commission has to be informed by this transaction under the EU merger regulation. If the JV does not fall under the EU merger regulation, it shall be judged by the general Articles 101 and 102 TFEU procedures and might be able to benefit from a block of exemptions.

[32] For more detailed guidance on the EU Merger Regulation (including its application to certain joint ventures) see separate Slaughter and May publication on The EU Merger Regulation. That publication also includes a brief overview of the national merger control rules in each of the EU Member States

Joining the company may reduce production and transaction costs, improve their innovation potential, bringing the total to stimulate a competitive market. On the other hand, the proposed merger may restrict competition, and if it has the potential to reduce effective competition. A typical example of reduction of effective competition is the creation or strengthening of a dominant position in a particular market on the basis of concentration. Not all mergers among businesses subject to control by the antitrust authorities, but only those for which the criteria for turnover are fulfilled. The purpose of the adjustment was to analyze mergers of undertakings with a certain force, for which it is necessary to fall under the control mechanism.

3.2.2 Enforcement of the EU competition rules

The competition rules and regulations have been mainly implemented by the Commission (a task predicted by Article 103 TFEU (ex Article 83 EC)) via the Directorate-General for Competition based in Brussel.[33] The power of the Commission was ruled in Regulation 17/62/EEC, which was applicable from 1962 since 2004, and later on was changed by Regulation 1/2003/EC which is applicable from 2004.[34] The Commission may start its investigation upon their own initiative, for instance caused by curious press release or investigation of an economic sector under the rules stated in Regulation 1/2003, article 17. Furthermore, it can start investigation initiated by private authorities regarding breaking the rules. However, the Commission officially does not need to make a decision on every complaint they can freely priorities the case, which are in interest with a Union.[35] Consideration of a Union interest is when parties perpetrate violations, when the case gives rise of legal issues or if there is a direct effect on market integration. In order to increase application of competition law at national level, fever cases will be in the future considered to be of Union interest. According to the official letter of the European

[33]D.Chalmers,G.Davies,G.Monti *European Union Law* (Cambridge University Press, 2010)

[34] Regulation 17/62/EC, First Regulation implementing Articles 81 and 82 EC (1959) OJ Spec. Edn 062, 57; Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and 82 EC (2003) OJ L1/1

[35] Commission Notice on cooperation within the Network of Competition Authorities (2004) OJ C101/42, paras. 14, 15 and 54.

Commission "the Commission may also impose fines on undertakings, which violate the EU antitrust rules."

National Competition Authorities (NCAs) are responsible for the fair competition on the market. Especially to ensure that competition is not restricted or altered.

The cases which are under anticompetitive agreements can be started upon 1) a complaint, 2) opening of an own–initiative investigation, or 3) a leniency application from one of the participants to a cartel.[36] Under the Commission's Leniency Program the first company, which will decide to participate in the infringement and contribute to the investigation, can be eligible for fine reduction. According to the official letter by the European Commission, the Commission is empowered to do the following: send the request to the firms to commence investigation, collect the relevant records related to business and use them afterwards for investigation, explore the firm's business areas, seal the business premises and records during an inspection, ask members of staff or company representatives questions relating to the subject-matter and purpose of the inspection and record the answers.[37] The decision of a European Commission has the right to be either altered or annulled in front of the EU General Court.

3.2.3 Leniency program

Leniency program under the European Commission which defines the exact procedure when applying for the application of the leniency program.

The Slovak Law on Protection of Competition allows the Authority to impose a fine or reduce the fine for entrepreneur participating in the cartel, which would otherwise be for the unlawful conduct imposed.

Not to impose a fine is possible only once, to the first entrepreneur who requests its own initiative on immunity from fines and also provided decisive evidence of the

[36] European Comission.(2013). *Antitrust procedures in anticompetitive agreements*.

[37] European Comission.(2013). *Antitrust procedures in anticompetitive agreements, Investigation.*

cartel or submits information and evidence that are relevant for inspection. If a participant in a cartel submit relevant evidence, that one that by itself might not be sufficient to prove an agreement restricting competition, but in conjunction with the information they already have authority available to agreements demonstrate the possible reduction of fines of up to 50% of the penalties that would otherwise have been imposed.

The leniency program makes a major contribution to the detection and sanctioning of cartels, encourages entrepreneurs to cooperate with the authorities and thus help the body to fight the cartels. Official papers issued by the European Commission regulates, inter alia, details of the form of administration, the summary information to be provided, the possibility of "reservations" to the order in the case that the entrepreneur needs more time to gather this evidence, etc.

3.3 Examples of hard-core cartels which have been fined

The trend of the fines to eliminate hardcore cartels is steadily increasing over the past years. Moreover, the following two cases are cases of hard-core restrictions, which show the application of Article 101(1) TFEU. There are also several other competition cases in the automotive industry, which fall under RPM. In the case of *Car Glass* 2008 which was the highest fine, the Commission has fined three companies a total of €13 billion for the exchange of a very sensitive information regarding the competitors as well as illegal market sharing. One of the latest cases that concerned price fixing arrangements resulted in The Federal German Cartel Office (Bundeskartellamt) fining five auto parts manufacturers a total of €75 million for participating in a cartel. The German Cartel office said the fines were ordered to five auto parts suppliers because they participated in price fixing agreements that lasted at least from 2005 till 2013. The major issue was that these agreements agreed on prices in tenders upon the orders placed by original manufacturers, which is definitely contradicting to EU competition law. According to the Bundeskartellamt the companies fined were Autoneum Germany GmbH, Carcoustics International GmbH, Greiner Perfoam GmbH, Ideal Automotive GmbH, and the International Automotive Components Group GmbH. Although another company, which was

involved, in this case, was Johann Borgers GmbH, they were not fined under the leniency program because they were the first who cooperated with the Bundeskartellamt investigators. According to Andreas Mundt, who is the president of the Bundeskartellamt: "the cartel participants were generally in agreement that they would, where possible, not target the existing business and follow-on orders of their competitors."[38] Citing Mr Mund: "The companies agreed on minimum price levels, to pass on increases in raw material prices to their customers, on discounts to be granted, compensation for tool costs and to include cost escalation clauses in their contracts," Mundt also mentioned that agreements covered "minimum price levels, passing on of raw material price increase, discounts, tool cost compensation and contract escalation clauses." The agreements between these companies were focused on car components, including flooring, car mats, hat racks, trunk trims, textile wheelhouse shells, engine compartment insulation, front shock absorbers and trunk shock absorbers. The German Cartel Office also noticed that not all the companies were equally involved in these anti-competitive agreements and that not all companies colluded through the same intermediaries. The Bunderkartellamt also mentioned in their letter that this were the first fines in its history which were applied upon the anonymous notification to the system which is focused on anti-competitive investigation. Right after the Cartel Office decided that that information were sufficient they immediately started the investigation process regarding the price fixing agreements. Very unusual in cases such this was that all of the companies started cooperating with the Bunderkartellamt, which afterward led to reducing their fines under the leniency program. Although, the German Cartel office did not specifically illustrated the breakdown of amount that each company was fined, the company Autoneum Germany said: "they agreed to a settlement with the office in which it will pay €29.5 million and by paying the amount agreed in the settlement, Autoneum Germany is able to bring to a close the proceedings that primarily concerned the actions of its predecessor." The German Cartel authority mentioned in their public statements that during the proceedings no damage was caused to the customers of company Autoneum. They were only fined €8.4 million. Axel Kuhner, who is the chairman of the Greiner's management board said that they cooperated with the authorities that were responsible for this case right from

[38] See Law360: Germany Fines Auto Part Makers €75M Over Cartel.

proposed initiative to investigate those price fixing agreements in order to reduce the fine. The German Cartel office is the latest European competition authority who fined the producers of automotive parts.

3.4 Commission fines car parts producers € 137 789 000 in cartel settlement

The European Commission has found out that Mitsubishi Electric and Hitachi were participating in cartel agreements regarding alternators and starters with another Denso. Both two companies have received the fines of € 137 789 000. The company Denso was not fined as they decided to participate in the infringement and contribute to the investigation. They were eligible for fine reduction.

Over the last five years, the three companies (car parts manufacturers) altered the prices of alternators and starts and allocated in regard to geographic position. These two parts are the two most important components of the engine. Although the anticompetitive agreements came into existence outside the EEA, the European customers were directly affected because the parts were sold to the manufacturers, which are operating in the EEA. Therefore, the European Commission brought an action.

The representative of the European Commission Margrethe Vestager who is responsible for the anticompetitive agreements has mentioned:

"Breaking cartels remains a top priority for the Commission, in particular when they affect important consumer goods, such as cars. Today's decision sanctions three car part producers whose collusion affected component costs for a number of car manufacturers selling cars in Europe, and ultimately European consumers buying them. If European consumers are affected by a cartel, the Commission will investigate it even if the cartel meetings took place outside Europe." [39]

The Commission's representatives have found out that three Japanese, particularly Mitsubishi Electric, Hitachi companies and Denso were in contact on a regular basis

[39] European Commission Press release (2016).Antitrust: *Commission fines car parts producers in cartel settlement.*

and met various times in order to minimize the competition between them. Especially, they agreed on who will win the tender, which business they will target, they also decided on a specific price, which will win the tender. They shared various markets, which they supply with alternators and starters among themselves. Moreover, they exchanged very sensitive information about the prices and market strategies.

The fines were divided between these three firms according to the general rules of the Commission's 2006 Guidelines on fines.

In the decision process, the Commission had taken to account the sales generated from the supply of alternators and starters of the firms on the Asian market as well as sales in European Economic Area, the duration of the anticompetitive proceedings and to what extent the EU antitrust rules have been violated.

Under the Leniency program the firm Denso has received the reduction of 100% of the fine because they uncover the cartel agreements therefore, they avoided the fine of €157 million.

For the cooperation with the investigators, Hitachi and Melco received also a reduction on the fine. The Commission has taken into account the duration of their cooperation and also the content of the documents the Commission was provided with to reveal and prove the existence of the cartel. Therefore, the Hitachi was fined € 26 860 000 and Melco €110 929 000.

4 Resale Price maintenance in the European Union (developments since Leegin)

The history of RPM has gradually changed in 2007 when the U.S. Supreme Court ruled that RPM (Dr.Miles,Leegin) should no longer be considered as "per se" violation but should be subjected to a "rule of reason" approach.[40] The opinion of the court regarding the Leegin opened a new debate on both sides in the European Union and in the United States with respect of RPM in vertical agreements. The

[40] Leegin Creative Leather Products, Inc. v. PSKS, Inc.,127 S.Ct.2705 (2007).

greatest impact of Leegin on RPM is shown in the judgment (2008) of the ECJ in the case called CEPSA, where the court officially ruled the following:

[when] there is an agreement between undertakings within the meaning of Article (101 TFEU), as regards the sale of goods to third parties, the fixing of the retail price of those goods constitutes a restriction of competition expressly provided for in Article (101(1)(a) TFEU) which brings that agreement within the scope of the prohibition laid down in that provision to the extent to which all the other conditions for the application of that provision are satisfied, namely that agreement has as its object or effect to restrict appreciably competition within the common market and is capable of affecting trade between the Member States.[41]

If (a distributor is) required to charge the fixed or minimum sale price imposed by (a supplier), that contract (...) will be caught by the prohibition provided for in (101(1) TFEU) only if its object or effect is to restrict appreciably competition within the common market and it is capable of affecting trade between Member States.[42]

In the official text above the Court clearly indicated that vertical agreements, which include RPM obligation, do not necessarily fall under Article 101 (1) TFEU.

Furthermore, the debate initiated by Leegin had a strong impact in the European Union regarding the Commission's new Guidelines on Vertical Restraints in 2010, whose main aim was to follow/replace the previous Guidelines on Vertical Restraints of 1999.[43] Generally, in the previous Guidelines from 1999, the Commission stated that RPM is a "hardcore restrain" (if a vertical agreement contained such a limitation than it would be prevented from benefiting from the safe harbor by the Regulation on the block of exemption of vertical restraints).

On the other hand, the new Guidelines on Vertical Restraint from 2010 focus more

[41] Case C-279/06 *CEPSA Estaciones de Servicio SA* [2008] ECR I-6681, § 42.

[42] Case C-279/06 *CEPSA Estaciones de Servicio SA* [2008] ECR I-6681,§ 72

[43] Commission notice Guidelines on Vertical Restraints, OJ C 291, 13.10.2000, pp. 1- ("Former Guidelines").

deeply on RPM. The Commission agreed that RPM forms a hardcore restraint.[44] Moreover, the Commission argued in contrary with CEPSA judgment, which says: when hardcore restraint is included in a vertical agreement, this agreement fall under Article 101 (1) TFEU, but it is unlikely that it will also fulfill all conditions which are stated in Article 101 (3) TFEU.[45]

Moreover, the Commission stated that in respect to hardcore restraint it might lead in individual cases to pro-competitive effects under Article 101 (3). It also stated that RPM not only restrict competition but it may also in specific cases lead to efficiencies, which will fall within the scope of Article 101 (3) TFEU.[46] Following such a gradual change in EU competition law regarding RPM, the question arises as how the adoption and treatment of RPM have developed after the Leegin and after the adoption of new Guidelines on Vertical Restraints till now. To answer this question it is necessary to examine the case law of the courts and procedures of competition authorities of the EU Member States. National courts and authorities focusing on competition law nowadays deal with most of the cases on vertical restraints. Since the adoption of the new Guidelines on Vertical Restraints, there was no specific case regarding the RPM in vertical agreements dealt either by the Commission or EU Courts. The current analyses show that the Commission and also EU Courts are still applying a negative approach against the RPM in vertical agreements.[47] Generally, it the negative approach against the RPM under EU competition law seems to be unchanged in most of the EU Member States. The recent article of national law on RPM concluded that: despite the existence of a generally broad consensus in economic thinking on the need for a more open-minded approach to RPM, the current treatment of RPM in EU competition law is and seems destined to remain very hostile, [and it] is highly unlikely that the EU competition law or the authorities that enforce it will move away from its instinctive dislike of RPM.[48]

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[44] Gudlines on Vercital Restraints, § 48.
[45] Guidlines on Vertical Restraints, § 47.
[46] Guidlines on Vertical Restraints, § 225.
[47] Nicolas Petit & Guillaume Taillandier, Resale Price Maintenance*: A synthesis of national case laws, e-Competition Bulletin Resale Price Maintenance*, Art.N32560.
[48] Derek Ridyard, Resale Price Maintenance*: An overview of EU and national case law, e-Competitions Bulletin Resale Price Maintenance*, Art. N41915.

4.1 Agreements which are not exempted by the Block Exemption Regulation

The exemptions illustrated in Article 2 of Commission's Regulation (EU) No 330/2010 should not be applicable to vertical agreements with several factors under control of the parties, have as their object:

1) The restriction of the buyer's ability to determine the sale price without taking into consideration recommended or set the maximum sale price provided by the supplier provided that the set or minimum sale price is not a result of the pressure exerted by other parties.
2) The restriction of the territory in which, the customer or a buyer may sell the products or services regardless its place of establishment except the restrictions of active sales to the territory or group of the customers which is exclusively reserved by the supplier or allocated by the supplier to another buyer where this restriction cannot limit sales by the customers of the buyer.
3) The restriction of selling goods to end user by a customer who is operating his business at the wholesale level of trade.
4) The restriction of sales to a member who is a member of a selective distribution system to an unauthorized distributors within an exclusive territory in advance reserved by the supplier who is operating that system and the restriction of the buyer's ability to sell components which were supplied for the purpose of an unfair competition, to the customers who would use these components to manufacture the same product which was delivered by the supplier.
5) The restriction of active or passive sales to the final customer by members of the distribution system operating at the retail level of trade without prohibiting a member of the system from operating out of an unauthorized place of establishment.
6) The restriction of cross-supplies, which means sales between distributors within a distribution system, as well as distributors operating at the same level of trade.

7) The restriction agreed between a supplier of components and a buyer that the supplier may sell its components as spare parts to end-user or to repairers without permission of a buyer.

4.2 RPM in general and in the context of the BER (vertical agreements)

The first significant restriction of competition under the BER is the maintenance of resale price. RPM term refers to a type of vertical agreements under which the upstream company (supplier) control or limit prices (or other conditions), for which the downstream company (purchaser) may sell goods or services usually to the final customer. Therefore, the upstream company limits the possibility of downstream companies to determine the prices at which they will resell goods or services from upstream to the final customer. The upstream company is usually the manufacturer or importer and the downstream company is usually the distributor or retailer.

RPM is interpreted by the hardcore restriction set out in Article 4(a) of The BER as agreements or competitive practices having primary their direct or indirect object the establishment of a fixed or minimum resale price or fixed or minimum price level for the customer. In other words, RPM is defined as a restriction of the buyer to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that it is not fixed or minimum sale price as a result of the pressure of any of the parties. In the processes where the resale price is directly established, the restriction is “clear cut.”

RPM occurs in three basic forms - minimum RPM (fixed minimum resale price) and fixed RPM (is determined by fixed resale). Under the RPM also fall indirect methods of price fixing - fixing the distribution margin, fixing the maximum level of discounts, which the distributor can give the customer, the provision of sales or reimbursement of promotional costs for distributors in regard to compliance with certain price level, linking the sales price to the sales price of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations

regarding a given price level. [49] Direct or indirect practices of obtaining price fixing can be easily and more efficiently made by combining with measures to identify price-cutting distributors, such as the implementation of monitoring systems, or the pressure on retailers to report uncompetitive practices of other members of the distribution chain that distinguish from the standard prices. Moreover, direct or indirect price fixing can be also obtained by implementing measures to prevent customer's incentive to decrease the resale price, for instance including supplier's marks on the packages which include a recommended resale price of the product. The same preventions could be used to make maximum or recommended list prices work as RPM. However, all the "supportive" measures mentioned above are not considered in itself as leading to RPM.

It should be noted that in accordance with the BER, authority responsible for the restriction of competition do not consider to be harmful determining the recommended sale price. It follows that the supplier has the right to indicate the recommended price at which the buyer should sell these products. The freedom to decide at what price he wants to sell the purchased products to its customers must be retained to the buyer. According to the BER, neither setting minimum prices at which the buyer may sell the products to its customers (especially the final consumer) is not in itself a serious constraint on competition. Setting maximum resale price may, in fact, lead to lower prices for final consumers.

RPM mainly limit competition within a single brand. This means that if a supplier sets the prices at which its customers have to sell their goods to their customers, thus the price competition between the customers is limited. For this reason, the situation is often the case that the initiative for the introduction of RPM comes from the bottom of the market, mostly the retailers of the products concerned. In this case, it may happen that the RPM is used as a tool to facilitate horizontal agreements between the distributors of one brand.

In agency agreements, the principal proposes the sale price because the agent does not become the owner of the goods. However, when these agreements cannot be qualified as agency agreements regarding the application of Article 101(1) TFEU, an

[49] Guidelines on Vertical Restraints (2010/ C 130/ 01), §48.

obligation arises for the agent, requiring him to be prevented or restricted from sharing its commission or fixed variable, with the customer which would be a hardcore restriction under Article 4(a) of the BER.[50]

4.2.1 Resale price maintenance, the role of Block Exemption

As already mentioned, RPM refers to an agreement between a manufacturer with the downstream retailer by which they agree to set the retail price for which retailer can sell its goods. Competition law strictly controls these agreements. Over the last few years, lawyers and economist around the world were discussing the same topic and trying to solve the issue about the appropriate treatment of RPM under competition law. European Commission decided to review of the vertical restraints block exemption and guidance. [51] The BER prohibits agreements and concerted practices of undertakings which have as their object or may have the effect of restricting competition. The BER contains the conditions under which certain agreements will benefit from the exemption provision of Article 101 (3).Agreements which are block exempted from the prohibition are agreements for the distribution and servicing of motor vehicles, on specialized agreements, research and development, provision of technology, agreements in the insurance sector and maritime transportation. The regulation is very well known in automobile industry caused by the issues of the BER from the European Commission. BER has changed the automobile industry over the last decades. The issue was that owners of automobiles nullify their warranty when the car was not serviced in services which belong to the manufacturer of the car or its dealers. Later on in October 2003, the European commission has presented a new law which restricts such as action and it gives the owners a freedom to choose the service upon their preference. By this law,

[50] Guidelines on Vertical Restraints (2010/ C 130/ 01), §49.

[51] Commission Regulation on the Application of Article 81(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, No. 330/2010, 2010 O.J. L 102/1 (reevaluating European Union ("EU") antitrust policy on vertical agreements); Commission Notice, 2010 O.J. C 130/1 (promulgating new guidelines on vertical restraints).

the European Commission opened the competition and provide the owners of cars to freely choose the repairer of their car. Furthermore, BER eliminates the pressure from the manufacturers on the owners. Under the current framework of RPM in the European Union, setting the fixed and minimum resale price is not consistent with the vertical agreements block exemption regulation because it is considered as a hardcore restriction. Consequently, this action is against the competition law, therefore, it is presumed as illegal and prohibited by Article 101 TFEU. The BER is applicable to both vertical agreements and restraints.

Vertical agreements are agreements between suppliers and distributors. The word vertical illustrate that these business undertakings are operating at different levels. Agreements between supply, manufacturer, distributor and retailer are typical types of vertical agreements. Vertical restraints are much less harmful than horizontal (between competitors operating at the same level (direct competition)). Guidelines and regulations of block exemption are more inspired by economic and effect based approach. For the proper assessment of vertical agreements, there is always a necessity to analyze its both negative and positive effects on the market. Benefits of the block exemption are only when there is no fixed minimum or maximum price, but where the maximum price is set by the buyer or where the maximum prices for seller is only recommended which in result has nothing with setting the fixed price of a manufacturer and there is also no pressure on retailer by supplier or buyer. By including RPM in an agreement, this agreement cannot benefit from the block exemption. Moreover, the Commission perceives these agreements as potentially harmful. However, it doesn't mean that including RPM is fully prohibited. It is always possible for a firm to question the responsible competition authority that by implementing RPM to an agreement, the efficiency will raise. Therefore, the Commission in order to apply the hardcore rule cannot only investigate the efficiencies but also has to show the actual or potential negative effects. The agreement is not prohibited when the efficiencies are stronger and other conditions of Article 101(3) TFEU are also fulfilled.

4.2.2 Restriction of competition by RPM

RPM may influence competition in several ways. RPM may increase an efficiency of agreements between suppliers by rising price transparency on the market. Therefore, it would become easier to recognize and track whether a supplier deflects from previously agreed prices. RPM also helps to retain resale price so a supplier will not be able to alter the price for a distributor. Such a negative effects are acceptable if the market is susceptible to anti-competitive agreements. Moreover, by excluding intra-brand price competition, RPM my support agreements which may lead to negative effects between the buyers at the distributor level.[52] Distributors with high market share might be able to force one or more suppliers to alter their resale price, especially to fix it above the price set by competition that will help them to reach collusion. Collusion is an anti- competitive agreement between competitors operating at the same market level in order to break market equilibrium. Another RPM restriction might decrease the competition between rivaling business more generally between manufacturers or retailers, especially when manufacturers are using the same distributor who is bound by RPM which is applied by all of them. The subsequent effect of RPM is that distributors are prevented from decreasing their sales price of a particular product. This means that the effect of RPM is that prices will increase. Moreover, market leaders in manufacturing sector to eliminate smaller competitors may implement the RPM. Resale price maintenance may also decrease dynamic environment and innovation in the distribution sector. By prohibiting price competition between distributors, resale price maintenance may decrease the number and prevent the market from retailers who enter the market with lower prices to go beyond the competition.

4.2.3 Efficiency of RPM

Efficiencies mostly come from a supplier driven chain, covered by Article 101(3) TFEU. RPM does not only restrict competition but may also lead to efficiencies. For instance, this could happen especially when a manufacturer introduces a new product on the market, RPM may help during the period of introducing the product

[52] Guidelines on Vertical Restraints (2010/ C 130/ 01), §224.

and expanding demand to push distributors to pay more attention to manufacturer's interest to promote the product. Distributors under competitive pressure may be forced to increase the demand for the product, consequently, make the launch of the product a success. In addition, fixed resale prices are necessary for a franchise system or another retail system implementing the same retailing format composed by coordinated short-term low price campaign where the consumer benefits.[53]

Sometimes the high margin occurred by RPM may be used in particular business to provide the customer with some extra pre-sale services. If a great pool of customers' demands such a service but then the purchase is made in another retailer because of the lower price offer, retailers who use such a benefit may reduce or eliminate these services in order to increase the demand for the product. Free-riding phenomena at the distribution level can be prevented or reduced by resale price maintenance. Retailers have to demonstrate that RPM may overcome possible problems with free riding between retailers on these services and that such a services are beneficial for the consumers and that all the conditions of Article 101(3) TFEU are fulfilled.

The BER covers the practice of recommending a resale price to a reseller or setting the maximum resale price to reseller where each of the party bound to an agreement does not exceed the 30% market share. Providing that the parties in agreements are not under pressure offered by another party which are ruling the minimum or fixed resale price. However, the possible competition risk with maximum and recommended prices is that most of the resellers will mostly focus on those prices and other resellers, which will soften the competition, might follow them and it also can be a starting point for anti-competitive practices between suppliers. The position of the supplier on the market is a very crucial factor in forecasting possible anti- competitive practices of maximum or recommended resale price. The stronger the position of a supplier is on the market the higher the risk that a recommended or the maximum resale price will become a focal point for a reseller. It may become an issue for them to decide whether they deviate from the price they perceive to be the preferred resale price set by the supplier who is leading the market. Where anti-competitive effects of maximum or recommended price rise substantially the question arises whether there is a possibility of exemption under

[53] Guidelines on Vertical Restraints (2010/ C 130/ 01), §225.

Article 101(3) TFEU.[54] A maximum resale price could be also very efficient to ensure that the new brand strongly competes with other brands already operating on the market distributed by the same distributor.

4.2.4 Application of BER

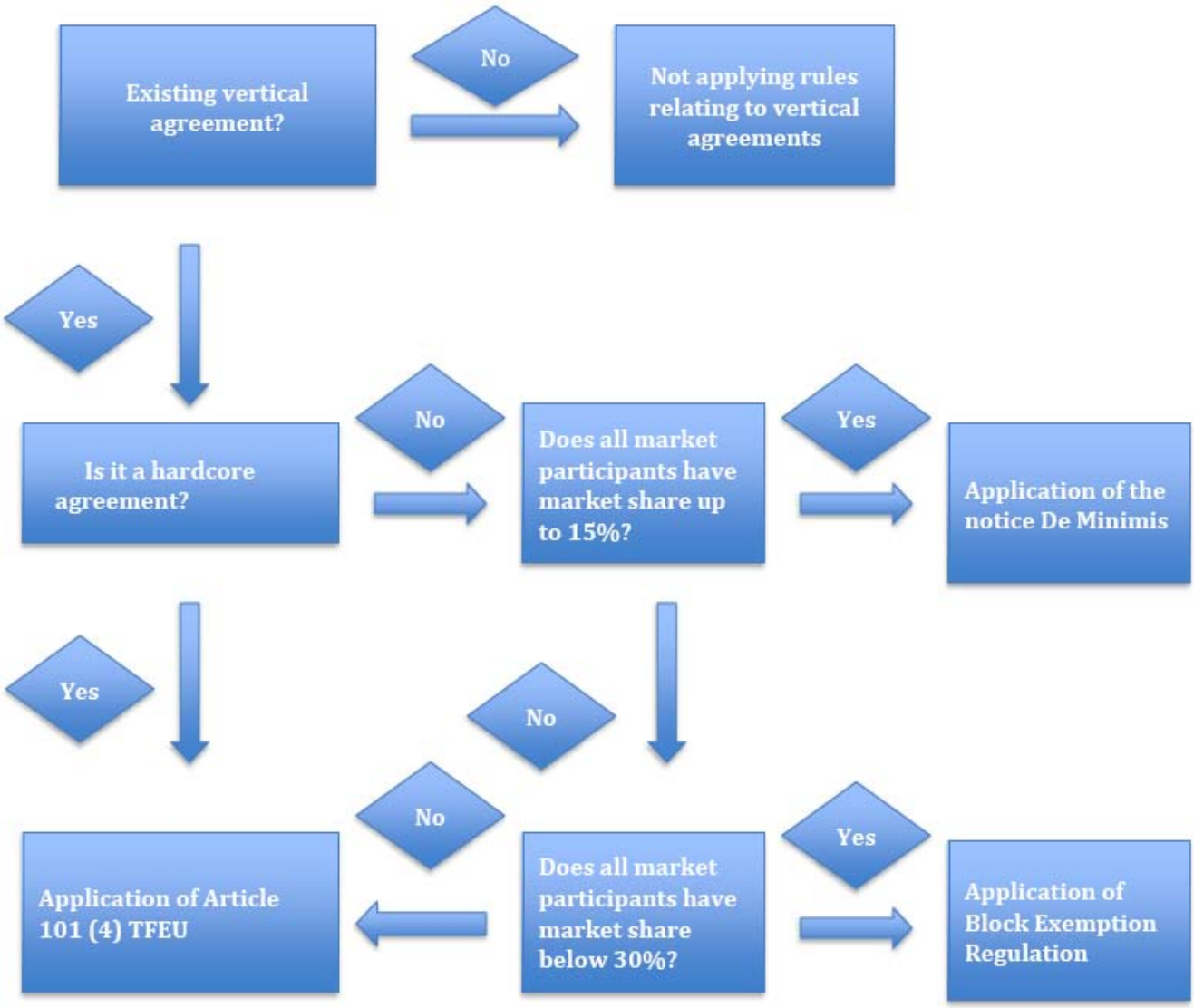
For the most vertical restraints, competition issue can only appear when there is a lack of competition that means that there is a market power on either at the level of the supplier or the buyer or at both levels. Provided that they do not contain any hardcore restrictions, the BER creates a presumption of legality for vertical agreements based on the market share of the buyer or the supplier. In order to fall within the scope of block exemption that means to become applicable, both the buyer and the supplier should have a market share 30% or less. Vertical agreements between undertakings with market shares above 30% are presumed that they still may fall within the scope of Article 101 (1) TFEU and they may fulfill the condition within the Article 101 (3) TFEU but on the other hand, it is not true that vertical agreements between undertakings which fall within the scope of Article 101 (1) TFEU will satisfy the conditions of Article 101 (3) TFEU.

4.2.5 Vertical agreements between competitors

The Block Exemption Regulation defines "an actual or potential competitors" by competing undertakings with each other. Companies, which are active in the same market, are treated as actual competitors. A company is treated as a potential competitor of another company if a company within a relatively short period of time normally no longer than one year will acquire additional investments to enter the market where another company is operating. Article 2 (4) of the BER provides two exceptions to the exclusion of vertical agreements between competitors. Non-reciprocal agreements are related to those exemptions. Non-reciprocal agreements between competitors are agreements where (1) the supplier is a manufacturer and distributor and the buyer is only a distributor and do not compete at the manufacturing level, (2) or where the supplier is a provider of services and is

[54] Guidelines on Vertical Restraints (2010/ C 130/ 01), §229.

operating at various levels of trade. Whereas, the buyer operates only at the retail level. The first exemption covers a dual distribution, which means that a manufacturer of goods acts also as a distributor and is competing with other independent distributors. The second exemption covers a situation similar to dual distribution but in this case with services, where the supplier is providing products at the retail level where the buyer is operating.



Source: The Slovak National Competition Authority 2013

5 Assessment of the facts, as established, in the light of competition law in two major retail companies IMPA a.s. (Škoda Auto Slovensko) and Porsche Inter Auto Bratislava

A) According to the interview conducted with prokura of IMPA a.s. (Mgr. Ingrid Zajacova), which is privately owned company and the biggest authorized reseller of the cars Škoda in Slovakia and with the director of sales (Ing. Marek Ferencik) representing the company Porsche Inter Auto Slovakia[55] which is on the other hand multinational corporation owned by German shareholders. The following information was provided by these representatives for the evaluation of resale price maintenance, tariffs and quotas, anticompetitive practices and many other facts which fall under EU competition law and are in contrary with fair competition practices. Generally, Škoda Auto Slovensko who is the major and the only importer of the leading Czech car manufacturer Škoda sets all the rules for the retailers. Škoda is currently operating in the European Union, Russia, China, India, Latin America, Africa and Asia. Škoda often delivers its cars to the customers through official and independent dealers who buy these cars mostly into their ownership and afterward are selling these vehicles to their customers. The difference between buying price from Škoda and selling price at which dealers sell these cars to end customers is called the distribution margin. Therefore, the profit of the dealers is depending on the sales price to its end customers. Firstly, based on the interview with two official dealers, the research will illustrate Škoda's practices to its dealers. Regarding the design of the retail stores which have to look the same throughout all Škoda dealers; there cannot be anything, which does not correspond to the brand of Škoda and anything that is not provided by škoda or allowed for permission. This means that all the stores have to be equipped only with materials/catalogues provided by Škoda, machines, cars and many other tools. All the stores have to look the same all across the European Union and only Škoda cars can be exhibited in the showrooms. Their focus point is the representation of the brand from the side of the official retailers.

[55] The interview conducted with Zajacova, I. & Ferencik, M. 15.03.2016. IMPA a.s. and Porsche Inter Auto Bratislava. Bratislava.

Moreover, authorized dealers are pushed to use "unfair commercial practices" which are in contrary to the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market. The importer Škoda Auto Slovensko also sets which type of products (care for the cars, branded clothes, tires and etc.) retailers are allowed to sell. They are also provided with the exact time since when they will start offering certain products and what promotions they need to launch in order to increase sales and overall reputation of the brand. Škoda Auto Slovensko dictates even the exact place in the city where the retailers are allowed to sell their cars. Moreover, not all the cities are permitted to sell Škoda cars. Even though, it might look that private authorized dealers are selling Škoda cars under their name of the company (IMPA, Porsche Inter Auto) they cannot do anything regarding the sales and services without noticing for permission from the official importer which is Škoda Auto Slovensko. Regarding the prices, all the prices offered from the official dealers have to coincide with the prices set by Škoda Auto Slovensko. The official dealers cannot maintain the trend that they always offered its customer a discount on the purchase of new cars. This is prohibited by Škoda Auto Slovensko. The official price list on the website impa.sk and porscheinterauto.sk will automatically be directed to the central price list of the official importer Škoda Auto Slovensko. Therefore, they correspond with the prices, which are set by Škoda Auto Slovensko. Because of this issue, many official retailers in Slovakia use anticompetitive practices in order to gain a competitive advantage. Particularly, they bribe supervisors from Škoda Auto Slovensko who are responsible for checking the standards provided by the dealers therefore they are servicing and selling also other cars from the concern VW which gives them a greater power on the market, as well as they use the freedom to provide their customers with its own prices and they implement their own commercial practices based on the target market. Škoda Auto Slovensko took a measure to limit discounts aim at fixing the retail price which represents a so-called hard-core restriction of competition. Such measures are in contrary to Article 101(1) TFEU which prohibits price fixing measures and are disparate to the BER applicable to motor vehicles distribution. This case is an example of not respecting the BER. One of the most important element of the current motor vehicle BER is to ensure to dealers the freedom to provide their prices. The BER should not apply where *"the*

manufacturer, … directly or indirectly restricts the dealer's freedom to determine prices and discounts in reselling contract goods". Regulation No. 1475/95 gives the right to consumers to be offered by competitive prices from dealers, including discounts and other after sale services. Therefore, if some retailers want to raise sales they artificially truckle the official price (give too much discount), which would increase sales but not profits. Two major competitors mentioned above do not follow these practices. IMPA Bratislava and Porsche Inter Auto Bratislava have to follow the strict rules, which are set in agreements by Škoda Auto Slovakia. Practices presented by Škoda Auto Slovensko represents a clear restriction of dealer's freedom to provide their customers with their prices. If they break the contract, they may receive substantial fines. Both IMPA Bratislava and Porsche Inter Auto Bratislava mentioned that crucial problem is margin, also so-called distribution margin which is set very low around 3% to 4%. Therefore, the sales are not generating enough from the revenue, but rather the provision of services is what increases the EBITDA and drives the business industry. Representatives said that each year controllers from Škoda (Audi,VW…all brands they are selling and servicing) check and make an audit whether they meet all the conditions mentioned above and if they do not meet all the requirements they may lose their license or pay a fine which is sometimes incredibly high, depending on the dealer's position on the market, sales, turnover and to which extent the damaged has occurred. Within the member states of the European Union prices of Škoda cars differ and are inconsistent from state to state and from dealer to dealer. The prices offered from dealers, which are set by Škoda, differ because they depend on the economy of each country and domestic currency (if not EURO). That means the prices in Slovakia cannot be identical to the prices for example in Austria because of the economy power, labor, interests and other factors, which influence the sale price. For instance, IMPA a.s. mentioned that they have recognized an increase in orders from Germany and they expect that this trend will further increase. This happened because of the cheap labor cost and cheaper cost of operation. The proposed/recommended sele price offered from Škoda Auto for Slovakia is much lower in comparison to Germany or Austria. On the other hand, executives from Porsche Inter Auto have shown that they did not recognize this increase in foreign demand. It could be done by its position on the market. As they mentioned,

shareholders of Porsche Inter Auto do not force them to increase the sales because (Slovakia, particularly Bratislava) is not their primary (focus) market and is not the main driver of its company, which is generating the revenues. They need to be positioned in Bratislava because of their overall strategy of the concern VW and also to enhance the competitiveness of the market.

According to official reports provided by IMPA a.s. and Porsche Inter Auto Bratislava, restriction on imports and exports within EU does not exist. It would be illegal regarding the four freedoms, especially free movement of goods. Basically, there are no quotas from the side of Škoda and therefore, dealers can sell cars without any limitations. On the other hand, representatives from the company Inter Porsche Auto Bratislava mentioned that free import and export does not exist for the Porsche which is also from the VW Group. Citing the legal text of the Article 28 TFEU (ex Article 23 TEC) shows the importance and the meaning of the free movement of goods: "The Union shall compromise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and export and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries."

By the most recent analysis, the freedom of free movement of goods within the EU opens a door for tax fraud because states do not properly and efficiently control and implement these agreements of double taxation on the sale and purchase of vehicles. All this information above falls within the area of the European Union. It is very different when we mention the area outside the EU. There are indirect restrictions on duty/tax, this leads to the fact that it is inconvenient for the dealers from the EU to import or export cars outside the EU because other countries can naturally protect its internal market.

In addition to, Article 102 TFEU (ex Article 82 TEC) prohibits: any abuse by one or more undertakings of a dominant position with the internal market, which may affect trade between the Member States. According to two companies from which IMPA a.s. carries such a monopoly power by selling the greatest number of Škoda cars within the Slovak dealers and is leading the market whereas Porsche Inter Auto Bratislava does not depend on the sales in Slovakia, they both mentioned regarding

Article 101 and 102 TFEU some very important details how the internal market is abused by undertakings.

In order to prevent themselves from anti-competitive practices, IMPA a.s. undercuts the prices, they decrease the prices on service and services offered which are not regulated by Škoda Auto Slovensko. By providing customers with extra after sale services they could increase their profits, which thereafter lead to other extra services by which they distinguish themselves with other competitors on the market. Provision of extra services is what drives IMPA a.s. to be the market leader. Extra services include a non-stop emergency service, service mobile, service opened 16 hours every day including weekends, and etc. Other undertakings use different unfair practices in order to gain a competitive advantage over the competing firms that cannot be mentioned because of the disclosure of secrete information, but they definitely do not fall under Article 101 and 102 TFEU as mentioned above.

Regarding cartels which are any agreements between competitors about price fixing, shares markets or any other trade conditions, which are restricting competition in the meaning of Article 101 TFEU is very difficult to investigate such a firms. Over the last decade, it became a very big problem from Slovak dealers. Many firms on the market do not trust to the Leniency program provided by the European Commission therefore, dealers are not participating in investigations and do not support the authorities which are responsible for the fair competition and prevention of the market from cartel agreements. One example is that IMPA a.s. has been fined regarding the volume of sales and for creating a cartel. They have participated in the investigation, but even though they helped to resolve this problem the Slovak National Competition Authority has decided to impose a fine of 100% of the fine. The allegation of cartel agreements in public tenders became a very crucial issue. The very recent problem regarding cartel agreements happened to an unnamed company who agreed on what price put up for tender. The ministry of defense announced a public tender to acquire new cars which led some vendors to agree to bid higher prices of course with a general known of Škoda Auto Slovakia. According to the most recent document 2014/KV/2/1/029 issued by the Slovak National Competition Authority on 22.10.2014. In the period from 02.03.2010 to 01.07.2013 Škoda Auto Slovensko s.r.o. agreed and filled the agreements with authorized car

dealers of Škoda operating in the Slovak Republic whose object was to fix minimum prices for the resale of new passenger cars of ŠKODA, particularly models Škoda Fabia, Škoda Roomster, Škoda Octavia, Škoda Octavia Tour, Škoda Yeti, Škoda Superb, based on agreements of maximum discounts on the retail recommended price set by importer Škoda Auto Slovakia s.r.o., which may authorized dealers provide to its final customers when selling to individual customers and target groups of customers. Škoda Auto Slovensko agreed and fulfilled prohibited agreements on the indirect fixing of prices. For violating the law on protection of competition, especially Article 101 (1) TFEU, the Slovak National Competition Authority ordered a fine of € 2,182,241.[56]

Based on the position of the company and its power in the market representative from IMPA a.s. also mentioned that from the side of the state it is very difficult to be in automotive business. There are many disadvantages that dealers have to deal with, for instance very high-income tax, antitrust controls from the Slovak National Competition Authority (Antitrust office) every month and other controls and requirements which are very costly for dealers to get through them. Many dealers are not able to carry this pressure, therefore, they fail. Moreover, there are also some dealers which are not strictly following the competition rules and are not punished because of the composition of the current government operating in Slovakia which is currently facing various accusations regarding not taking any actions to prevent anti-competitive practices. They fail to fulfill their responsibilities and ridiculously punish/ control the firms, which are not major players on the market. Very recently, the prime minister and minister of the interior have been accused of corruption and favoring some companies in order to win the public tender for the acquisition of a new fleet of cars for the state institutions, such as police, post, emergency. All these measures adopted by Škoda Auto Slovensko represent a direct restriction of dealer's freedom to provide their customers with their own prices, and are pushed to do their business based on strict regulations set by Škoda Auto Slovensko. One of the most important parts of the BER of the current motor vehicle is freely to decide on dealer's own prices which were largely abused.

[56] Document 2014/KV/2/1/029

B) The automotive sector is a major EU industry. Both manufacturers and dealers face a stronger competition leading to the fact, that revenues are not anymore generated from the sales of cars. This means that secondary market is becoming even more important. According to data provided by Mr. Zohrer[57], in contrast to the primary market, the aftermarket have recognized huge competition problems. This market is highly dependent on the results in the car manufacturer´s industry. Authorized dealers hold a significant share of the market whereas manufacturers play a key role in the spare part market.Therefore, the European Commission had to give a possibility to independent repair shops have an access to technical information. Compared to the primary market, a different economic environment shows the fact that dealers generate significantly higher profits through service and maintenance of cars, rather than through sale of new cars. On the other hand, manufacturers make a profit on spare parts. In order to increase the competition and protect the customer´s choice, the European Commission has published the Motor Vehicle Block Exemption Regulation (EC) 1400/2002 which sets the rules for market players. Moreover, MVBER is much more detailed than BER.

It might seem quite restrictive for retailers of cars when the manufacturer determines the location and number of outlets for the retailers. However, as mentioned by Mgr. Zajacova, these are all internal agreements on which the manufacturer (Škoda), the importer (Škoda Auto Slovensko) and all retailers within the area of Slovakia agreed. Therefore, these agreements do not affect the market competitiveness as all the conditions are the same for the retailers, and Škoda Auto Slovensko is the only importer of Škoda cars in Slovakia. Competition can be restricted by the state but cannot be restricted by private businesses. Regarding the impact of car manufacturers on dealers, the only area where the pressure from the importer is partially limited are services related to the operation of vehicles and maintenance. This market is highly competitive due to the innovations in the automotive industry. The after-sale market is operated mostly by SMEs. Service is based solely on the quality of the company. This is closely related to the performance and sales of the company as service and sales are closely linked to each

[57] ZÖHRER,. (2016). *Opinion of the European Economic and Social Committee on 'The components and downstream markets of the automotive sector'.*

other. According to Mgr. Zajacova, Škoda Auto Slovensko controls the repair and maintenance only whether the quality provided to its customers is ensured.

As stated in the MVBER regarding the hardcore restrictions, the exemption should not apply to any vertical agreements which have as their object the restriction of the dealers or repairers to set their own sale price, without prejudice to the supplier's ability to impose a maximum sale price or to recommend a sale price, the restriction of territory or customers where/whom the dealer can sell the goods, the restriction of cross-supplies, the restriction of active or passive sales, the restriction of the distributor's ability to sell any new motor vehicle which fall under its contract range, the restriction of the distributor's ability to subcontract the provision of repair and maintenance services to authorised repairers, the restriction of the provision of repair and maintenance services and the distribution of spare parts, the restriction of the sales of spare parts by members of a selective distribution system, the restriction agreed between a supplier of original spare parts and a manufacturer of motor vehicles, which limits the supplier's ability to sell these goods or services, the restriction of a distributor's ability to obtain original spare parts from a third undertaking and to use them for the repair, without prejudice to the ability of a supplier of new motor vehicles to require the use of original spare parts supplied by it . Moreover, the exemption shall not apply where the supplier refuses to give independent operators access to any technical information.[58] This means that dealers and manufacturers have to follow strict rules without violating antitrust laws and it also clearly shows that the competition policy is very important. In regards to the selling prices of cars within the EU,the economic indicators such as the GDP of the state have a big impact on these prices . The price depends on the cost of labor and costs associated with the operation of outlets. However, these indicators influence the market to a relatively small extent. It is more important to enact clear rules of a particular State in order to avoid violating antitrust laws, as it is currently happening, whether in the automotive sector or in any other industry. The concept of cartel agreements is similar in all the other EU countries. In order to avoid businesses from such agreements, it should be a responsibility of every State to ensure the possible development of companies and fair competition in the market. It

[58] COMMISSION REGULATION (EC) No 1400/2002, Article 4.

is important to have the opportunity to expand the company without violating an antitrust law of the state concerned. I realized that this is not an easy task, neither for producers, importers, as well as auto dealers, but more and more the trade will depend on the correctness of relationships either between small retailers in the sector or large multinational companies. Since time immemorial, trust can be lost very easily, but regaining it can be a long and tedious journey. By the information provided in the section above, the question arises, which freedom do dealers have? And how is it possible that the leading Czech car maker Škoda has such a power?

6 Conclusion

The main purpose of this research paper was to focus on resale price maintenance, the role of Block exemption regulation in the automotive industry, especially in Slovakia, the importance of free trade and trade policy as well as free movement of goods, Article 101 TFEU, regulations (and Commission Guidelines and Supplementary Guidelines) in the automotive industry. Moreover, to represent how the EU competition authorities regulate the market and how regulations can affect trade between the Member States. All these elements of a competition law were supported by scientific literature and several cases in order to determine and solve the problem of RPM in the automotive industry. The automotive industry is a sophisticated chain of interconnected industries. An important part of the chain is more and more legal aspect of the industry, which will ensure the healthy development of the automotive industry from production of the product to final product and its accountability to the final consumer. In an effort to gain primacy of individual automobile manufacturers, it may occur by manufacturers and retailers to seek to govern antitrust laws. These laws may serve to protect competition in order to avoid distorting competition on the relevant market or strengthening some of them to abuse collective dominance on the market. The antitrust authority of each country has the right to carry out checks to detect violation of act on protection of competition. The law of antitrust authorities gives the right to reveal the anti-competitive conduct of dealers. The antitrust authorities have the right to collect relevant documents and information in order to prevent distortions of competition in the private sector and distort competition and prevent agreements which directly

or indirectly determining the price of the goods, or other unfair trading conditions, market sharing and coordination in public procurement tender in connection with public procurement, which in accordance with the Act on protection of competition. Also, the provision of after-sales services is closely related to this issue, as well as the sale of motor vehicles of different brands. The role of antitrust authorities is to prevent businesses from violation of the law by agreeing on vertical agreements. The aim of these vertical agreements is that services and repairs of motor vehicles will be exclusively made only by authorized service providers for motor vehicles and thus, they will be able to manipulate with the validity of the guarantees in repair and maintenance only in repair shops that are part of authorized networks. Other task of the European antitrust authorities is to fight against the restriction of competition in the automotive supply market. Therefore, dealers will not be able to coordinate and agree on the prices which will participate in public procurement. The role of antitrust authorities is the prevention of the horizontal and vertical agreements in the market.

It is necessary for the state to eliminate any factors causing economic distortions and thereby avoid the introduction of information asymmetry, market failures, create the conditions for perfect competition and moreover, prevent the possibility of monopolies. This regulation is in charge of the EU antitrust authorities, which perform regulatory functions in the business sector, the protection of competition in all areas of business and creates optimal conditions for competition between businesses in an effort to defend the healthy development and competition in favor of consumers. The challenge is to further prevent market failures, thereby lowering the quality, price and thereby giving rise to distortions of a healthy business and competitive environment in a particular country. It is important to streamline the competitive pressure in favor of the development of a healthy market with the possibility to create healthy competitive conditions for businesses, investments, job growth, and ensure competitiveness and attractiveness of the market economy.

The main goal of this study was to demonstrate based on the collected data and on the interview with two major dealers on the Slovak market which are IMPA a.s. and Inter Porsche Auto that RPM is a crucial problem in the EU Member States in the automotive industry, particularly in Slovakia. The only importer of škoda cars, škoda

Auto Slovensko, which has the power on the market to regulate all dealers in order to increase its dominance, dramatically regulates these two companies which are the best performing dealers in Slovakia. Measures provide by Škoda Auto Slovensko indicate so-called hard-core restrictions, which are violating Article 101 TFEU. The research shows a very negative result, which is that almost all dealers are losing their freedoms to provide services and are pushed to collaborate with the importer and other businesses in contrary to EU competition law.

Cases provided in this research clearly show that the competition policy is very important and it serves consumer's interest. To conclude, all the considerations mentioned in this research paper support the fact that RPM is becoming a great issue in the automotive industry, which further lead to restriction of price competition.

7 Bibliography

Amato, F., & Day, J. (2013). RPM in the European Union: Any Developments Since Leegin?. *CPI Antitrust Chronicle*, 2-7.

A.Smith, *The Welath of Nations* originally published in 1776, Bk IV, Ch. II cited in P.Kenen, *The International Economy*, 4th edn (Cambridge:CUP,2000),9.

Automotive industry - European Commission. (2015). *Ec.europa.eu*. Retrieved 20 November 2015, from http://ec.europa.eu/growth/sectors/automotive/index_en.htm

2015 Auto Industry Trends. (2015). *Strategyand.pwc.com*. Retrieved 7 October 2015, from http://www.strategyand.pwc.com/perspectives/2015-auto-trends

Automotive Innovation Slovakia. (2014) (1st ed.). Bratislava. Retrieved from http://www.sario.sk/sites/default/files/data/casopis-zap-2014-01.pdf

Svac, V. (2014). *Automotive Innovation Slovakia Survey 2014* (2nd ed.). Bratislava: KPMG. Retrieved from https://www.kpmg.com/SK/en/IssuesAndInsights/ArticlesPublications/Documents/KPMG-Automotive-innovation-survey-EN.pdf

Barnard, C. (2007). *The substantive law of the EU*. Oxford: Oxford University Press.

Bennett, M., Giovannetti, E., Fletcher, A., & Stallibrass, D. (2011). Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy. *Fordham International Law Journal*, *33*(4).

Case 2014/KV/2/1/029.Škoda Auto Slovensko v. The Slovak National Competition Authority.(2014).

Case C-2/90 Comission v. Belgium (1992) ECR I-4431, para. 28.

Case 218/87 Schumacher (1989) ECR 617.

Case 7/68 Commission v. Italy ((1968) ECR 423,428-9.

Case 72/83 Campus Oil Ltd and others v. *Minister for industry and Energy and others* (1984) ECR 2727, para 17.

Case C- 97/98 Jagärskiöld v. Gustafsson (1999) ECR I-7319. Para. 20.

Case C-221/06 *Stadtgemeinde Frohnleiten v. Bundersminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft* (2007) ECR I-9643,paras. 36-8.

Case C-318/07 Persche (2009) ECR I-359, para. 29.

Case Thomprson (1978) ECR 2247. Cf. donations in kind which are not goods.

Case C-279/06 *CEPSA Estaciones de Servicio SA* [2008] ECR I-6681,§ 42.

Case C-279/06 *CEPSA Estaciones de Servicio SA* [2008] ECR I-6681,§ 72.

Commission Notice on cooperation within the Network of Competition Authorities (2004) OJ C101/42, paras. 14, 15 and 54.

Commission notice - Guidelines on Vertical Restraints, OJ C 291, 13.10.2000, pp. 1-44 ("Former Guidelines").

COMMISSION REGULATION (EC) No 1400/2002, Article 4.

Commission Regulation on the Application of Article 81(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, No. 330/2010, 2010 O.J. L 102/1.

Chalmers, D., Davies, G., & Monti, G. (2010). *European Union Law* (2nd ed.). London: Cambridge University Press.

Commission Regulation (EU) No 330/2010. (2010). *Official Journal Of The European Union*.

Competition: opening markets to competition - European Commission. (2015). *Ec.europa.eu*. Retrieved 6 February 2016, from http://ec.europa.eu/competition/general/overview_en.html

Craig, P., & De Búrca, G. (1998). *EU law*. Oxford: Oxford University Press.

Derek Ridyard, Resale Price Maintenance*: An overview of EU and national case law, e-Competitions Bulletin Resale Price Maintenance*, Art. N41915.

D.Chalmers,G.Davies,G.Monti *European Union Law* (Cambridge University Press,2010).

D.J.Gerber, *Law and Competition in Twentieth Century Europe* (Oxford University Press, 1998).

Ehlers, D., & Becker, U. (2007). *European fundamental rights and freedoms*. Berlin: De Gruyter Recht.

European Commission (2013*). Antitrust procedures in abuse of dominance (Article 102 TFEU cases).*

European Comission.(2013). Antitrust procedures in anticompetitive agreements.

European Comission.(2013). Antitrust procedures in anticompetitive agreements, Investigation.

European Commission Press release (2016).Antitrust: *Commission fines car parts producers in cartel settlement.*

European Commission - PRESS RELEASES - Press release - Antitrust: Commission fines car parts producers € 137 789 000 in cartel settlement. (2016). *Europa.eu*. Retrieved 14 February 2016, from http://europa.eu/rapid/press-release_IP-16-173_en.htm

European Commission. Fines for breaking EU Competition Law. (2011).

Express Derogations. (2015). *Publicinterest.info*. Retrieved 10 November 2015, from http://publicinterest.info/?q=eu-law/express-derogations

Free movement of goods. (2016). *Europarl.europa.eu*. Retrieved 1 March 2016, from http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.2.html

Free movement of goods, Article 36 TFEU.

Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, No. 330/2010, 2010 O.J. L 102/1

G.Marenco, The Birth of Modern Competition Law inEurope in A. Von Bogdandy, P. Marvroidis and Y. Mény, *European Integration and International Coordination:* Studies in Transactional Economic Law in Honour C-D Ehlermann (The Hague, Kluwer, 2002).

German cartel office fines auto suppliers - Plastics News. (2015). *Plastics News*. Retrieved 20 January 2016, from http://www.plasticsnews.com/article/20150629/NEWS/150629903/german-cartel-office-fines-auto-suppliers

Germany Fines Auto Part Makers €75M Over Cartel - Law360. (2015). *Law360.com*. Retrieved 20 January 2016, from http://www.law360.com/articles/671967/germany-fines-auto-part-makers-75m-over-cartel

Growth – Internal Market, Industry, Entrepreneurship and SMEs - European Commission. (2015). *Ec.europa.eu*. Retrieved 10 December 2015, from http://ec.europa.eu/growth/index_en.htm

Guidelines on Vertical Restraints. (2010). *Official Journal of the European Union*.

Guidelines on Vertical Restraints. *Official Journal of the European Union.* 2010. (Pp.23-73).

Guidelines on Vertical Restraints. *Official Journal of the European Union.* 2010. (Pp.100-105).

Guidelines on Vertical Restraints. *Official Journal of the European Union.* 2010. (Pp.106-127).

Guidelines on Vertical Restraints. *Official Journal of the European Union.* 2010. (Pp.223-229).

H.G. Schröter, Centralization and Decentralization in Europe, 1870-1995: Rise and Decline of an Economic Institution(1996) 25 *Journal of European Economic History* 129. An exception was West German's Competition law drafted in 1957.

Law, C. (2009). *RESALE PRICE MAINTENANCE IN E.U. COMPETITION LAW: THOUGHTS IN RELATION TO THE VERTICAL RESTRAINTS REVIEW PROCEDURE | The Columbia*

Journal of European Law. *Cjel.net*. Retrieved 8 January 2016, from http://www.cjel.net/online/16_1-verras/

Leegin Creative Leather Products, Inc. v. PSKS, Inc.,127 S.Ct.2705 (2007).

Maciejewski.M.(2016).*Fact Sheets on the European Union, Free movement of goods.*

Maciejewski, M. (2016). *Free movement of goods*. *Europarl.europa.eu*. Retrieved 9 March 2016, from http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.2.html

MacKay, Alexander and Smith, David Aron, The Empirical Effects of Minimum Resale Price Maintenance (June 16, 2014). Available at SSRN: http://ssrn.com/abstract=2513533

Moisejevas, R., & Novosad, A. (2013). *SOME THOUGHTS CONCERNING THE MAIN GOALS OF COMPETITION LAW.*

Nicolas Petit & Guillaume Taillandier, Resale Price Maintenance*: A synthesis of national case laws, e-Competition Bulletin Resale Price Maintenance*, Art.N32560.

P.Reindl, A. (2011). Resale Price Maintenance and Article 101: Developing a More Sensible Analytical Approach. *Fordham International Law Journal*, *33*(4). Retrieved from http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2205&context=ilj

Platnosť zákona o skupinových výnimkách ukončí vstup do únie. (2013). *www.etrend.sk*. Retrieved 3 January 2016, from http://www.etrend.sk/podnikanie/platnost-zakona-o-skupinovych-vynimkach-ukonci-vstup-do-unie.html

Regulation 1/2003, article 23(1).

Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and 82 EC (2003) OJ L1/1.

Regulation 17/62/EC, First Regulation implementing Articles 81 and 82 EC (1959) OJ Spec. Edn 062, 57;

Roundtable on Resale Price Maintenance.(2008). Retrieved from http://ec.europa.eu/competition/international/multilateral/2008_oct_resale_price_maintenance.pdf

Rules Applicable to Antitrust Enforcement. (2013). *EU Competition Law*, *1: General Rules*. http://dx.doi.org/10.2763/35312

Rules Applicable to Antitrust Enforcement. (2013). *EU Competition Law*, *2: General Block Exemption, Regulations and Guidelines*. http://dx.doi.org/10.2763/35481

Slaughter, & May,. (2012). *The EU Competition Rules on Vertical Agreements*, *50*. Retrieved from https://www.slaughterandmay.com/media/64575/the-eu-competition-rules-on-vertical-agreements.pdf

Sy, S. (2016). *The Charter of Fundamental Rights*. *Europarl.europa.eu*. Retrieved 2 February 2016, fromhttp://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.1.6.html

The European Commission Explained: *Trade*.(2014).*Luxemburg*

The European Comission,Internal Market, Industry, Entrepreunership and SMEs, 2014.

Treaty on the Functioning of the European Union 2010 OJ C 83/47.

Tobler, C., Beglinger, J., & Geursen, W. (2011). Essential EU Competition Law in Charts. (18-28)

(2013). *Ucl.ac.uk*. Retrieved 14 December 2015, from https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-3-2013

Wesseling.R.(2000) *The modernisation of EC antitrust law*. Hart Publishing.

Whiddington, C., Pimlott, N., & Cassels, J. (2010). Article 101 and Article 102. *EU Competition Law*.

Statista. (2014).*Automotive Industry Statistics&Facts.*

Zajacova, I. & Ferencik, M. (2016). IMPA a.s. and Porsche Inter Auto Bratislava. Bratislava.

Zemanovičová, D., Semančínová,, L., Šramelová, S., Šufliarsky,, J., & Demčák, P. (2010). Kartelové dohody vo verejnom obstarávaní. *PROTIMONOPOLNÝ ÚRAD SR*. Retrieved from http://www.antimon.gov.sk/data/files/96_kartelove-dohody-vo-vo.pdf

ZÖHRER, & LEIRIÃO,. (2009). *Opinion of the European Economic and Social Committee on 'The components and downstream markets of the automotive sector'*. Brussels: The European Economic and Social Committee. Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009IE1204