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RESTRICTIVE AGREEMENTS

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According to the Competition act, competition violation comes from acts or actions performed by market participants which serve or could serve as means to the end of significantly diminishing, limitation, violation or prevention of competition.

Restrictive agreements serve as a the most common example of competition violation on Serbian market, therefore, considering the definition of the issue, one might argue that restrictive agreements are those that serve as an end to ensure significant limitation, disturbance and prevention of competition in Republic of Serbia.

From forwardly-mentioned definition one comes to conclusion that condition for the existence of a restrictive agreement in relation to the relevant acts (limitation, disturbance, prevention) is set as an alternative. Therefore, to be seen as restrictive, it is sufficient for any contract to have any of the relevant actions for its end.

Such a definition apart from its theoretical, also has an immense practical significance because it absolves state authority from proving the existence of negative consequences for the competition on Serbian territory in case some agreement has a forbidden cause (some cases have already refined in Commission's practice as those in which the cause is presumed as forbidden, for example retail price determination to the buyer and such).

It is useful to notice that in general definition of competition violation (which incorporates dominant position abuse, merging without Commission's approval) set in article 9, legislator uses the term “have or could have” (significant limitation, violation or prevention of competition) for acts and actions of market participants, while restrictive contract definitions, set in article 10, only uses the term “have”.

1) Forms of restrictive agreements

Restrictive agreements can be performed as contracts, individual contract provisions, explicit and taciturn agreements, agreed practices, as well as market participants associations, used especially in order to:

1) directly and indirectly determine buy/sell retail prices and other trade terms;

2) limit and control production, market, technical development and investments;

3) apply uneven terms of business to different market participants, bringing them in unpleasant position with other competitors;

4) set additional conditions for contract or agreement conclusion by acceptance of additional obligations that given its nature and commercial customs and practice have no relation to the subject of the agreement;

5) divide markets and supply sources.

Competition protection act sets forms and examples of restrictive agreement exempli causa, leaving the possibility (by using the term “especially”) that other forms are considered restrictive agreements if they contain above mentioned forbidden cause as such.

Naturally, given the diversity of forms, horizontal agreements or market participants agreements on the same level of production and distribution (cartels), vertical agreements, as well as mixed agreements (containing elements of both) could be seen as restrictive ones.

2) Prohibition

Restrictive agreements are prohibited by the law, which makes every conclusion or execution of such an agreement directly contrary to the imperative provision of the article 10 of Competition protection act with sanction of nullity.

However, other than general rule of restrictive agreements being void, the law allows some exceptions. By the article 11 of the Competition act restrictive agreements can be excused from prohibition provided they contribute to production and traffic improvement, technical and economic progress, as well as securing fair share of benefit to consumers, as long as market participants are not imposed by limitations which are not necessary for reaching agreement cause.

Generally, there are three grounds, or should we say possibilities of exemption. Those are:

- Individual exemption
- Exemption for some categories of agreements
- Bagatelle agreements

In the event of Individual exception, any participant of potential restrictive agreement can submit request to Competition protection Commission (content of the request is proscribed by the Government of the Republic of Serbia through by-law) for exemption from prohibition in period of not more than eight years , bearing the burden of proving the fulfilment of conditions set out in the article 11 of the Competition act.

In the event of Exemption for some categories of agreements, on grounds of article 13 of the Competition law, Government of Republic of Serbia has the authority of issuing a regulation in order to determine which categories of agreement ought to be exempt from prohibition, under terms of article 11 of the Competition law and other special conditions from that law are met.

Using this authority, the Government has so far issued: (i) Regulation on participants agreements that do business on different levels of production or distribution which are excused from prohibition (for example vertical agreements on exclusive distribution, exclusive assignment of buyers, agency agreements, franchising and such) under conditions set out in the Regulation; (ii) Regulation on agreements of research and development between market participants that do business at the same level of production and distribution which are excused from prohibition; (iii) Regulation on agreements of specialization between market participants that do business at the same level of production or distribution which are excused from prohibition (for example joint production agreements).

Additionally, there are currently two Regulations in procedure of public discussion, related to agreements between participants on market of railway, road and internal waters traffic which are excluded from prohibition in public debate phase http://www.kzk.gov.rs/nacrt-uredbe-o-sporazumima-izmedu-ucesnika-na-trzistu-zeleznickog-drumskog-i-saobracaja-na-unutrasnjim-vodnim-putevima-koji-se-izuzimaju-od-zabrane as well as Regulation of technology transfer agreements which are excluded from prohibition http://www.kzk.gov.rs/nacrt-uredbe-o-sporazumima-o-transferu-tehnologije-koji-se-izuzimaju-od-zabrane.

Finally, Serbian Competition act defines Bagatelle agreements as ones between market participants which total market share on relevant market on Serbian territory is not larger than:

1) 10% of market share, provided the agreement participants do business at the same level of chain of production and traffic (horizontal agreement);

2) 15% of market share, provided the agreement participants do business on different levels of chain of production;

3) 10% of market share, provided the agreement incorporates characteristics of both horizontal and vertical agreements or where it is difficult to determine whether an agreement is horizontal or vertical;

4) 30% of the market share, provided that the subject agreements are agreements with similar influence on the market concluded between different participants, as long as each of their market share does not exceed 5 % on every individual market on which the effects of the agreement are manifested.

Bagatelle agreements are allowed, unless the cause of horizontal agreement is determination of prices or limitation of production or sale, supply market division, as well as price determination, namely market division.

So, generally relative to the specific agreement participant's relevant market share percentage, even though such agreements might have restrictive agreement characteristics, they would nonetheless be allowed unless they serve as means for upper-mentioned goals (so called "Hard core" provisions/violations).

3) Penalties and practice

Aside from general nullity of the restrictive agreements, conclusion and execution of the restrictive agreement also succumbs to measures of protections in relation to article 68 Competition law in form of payment in the amount of not more than 10% of the total yearly income earned on Serbian territory and calculated in accordance with article 7 of this law (total yearly income prior to the taxation for the year in which the procedure was initiated).

So far, Commission for protection of competition has issued over 20 decisions on measures of competition protection related to concluded and executed restrictive agreements and over 30 decisions on individual exception of agreements form prohibition requested by market participants.
Taking into account the practice of similar bodies in developed free-market countries that spans over decades and the number of initiated procedures in our country for little over 10 years of work of the Commission, it is fair to say that our country is still in the initial phase of development of this area of competition.

It is however an undisputable fact that the practice continues to evolve each year in terms of forms of restrictive agreements, relevant markets on which they appear, conditions and reasons for their excuse from prohibition, alleviating circumstances during pronouncement of measures of protection, all of which is accompanied by operations made by market participants as well as those made by attorneys and regulative bodies.