



EUROPEAN COMMISSION
Competition

CASE AT.40037 – Carpenter/Subaru

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003 and Commission Regulation (EC) 773/2004

Article 13 of Council Regulation 1/2003

Article 7(2) Regulation (EC) 773/2004

Date: 26.06.2018

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EUROPEAN COMMISSION

Brussels, 26.6.2018
C(2018) 4138 final

LL-Carpenter s.r.o.



Czech Republic

Subject: Case AT.40037 – Carpenter/Subaru
Commission Decision rejecting the complaint
(Please quote this reference in all correspondence)

Dear Mr [REDACTED],

- (1) The European Commission ("the Commission") hereby informs you that, pursuant to Article 13 of Council Regulation 1/2003¹ and Article 7(2) of Commission Regulation (EC) 773/2004 ("Regulation 773/2004"),² it has decided to reject LL-Carpenter s.r.o.'s ("Carpenter") complaint dated 6 September 2012 against: (i) Subaru Europe NV/SA ("Subaru"), including its parent company Fuji Heavy Industries ("FHI") and its subsidiaries Subaru Benelux and Subaru Italia; (ii) Subaru Ceska Republika, Spol.s.r.o. ("Subaru CZ") and Subaru Germany ("Subaru DE"), both belonging to Emil Frey AG; and (iii) Subaru Nordic.³

1. BACKGROUND

1.1. The complaint lodged by Carpenter with the Commission

- (2) In its complaint dated 6 September 2012,⁴ Carpenter asked the Commission to launch an investigation into certain behaviour in the field of motor vehicle distribution that Carpenter considers to be in breach of Articles 101 and 102 of the Treaty on the

¹ 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, OJ L 1/1 1.4.2003, hereinafter ("Regulation 1/2003").

² Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

³ Fuji Heavy Industries is the parent company of Subaru Europe NV/SA. Subaru Benelux and Subaru Italia are subsidiaries of Subaru Europe NV/SA. Subaru CZ, Subaru DE and Subaru Nordic are not part of the FHI/Subaru Europe NV/SA group of companies. Subaru CZ and Subaru DE are subsidiaries of Emil Frey AG, which is the exclusive supplier of Subaru motor vehicles for the Czech Republic, France, Germany, Hungary, Poland and Switzerland. Subaru Nordic belongs to IM Group Ltd.

⁴ See DocID 1.

Functioning of the European Union (hereinafter "TFEU"). More specifically, Carpenter alleged that:

- (i) Subaru CZ rejected Carpenter's application to become an authorised distributor⁵ of Subaru motor vehicles in the Czech Republic. Carpenter alleges that the distribution agreements concluded between Subaru CZ and its authorised distributors amounted to "prohibited agreements" within the meaning of Article 101 TFEU. Carpenter argues that the Commission ought to withdraw the benefit of Block Exemption Regulation 1400/2002⁶ from these agreements;
 - (ii) Subaru CZ, Subaru DE, Subaru IT, Subaru Nordic, Emil Frey AG and FHI have obstructed the activities of intermediaries⁷ by engaging in concerted practices to put pressure on authorised distributors of Subaru motor vehicles located outside the Czech Republic not to sell Subaru vehicles to buyers from the Czech Republic who purchase vehicles through intermediaries such as Carpenter. Carpenter alleges that this conduct is in breach of Article 101 TFEU;
 - (iii) Subaru CZ, Subaru DE, Subaru Nordic and Subaru Benelux have been coordinating sales prices in Lithuania, Denmark, Belgium, Luxembourg, the Netherlands and the Czech Republic. FHI, the parent company of Subaru, also agreed to this claimed price fixing. Carpenter alleges that this conduct is in breach of Article 101 TFEU;
 - (iv) In Germany and in the Czech Republic, authorised distributors belonging to the Subaru CZ and the Subaru DE networks have refused to provide (extend) warranty services to consumers who bought their Subaru motor vehicles via Carpenter. Carpenter alleges that this conduct is in breach of Article 101 TFEU; and
 - (v) Subaru CZ has failed to deliver spare parts for Subaru motor vehicles and to disclose technical information necessary for the sale and servicing of Subaru motor vehicles to Carpenter, other intermediaries and end customers. Carpenter alleges that this conduct is in breach of Articles 101 and/or 102 TFEU.
- (3) Carpenter submitted supplementary observations on its complaint, notably on 12 February 2013, 8 July 2013, and 6 December 2013.⁸
- (4) On 4 June 2013, with Carpenter's consent, the Commission sent Subaru a non-confidential version of the complaint.⁹

⁵ According to paragraph 15 of the complaint, an authorised distributor is entitled both to sell new Subaru motor vehicles and provide repair and maintenance services for Subaru motor vehicles. The Commission will use the same definition for the purposes of this letter.

⁶ Commission Regulation (EC) no 1400/2002 on the application of Article 81(3) of the treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJEU L 203/30 1.8.2002 (hereinafter the "Regulation 1400/2002". On 1 June 2013, this Regulation was replaced by Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices - OJ L 102, 23.4.2010, p. 1–7. See also paragraphs 23 and 26 of the complaint.

⁷ Pursuant to Regulation 1400/2002, intermediaries are firms that buy vehicles on behalf of and for the account of individual end consumers. They therefore act as direct intermediaries between the dealer and the end consumer, and are to be treated as legal extensions of the end consumer.

⁸ See DocID 7 for the observations of 12 February 2013, DocID 77 for the observations of 8 July 2013 and DocID 95 for the observations of 6 December 2013.

(5) On 12 July 2013, Subaru submitted its comments on the non-confidential version of the complaint.¹⁰

- Regarding Subaru CZ's rejection of Carpenter's application to become an authorised distributor, Subaru explained that Subaru CZ operates a quantitative selective distribution system for new Subaru motor vehicles in the Czech Republic and therefore does not appoint all firms that meet its quality standards. It further explained that, in any event, there would be grounds not to accept Carpenter into the Subaru CZ network since the two undertakings have been in a commercial dispute centred on allegations that Carpenter had misused the Subaru trademark, and had acted as an independent reseller of new Subaru motor vehicles in the Czech Republic.¹¹

- Regarding the alleged pressure by Subaru CZ, Subaru DE, Subaru IT, Subaru Nordic, Emil Frey AG and FHI on authorised distributors of Subaru motor vehicles located outside the Czech Republic, Subaru denied exerting such pressure and indicated that the agreements in place expressly permit the sale of new motor vehicles by authorised dealers to end users acting through an intermediary acting on behalf of individual named end users in any territory of the EEA. Subaru also indicated that it had been notified that Subaru Nordic had reminded its authorised dealers not to sell to unauthorised resellers and had provided its authorised dealers names of companies, including Carpenter. Subaru considers that such an action on the part of Subaru Nordic is appropriate, as its importers are obliged to ensure that their dealers do not sell to unauthorised resellers. Subaru further points out that it has no information that Subaru Nordic informed its dealers not to sell to Carpenter when it had a mandate.¹²

- Regarding the alleged coordination by Subaru CZ, Subaru DE, Subaru Nordic, Subaru Benelux and FHI of sales prices in Lithuania, Denmark, Belgium, Luxembourg, the Netherlands and the Czech Republic, Subaru denied having put in place such practices and explained that the prices reflected local competitive conditions.¹³ As regards alleged price increase coordination between Subaru CZ and Subaru DE in Germany, Subaru points out that these two companies belong to the same undertaking and that therefore such actions could not infringe Article 101 TFEU.

- Regarding the alleged refusal by authorised distributors belonging to the Subaru CZ and the Subaru DE networks to provide (extend) warranty services to consumers that bought their Subaru motor vehicles via Carpenter, Subaru explained that it is not aware of these allegations. Subaru indicated that it will remind its importers/distributors of their contractual obligation to ensure that warranty repairs are made available to all customers regardless of where they purchased their Subaru vehicle.¹⁴

⁹ See Subaru's comments, DocID 57.

¹⁰ See DocID 80.

¹¹ Subaru refers to several court cases between Carpenter and the authorised Subaru importer in the Czech Republic, Emil Frey CZ. According to Subaru, courts in the Czech Republic have ordered Carpenter to stop using Subaru trademarks in its showroom because this was conveying the mistaken impression that Carpenter was an authorised dealer of Subaru motor vehicles. See paragraph 11 of Subaru's comments, DocID 57.

¹² See paragraphs 36-37 of Subaru's comments, DocID 57.

¹³ See paragraphs 40-49 of Subaru's comments, DocID 57.

¹⁴ See paragraphs 54-55 of Subaru's comments, DocID 57.

- Regarding the alleged failure by Subaru CZ to deliver spare parts for Subaru motor vehicles, Subaru explained that it is not required to provide independent repairers with wholesale access to genuine spare parts. Regarding the alleged failure by Subaru CZ to disclose to Carpenter, other intermediaries and end customers, technical information necessary for the sale and servicing of Subaru motor vehicles, Subaru explained that it is not aware of such a failure and indicated that it will remind its importers/distributors of their contractual obligation to provide independent repairers in the EEA equal access to technical information and training.¹⁵

1.2. The complaint lodged by Carpenter with the Office for the Protection of Competition of the Czech Republic

- (6) Prior to lodging its complaint with the Commission, Carpenter lodged a complaint on 19 May 2010 with the Office for the Protection of Competition of the Czech Republic ("OPC") regarding possible breaches of the EU and Czech competition rules by Subaru CZ. That complaint was registered by the OPC under reference P335/2010/KD.
- (7) Carpenter's complaint lodged with the OPC made, *inter alia*, a number of allegations that related to the same factual matrix as in Carpenter's subsequent complaint to the Commission and the OPC assessed those allegations pursuant to both EU and Czech competition rules:
- Carpenter alleged that Subaru CZ refused to accept it into its authorised network (i.e., the same allegation as summarised in paragraph 2(i)). The OPC assessed that allegation pursuant to Article 101 TFEU and section 3(1) of the Czech Act N^o 143/2001 on the protection of competition ("Act on Protection of Competition");
 - Carpenter alleged that authorised distributors belonging to the Subaru CZ network have refused to provide (extend) warranty services to consumers who bought their Subaru motor vehicles via Carpenter (i.e., the same allegation summarised in paragraph 2(iv) in so far as it relates to the Czech Republic). The OPC assessed that allegation pursuant to Article 101 TFEU and section 3(1) of the Act on the Protection of Competition; and
 - Carpenter alleged that Subaru CZ has failed to deliver spare parts for Subaru motor vehicles and to disclose technical information necessary for the sale and servicing of Subaru motor vehicles to Carpenter (i.e., the same allegation summarised in paragraph 2(v)). The OPC assessed that allegation pursuant to Articles 101 and 102 TFEU and sections 3(1) and 11(1) of the Act on Protection of Competition.
- (8) On 11 December 2014, the OPC informed Carpenter that it had closed its investigation into Carpenter's complaint because the information in its possession did not allow it to conclude that the conditions for prohibition under EU and Czech competition law were met.

¹⁵ See paragraphs 50-54 of Subaru's comments, DocID 57.

1.3. Procedural steps since 16 March 2015

- (9) On 16 March 2015,¹⁶ the Commission informed Carpenter of its intention to reject, pursuant to Article 7 of Regulation 773/2004, each of the allegations summarised in paragraphs 2(i)-2(v) ("the Article 7(1) letter").
- (10) On 14 May 2015,¹⁷ Carpenter submitted observations in response to the Article 7(1) letter ("the Article 7(1) reply"):
- In support of its allegation summarised in paragraph 2(i), Carpenter reiterated its view that Subaru CZ was operating a qualitative selective distribution system. Moreover, Carpenter claimed that Subaru CZ tightened those standards specifically to exclude it from the Subaru network, and that existing members of the Subaru authorised network did not, and in some cases do not, meet Subaru's quality standards. Carpenter also claimed that the Commission ought to assess whether Subaru CZ ought to have allowed Carpenter to join its authorised network as a stand-alone authorised repairer (i.e., without being required to sell new cars).
 - In support of its allegation summarised in paragraph 2(ii), Carpenter explained that it does not consider that it is required to prove that it has always acted as an intermediary acting on behalf of individual named end users, but rather that the burden of proof should be on Subaru to demonstrate that Carpenter did not act as such an intermediary.
 - In support of its allegation summarised in paragraph 2(iii), Carpenter claimed that the evidence it submitted with respect to the alleged coordination by Subaru CZ, Subaru DE, Subaru Nordic, Subaru Benelux and FHI of sales prices in Lithuania, Denmark, Belgium, Luxembourg, the Netherlands and the Czech Republic is sufficient to conclude that Subaru engaged in price fixing.
 - In support of its allegation summarised in paragraph 2(iv), Carpenter claimed that the alleged refusal by authorised distributors belonging to the Subaru CZ and the Subaru DE networks to provide (extend) warranty services to consumers that bought their Subaru motor vehicles via Carpenter was the result of encouragement by an unspecified importer.
 - In support of its allegation summarised in paragraph 2(v), Carpenter claimed that Subaru CZ refused to sell Czech operating/user manuals to purchasers that had purchased Subaru vehicles through intermediaries and that this claim was not investigated properly by the OPC.
- (11) In its reply to the Article 7(1) letter, Carpenter also made an additional, broader claim, that Subaru Nordic was obstructing parallel trade in its vehicles by: (i) requiring its Danish authorised dealers to submit the sales contract to it in the event of sales to consumers from other Member States; (ii) requiring its authorised Danish dealers to make a profit of at least EUR [REDACTED] for each sale to a Danish consumer, and of EUR [REDACTED] for each sale to a consumer from another Member State; and (iii) putting pressure on those authorised dealers not to sell "a larger number" of vehicles abroad. Carpenter alleges that this conduct is in breach of Article 101 TFEU.

¹⁶ See DocID 123.

¹⁷ See DocID 135.

- (12) On 18 December 2015,¹⁸ the Commission informed Carpenter of its intention to reject, pursuant to Article 13 of Regulation 1/2003, the allegations summarised in paragraphs 2(i), 2(iv) (in so far as it relates to the Czech Republic) and 2(v) because those allegations had already been dealt with by the OPC ("the Article 13 Letter").
- (13) On 22 February 2016,¹⁹ Carpenter submitted observations in response to the Article 13 Letter ("the Article 13 Reply"). In particular, Carpenter complained about the way the OPC has conducted the investigation of its complaint arguing that there are "*serious doubts about the professional ability of the OPC's staff to properly assess Carpenter's complaint*". Carpenter also alleged, for the first time, that Subaru Nordic obstructs parallel trade by monitoring the sale of cars by its authorised dealers from Denmark to other countries.
- (14) On 29 September 2016,²⁰ Carpenter submitted further observations regarding the allegations summarised in paragraphs 2(i), 2(iv) (in so far as it relates to the Czech Republic) and 2(v).
- (15) On 26 July 2017, the Commission informed Carpenter of its intention to reject, pursuant to Article 7 of Regulation 773/2004, the allegations summarised in paragraphs 11 and 13 ("the additional Article 7(1) letter").
- (16) On 14 November 2017, Carpenter submitted observations in response to the additional Article 7(1) letter ("the reply to the additional Article 7(1) letter"):
- Carpenter claimed that the evidence it submitted is sufficient to conclude that Subaru obstructs parallel trade by requiring its Danish authorised dealers to submit the sales contract to it in the event of sales to consumers from other Member States. Carpenter made in particular reference to transcripts of phone conversations between [REDACTED] from Carpenter and [REDACTED], [REDACTED] of [REDACTED], dealer of Subaru motor vehicles, located in Denmark. Carpenter also described in further detail the context in which those conversations took place.²¹
 - Carpenter claimed that the evidence it submitted is sufficient to conclude that Subaru Nordic obstructs parallel trade by monitoring the sale of cars by its authorised dealers from Denmark to other countries. Carpenter made in particular reference to the fact that Subaru Nordic makes the issuance of certificates of conformity ("COCs") for new vehicles conditional on the provision of the purchase agreement between an authorised dealer and an end user, including the sale price and the address of the end user. Carpenter also referred to transcripts of phone conversations between [REDACTED] from Carpenter and [REDACTED], [REDACTED] of [REDACTED].²²

¹⁸ See DocID 166.

¹⁹ See DocID 175.

²⁰ See DocID 177-181.

²¹ See paragraph 14 of the reply to the additional Article 7(1) letter where Carpenter describes the phone conversation of 15 July 2014. See also paragraph 15 of the reply to the additional Article 7(1) letter where Carpenter describes the phone conversation of 25 October 2016.

²² See paragraph 21 of the reply to the additional Article 7(1) letter where Carpenter describes the phone conversation of 15 July 2016.

- Carpenter claimed that its allegation that authorised distributors belonging to the Subaru DE network have refused to provide (extend) warranty services to consumers that bought their Subaru motor vehicles via Carpenter is supported by a 2017 decision of the Antimonopoly Office of the Slovak Republic in which Mikona s.r.o., the official importer and wholesaler of new Subaru motor vehicles within the territory of Slovak Republic was sanctioned for similar conduct.²³

2. THE ALLEGATIONS IN CARPENTER'S COMPLAINT TO THE COMMISSION THAT HAVE ALREADY BEEN DEALT WITH BY THE OFFICE FOR THE PROTECTION OF COMPETITION OF THE CZECH REPUBLIC

2.1. Principles

- (17) Pursuant to Article 13(2) of Regulation 1/2003, the Commission may reject a complaint or part thereof on the ground that a competition authority of a Member State has dealt with the same agreement, decision of an association or practice.²⁴ This is the case when a competition authority of the Member State has found that the information in its possession does not allow it to conclude that the conditions for prohibition are met regarding the same agreement, decision of an association or practice.²⁵

2.2. Application to this case

- (18) In the Article 13 Letter, the Commission informed Carpenter of its intention to reject, pursuant to Article 13 of Regulation 1/2003, the allegations summarised in paragraphs 2(i), 2(iv) (in so far as it relates to the Czech Republic) and 2(v) because those allegations had already been dealt with by the OPC.
- (19) Moreover, nothing in the Article 13 Reply has led the Commission to a different assessment regarding those allegations.
- (20) The Commission therefore rejects, pursuant to Article 13 of Regulation 1/2003, the allegations summarised in paragraphs 2(i), 2(iv) (in so far as it relates to the Czech Republic) and 2(v).

3. THE ALLEGATIONS IN CARPENTER'S COMPLAINT TO THE COMMISSION THAT HAVE NOT ALREADY BEEN DEALT WITH BY THE OFFICE FOR THE PROTECTION OF COMPETITION OF THE CZECH REPUBLIC

3.1. Principles

- (21) The Commission is unable to pursue every alleged infringement of EU competition law which is brought to its attention. It has limited resources and must therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints.²⁶

²³ See paragraphs 10 and 11 of the reply to the additional Article 7(1) letter.

²⁴ Case T-201/11 *Si.mobil v Commission*, EU:T:2014:1096, paragraphs 31-34.

²⁵ Ibid, paragraph 75.

²⁶ OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, p. 25-27.

- (22) When deciding which cases to pursue, the Commission takes various factors into account. There is no fixed set of criteria, but the Commission may take into account whether, on the basis of the information available, it seems likely that further investigation will ultimately result in the finding of an infringement. The Commission may consider the scope of the investigation required. If it appears that an in-depth investigation would be a complex and time-consuming matter and the likelihood of establishing an infringement appears limited, this will weigh against the Commission taking further action.²⁷
- (23) Moreover, while the Commission is obliged to examine carefully the factual and legal particulars brought to its attention by the complainant,²⁸ it is an inherent feature of the complaints procedure that the burden of proving the allegation rests on the complainant.²⁹
- (24) The mere fact that the Commission has already dedicated some time and resources to an investigation does not preclude a rejection of the complaint for reasons of priority setting. The Commission may take a decision to reject a complaint even at an advanced stage in the investigation.³⁰ The Commission is also not obliged to make a final finding as to the existence or non-existence of the alleged infringement.³¹

3.2. Application to this case

- (25) In the Article 7(1) letter, the Commission informed Carpenter of its intention to reject, pursuant to Article 7 of Regulation 1/2003, the allegations summarised in paragraphs 2(ii), 2(iii) and 2(iv) (in so far as that allegation relates to Germany).
- (26) In the additional Article 7(1) letter, the Commission also informed Carpenter of its intention to reject, pursuant to Article 7 of Regulation 1/2003, the allegations summarised in paragraphs 11 and 13.
- (27) Moreover, the views expressed by Carpenter in the reply to the Article 7(1) letter and the reply to the additional Article 7(1) letter have not led the Commission to a different assessment of the allegations summarised in paragraphs 2(ii), 2(iii), 2(iv) (in so far as that allegation relates to Germany), 11 and 13.
- (28) The Commission has therefore decided not to conduct a further in-depth investigation into those allegations for the following reasons.

3.2.1. The likelihood of establishing the existence of an infringement

- (29) The likelihood of establishing the existence of an infringement of Article 101 TFEU in respect of each of the allegations summarised in paragraphs 2(ii), 2(iii), 2(iv) (in so far as that allegation relates to Germany), 11 and 13 appears to be limited.

²⁷ Joined Cases T-104/07 and T-339/08 *Belgische Vereniging van handelaars in- en uitvoerders geslepen diamant (BVG D) v Commission*, EU:T:2013:366, paragraph 218.

²⁸ Case T-320/07 *Jones and Others v Commission*, EU:T:2011:686, paragraph 117.

²⁹ Case C-56/12 P *EFIM v Commission*, EU:C:2013:575, paragraphs 71-72; Case T-712/14 *CEAHR v Commission*, EU:T:2017:748, paragraph 39.

³⁰ Case T-110/95 *IECC v. Commission*, EU:T:1998:214, paragraphs 48 and 49.

³¹ Case C-119/97 P *UFEX and Others v Commission*, EU:C:1999:116, paragraph 87.

- i. *Alleged pressure by Subaru CZ, Subaru DE, Subaru IT, Subaru Nordic, Emil Frey AG and FHI on authorised distributors of Subaru motor vehicles located outside the Czech Republic not to sell Subaru vehicles to buyers from the Czech Republic who purchased vehicles through intermediaries such as Carpenter*
- (30) The likelihood of establishing the existence of an infringement of Article 101 TFEU in respect of the allegation summarised in paragraph 2(ii) is limited, since Subaru CZ, Subaru DE, Subaru IT, Subaru Nordic, Emil Frey AG and FHI do not seem to have exerted the pressure on authorised distributors of Subaru motor vehicles located outside the Czech Republic alleged by Carpenter. This is confirmed by the following.
- (31) First, as Subaru indicated, its minimum dealer standards appear to permit expressly the sale of new motor vehicles by authorised dealers to end users acting through an intermediary acting on behalf of individual named end users in any territory of the EEA³². Subaru also indicated that it made clear to its distributors that they should not place pressure on authorised dealers to prevent or discourage them from selling to authorised dealers and end users in other countries throughout the EEA.³³
- (32) Second, there appears to be a genuine commercial dispute between Subaru CZ and Carpenter as to whether Carpenter has acted as an independent reseller of Subaru motor vehicles, and has attempted to pass itself off as an authorised Subaru dealer by misusing Subaru signage.³⁴ While Article 4(b) of Regulation 1400/2002³⁵ describes as hardcore the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement may sell the contract goods or services, it provides an exception "*for the restriction of sales of new motor vehicles and spare parts to unauthorised distributors by the members of a selective distribution system*" where such a system is operated.
- (33) The existence of such a dispute, which is for the Czech courts to resolve, is confirmed by the following.
- (34) In the first place, according to Subaru, a visit by one of Subaru's representatives to Carpenter premises on 10 February 2011 led it to conclude that Carpenter was an independent reseller because it was displaying Subaru vehicles for sale.³⁶
- (35) In the second place, Carpenter does not dispute the fact that it was displaying Subaru vehicles at its premises, but indicated that these vehicles were only waiting to be picked up by the purchaser for whom it mediated the purchase.³⁷
- ii. *Alleged coordination by Subaru CZ, Subaru DE, Subaru Nordic, Subaru Benelux and FHI of sales prices in Lithuania, Denmark, Belgium, Luxembourg, the Netherlands and the Czech Republic*

³² See paragraph 65 of Subaru's comments, DocID 57.

³³ Ibid.

³⁴ See paragraph 11 of Subaru's comments, DocID 57.

³⁵ See footnote 6.

³⁶ See paragraph 33 of Subaru's comments, DocID 57.

³⁷ See DocID 135, at paragraph 27.

- (36) The likelihood of establishing the existence of an infringement of Article 101 TFEU in respect of the allegation summarised in paragraph 2(iii) is limited for the following reasons.
- (37) First, factors other than price fixing can explain a reduction in price differentials between Member States, and the fact that prices decreased in the Czech Republic and increased in other countries³⁸ is not of itself indicative of price-fixing. The Commission's reports on car prices showed that prices converged within the EU's single market from 1993 until the last report in 2011.
- (38) Second, Carpenter has not brought to the attention of the Commission any evidence that would demonstrate that the alleged reduction in price differentials, between, on the one hand, the Czech Republic and on the other Lithuania, Denmark, Germany, Belgium, Luxembourg, and the Netherlands is the result of co-ordination between Subaru and its importers.
- iii. *Alleged refusal by authorised distributors belonging to the Subaru DE network to provide (extend) warranty services to consumers that bought their Subaru motor vehicles via Carpenter*
- (39) The likelihood of establishing the existence of an infringement of Article 101 TFEU in respect of the allegation summarised in paragraph 2(iv) (in so far as that allegation relates to Germany) is limited for the following reasons.
- (40) First, authorised distributors belonging to the Subaru DE network do not seem to have refused to provide (extend) warranty services to consumers that bought their Subaru motor vehicles via Carpenter. While Carpenter has alleged that a particular authorised distributor belonging to the Subaru DE network refused to honour the warranty in one instance,³⁹ it also acknowledged in the complaint that, in that particular instance, the dealer did in fact honour the warranty in question: "*Subaru DE finally accepted Mr [REDACTED] warranty and repaired his motor vehicle defects as claimed*".⁴⁰
- (41) Second, it is irrelevant whether, as Carpenter alleges, the 2017 decision of the Antimonopoly Office of the Slovak Republic sanctioned Mikona s.r.o, the official importer and wholesaler of new Subaru motor vehicles within the territory of Slovak Republic for similar conduct.
- (42) In the first place, the importer of Subaru vehicles in Germany is a different company, Emil Frey AG.
- (43) In the second place, Carpenter neither alleges nor demonstrates that Emil Frey AG has implemented similar conduct in Germany to Mikona s.r.o, in the Slovak Republic.
- iv. *Alleged obstruction by Subaru Nordic of parallel trade in its vehicles as summarised in paragraph 11*

³⁸ See Annex 30 of the complaint.

³⁹ See paragraph 88 of the complaint.

⁴⁰ Ibid.

- (44) The likelihood of establishing the existence of an infringement of Article 101 TFEU in respect of the allegations summarised in paragraph 11 is limited for the following reasons.
- (45) First, as Annex 3 to your letter dated 22 February 2016 indicates, Subaru Nordic's agreement with its authorised dealers expressly permits the sale of new motor vehicles to any end user within the EEA. Moreover, in the same document, Subaru Nordic states that *"it does not prevent its authorised dealers from selling new motor vehicles to end users, given that the buyer is able to provide the authorised dealer with the relevant documentation showing his/her identity as an end user"*.⁴¹
- (46) Second, you have submitted no evidence in support of your allegation that Subaru Nordic obstructs parallel trade by requiring its Danish dealers to make a profit of at least EUR [REDACTED] for each sale to a Danish consumer and of EUR [REDACTED] for each sale to a consumer from another Member State.
- (47) Third, you have submitted no evidence in support of your allegation that Subaru Nordic obstructs parallel trade by putting pressure on its authorised dealers not to sell new motor vehicles abroad. In particular, while in your letter of 29 September 2016, you refer to threats from Subaru Nordic to either terminate the contracts of the authorised dealers that were selling new motor vehicles to end customers in Germany and in the Czech Republic or to increase the prices of new Subaru vehicles in Denmark, you provide no concrete evidence to demonstrate the existence of such threats.⁴²

v. *Alleged obstruction by Subaru Nordic of parallel trade in its vehicles as summarised in paragraph 13*

- (48) The likelihood of establishing the existence of an infringement of Article 101 TFEU in respect of the allegation summarised in paragraph 13 is limited for the following reasons.
- (49) First, as Annex 3 to your letter dated 22 February 2016 indicates, Subaru Nordic's agreement with its authorised dealers expressly permits the sale of new motor vehicles to any end user within the EEA and that it has not instructed any of its authorised dealers not to sell new vehicles to end users.⁴³
- (50) Second, it is unlikely that Subaru Nordic would be able to restrict parallel trade in its vehicles even if, as Carpenter contends in the reply to the additional Article 7(1) letter, Subaru Nordic makes the issuance of a COC for a new vehicle conditional on the provision of the purchase agreement between the authorised dealer and an end user. This is because, when an end consumer purchases a vehicle from an authorised Subaru dealer, either directly or through a mandated intermediary, both the authorised dealer in question and the end consumer (or his intermediary) have copies of the purchase agreement, and

⁴¹ See Annex 3 of your letter of 22 February 2016.

⁴² See DocID 177-181.

⁴³ See Annex 3 of your letter of 22 February 2016.

will therefore be able to obtain the appropriate COC from Subaru Nordic, in accordance with Article 18 of Directive 2007/46/EC.⁴⁴

3.2.2. *The scope of the investigation required*

- (51) A further in-depth investigation of the allegations summarised in paragraphs 2(ii), 2(iii), 2(iv) (in so far as that allegation relates to Germany), 11 and 13 would require considerable resources and would be disproportionate in view of the limited likelihood of establishing the existence of an infringement.
- (52) In the first place, a further in-depth investigation of the allegations summarised in paragraphs 2(ii), 2(iii), 2(iv) (in so far as that allegation relates to Germany), 11 and 13 would, among other things, require the Commission to conduct inspections at one or more Subaru premises and potentially assess large volumes of documents. This would be disproportionate given the limited likelihood of finding an infringement in relation to these allegations.
- (53) In the second place, a further in-depth investigation of the allegations summarised in paragraphs 2(ii), 2(iii), 2(iv) (in so far as that allegation relates to Germany), 11 and 13 would, among other things, require the Commission to send numerous requests for information to undertakings. This would be disproportionate given the limited likelihood of finding an infringement in relation to this allegation.

4. CONCLUSION

- (54) In view of the above, the Commission, in its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringements of Articles 101 TFEU and 102 TFEU and consequently rejects the complaint pursuant to Article 13 of Regulation 1/2003 and Article 7(2) of Regulation No. 773/2004.

5. PROCEDURE

5.1. Possibility to challenge this Decision

- (55) An action may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

5.2. Confidentiality

- (56) The Commission reserves the right to send a copy of this Decision to Subaru. Moreover, the Commission may decide to make this Decision, or a summary thereof, public on its website.⁴⁵ If Carpenter considers that certain parts of this Decision contain confidential information, I would be grateful if, within two weeks from the date of receipt, you would inform [REDACTED] Please identify clearly the information in question and indicate why Carpenter considers it

⁴⁴ Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, OJ L 263, 9.10.2007, p. 1–160.

⁴⁵ See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.

should be treated as confidential. Absent any response within the deadline, the Commission will assume that Carpenter does not consider that the Decision contains confidential information and that it can be published on the Commission's website or sent to Subaru.

- (57) The published version of the Decision may conceal Carpenter's identity upon request, but only if this is necessary for the protection of Carpenter's legitimate interests.

For the Commission
Margrethe VESTAGER
Member of the Commission

