

INDIVIDUAL EXEMPTIONS AND SELECTIVE DISTRIBUTION SYSTEMS – THE DOS AND DON'TS IN SERBIA

Serbian competition rules dealing with agreements restricting competition are largely taken from and harmonized with EU competition rules. There is, however, one difference: in Serbia, if a restrictive agreement does not benefit from the local block exemption regulation ("BER"), the parties cannot self-assess whether their agreement meets the criteria comparable to those stipulated in Article 101(3) of the Treaty on the Functioning of the European Union. Instead, the parties must notify the agreement to the Serbian Commission for the Protection of Competition ("Commission") and request that it is individually exempted from the legal restriction.

Obtaining the exemption can take time (in practice, up to six or seven months). Companies suspecting competition concerns should take this into consideration as early as possible when negotiating local agreements. Furthermore, an individual exemption cannot be granted for more than 8 years.

STATISTICS

In the initial years of the Commission's set up, applying for an individual exemption was not that common. According to the Commission's activity reports, during the first year of its existence (2006), it dealt with only 4 cases involving generally restrictive agreements (both horizontal and vertical), and no requests for individual exemption. From 2007 through 2013, the number of requests for individual exemption gradually increased with, on average, roughly 10 cases per year; climaxing in 2014 (23 cases) and 2015 (35 cases heard with 31 resolved).

This increase in the number of the requests may be due to the fact that the Commission started extensively applying its power to fine companies from early 2011. In addition, in 2015 and 2016 respectively, the Commission started actively dawn raiding undertakings and publicized its first, rough guideline on the individual exemption process.

GUIDELINE ON THE INDIVIDUAL EXEMPTION PROCESS

In the guideline the Commission emphasized that when assessing restrictive agreements it will apply the EU law guidelines; priority will however be given to local laws and regulations if these diverge from EU law. Other points include:

- If the Commission, ex officio, discovers the existence of a restrictive agreement that would have received an individual exemption if duly notified, it will not stop the investigative proceedings, but will still sanction the parties for failing to request the exemption.

- Parties should not submit draft agreements or descriptions of restrictive clauses when requesting an individual exemption. Rather, when the final, signed version of the agreement (together with the applicable annexes) is submitted for review, the validity of clauses which may raise competition concerns can be made conditional upon obtaining the exemption.
- Finally, the Commission announced that henceforth exemptions will be granted effective as of the date of submission of the completed request (and not from the date when the agreement was signed).

SELECTIVE DISTRIBUTION

In its 2016 activity report, the Commission included an explanation of certain aspects to be considered when assessing selective distribution systems for Serbia:

- With respect to the question whether a selective distribution agreement, concluded for an indefinite period of time and which initially benefits from the block exemption, remains safe harbored even if the market share of one or both parties change over time to exceed the (25%) threshold required for the local vertical BER to apply, the Commission emphasized that the parties are responsible for making sure that their agreement continues to meet the criteria necessary for the BER to apply (including the market share requirements). If at any time during the term of the agreement this is no longer the case a request for an individual exemption must be submitted.
- A clarification was sought from the Commission regarding the possibility to agree on a restriction to sell competing brands (non-compete obligation) of up to 5 years in a selective distribution system. Currently, the local vertical BER, on the one hand, generally allows non-compete obligations of up to 5 years, but, on the other hand, states that any (direct or indirect) obligation on the members of a selective distribution system not to sell competing goods (or services) shall not be block exempted. The Commission upheld the EU approach; the local vertical BER shall be interpreted as excluding from its coverage any obligation on the members of a selective distribution system not to sell the brands of particular, identified competing suppliers, whereas it implied that the combination of selective distribution with a non-compete obligation of up to 5 years may still be block exempted as long as such obligation referred to competing brands in general.
- Further, where an individual exemption is required for a selective distribution system consisting of several distribution agreements of a supplier with a number of distributors, each agreement must be assessed individually, rather than the system as a whole. This is because each agreement may concern different relevant markets with varying market shares and the effects that the agreement produces. The Commission explained that it intends to instigate separate individual exemption proceedings for each (selective) distribution agreement.

TO CONCLUDE

The Commission is a fairly young competition authority (it was only set up in mid-2006). In the initial phases of its existence, the emphasis of its work was on merger control notifications, and only second to that, on increasing the awareness of competition

protection rules and investigating anticompetitive activity in the local markets.

As time passes and the regulations change to accommodate EU requirements, the legal and sanctioning powers of the Commission are on the rise. It is therefore not surprising that the awareness for this area of competition law is growing and that individual exemptions are becoming an important part of the Commission's enforcement activities.

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