



REPUBLIC OF ALBANIA  
-COMPETITION AUTHORITY-  
COMPETITION COMMISSION

---

DECISION  
No. 154 of 1 October 2010

**“On  
prohibiting the agreement between undertakings Classic sh.p.k., Hyundai Auto  
Albania sh.p.k., Noti sh.p.k. and Ultra Motors sh.p.k., and imposing a fine on  
them for competition restriction in the market of new vehicle procurement”**

The Competition Commission, composed of

- Lindita Milo (Lati) Chair
- Servete Gruda Member
- Koço Broka Member
- Rezana Konomi Member

in its meeting of 20 September 2010 reviewed the Case with:

**Subject-matter:** A bid-rigging agreement between undertakings Classic sh.p.k., Hyundai Auto Albania sh.p.k., Noti sh.p.k. and Ultra Motors sh.p.k., restricting competition in the market of new vehicle procurement.

**Legal basis:** - Article 24 (d); Article 26; Article 4 (1); Article 74 (1) (a) and Article 75 (1) of Law no. 9121 of 28 July 2003 “On Competition Protection”;  
- Law no. 8485 of 11 November 1999, “Administrative Procedure Code”.

**After reviewing the**

- Report of the working group on the investigation into the market of new vehicle procurement, initiated by Competition Commission Decision no. 135 of 21 December 2009;
- Report of the Secretary General;
- arguments submitted by Classic sh.p.k, Huynday Auto Albania sh.p.k., Ultra Motors sh.p.k. in the hearings of 17 June 2010 and 23 June 2010, and the written arguments submitted to the Competition Authority by means of Letters nos. 116 of 05.06.2010; 067 of 05.06.2010; 10 of 10.06.2010. Noti sh.p.k. did not submit any written arguments, nor did it participate in the hearings despite the invitation by the Authority.

## NOTES THAT:

### I. PROCEDURE

1. The investigation procedure is pursuant to Chapters II and III of Part III of Law no. 9121 of 28 July 2003 "On Competition Protection" (hereinafter the "Law") and Law no. 8485 of 11 November 1999, "Administrative Procedure Code".
2. Pursuant to Article 28 (a) of the Law, the Competition Authority Secretariat, on its own initiative, carried out a monitoring of the new vehicle procurement market in order to determine whether there were any elements restricting or distorting competition in that market.
3. Based on the findings of the monitoring of the new vehicle procurement market, the Competition Authority Secretariat, pursuant to Article 42 of the Law and Decision no. 246 of 8 July 2009 "On initiating an inquiry into the new vehicle procurement market", amended by Decision no. 260 of 21 July 2009 of the Secretary General, decided to initiate an inquiry into the market of new vehicle procurement in order to determine whether there were any undertakings whose actions or behaviours contained anticompetitive elements in conflict with the Law.
4. The inquiry showed that there was electronic and written evidence of collusion for public bid rigging among four undertakings – Classic sh.p.k., Ultra Motors sh.p.k., Noti sh.p.k. and Hyundai Auto Albania sh.p.k. – which could have amounted to a prohibited agreement for procurement (bid rigging) among undertakings in the relevant market.
5. After reviewing the inquiry report, the Competition Commission, pursuant to Articles 24 (d) and 43 (1) of the Law and Articles 12 and 21 (4) of the Regulation on the functioning of the Competition Authority, adopted Decision no. 135 of 21 December 2009, whereby it decided to "Initiate an in-depth investigation into the new vehicle procurement market, on undertakings Classic sh.p.k.; Ultra Motors sh.p.k.; Noti sh.p.k.; and Hyundai Auto Albania sh.p.k.," in order to determine whether there was bid rigging that restricted competition in the market of new vehicle procurement.
6. Pursuant to the Commission Decision, the Secretariat carried out the investigation pursuant to the Law and the Administrative Procedure Code. At the end of the investigation, the Secretariat submitted the in-depth investigation report to the Competition Commission.
7. The in-depth investigation report was also communicated to the undertakings under the investigation: Classic sh.p.k.; Ultra Motors sh.p.k.; Noti sh.p.k.; and Hyundai Auto Albania sh.p.k., attached to Letter no. 203 of 7 May 2010 of the Competition Authority.
8. Pursuant to Article 39 of the Law, the parties under investigation submitted their objections to the Investigation Report in the oral hearings and in a written form, which were taken into account by the Competition Commission.

### II. INVESTIGATION PERIOD AND UNDERTAKINGS UNDER INVESTIGATION

9. As specified in the Competition Commission Decision no. 135 of 21 December 2009 “On initiating an in-depth investigation in the market of new vehicle procurement” the period of investigation was from 1 January 2007 till 20 December 2009.
10. The undertakings under investigation were listed in Competition Commission Decision no. 135 of 21 December 2009. The undertakings under investigation, as specified in the abovementioned Competition Commission Decision are:
  - **HYUNDAI AUTO ALBANIA** sh.p.k., with Tax Registration Number K62420006T, and residing at: Rruga e Durrësit, përballë Pallatit të Sportit “Asllan Rusi” Tirana;
  - **ULTRA MOTORS** sh.p.k., with Tax Registration Number K21525002J, and residing at: Rruga e Kavajes, no. 116, Tirana;
  - **CLASSIC** sh.p.k., with Tax Registration Number J91909004J, and residing at: Rruga e Kavajes, Tirana;
  - **NOTI** sh.p.k., with Tax Registration Number K62717605S, and residing at: Gerhot, Gjirokastra, Lagjia “Pllake”, Blloku i Furrave.

### **III. MARKET STRUCTURE**

11. Pursuant to Article 3 (7) of the Law and Competition Commission Decision no. 76 of 7 April 2008 “On approving the guidelines on the determination of the relevant market”, the relevant market is determined in two aspects:
  - a. Product Market
  - b. Geographic Market

#### ***III.1 Relevant Product Market***

12. Under the principle of substitutability, the substitutable products in the market of public procurement of new vehicles are all the new vehicles provided by the undertakings in the market of new vehicle procurement. Those products should meet the technical specifications required in the public procurement organized by a Contracting Authority.
13. The technical specifications required by Contracting Authorities in the public procurement of vehicles are the main determinants of the relevant market size. The criteria specified by Contracting Authorities are classified into several main groups, including size, engine power, transmission, and other equipment; this also determine which undertakings may participate. The criteria specify which undertakings are operating in the relevant product market.
14. In our analysis of undertaking behaviour and of the effect that behaviour had on the market we are going to consider the relevant product market – the market of new vehicles quoted for public procurement.

#### ***III. 2 Geographic Market***

15. All the parties are active in the product market, and provide their products, across Albania. In assessing the bid effect, the geographic market will be the territory of the Republic of Albania.

### **IV. MARKET BEHAVIOUR ON THE MARKET**

16. **An amount of evidence was reviewed in order to assess market behaviour from the point of view of the Competition Protection Law, in the investigation into the behaviour of Classic sh.p.k., Hyundai Auto Albania sh.p.k., Ultra Motors sh.p.k. and Noti sh.p.k.**
17. The review of the evidence related to the competition on the market of new vehicle procurement, based on OECD Guidelines for Fighting Bid Rigging in Public Procurement,<sup>1</sup> showed that
- There was a small number of bidders participating in the relevant market;
  - There was bid rotation;
  - There were the means and indications of communication among bidders;
  - There were relations among bidders after the award of winning bid;
  - There were similar signs in the documents submitted by various bidders.
18. The undertakings under investigation—Classic sh.p.k., Hyundai Auto Albania sh.p.k., Ultra Motors sh.p.k. and Noti sh.p.k.—*used the subcontracting scheme*, by purchasing the procured vehicles from each other. The vehicles were purchased by the winning bidder after the award of the contract from one of the undertakings under investigation, which could be either a non-winning bidder or an undertaking that did not participate in the procurement. The vehicles were purchased and sold at the same price, thus maintaining the resale price.<sup>2</sup> Through those arrangements the undertakings under investigation effectively participated in the procurement and shared unfairly gained profits. One of the schemes that were used to share such profits was evidenced by the written agreement between Noti sh.p.k. and Classic sh.p.k., whereby any profit realized from sales were divided by setting the resale price and the profit share to be received by Noti sh.p.k. from the revenues. Thus Classic sh.p.k. participated de facto in the market of new vehicle procurement, while it had been excluded from that market. So, for instance:
- According to fiscal invoice no. 811 of 18.09.2008, with serial number 40152263, Classic sh.p.k. sold to Noti sh.p.k. 1 (one) VW Jetta, with VIN: WVW ZZZ 1KZ 8M 196 346 at the VAT-exclusive price of ALL xxxxx. According to invoice no. 45 of 19.09.2008, with serial number 36747896, Noti sh.p.k. sold the same vehicle to the Contracting Authority “Borough no. 8” in Tirana, at the same price it had purchased it from Classic sh.p.k., after the tender date ( 15.08.2008) and, therefore, after it had been awarded the contract.
  - According to invoice no. 454 of 25.06.2009, with serial number 41888305, Classic sh.p.k. sold to Noti sh.p.k. 1 (one) VW Passat, with VIN: WVW ZZZ 3CZ 9P 073 372 at the VAT-exclusive price of ALL xxxx. According to invoice no. 31 of 25.06.2009, with serial number 38310946, Noti sh.p.k. sold the same vehicle to the Contracting Authority “The Constitutional Court”, at the same

---

1 <http://www.oecd.org/dataoecd/27/19/42851044.pdf>

2 Based on the invoices taken during the onsite inspections and submitted by the undertakings in response to information requests.

date and at the same price it had purchased it from Classic sh.p.k., after the tender date (03.06.2009) and, therefore, after it had been awarded the contract.

19. Similar subcontracting (supplier) schemes were also found among the rest of the undertakings under investigation. Some examples are given below:

- According to invoices nos. 847, 848, 849, 850, 851, 852, 853 of 26.12.2007 *Ultra motors sh.p.k.* purchased from *Classic sh.p.k.* three Mitsubishi off-road vehicles at ALL xxx and three Mitsubishi off-road vehicles at ALL xxx. The out-memo data from the warehouse show that, with invoices nos. 5,6,7,8,9,10,11, of 31.12.2007 *Ultra motors sh.p.k.* sold to DG Taxes *vehicles at ALL xxxx*. According to Letter no. 7/4 of 26.01.2010, *Ultra Motors sh.p.k.* confirmed that it had submitted a bid in the procurement organized by DG Taxes, for 7 Mitsubishi off-road vehicles, at a price ALL xxxx each, for a total of ALL xxxx, which indicates that: *Ultra Motors sh.p.k.* had purchased the procured vehicles from *Classic sh.p.k.*, which had participated in the tender but had not won it, and had delivered them to the Contracting Authority (DG Taxes) at the purchase price.
- According to invoice no. 80 of 27.08.2007 *Ultra Motors* bought from *Hyundai Auto Albania* a nine-seat minivan at ALL xxxx. According to invoice no. 4 of 08.10.2007 *Ultra Motors* sold to the Commune of Kashar a vehicle at ALL xxxx. According to Letter no. 7/4 of 26.01.2010, *Ultra Motors* confirmed that it had submitted a bid in the Commune of Kashar procurement of a minivan at ALL xxxx. Therefore, *Ultra Motors sh.p.k.* had purchased the procured vehicles from *Hyundai Auto Albania sh.p.k.* and had delivered them to the Contracting Authority (Commune of Kashar) at the purchase price.
- According to the 2009 analytical purchase books, *Ultra Motors* bought from *Classic*, with invoices nos. 108, 109, 110, of 05.02.2009; nos. 138, 139, 140, 141, 142, of 16.02.2009, vehicles (Mitsubishi Pajero) with code 004, at ALL xxxx *per vehicle (exclusive of VAT)*; According to the 2009 analytical sales book, Mitsubishi Pajeros with code 004 were sold to Directorate General of Customs, with invoices nos. 6, 7, 8, of 05.02.2009; nos. 9, 10 of 23.02.2009 at ALL xxxx per unit (exclusive of VAT), that is at the same amount they had been bought from *Classic sh.p.k.*

20. **The undertakings under investigation had used the cover pricing scheme** by agreeing in advance who would submit the winning bid in a tender where they would all participate so that the lowest bid would win. It should be noted that when only *Classic*, *Ultra Motors*, *Noti* and *Hyundai* participated in a tender their bids were very close to the limit fund and were very similar to each other, thus increasing the amount of the winning bid. In those cases their bids varied from 95% to 99% of the limit fund. When other entities participated in the bids, in addition to the undertakings under investigation, the values of the winning bids varied from 75% to 89% of the limit fund; in addition, the bids of the

undertakings under investigation as a percentage of the limit fund was reduced. So, for instance:

- Classic and Hyundai participated in the tender organized by ALUIZNI in 2007 with a limit fund of ALL xxx (exclusive of VAT), with Classic winning bid being at 99.8% of the limit fund (at ALL xxxx exclusive of VAT).
- Ultra Motors and Classic participated in the tender organized by the Directorate General of Taxes in 2007 with a limit fund of ALL xxxx (exclusive of VAT), with Ultra Motors winning with 100% of the limit fund (at ALL xxxx exclusive of VAT), supported by Classic with 100% of the limit fund (ALL xxxx exclusive of VAT).
- Ultra Motors and Classic participated in the tender organized by the Seaport of Vlora in 2007 with a limit fund of ALL xxxx (exclusive of VAT), with Ultra Motors winning with 99.9% of the limit fund (at ALL xxxx exclusive of VAT), supported by Classic with 99.9% of the limit fund (ALL xxxx exclusive of VAT).
- Anas and Classic participated in the tender organized by the Albanian Post in 2007, with Anas winning with 84% of the limit fund – Classic had submitted a bid for 89% of the limit fund. This case is an example of a reduced bid by the undertakings under investigation.
- Noti, Ultra Motors and Hyundai participated in the tender organized by Borough no. 8 in Tirana in 2008 with a limit fund of ALL xxx (exclusive of VAT), with Noti winning with 97.6% of the limit fund (ALL xxxx exclusive of VAT) supported by Ultra Motors with 99.1% (ALL xxxx exclusive of VAT) and Hyundai (ALL xxxx exclusive of VAT). Hyundai Auto Albania and Noti participated in the tender organized by the Constitutional Court in 2008 with a limit fund of ALL xxxx (exclusive of VAT), with Noti winning with 99.6% of the limit fund (ALL xxxx exclusive of VAT) supported by Hyundai Auto Albania with 99.9% of the limit fund (ALL xxxx exclusive of VAT).
- Noti and Ultra Motors participated in the tender organized by the Ministry of Public Works, Transport and Telecommunications in 2008 with a limit fund of ALL xxxx, with Noti winning with 99.6% of the limit fund supported by Ultra Motors with 99.8%.
- Noti, Ultra Motors and Anas participated in the Lot VII tender organized by the Ministry of Interior in 2008 with a limit fund of ALL xxxx, with bids at 75%, 79% and 85% of the limit fund, respectively – Noti won with 75% of the limit fund, which was lower than the limit fund. Bids were reduced relative to the limit fund by the undertakings under investigation in those cases where the bidders included other undertakings than the latter.
- Hyundai Auto Albania and Noti participated in the tender organized by the Constitutional Court in 2009 with a limit fund of ALL xxxx (exclusive of VAT), with Noti winning with 99.6% of the limit fund (ALL xxxx exclusive of VAT) supported by Hyundai Auto Albania with 99.8% of the limit fund (ALL xxxx exclusive of VAT).

- Noti and Hyundai participated in the tender organized by the University of Tirana in 2009 with a limit fund of ALL xxxx, with Noti winning with 99.6% of the limit fund supported by Hyundai with 99.8%.
- Ultra Motors and Hyundai Auto Albania participated in the tender Lot IV organized by the Ministry of Interior Procurement Unit in 2009 with a limit fund of ALL xxxx, with Ultra Motors winning with 98.2% of the limit fund supported by Hyundai with 99.6% of the limit fund.
- Porsche Albania and Hyundai Auto Albania participated in the tender organized by the Ministry of Interior Procurement Unit in 2009 with a limit fund of ALL xxxx, with bids at 87% and 91% of the limit fund, respectively – Porsche Albania won the contract, thus reducing the amount relative to the limit fund.

21. **The undertakings under investigation have used the bid rotation scheme** by submitting the lowest bid in rotation so that all of them could win the contracts and thus increase their joint market share in 2008. In the rotation, the percentage of the winning bid would generally be close to the limit fund and slightly lower than the competitive bids. So, for instance:

- In 2007: Classic won 6 times against Ultra Motors, with a total amount of ALL xxx – Ultra Motors won 2 times against Classic, with a total amount of ALL xxxx.
- In 2008: Hyundai won 2 times against Noti, with a total amount of ALL xxxx lek – Noti won 6 times against Hyundai, with a total amount of ALL xxxx; Noti won 6 times against Ultra Motors, with a total amount of ALL xxxx – Ultra Motors won 2 times against Noti, with a total amount of ALL xxxx.
- In 2009: Hyundai won 4 times against Ultra Motors, with a total amount of ALL xxxx lek – Ultra Motors won 1 time against Hyundai, with a total amount of ALL xxxx;

22. Another indicator of collusion among the undertakings under investigation is the **existence of similar or identical marks** in the documents submitted to the Contracting Authorities by Classic sh.p.k., Ultra Motors sh.p.k., Noti sh.p.k. and Hyundai Auto Albania sh.p.k. Such marks include, for instance, misspellings, certificates bearing the same date and successive serial numbers by the same insurance companies, identical or successive protocol numbers, certification by the same public notary, translation by the same person, the same wording, formatting, and font type and size, and the same procurement representatives. So, for instance:

a) In the tender organized by the Contracting Authority *“Borough no. 6”* on 04.10.2007, with a limit fund of ALL xxx exclusive of VAT, with the following bidders: Hyundai Auto Albania sh.p.k. with a bid at ALL xxxx exclusive of VAT; Ultra Motors sh.p.k. with a bid at ALL xxxx exclusive of VAT; and Classic sh.p.k. with a bid at ALL xxxx exclusive of VAT; the bidding documentation bore identical characteristics, such as:

- The Company Register statements for Classic, Ultra Motors and Hyundai had the same date of issuance for the three bidders – 21.09.2007;
- The Judicial Record Statements for Classic, Hyundai and Ultra Motors had the same Protocol number and date of issuance – **25.09.2007**;
- The Judicial Enforcement Office statements for Classic, Hyundai and Ultra Motors had the same date of issuance – 20.09.2007 – and successive Protocol numbers;
- The Tirana Court statements for Hyundai, Ultra Motors and Classic had the same date of issuance for the three bidders – 21.09.2007;
- The Prosecution Office statements for Hyundai, Ultra Motors and Classic had the same date of issuance for the three bidders – 21.09.2007;
- The Tax Administration certificate of payment of taxes for Hyundai and Ultra Motors had the same date of issuance – 26.09.2007 – and successive Protocol numbers.

b) In the tender organized by the Contracting Authority “Borough no. 8, Tirana” on 15.08.2008, with a limit fund of ALL xxxx exclusive of VAT, with the following bidders: Hyundai Auto Albania sh.p.k. with a bid at ALL xxxx exclusive of VAT; Ultra Motors sh.p.k. with a bid at ALL xxxx exclusive of VAT; and Noti sh.p.k. with a bid at ALL xxxx exclusive of VAT; the bidding documentation bore identical characteristics, such as:

- The Company Register background statements for Noti, Ultra Motors and Hyundai had the same date of issuance for the three bidders – 21.03.2008;
- The Company Register statements for Noti and Ultra Motors bore the same date of issuance – 17.06.2008.
- The Bid Security forms for Noti and Hyundai were issued by the same insurance company; bearing the same date of issuance – 15.08.2008; and successive serial numbers.
- The Tax Administration certificate of payment of Social and Health Insurance Contributions for Hyundai and Ultra Motors had the same date of issuance – 01.08.2008 – and successive Protocol numbers.
- The Tax Administration certificate of Annual Turnover for Hyundai and Ultra Motors had the same date of issuance – 01.08.2008 – and successive Protocol numbers.



- The Tax Administration certificate of payment of taxes for Hyundai and Ultra Motors had the same date of issuance – 01.08.2008 – and successive Protocol numbers.
- The Judicial Enforcement Office statements for Hyundai and Ultra Motors bore the same date of issuance – 16.06.2008 – and successive Protocol numbers.

c) In the tender organized by the Contracting Authority *Vlora Municipality* on **25.06.2009**, with a fund of **ALL xxxx** exclusive of VAT, and with the following bidders: Hyundai Auto Albania sh.p.k. with a bid at ALL xxxx exclusive of VAT; Ultra Motors sh.p.k. with a bid at ALL xxxx exclusive of VAT; the bidding documentation bore identical characteristics, such as:

- The Judicial Enforcement Office statements for Hyundai and Ultra Motors bore the same date of issuance – 21.05.2009 – and successive Protocol numbers.
- Price Quote Forms for Hyundai and Ultra Motors: Both bidders used the same table format, the same wording and the same blank space (there are two rows in the table).
- Bid Forms for Hyundai and Ultra Motors: Both bidders used the same wording, the same font size and type, and the same blank space between list items.
- Quantity and delivery timeframe for Hyundai and Ultra Motors: Both bidders filled in the form using the same wording, the same table format and the same font size and type.
- Conflict of Interest Statements for Hyundai and Ultra Motors were filled in using the same wording and the same font size and type.
- Certificate of Agreement Translation for Hyundai: The translation from English of the agreement between Hyundai Auto Albania and Hyundai Motor Company was certified by the same person as the Sales Manager of Classic sh.p.k.

**23. Direct electronic and printed evidence** of collusion between the four undertakings (Classic sh.p.k., Ultra Motors sh.p.k., Noti sh.p.k. and Hyundai sh.p.k.) was found. The public procurement evidence and the evidence taken during the inspections show indications of collusion in the preparation of the bids and the relevant public procurement participation documentation among Classic sh.p.k., Noti sh.p.k., Hyundai sh.p.k. and Ultra Motors sh.p.k. The collusion is evident in the exchange of detailed information on vehicle prices and technical specifications, which shows that the bids were prepared by joint staff or by a number of employees working closely together; the number of joint staff who, as the inspections showed, were mainly involved in the public procurement participation; joint dealers bidding in the market of new vehicle procurement. The direct evidence points to the existence of a bid rigging agreement among the undertakings under investigation.

24. Hyundai sh.p.k., Ultra Motors sh.p.k., Classic sh.p.k. and Noti sh.p.k. have applied the schemes that were confirmed by the findings, in accordance with the OECD methodology, and have violated Article 4 (1) of the Law, in particular point (a) of that paragraph.
25. Based on the above analysis of the market undertakings' behaviour it was shown that they had been involved in bid rigging,<sup>3</sup> which pursuant to Law no. 9121 of 28 July 2003 "On Competition Protection" (Article 4(1)(a)) is considered as a prohibited agreement since it aimed at limiting competition in the market of new vehicle procurement.

**FOR THESE REASONS :**

The Competition Commission, pursuant to Articles 4 (1), 24 (d), 45 (1), 74 (1) (a) and 80 of Law no. 9121 of 28 July 2003 "On Competition Protection",

**DECIDED :**

- I. To conclude the in-depth investigation unto undertakings Classic sh.p.k., Hyundai Auto Albania sh.p.k., Noti sh.p.k. and Ultra Motors sh.p.k.
- II. To prohibit the bid rigging agreement in the market of new vehicle procurement, among "Classic" sh.p.k., Ultra Motors sh.p.k., Noti sh.p.k. and "Hyundai Auto Albania" sh.p.k. as a prohibited agreement pursuant to Article 4 of Law no. 9121 of 28 July 2003 "On Competition Protection".
- III. To impose a fine of ALL 25,712,000 on Classic sh.p.k. for taking part in bid rigging;
- IV. To impose a fine of ALL 5,383,000 on Hyundai Auto Albania sh.p.k. for taking part in bid rigging;
- V. To impose a fine of ALL 1,517,000 on Ultra Motors sh.p.k. for taking part in bid rigging;
- VI. To impose a fine of ALL 2,994,000 on Noti sh.p.k. for taking part in bid rigging;

---

<sup>3</sup> Bid rigging aims at restricting competition by coordinating bids and submitting bids with the purpose of effective participation in procurement and increasing profits.

VII. The Secretary General shall be charged with enforcing this Decision and communicating it to the undertakings referred to above.

This Decision shall enter into force immediately.

### COMPETITION COMMISSION

Servete GRUDA

Member

Koço BROKA

Member

Rezana KONOMI

Member

Lindita MILO (LATI)

CHAIRPERSON

---

### MINORITY OPINION

With regard to Competition Commission Decision no 154 of 1 October 2010 “On prohibiting the agreement between undertakings Classic sh.p.k., Hyundai Auto Albania sh.p.k., Noti sh.p.k. and Ultra Motors sh.p.k., and imposing a fine on them for competition restriction in the market of new vehicle procurement”, I have taken a dissenting position, particularly regarding the fact-finding part and, therefore, the disposition. I support and justify this position below:

A. Since the very beginning of the Commission review of the New Vehicle Procurement Inquiry Report I have expressed my concern on the:

I) Unequal treatment of the undertaking under investigation by the working group;

II) Determination of the relevant market;

III) Specific bidding issues, including bid rigging, which need to be addressed by the Public Procurement Agency, or determination whether there is competition restriction which is governed by the laws and regulations on the protection of free and effective competition on the market.

Below I explain my dissenting position and vote:

I cannot stress enough that competition and, especially, **its protection requires a level game ground and a Competition Authority that functions like an arbiter ensuring equal game rules. The question is how did the monitoring and inquiry working group observe such equal game rules?**

Based on the investigation files, the market monitoring and subsequent investigation by the Secretariat was initiated due to the indications noticed during the procurement of a car by the

Competition Authority in 2008, as shown by the finding that “The monitoring that the Competition Authority Anti-Cartel Unit did in the market of new vehicle procurement and the review of the file on the procurement of a new car by the Competition Authority in 2008 found indications of competition restriction in at least two procurement procedures:

I. Hyundai Auto Albania sh.p.k. and Ultra Motors sh.p.k. participated in the car procurement tender organized by the Competition Authority on 02.05.2008 and 11.09.2008 with a limit fund of ALL xxxx, with the following violations:

- The tender participation authorizations bore the same date and the same spelling mistakes. On 02.05.2008 Hyundai authorized Mr. D. GJ. to participate in the tender organized by the Competition Authority, while Ultra Motors authorized Mr. A.M. In the authorizations for the following tender in September 2008, the Hyundai representative in the first tender now represented Ultra Motors, and the Ultra Motors representative in the first tender now represented Hyundai;
- The Company Register statements for both companies bore the same date (20.03.2008) and were issued by the same person, with the same marks and printing signs;
- The certified auditor’s reports and financial statements for January-December 2007 were written by the same auditor, in the same writing and editing, and were certified by the same public notary;
- Both bids had the same date (02.05.08) and were conceived identically;
- The company description forms had the same date (02.05.08) and contained the same description, the editing was the same, only the font type was different, but the rest of the formatting was the same;
- The price quote form was written in the same format, font type and content;
- The rest of the bid elements were the same, with the same spelling errors (such as the use of “e” instead of “ë”) and the photocopying and printing marks were the same;
- The vehicle assessment notices had the same elements, albeit in different dates. The justification for the failure to deliver the goods was the same;
- The quantity and delivery timeframe was the same, with almost the same editing and the same printing marks, as well as the same spelling errors, albeit with some changes in the bold font;
- An analysis of the bids relative to the limit fund shows that both bids were close to the limit fund and that both bids had almost the same ratio relative to the bid—98.8% and 99.4%, respectively.
- Based on Law no. 9121 of 28 July 2003 “On Competition Protection” and the OECD Guidelines on Fighting Cartel in Public Procurement, the elements above are the elements of coordinated behaviour in public procurement pursuant to Article 4 of the Competition Protection Law.<sup>4</sup>

II. The competition analysis that was carried out in relation to the public procurement of new vehicles by the Ministry of Interior with a limit fund of ALL xxxx, competition restrictions were found, based on: ... “<sup>5</sup>

On that basis, on the Secretary General’s initiative, a monitoring procedure on the vehicle market was started, and on 8 July 2009 a decision was taken to: “initiate an inquiry into the new vehicle procurement market”, in order to determine whether there were any “potential competition restrictions in the market of new vehicle public procurement” and whether there were any “undertakings that were involved in anticompetitive actions or behaviours that are in conflict with Law no. 9121 of 28 July 2003 “On Competition Protection”.

---

<sup>4</sup> See Folder no 1 on new vehicle procurement, document no 9.

<sup>5</sup> Ibid.

Without implying that an inquiry may not be initiated from such a cause, special importance should have been given to the issue of addressing it in a timely and objective manner, by treating all undertakings operating in the market equally. Therefore, a question arises:

a) What was done when, during the tender that the Competition Authority organized to purchase a new vehicle, the staff saw all the documentation demonstrating the abovementioned behaviours? What were the consequences of the abovementioned actions of the bidders, including the price of the new vehicle that the Competition Authority purchased, or other effects? Based on the above, the question arises: did the Secretariat, which was the buyer of the new vehicle, cooperate with the relevant Public Procurement Authority that deals with the public procurement violations? The files show that there were no complaints or acts of cooperation with the Public Procurement Authority for the timely elimination of the abovementioned attitudes.

The Public Procurement Agency should have been notified as soon as possible, regardless the investigation of this case by the Competition Authority. I, too, stand by the opinion stated by my colleague members of the Commission that the “Methodology of the investigation was the correct methodology”. In fact, how I see it, the methodology should help the procurement staff to detect bid rigging, because it explains all the cases of potential bid rigging. It also points to the signs that should be picked up by public procurement officers. In all the procurements I have seen, all the vehicles were procured under subcontracting arrangements.

b) In addition to the unequal treatment in the form of failure to investigate all the undertakings in the market under investigation completely, it is not difficult to see that the indications referred to above, such as the proximity of the winning bids to the limit funds, which the working group identified with regard to the undertakings under investigation and which subsequently led to imposing a fine on them, are also evident among other undertakings.

- The Albanian Competition Authority is, therefore, facing the real challenge of implementing the same rules for all the undertaking in the market and protect and restore, at the same time, free and effective competition in the market; it should not treat undertakings differently and merely impose fines. Furthermore, the latter should not become a purpose in itself. Its investigations should have the same rules, and the Authority’s concern should be the restoration of free and effective competition in the market.

What are some of the elements that the working group carried out in this process?

- **First.** After the opening of the inquiry, the Working Group consciously set as its methodology that Mrs. X Y would collect information on the bids and awarded contracts for the period June 2008-June 2009 from the Public Procurement Agency website, in order not to compromise the investigation by collecting information through other means.<sup>6</sup> Thus the information was collected merely as a cover-up, without thinking whether it contained any evidence of a potential restriction in the market.
- Investigation Folder 1 contains file 19 with this information, but it did not have a letterhead (when asked what this document was the Working Group noted: **Data extracted from PPA website [www.app.gov.al](http://www.app.gov.al)**). The document has 16 pages and contains information on the bids and winning bidders for each tender from 6 June 2008 till 16 July 2009, as per the task assigned in the abovementioned record.
- Document 19 in folder 1 of the inquiry into the bids published by PPA was not reviewed by the Working Group to see whether there were any actions belonging to the undertakings under

---

<sup>6</sup> See the Working Group Minutes, 21.07.09.

investigations and other undertakings. The document contains information on 65 tenders, while the number of tenders organized during the three years under investigation is much bigger. So, instead of also using this document as investigation evidence, it was merely used as a cover-up.

- The document proves that the statement “An analysis of the bids relative to the limit fund shows that both bids were close to the limit fund and that both bids had almost the same ratio relative to the bid—98.8% and 99.4%, respectively” was not about a phenomenon limited to the undertakings under investigation, which were subsequently fined, but was something that was present in other tenders, too. I reviewed the first tenders in the abovementioned file and I got the following results, excluding the undertakings under investigation which were fined:

This phenomenon is not isolated, therefore. The investigation did not, however, extend in that direction. The treatment of the undertakings under investigation was, thus, done deliberately on unequal terms by the working group.

While I agree on the fight against bid rigging, I cannot agree with the deliberate practice of selective treatment of undertakings, at a time when there are indications of other companies being involved in the same practice. Bid rigging can be fought against effectively only if it is addressed on a case-by-case basis, without excluding anyone.

In this context, my fellow members of the Commission asked for information on the criteria used to select the undertakings under investigation and I have always supported that request and asked the working group to treat all companies equally. But, while the working group—at a practical level—and the legal advisor to the Commission—at a point of law level—maintain a position on the legal equality in the inspections carried out under the inquiry into the market of new vehicle procurement<sup>7</sup> that position is that “the principle of equal treatment before the law means identical treatment in identical or similar situations and different treatment in different situations. It should be noted that any unequal treatment of infringements of law does not enjoy legal protection in the Albanian system, i.e. no one who has violated the law may avoid criminal or administrative liability just because a public authority has not succeeded in finding and punishing other persons

No	The tender number in the document	Limit fund	Winning bid	Competitive bid	Winning and competitive bid ratio over the limit fund
1	3	4 569 973	4 500 000	4 560 000	98.46;99.78
2	4	1 400 000	1 380 000	1 390 000	98.57; 99.28
3	7	1 500 000	1 494 000	1 499 500	99.6;99.96
4	8	1 200 000	1 190 000	1 195 000	99.16;99.58
.....					

<sup>7</sup> Internal Memo, 21.12.2009.

that have violated the law.”

Instead of implementing identical procedures for everyone, in other words a complete investigation of all the companies under investigation and, especially, of those showing signs of bid rigging, a deliberate selective approach was taken. My position is that the Competition Authority should impose identical game rules for the protection of free and effective competition.

There is another argument that proves that the procedures followed by the working group were selective. The action plan implementing Inquiry Decision no. 246 of 8 July 2009 provided for, inter alia, the following:

- : The Dawn Raids would begin where the biggest winning bid was, and where there were more indications of bid formulation.
- Leandro Noti and Ultra Motors, because both participated together in at least two tenders with each winning in rotation.
- Hyundai, because it participated in several tenders together with Leandro Noti, with bids being close to the limit fund and each winning in rotation.
- Anas and Porsche Albania, because they had submitted regular bids.
- Noshi, because it had never won a bid. The inspection was to see what cooperation it had with the rest of the companies or to find out the reason for never winning a bid. The company had submitted bids several times, without winning once.

I note that this determination was done at the very beginning of the inquiry. The last company only answered a questionnaire: it did not undergo an inspection, contrary to what the action plan envisaged—Dawn Raids would begin with the **biggest tender winner**. It should be noted that this was the company that won the tender with the biggest amount of vehicle public procurement in 2009, according to the Official Bulletin of the Public Procurement Agency.

I clearly stated my position in the Competition Commission meeting of 21 December 2009, where it reviewed the Report on Opening the In-Depth Investigation into the Market of New Vehicle Procurement. My position was: “I reconfirm the concern that I have already raised. There are law infringements in Albanian tenders, but this requires an accurate definition. Our Authority is embarking on the wrong path: instead of helping the market function we are causing additional problems. If our intervention is selective we are going to aggravate the problem instead of solving it, we are going to stick one’s eyes out instead of fixing one’s brows.”

In the investigation folder no 1 there is a file no 26 which states that Mr. A.P. is the sole owner of the Ultra Motors sh.p.k. shares and Classic sh.p.k. shares. I have not seen anything about this in the Report, about its implications in the new vehicle market and in the market of new vehicle procurement, especially with regard to the restoration of free and effective competition in the market of new vehicle procurement.

Based on the above, one gets the impression that this investigation was initiated on the basis of a grudge among the Competition Authority staff against Hyundai sh.p.k. arising from the purchase of the new institutional vehicle. I do not wish to become part of such decision-making that gives rise to conflict of interest. I would have participated in the decision-making if the investigation had ensured equal treatment of all undertakings in this market.

The working group should have been more transparent regarding the above.

**Second.** I do not agree with the elusive definition of the relevant market.

a) The vehicle market in Albania is known to comprise several markets, e.g. the second-hand vehicle market, the new vehicle market and the market of new vehicle procurement.

It is a known fact that while the second-hand market is not regulated and controlled it is the biggest one. In the contrary, the new vehicle market is supervised by state authorities—Directorate General of Customs, Directorate General of Taxes, Competition Authority, etc. The ratio in terms of vehicles between both markets is 10:1, 9:1, 8:1, in favour of the second-hand vehicle market. Various associations that are related to the market of new vehicles, such as the German Chamber of Commerce, have demanded for the state authorities to fight the **unfair competition** in that market, and they have continuously invited the Competition Authority in their meetings.

It is in this backdrop where there is no serious commitment to the second-hand vehicle market or towards the concerns of the new vehicle market that the Secretariat opened an investigation into the market of new vehicle public procurement.

It should be noted that the public procurement of new vehicles took 6.82% of the new vehicle market in 2007; 5.66% in 2008 and 11.57 in 2009. So, when the investigation was initiated the share of this market segment was much lower than 10% of the new vehicle market and much smaller vis-à-vis the overall vehicle market in Albania.

There are some significant changes between the new vehicle market and the market of new vehicle public procurement. Based on the number of companies operating in the market of new vehicles it corresponds to the structure of monopolistic competition. While it is part of other forms of incomplete competition, this market structure is closer to complete competition, with some distinguishing features. The main feature is the differentiation of the product through its **quality, image, service and limited control of prices**. The limited control prices is also transferred to the **market of new vehicle public procurement, which is a regulated market with a significant restriction of free competition that is typical of this product, such as the make, image, etc.**

I underlined the difference between the market of new vehicle public procurement from the general new vehicle market because, as the investigation shows, the issues found in the former were more widespread than the companies that were in the focus of the working group.

Therefore, the addressing of only some subcontracting schemes, by excluding the rest, is not in the interest of protection and restoration of competition in the market of new vehicle public procurement, as it can lead to the exit of some companies from the market.

It is striking that the most powerful company in the new vehicle market has only 15.81% of the market, which creates the precondition for free, effective and fair competition. It is important for the market to be protected against unfair competition, which is also the concern of its operators, while also focusing on other violations of free and effective competition.

b) In item 6.1 definition of the relevant market, referring to no. 42, the relevant product market is defined like this: “In our analysis of undertaking behaviour and of the effect that behaviour had on the market we are going to consider the relevant product market—**the market of new vehicles quoted for public procurement.**”

With reference to that definition, one can easily see that company no. 28 in Table 4 on page 26 of the Report has 49.88% of the market of new vehicles quoted for public procurement in 2009 and had won the contract with the highest amount (ALL xxxx) in the period under investigation, with a direct impact on the development of the market of new vehicles. That company was not subject to the full



inspections and investigation (not even in the stage of preliminary inquiry) apart from answering a questionnaire.

With regard to that market, the working group did not carry out a research in physical terms, even though this type of analysis was carried out during other Competition Authority investigations.

The determination of the relevant market is not a purpose in itself, but it is necessary to judge the market power and to look into the behaviour of market operators. The working group took a completely different approach when it found an increased market power of the abovementioned company, which was not subject to investigation.

When addressing the issue of the relevant market, the report states, “Under the principle of substitutability, the substitutable products in the market of public procurement of new vehicles are all the new vehicles provided by the undertakings in the market of new vehicle procurement which meet the technical specifications required under a public procurement organized by a contracting authority.”

This is a very important element in the market of new vehicle public procurement. The participation in specific tenders is determined by those specifications. However, apart from this definition, the report does not include a list of the technical specifications, nor does it include an analysis of the behaviour of the undertakings in each of the relevant markets, which would have helped us to judge how the market was abused by the undertakings in order to increase their new vehicle market share or unfairly increase their prices and profits.

Thus the determination of the relevant market remains a purpose in itself in both cases, and not a starting point for research and inquiry.

Its definition does not specify therefore whether the relevant market is the market of the procurement of new vehicles or of any kind of procurement. On the other hand, as I have already said in the decision-making meeting, the specific issues of those tenders where the number of vehicles is one do not fall in the remit of the Law and Institution of the Competition Authority.

III- Bid rigging or tender collusion is not a purpose in itself but an effort to reach secret agreements to increase the market and the price or to reduce the quality of goods and services by rigging the process of tendering. This is clearly stated in the Guidelines on the fight against bid rigging in public procurement, which the working group claims to have applied to this investigation.

One of the challenges for this investigation was the difference between various types of tender collusion, which lies with the fact if it is bid rigging for certain unfair benefits (e.g. increased share of an undertaking in the free market, higher prices, etc.), subcontracting, which is provided for in the Public Procurement Law (the Law allows subcontracting subject to certain rules, such as the reporting of the subcontracting arrangements to the contracting authority and the limit of 40% of the procured goods), or simply fictitious participation to complete the required number of participants in a tender, especially when the number of procured vehicles is one. In the latter case, too, there is bid rigging, but it does not mean, in my opinion, that the new vehicle public procurement inquiry analysis should stop here. The analysis of the fact that a bid rigging violates the Public Procurement Law or the Competition Protection Law would be complete if it shed some light on the illegal gains of the undertakings under investigation. This takes special importance for the restoration and maintenance of competition in both the public procurement market and the new vehicle market.

To that end, the three major undertakings under investigation had the following performance in the market of new vehicles (as an outcome of their bid rigging arrangements):

- two companies experienced stagnation and an insignificant fall in 2008 and 2009 compared with 2007, and one company had a slight increase of no more than 1.6% in 2009
- prices quoted by the undertakings under investigation in the procurement procedures were the same as, or lower than, their prices in the market of new vehicles
- a fourth company served as a “dealer” for one of the three undertakings under investigation, and
- while the working group does not give any information about the number of vehicles each of those undertakings sold through public procurement, or an analysis in physical terms of the relevant market, based on the above I have come to the following conclusion:

With reference to the Report and its schematic presentation by the working group in the Commission meeting, the working group was not able to address the Competition Commission concern (and my concern, mainly) with regard to the issues found in this market and, especially, how to regulate this market. Therefore, the working group failed to submit any proposals on such issues, which gives me reservations with regard to the final conclusions of the working group that were ignored by the rest of the Commission members.

My proposal was to consider a meeting or a round table with the relevant authorities before the taking of a decision, especially in the conditions where the working group gave no detailed information on which the line agencies were (with the claim that they had changed) and which should have been contacted for an official opinion. One such institution is the Procurement Advocate. Regarding its findings I demanded for the working group to be more transparent in the identification of facts, and despite my insistence my demands were not taken aboard and the Report is incomplete.

Based on the above, since I do not agree with almost any of the facts in the fact-finding part of the Decision, which was drafted by the majority, I cannot agree and approve the disposition of the Decision, which was a direct outcome of those findings.

**Therefore, I have decided to vote against it.**

**COMPETITION COMMISSION**

**Koço BROKA**

**Member**