ЕКОНОМИКА
ISSN 0350-137X, EISSN 2334-9190, UDK 338 (497,1)
Vol. 67, july-september 2021, № 3
P. 119-132

Nevena Tepavac[1]
University Business Academy in Novi Sad,
Faculty of Law for Commerce and Judiciary

Slavko Ivkovic[2]
University Union - Nikola Tesla, Faculty of Management

SCIENTIFIC REVIEW ARTICLE
DOI: 10.5937/ekonomika2103119T
Received: March, 21. 2021.
Accepted: April, 11. 2021.

EXCLUSIVE PURCHASING AGREEMENT AS A SPECIAL TYPE OF DISTRIBUTION AGREEMENT – THE CONCEPT, LEGAL NATURE AND SOURCES OF LAW

Abstract

It is noticeable in business practice that direct sales of goods are very rare which means that economic entities in the market, which mainly operate at different levels of production or distribution, are often part of complex distribution systems by which the product reaches from the producer to the final consumer in the fastest and easiest way. These distribution systems are formed by means of distribution agreements, which according to their specifics, can be divided into an exclusive distribution agreement, a non-exclusive distribution agreement, a selective distribution agreement and an exclusive purchasing agreement. An exclusive purchasing agreement, as a special type of distribution agreement, is a framework, unnamed agreement, with permanent obligation, which contains certain elements of exclusivity and thus restricts competition, so it is very important to harmonize it with the relevant provisions of competition law. The subject of this paper is the study of the exclusive purchasing agreement through the determination of its concept, basic features, legal nature and sources of law which are applied to it.

Key words: *vertical agreements, distribution agreement, exclusive purchasing agreement, goods, competition law*

JEL classification: K20, K21, K29

ПОЈАМ, ПРАВНА ПРИРОДА И ИЗВОРИ ПРАВА УГОВОРА О ИСКЉУЧИВОЈ КУПОВИНИ КАО ПОСЕБНЕ ВРСТЕ УГОВОРА О ДИСТРИБУЦИЈИ

Апстракт

У пословној пракси је уочљиво да је директна продаја робе веома ретко заступљена, што значи да су привредни субјекти на тржишту, који углавном послују на различитом нивоу производње или дистрибуције, често део сложених дистрибутивних система, помоћу којих производ најбрже и најлакше доспе од произвођача до крајњег потрошача. Ови дистрибутивни системи се формирају

[1] office@advokatnevenatepavac.rs ORCID ID 0000-0003-2981-2304

[2] ivkovic022@gmail.com ORCID ID 0000-0002-1671-3107

помоћу уговора о дистрибуцији, који се, спрам својих специфичности, могу поделити на уговор о ексклузивној дистрибуцији, уговор о неексклузивној дистрибуцији, уговор о селективној дистрибуцији и уговор о искључивој куповини. Уговор о искључивој куповини, као посебна врста уговора о дистрибуцији, јесте оквирни, неименовани уговор, са трајном облигацијом, који у себи садржи одређене елементе искључивости и на тај начин ограничава конкуренцију, па је веома важно ускладити га са одговарајућим одредбама права конкуренције. Предмет овог рада је проучавање уговора о искључивој куповини кроз одређивање његовог појма, основних особина, правне природе и изворе права која се на њега примењују.

Кључне речи: *вертикални споразуми, уговор о дистрибуцији, уговор о искључивој куповини, роба, право конкурекције*

Introduction

The modern market economy is now facing with increasing competition, overproduction and business expansion. These market conditions impose on every manufacturer or service provider to thoroughly consider all ways that can enable them to conquer new markets, as well as to expand their share in the markets where they are already present. Constantly growing demand for many products and services, as well as a wide range of them, literally imposes on producers need to establish their own distribution system through which distributors can place and sell their products as quickly, easily, efficiently, successfully and as much as possible.

As a result of overcoming these problems, the practice has developed a distribution agreement, which is often a part of a complex network of contractual relationships between multiple entities. An exclusive purchasing agreement, as a special type of distribution agreement, will be the subject to further detailed consideration in this text, through its definition, sources of law, separation compared to other types of agreements and other details that are specific to this type of agreement.

Concept and types of distribution agreement

Distribution agreement can be defined as a general, framework agreement on vertical cooperation, according to which the distributor undertakes to buy goods permanently from the manufacturer or seller on the basis of future individual agreements, as well as to place and to distribute purchased goods in its own name and for its own account, at its own risk, but at the same time integrating in the sales organizational network of the manufacturer (Vilus, Carić, Šogorov, Đurđev, Divljak, 2012, p. 271). Based on the existing general contract, the parties subsequently conclude individual contracts by which further specify the details of delivery, as well as all other related duties (Spasić, 2013, p. 74). From the economic aspect, distributors can be characterized as intermediaries in trade whose role in this contractual relationship has more similarities with the role of the agent than with the role of the buyer in classical contract law (Vilus, Carić, Šogorov, Đurđev, Divljak, 2012, p. 273).

There are different types of distribution agreements and in theory the most common and most widely accepted division is into an exclusive distribution agreement, a non-exclusive distribution agreement, an exclusive purchasing agreement and a selective distribution agreement.

Concept of exclusive purchasing agreement

Exclusive purchasing agreement is a contract by which one contracting party undertakes to purchase the contracted goods for resale, exclusively from the other contracting party or from a third party designated by the other contracting party (Bogaert, Lohmann, 2000, p. 39; Christou, 2011, p. 76). Horak (2005) states that in this agreement "the purpose of the purchase must be further resale of the goods, not the further processing of the goods, which means that the goods must retain the same economic identity" (p. 75). In this contractual relationship is particularly significant that the distributor is not assigned an exclusive territory to which distributor will be reselling the goods as is the case with the exclusive distribution agreement. Therefore, distributor's position is different from the distributor's position in exclusive distribution agreements, as he is exposed to competition from other distributors who also procure goods directly from the same supplier, but are not limited in terms of the territory in which they can resell the contracted goods (Horak, 2005, p. 71; Parivodić, 1996, p. 35; Divljak, 2004, p. 241). In addition to what is just stated, it is also significant that the distributor can not use the services or to purchase the contracted goods from other manufacturers or suppliers, except from the one that is specified in the contract (Spasić, 2013, p. 72).

Contracting parties of the exclusive purchasing agreement

Contracting parties are distributor (dealer) and manufacturer or supplier. Both parties are autonomous and legally independent business entities, operating in its own name for its own account and they independently bear the risk of their business. Suppliers are usually large producers of goods, but often they can be smaller manufacturers, who specialize in a particular type of product, while in the role of the distributor can appear larger or smaller companies and individual traders who are also usually specialized in the sale of certain types of goods (Spasić, 2013, p. 75).

Features of the exclusive purchasing agreement

In principle, an exclusive purchasing agreement is informal but since it's a contract of commercial law that appears in business practice, it is usually made in written form which is not a condition of validity of the agreement, but it serves for easier proving.

Keeping in mind that these contracts are derived from business practice, they are not legally regulated in the legal system of Serbia, as well as in the most legislations in comparative law, and they belong into the category of unnamed contracts. As an unnamed contract, an exclusive purchasing agreement may be concluded by the contracting parties

who are free to regulate their relations at their will, but in the limits of compulsory regulations, public order and good customs (Article 10 of the Law on Obligations). Exclusive purchasing agreements are double mandatory contracts because they create mutual obligations of the contracting parties.

These contracts are a kind of framework contracts, which constitutes the general legal framework for future individual contracts which are concluded by the distributor and the supplier and by which is specified e.g. delivery, exact quantity and type of goods, price, method of payment, etc. In addition to the above, another important feature of these contracts is that they are contracts with a permanent obligation and contracts with permanent performance of obligations. (Perović, 2010, p. 362).

The *intuitu personae* element of the exclusive purchasing agreement is especially characteristic, because in this contract, as in other types of distribution agremeents, the personal relationship which is established here is of the special importance, since the supplier chooses the distributor based on his personal qualities and abilities such as market reputation, knowledge and experience, sales network, which is all of particular importance for this contractual relationship because it's often the deciding factor for contracting.

Subject of the exclusive purchasing agreement

The subject of the contract is a special right of purchasing certain goods from the manufacturer or supplier or from a third party which is designated by the manufacturer (or supplier). The purchased goods are only an indirect subject of the contract because the distributor is not an ordinary buyer, whose role is limited to the reselling of goods to consumers, but he is focused on organizing the placement of goods and achieving established sales goals (Vilus, Carić, Šogorov, Đurđev, Divljak, 2012, p. 272).

The subject of purchasing is usually goods or products which have no major differences in their type, such as e.g. fuel or food products, like ice cream or beer. Basically, it is goods that is in massive use (Spasić, 2013, p. 75). The effect of such an agreement is reflected in the fact that other producers have difficulties to access to the market, as well as to the end consumers, and thus limit competition between the same products which are differently branded or which carry different trademarks (Horak, 2005, p. 71).

In terms of determining the characteristics and amount of goods the general rules of contract law are applied and common business terms are often used in practice to specify the goods that is the subject of the contract, while certain types of goods often require additional detailed specifications. (Spasić, 2013, p. 75).

Legal nature of the exclusive purchasing agreement

An exclusive purchasing agreement is a contract that is very common in practice and it's represented widely in all branches of the economy. This contract, like other types of distribution agreements, is a complex contract which contains elements of several so – called "classic contracts". It contains elements of a special sales agreements, consecutive

delivery agreement, commercial agency agreement, mandate agreement, commercial or sales concessions. Although this contract generally contains all the elements of all the aforementioned contracts, in theory there is agreement that an exclusive purchasing agreement is a *sui generis* contract. It is noticeable in practice that sometimes is difficult to distinguish whether it is some type of distribution agreement or of any of its ilk contracts.

In particular, in the case of an exclusive purchasing agreement, the distributor in its own name and for its own account buys goods which he will further resell to consumers while he bears all the business risk. By purchasing the contracted goods, the distributor acquires ownership of the goods and pays a certain price to the supplier for it. Since this is a more permanent business relationship, it is possible that the quantity of goods is not precisely determined by the general contract, but in that case it must be determinable, whereby the general contract determines only the unit price while the total price will be determinable and the exact quantity of goods and the price for the same will be determined separately and precisely by each individual contract between the distributor and the supplier (Spasić, 2013, p. 75). In addition to the above, payment is usually carried out successively or in installments, depending on the deliveries and it's possible to determine the dynamics of payment by contract depending on the further sale of goods to consumers by distributors and the distributor's earnings are reflected in the difference between purchase and sale price (Spasić, 2013, p. 75).

Horak (2005) points that in the business world, exclusive purchasing agreements "have an important business function, as they guarantee the sure sale to one contracting party and the continuous supply to the other contracting party" (p. 71). Namely, unlike classic sales agreements, as well as framework sales contracts, the goal of the exclusive purchasing agreement, beside further placing the purchased goods on the market, is primarily the organization of placement of purchased goods, achieving established sales goals and as well as the establishment of more permanent mutual business cooperation, everything with the purpose of functioning of the formed distribution system.

In accordance with the above, it is obvious that exclusive purchasing agreements have certain similarities with sales agreements but also significant differences which are sufficient to single them out and define them as a special type of contract. In addition, these agreements also have certain similarities with franchising agreements. In the broadest sense, franchising agreement is a type of distribution where the franchisor undertakes to make periodic deliveries and certain business services, as well as to transfer his knowledge and experience in manufacturing and placeing to the franchisee while the franchisee undertakes to pay a fee to the franchisor for rendered services and also to abide by all obligations under this contract (Vilus, Carić, Šogorov, Đurđev, Divljak, 2012, p. 266; Spasić, 2013, p. 77). The obligation of the franchisor to supply the franchisee with goods is one of the elements of the franchising agreement which it makes in its broadest sense a type of distribution while all other elements distinguish it from distribution. Spasić (2013) points "what is the essence of franchising is the cession of the sales right and perform services under the franchisor's name, using the franchisor's trademarks and distinctive signs, with the transfer of business knowledge and experience (know-how), using the franchisor's marketing methods, and with the obligation of the franchisor to train the franchisee's staff and provide the franchisee with business assistance" (p. 77). Franchisee during the term of the contract pays a fee to the franchisor for all ceded

rights and knowledge and thus enters into a franchisor's business system, operating in franchisor's framework, as an independent business entity, but in its own name, for its own account and at its own risk (Spasić, 2013, p. 77). Bearing in mind the foregoing, we conclude that exclusive purchasing agreements, as a special type of distribution agreement, do not have all the elements of franchising agreement, and therefore these contracts are a lot less complex than franchising agreements.

Taking into account all the above, no doubt it can be concluded that the exclusive purchasing agreements are contracts of their own kind, ie contracts *sui generis*.

Sources of law

Bearing in mind that the distribution agreement is a contract that has originated in business practice, as well as the fact that in the most European and world legislation it is not regulated by the law, it is still partially in the phase of legal formation, since this contract belongs to the category of unnamed contracts. In the absence of specific legislation, to these contracts in most states are applied a common business practice and autonomous sources of business law, such as model contracts, general business conditions, standard contracts, etc., such as e.g. Principles of European Contracts Law – PECL, UNIDROIT Principles of International Commercial Contracts, Principles of European Law on Commercial Agency, Franchise and Distribution Contracts, Draft Common Frame of Reference – DCFR, The Common Frame of Reference – CFR, Distributorship: The ICC model distributorship contract: sole importer – distributor, ICC Publishing, 2011, ICC Model Contract on Distributorship, ICC Publication, No. 776E, 2016 and other. In addition to autonomous law, the general provisions of the obligation law, as well as the provisions of competition law, are certainly applied to these agreements, since these agreements or their certain provisions restrict competition in the area in which they are concluded between different market participants (Vilus, Carić, Šogorov, Đurđev, Divljak, 2012, pp. 272 - 273; Spasić, 2013, pp. 79 - 80; Perović, 2010, pp. 361 - 365; Bogaert, Lohmann, 2000, pp. 101 - 102). From a comparative point of view, most of the other states legislations don't regulate distribution agreements by the law. Belgium is the exception in Europe, whose legislation regulate certain issues of exclusive distribution by the special law from 1961, with amendments from 1971 (Bogaert, Lohmann, 2000, pp. 123 - 138). Namely, the special law in Belgium regulates the issue of termination of an exclusive distribution agreement concluded for an indefinite period and the issue of "fair" fee to the distributor upon termination of an exclusive distribution contract concluded for an indefinite period (Bogaert, Lohmann, 2000, p. 123, pp. 130 - 138).

European Union law

At the level of the European Union, the primary sources of rights for distribution contracts are the provisions of Art. 101 – 106 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). The provisions of Art. 101 and 102 TFEU regulate restrictive agreements and abuse of a dominant position. Under the provisions of Art. 101 different types of restrictive agreements are regulated, which can certainly include an exclusive purchasing agreement and contract practice.

Secondary sources of law include decrees, instructions and decisions, which were adopted by the Council and the European Commission (hereinafter: The Commission) in order to implement the mentioned provisions of the previous Establishment Contract (Vukadinović, 2014, p. 392). The Commission, on the basis of its own legislative powers, passed regulations on block exemptions in which the agreements are stated, which as such, by their nature, are considered allowed and exempted from the application of Art. 101 (1) TFEU, and their admissibility does not require individual approval, but it is sufficient for interested parties to draw up their agreement in accordance with a particular regulation and to invoke such a block of exemptions before the court (Vukadinović, 2014, p. 430). Thus, among other things, some previous regulations granted block exemptions for agreements, which refer to the right of exclusive purchase (Vukadinović, 2014, pp. 430 – 431).

The source of the law for exclusive purchasing agreements was at first one of the regulations, which regulated the block of exemptions, namely Commission Regulation no. 1984/83 (Commission Regulation (EEC) No 1984/83 June 22nd, 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive purchasing agreements), and Commission Notice concerning Regulations 1983/83 and 1984/83 (Commission notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of June 22nd, 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements). Regulation 1984/83 comprised of many provisions, taking into account the specifics of exclusive purchasing agreements, and the provisions limiting the scope and duration of block exemptions for exclusive purchasing agreements were of particular importance (Horak, 2005, p. 71). Furthermore, this regulation also had special provisions, which regulated contracts for the delivery of beer, as well as the sale and distribution of fuel to gas stations.

The mentioned decree was valid until December 31st, 1997, and with the new Commission Regulation no. 2790/1999 (Commission Regulation (EC) No 2790/1999 of December 22nd, 1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices), which came into force on January 1st, 2000, the positive trend in the application of block exemptions continued. The new regulation also regulated vertical agreements and replaced previous regulations, which regulated exclusive distribution, exclusive procurement and franchising (Zindović, 2019, p. 14; Vukadinović, 2014, p. 404). Regulation 2790/1999 ceased to be valid on May 31st, 2010, and was replaced by a new Commission Regulation no. 330/2010 (Commission Regulation (EU) No 330/2010 of April 20th, 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), which began to be applied on June 1st, 2010, and will be valid until May 31st, 2022. In general, this decree sets three conditions, which must be met by the agreements in order to be exempted from the prohibitions under Art. 101 (1) TFEU. The first condition is that the agreement must not contain any "hard limit" (Article 2 of Regulation 330/2010), the second condition is that the share in the relevant market must not exceed 30% for both suppliers and distributors (buyers), and finally, the Regulation sets special conditions (Article 4 of Regulation 330/2010) for three vertical restrictions, for non – competitive obligations during the contract and after its termination and when excluding special brands from the selective distribution system (Vukadinović, 2014, p. 434).

Moreover, significant sources of law are court practice, especially the practice of the Court of Justice of the European Union (English: Court of Justice of the European Union, French: Cour de justice de l'Unioneuropéenne) and the General Court, in the so – called leading cases in which the Court of Justice in the procedure of deciding on previous issues interpreted certain provisions of primary or secondary legislation (Vukadinović, 2014, p. 394). The best – known judgments for exclusive purchasing agreements are in the case of Braserie de Haecht Sa vs. Wilkin (1967), in which the Court of Justice ruled that exclusive purchasing agreements may fall under Art. 81 (1) of the Treaty establishing the European Communities (now Article 101 (1) TFEU), and that the overall economic and legal context of the treaty should be taken into account when assessing these treaties, then in Delimitis vs. Henniger Brau AG (1991), Lagnese - Iglo vs. Commission (1993), as well as many other judgments. Also, Commission decisions, such as BP Kemi and Leibig Spices, are a direct source of law.

Law of the Republic of Serbia

In the law of the Republic of Serbia, the sources of law for exclusive purchasing agreements, for now, are regulations in the field of competition law. Law on Protection of Competition ("Official Gazette of RS", No. 51/2009 and 95/2013, hereinafter: LPC) the provisions of Art. 10 – 14 regulate restrictive agreements, and the provisions of Art. 11 – 13 envisage and determine the conditions for exemption from the ban, as well as individual exemptions and exemptions from the ban by categories of agreements. It is stipulated that restrictive agreements can be exempted from the ban, if they contribute to the improvement of production and trade, i.e. encourage technical or economic progress, and provide consumers with a fair share of benefits, provided that they do not impose restrictions on market participants, which are not necessary to achieve the objective of the agreement, i.e. not to exclude competition on the relevant market or its essential part (Article 11 of the LPC). The provision of Art. 12, section 3 of the LPC stipulates that the period to which the individual exemption applies cannot be longer than eight years, while the provision of Art. 13 of the LPC stipulates that the exemption from the prohibition of a restrictive agreement may apply to certain categories of agreements, if the conditions from Art. 11 of the LPC are complied, as well as other special conditions, which refer to the type and content of the agreement, i.e. its duration, and that restrictive agreements, which meet the stated conditions, are not submitted to the Commission for exemption, as well as that the Government determines the categories of agreements and prescribes in detail the special conditions for such exemptions.

Draft version of the draft of the new Law on Protection of Competition (hereinafter: Draft LPC) in Art. 29, section 1 prescribes that agreements between market participants may be contracts, certain provisions of the contract, explicit or tacit agreements, harmonized practices, as well as decisions on the form of association of market participants. Draft LPC in Art. 29, section 5 defines the concept of restrictive agreements as agreements, which have the goal or consequence of significantly restricting, violating or preventing competition on the territory of the Republic of Serbia or its part. The provision of Art. 29, section 4 of the Draft LPC defines vertical agreements as agreements between market participants operating at different levels of

production or distribution (agreements of non – competitors, one of which is in the downstream and the other in the upstream market). Further, section 6 stipulates that restrictive agreements are especially agreements which directly or indirectly determine purchase or sale prices or other conditions of trade, bidders coordinate and harmonize participation in public procurement procedures, restrict and control production, market, technical development or investment, apply unequal conditions doing business on the same jobs in relation to different market participants, which puts some of them at a disadvantaged position compared to competitors, conditions the conclusion of contracts or agreements by accepting additional obligations that due to their nature and trade customs and practice are not related to the subject of the agreement, directly or indirectly exchange information that reduces uncertainty between competitors in the market and that may affect the business decisions of market participants, market participants agree to exclude from the market or prevent the entry of a potential competitor (collective boycott), market sharing and/or sources of procurement. Draft LPC in Art. 30 stipulates that restrictive agreements are exempted from the general prohibition if, throughout their duration, they contribute to the improvement of production or trade (distribution), i.e. the encouragement of technological or economic progress, provide customers and users with a fair share of benefits, do not impose unnecessary restrictions on market participants in order to achieve the objective of the agreement and do not exclude competition in the relevant market or a significant part of it. Draft LPC in Art. 31, 32 and 34 prescribes special conditions for restrictive agreements, and if these agreements meet the stated conditions, they will be neither prohibited nor null and void by the force of law.

It is interesting that the draft LPC separates only the contract on selective distribution from distribution agreements, and in Art. 32, section 1 defines the concept of selective distribution system as networks of agreements, which obliges the seller to directly or indirectly sell goods or services only to distributors selected on the basis of clear and objective criteria, and these distributors bind not to sell those goods or services to anyone outside the system. Other types of distribution agreements can be subsumed under Art. 30 and 34, provided that their term is nowhere specifically defined. Article 34 of the Draft LPC defines the notion of an agreement of minor importance. In Art. 1 agreements of minor importance are defined as agreements between market participants, which may result in restriction, distortion or prevention of competition, but which do not significantly restrict competition in terms of Art. 29 of this law and are allowed if the total market share of the participants in the horizontal agreement does not exceed 10% in the relevant markets where the agreement has effect (competitor agreement), the market share of each participant in the vertical agreement does not exceed 15% in any relevant market in which the agreement produces effect (non – competitor agreement), the total market share of the participants in the agreement does not exceed 10% in the relevant markets in which the agreement has effect, and has the characteristics of horizontal and vertical agreement or where it is difficult to determine whether vertical or horizontal, the total market share of participants in parallel networks with the same or similar restrictions producing a foreclosure effect of more than 40% of the relevant market, shall not exceed 30%, provided that the individual share of each participant in the agreement referred to in points 1), 2) and 3) of this paragraph does not exceed 5% in the relevant market produce effect (Articles 33 and 34 of the draft version of the draft Law on Protection of Competition). The following paragraph stipulates that agreements of minor importance

are allowed even if the market shares of the participants in the agreement referred to in section 1 during two consecutive calendar years increase up to 2%.

In addition to the LPC, a significant source of law for exclusive purchasing agreements is the Regulation on agreements between market participants operating at different levels of production or distribution exempted from prohibition (adopted by the Government of the Republic of Serbia and published in the Official Gazette of RS, No. 11/2010 of March 5th, 2010, hereinafter: The Decree). The mentioned regulation defines an exclusive purchasing agreement as a contract, by which the buyer directly or indirectly obliges to purchase the contract product exclusively from one seller (Article 3 of the Regulation). The provision of Art. 4, section 1 of the Regulation stipulates that vertical agreements are exempted from the ban, provided that the market share of each of the parties to the agreement in the relevant market does not exceed 25%. Under the provision of Art. 5 of the Regulation, certain restrictions have been set regarding the content of vertical agreements. Namely, this provision stipulates that vertical agreements are not exempted from the prohibition if they directly or indirectly, independently or together with other factors under the control of the contracting parties contain restrictions aimed at directly or indirectly restricting the buyer's right to freely determine the resale price, which does not preclude the seller's right to set a maximum or recommended selling price, on condition that this does not allow fixed or minimum selling prices to be determined by coercion, business restrictions or convenience, restriction of the territory in which the buyer may sell products subject to the agreement or restricting the sale of contract products to a certain group of end customers, restricting the right of members of the established selective distribution system, operating in the retail market, to actively or passively sell the contract product to end users, not excluding the right to prohibit each member of the selective distribution system from selling the contract product outside the approved point of sale, restricting mutual supply between members of a single selective distribution system, including supplying members, who do not operate at the same level of sales, and restricting the parts seller, who sells those parts to the buyer to make a new product, to sell those parts as spare parts to end users or repairers or other service providers not authorized by the buyer to repair or service its products. The following paragraph stipulates that vertical agreements, which contain restrictions aimed at restricting the territory in which the buyer may sell the products covered by the agreement, or restrict the sale of contract products to a certain group of end customers, may exceptionally contain provisions aimed at restricting active sales to the buyer in the territory or group of buyers that the seller has kept for himself, or in the territory or group of buyers that the seller has exclusively assigned to another buyer, provided that this does not restrict further sales by the customer, restricting the right of the customer operating at the wholesale level to actively and passively sell the contract product to end users, restricting the right of members of a selective distribution system to actively and passively sell a contract product to distributors who are not members of that distribution system and restricting the right of the buyer to sell parts he procures to make a new product to end users who would use those parts to produce a competing product. The last paragraph stipulates that vertical agreements are not exempted from the ban if there are several vertical agreements on the relevant market, which due to the cumulative effect do not meet the conditions for exemption from the prohibition from the Law and this Regulation, especially when agreements containing similar restrictions cover more than 40% of the relevant market (Article 5 of the Regulation).

Preliminary analyses are given from the point of view of competition law, primarily because the exclusive purchasing agreement, as well as other types of distribution agreements, or its individual provisions restrict competition in the area in which they are concluded and between different market participants. Additionally, it is necessary to make a brief analysis of certain provisions of the Draft Civil Code of the Republic of Serbia (hereinafter: The Draft Civil Code).

The Draft Civil Code in Art. 1232 defines the concept of distribution agreement, and stipulates that the distribution agreement obliges one contracting party – the supplier, to continuously supply the other contracting party – distributor with products, and the distributor undertakes to buy these products for sale to other persons – customers, in its own name and for its own account. Further, under the provision of Art. 1233, special distribution cases are determined, namely the exclusive distribution agreement, the selective distribution agreement and the exclusive purchasing agreement. An exclusive purchasing agreement is defined as a contract by which the distributor undertakes to purchase products only from the supplier or from a person designated by the supplier (Article 1233, paragraph 3 of the Draft Civil Code of the Republic of Serbia).

The provisions of Art. 1237 – 1243 of the Draft Civil Code prescribe the basic obligations of suppliers, namely the obligation to supply, the obligation to apply the rules of sale to the obligations of suppliers, the obligation to retain ownership, the obligation to notify distributors during the contract, the obligation to notify reduced supply capacity, the obligation to provide advertising materials and preserving the reputation of the product by the supplier. Analyzing the provision of Art. 1239 of the Draft Civil Code, which prescribes the obligation to retain property rights, we come to the conclusion that nomotechnically it would be much more correct if this provision was provided as the right of the supplier, and not as his obligation. This is primarily due to the fact that in the case of retention of title to products, which the supplier supplies the distributor with, until the distributor pays the agreed price in full, it actually protects the rights and interests of the supplier, not the distributor, thus it is much more correct that this provision is provided as the right of the supplier. In section 4, which contains the provisions governing the termination of the distribution agreement, the provision of Art. 1259 prescribes another obligation of the supplier in case of termination of the contract, namely the obligation to purchase supplies, spare parts and materials at a "reasonable price" at the request of the distributor. This provision stipulates that in the event of termination of the distribution contract based on cancellation or termination by one of the contracting parties, the supplier is obliged, at the request of the distributor, to buy the remaining supplies, spare parts and materials from the distributor at a reasonable price, if the distributor cannot sell them to third parties at the usual market price. The notion of reasonable price has not been defined, and it will be left to business, court and arbitration practice for a framework definition.

The provisions of Art. 1244 – 1253 of the Draft Civil Code prescribe the obligations of distributors, namely the obligation to sell in its own name and for its own account, the obligation to promote and protect the interests of suppliers, the obligation to hire sub – distributors, the obligation to notify suppliers during the contract, the obligation to inform about reduced orders, the obligation to apply sales to the obligations of the distributor, the obligation to hold to the instructions, the obligation to provide service, the obligation to provide control by the supplier and the obligation to preserve the reputation

of the product by the distributor. As with the prescribed obligation of suppliers to retain property rights, we have the same situation with the prescribed obligations of distributors, with the obligation to hire sub – distributors. Here, it would be nomotechnically much more correct as well, if this provision was envisaged as a distributor's right, and not as distributor's obligation, especially because the provision of Art. 1246 stipulates that the distributor may engage a sub – distributor or agent to sell in a certain product territory, which distributor procured from the supplier, unless otherwise agreed, and that in that case the distributor is responsible to the supplier for all legal affairs and actions taken by the sub – distributor or agent. Thus, a simple linguistic interpretation of the text of the provision leads to the conclusion that this represents the possibility of the distributor, which depends solely on his will, and that it does not represent his obligation, and therefore should not be provided as an obligation of the distributor, but as his right.

Soft law sources

It has already been stated above that distribution agreements fall into the category of unnamed contracts, thus in the absence of special legislation, these contracts are subject to common business practice and autonomous sources of business law in most countries. The Principles of European Law on Commercial Agency, Franchise and Distribution Contracts (hereinafter: PEL CAFDC) regulate distribution agreements in Part 4. Part 4 of the PEL CAFDC contains 3 sections, namely general, obligations of suppliers and obligations of distributors, which contain a total of 12 articles. The general section covers the field of application and definition (Article 4:101). The section prescribing the obligations of the supplier contains the obligation of the supplier to deliver products ordered by the distributor (Art. 4:201), the obligation of the supplier to inform the distributor about the terms of sale during the contract (Art. 4:202), the obligation of the supplier to warn the distributor of reduced supply capacity (Art. 4:203), the obligation to provide advertising materials needed for distribution (Art. 4:204) and the obligation to maintain the reputation of the product (Art. 4:205). The section prescribing the obligations of the distributor includes the obligation to act actively – sales effort (Art. 4: 301), the obligation to inform the supplier of all lawsuits, claims or infringements of intellectual property rights of the supplier during execution by third parties (Art. 4:302), the obligation to warn of a reduced request (Art. 4:303), the obligation to follow the instructions of the supplier (Art. 4:304), the obligation to allow inspection and control by the supplier (Art. 4:305) and the obligation to refrain from damaging the reputation of the product (Art. 4:306) (Hesselink, Rutgers, Bueno Diaz, Scotton, Veldman, 2006, pp. 257 - 292). Having in mind the above, we can conclude that PEL CAFDC, in the absence of a hard law source, greatly simplifies the very process of concluding distribution agreements, as well as their implementation.

Conclusion

Taking into account the aforementioned, it can be undoubtedly concluded that the exclusive purchasing agreement, as a special type of distribution agreement, is an

extremely complex agreement, with a very complex structure and legal nature. When we add to this the fact that this agreement is not legally regulated, neither nationally nor internationally, it is quite clear that in practice there are often misunderstandings between the parties, which often result in long and costly disputes. Problems often arise during the execution of these contracts, because the contracting parties do not pay enough attention to some important clauses, which in practice could regulate many controversial issues. These problems can be avoided by providing such contractual clauses, which are primarily in the interest of the contracting parties and which regulate in a precise, clear and unambiguous manner their rights and obligations during the term of the contract, as well as after its termination.

In the business world, exclusive purchasing agreements, which are most often concluded within the oil and food industry, for the distribution of goods that are in mass use, such as fuel, beer, ice cream, etc., have an increasingly widespread application in practice. Due to their beneficial effects, these contracts are in practice the ones that are most often concluded and are therefore among the most developed contracts in relation to other commercial law contracts. Their positive effects are certainly reflected in the fact that customers, end consumers, constantly have a wide selection of offers of various products, which is most important for them. On the other hand, negative effects can be noticed in the reduction of competition between sellers of the same products, but different labels, i.e. different brands. These effects are certainly eliminated by adequate legal and by – law protection of competition, because "healthy" competition is one of the biggest drivers of a successful economy.

Certainly, these contracts are a good driver of the economy, and it is up to the contracting parties to really adapt each specific contract to their own needs and the needs of a specific market, by doing their best to find optimal solutions in the practice of concluding and executing exclusive purchasing agreements and by striving to improve competition with each specific contract.

References

Bogaert G., & Lohmann U. (2000). Commercial Agency and Distribution Agreements: Law and Practice in the Member States of the European Union, Kluwer Law International, 3rd edition.

Vilus J., Carić S., Šogorov S., Đurđev D., & Divljak D. (2012). Međunarodno privredno pravo, Novi Sad, Univerzitet u Novom Sadu, Pravni fakultet, Centar za izdavačku delatnost.

Vukadinović R. (2014). Uvod u institucije i pravo Evropske unije, Kragujevac, Udruženje za evropsko pravo.

Divljak D. (2004). Praktikum za međunarodno privredno pravo, Novi Sad, Visio Mundi Academic Press.

Zindović I. (2019). Sporazumi o distribuciji robe i njihovo dejstvo na konkurenciju, Arhiv za pravne i društvene nauke, 1(1), 7 – 18.

Christou R. (2011). International agency, distribution, and licensing agreements, Sweet & Maxwell, Thomson Reuters, 6th edition.

Parivodić M. (1996). Ugovor o ekskluzivnoj distribuciji u pravima Jugoslavije i Evropske unije, Beograd, Novinsko – izdavačka ustanova Službeni list SRJ.

Perović J. (2010). Sporne odredbe ugovora o međunarodnoj distribuciji, Pravo i privreda, 4 – 6, 359 – 376.

Spasić I. (2013). Koncept i pravno uređenje sporazuma o distribuciji u pravu EU, Revija za evropsko pravo, 2-3, 69 – 89.

Hesselink W. M., Rutgers W. J., Bueno Diaz O., Scotton M., & Veldman M. (2006). Principles of European Law: Commercial Agency, Franchise and Distribution Contracts, Sellier, European Law Publishers.

Horak H. (2005). Ugovori o distribuciji u pravu i poslovnoj praksi Hrvatske i EU, Zagreb, Sinergija – nakladništvo d.o.o.

Zakon o obligacionim odnosima ("Sl. list SFRJ", br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, "Sl. list SRJ", br. 31/93 i "Sl. list SCG", br. 1/2003 – Ustavna povelja).

Zakon o zaštiti konkurencije ("Sl. glasnik RS", br. 51/2009 i 95/2013).

Nacrt Zakona o zaštiti konkurencije.

Uredba o sporazumima između učesnika na tržištu koji posluju na različitom nivou proizvodnje ili distribucije koji se izuzimaju od zabrane ("Sl. glasnik RS", br. 11/2010).

Nacrt Građanskog zakonika Republike Srbije.

Ugovor o funkcionisanju Evropske unije.

Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive purchasing agreements.

Commission notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements.

Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

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.