Blagojević Bojan[*]

UDK: 339.137(497.11:4672EU)
Review article
DOI: 10.5937/ptp2103053B
Received: 31.08.2021.
Approved: 13.09.2021.
Pages: 53–64

REGULATION OF RESTRICTIVE AGREEMENTS IN REPUBLIC OF SERBIA WITH A REFERENCE TO THE EUROPEAN UNION LAW

ABSTRACT: This paper explores the questions regarding regulations of restrictive agreements in Republic of Serbia as well as in the European Union. Moreover, it has a concept of a competition explained in order to make the importance of the exemption of agreements with the competition infringement noticed. The measures and requirements for protection of competition are presented as well. The aim of the paper is to present the importance of restrictive agreements, and to explain if the market should be protected only from an individual agreement or from all restrictive agreements. Moreover, the point whether the competition is protected from all infringements or just from some of them is explored. From all this stated, it can be concluded that there are big discrepancies in regulations against competition infringement in legal regulations of Republic of Serbia in comparison with regulations of the European Union.

***Keywords*:** *Restrictive arrangements, Competition infringement, Measures for protection of Competition, Competition in the European Union.*

[*] A lawyer, The Bar Association of Niš, Serbia, e-mail: advbojanblagojevic@gmail.com

1. Introduction

Taking in consideration regulations of restrictive agreements, we come up to a conclusion that this can be easily referred to as a "grey" area of legal regulations. Even though it is known that every legal norm has a specific political goal, which strives to be reached, and which naturally cannot be satisfying for all but rather a few, a real dilemma exists within regulations against competition infringement in restrictive agreements. Is it better to provide protection for large companieswhich participate in developing of the market and citizens' standard of living, or to help consumers get the best deal for their money, or to allow a country to create conditions for non-competitive companies to enter and be present on the market by providing subventions?

This issue of competition infringement is not a simple one, and it should be dealt with carefully and precisely. The problem of inadequate protection of competition cannot be seen fromthe damage made (lat. damnum emergens), but rather from the loss of profits (lat. lucrum cessans) which is more difficult to prove.

2. The concept of restrictive agreements

2.1. The concept of competition

Explaining the concepts that can destabilize or impinge the market, we should firstly explore the concept of competition. Competition is not a concept that has been always present, but rather something that has been mostly developed in the last fifty years. Before the mentioned time, competition was not present in all countries in the world, and it surly was not present in all branches of industry. Due to underdeveloped industry and country's interventionism rivalry was not emphasized even in the countries where it existed. Country's interventionism was more harmful than cartel activity.

Nowadays, it is very easy not to notice the number of changes that happened in the developed countries since the lack of competition is only present in underdeveloped countries. Deterrence of cartels and powerful business groups, as well as strengthening of competition have been closely connected with German and Japanese magnificent economic growth after the Second World War. The most competitive branches of Japanese industry were developed during the intensive competition in the domestic market, for example in consumer electronics and automotive industries. However, the development of other parts of Japanese industrylike finance, chemicals and retail are still undeveloped due to the lack of competition.

Even in the United States of America, which showed great tendency towards competition, some big parts of the economy were regulated to a big extent. Telecommunication sector, traffic sector, energy sector and the others show that competition can lead to innovations and big progress changes (Porter, 2008, p. 7).

It can be also concluded that competition is neithergood nor bad in principle. There is always a reason for intense competition in certain branches of industry and also a reason for profit "sharing".

2.2. The concept of competition infringement

Being already stated, competition has a big impact on the development of the market, as well as on the raising of the standard of living, and that is why a country should protect every behavior that badly affects competition in any market. This section of the paper explores how a country protects the market, especially consumers from competition infringement.

In order to make this conclusion, we should firstly explain the concept of competition infringement. Every negotiation among participants in the market which can result in restriction, distortion or prevention of competition is considered to be competition infringement.

Firstly, restriction can either stand for an inability of participants to access the market, or when the ability to access the market is hindered, in order to obtain monopoly.

Secondly, distortion of competition represents destroying of already established competition in order to obtain monopoly. Thirdly, prevention of competition stands for making competition more complicated also in order to obtain monopoly. It can be noticed that these three terms have the similar effect and also the identical goal.However, the most important segment of the definition of competition infringement is not just restriction, distortion and prevention of competition but the amount of infringement itself.

Conflicts of rivals in the market are a daily thing, where each rival tends to secure a better position in the market. These conflicts naturally lead to restriction, distortion and prevention of competition in order to obtain monopoly. However, a country should not intervene to a high degree and should not impose a rigid system which can possibly result in prevention of competition. A country should protect from some big changes in competition and only when those changes can negatively affect the market.

Apart from restrictions against competition infringement, there are also restrictions from which the market benefits and which can be also imposed by a country.

Namely, restrictions, distortions and preventions can be seen as negative effects only when the goal is to obtain monopoly. In addition, the following question raises, what if competition infringement results in the improvement in production, distribution and decrease in cost of either innovation or technical and technological progress or the improvement of the position of consumers?

Since restrictive agreements are in the "grey" area of regulations, thus being like that they cannot be regulated beforehand, which means that it is allowed to certain experts to think, investigate and decide on the goal of an agreement and the possible effects it may have in the market.

2.3. The concept of restrictive agreements

The concept is legally regulated in a general way, which is also the case with the Law on Protection of Competition (2009), (hereinafter: The Law) in the Republic of Serbia.

Namely, in the Law this concept is represented as an agreement between participants in the market of the Republic of Serbia whose main goal or consequence is competition infringement throughrestrictions, distortions or preventions.

The concept of restrictive agreements is not precisely defined since restrictive agreements do not include the following agreements: an agreement that is excluded by the government and a restrictive agreement excluded by a decision made by Commission for Protection of Competition (hereinafter: theCommission) and agreements of minor importance which are regulated byArticle 14 of the Law.

Being defined in this manner, restrictive agreements are not represented properly since they are complex agreements without all restrictive norms included.They are usually agreements that possess some restrictive norms, and some norms that are in accordance with the positive law of the Republic of Serbia. Due to these cases, a new question is raised- should all restrictive agreements need to bedeclared null and void, or kept alive in accordance with favor contractus principle whenever possible?

In comparison to restrictive "agreements", there are also cartels which stand for associations of the participants in the market, and by being like that they do not have any individual agreement. Moreover, can concerted practices of manipulation of prices and distribution restriction among participants that are not direct competitorsin the market be considered as "agreements"?

Namely, recent trends that exist worldwide give a precisely determined sections of the agreements and a set of behavior which are considered restrictive. Being like that, if it does not affect the competition, the whole restrictive agreement will not be cancelled.

I personally think that this doctrine should be explored more thoroughly in Serbian law, since the existing regulations issued by the government are in accordance with all previously mentioned, but only in respect of prohibitions. Parts of the agreements which are referred to as completely restrictive are not precisely regulated.

I would like to emphasize that the concept of competition infringement has to be precisely defined, and the protection of competition has to be provided too. At the moment, new participants in the market do not seem to be well informed either about the market they enter or the things that are allowed and prohibited.On one hand, I think that this results in low investment in the market of production and services. On the other hand, there is a market expansion of buying and renting of real estates. If the legal protection improves, there will be a considerable potential for growth, in comparison with a few new buildings for a population that emigrates.

3. Restrictive agreements in the Republic of Serbia

3.1. Regulations of restrictive agreements in the Republic of Serbia

The existing law on Protection of Competition was passed on November 1, 2009, and it only underwent one change.The changed was made in Article 10stating: "Restrictive agreements are agreements between undertakings which as their purpose or effect have a significant restriction, distortion, or prevention of competition in the territory of the Republic of Serbia."

It can be concluded from the definition above, that restrictive agreements are agreements that exist between participants either in a written or spoken form, and that they have a goal that can be directly or indirectly stated, as well as that they provide an immense restriction, distortion or prevention of competition in the market of the Republic of Serbia. This means that restrictive agreements do not only affect interests of an individual or a group of individuals, but also interests of a group of numerous parties in the market or consumers, or a public interest in general.

In addition, due to the "grey" area of restrictive agreements, the Commission may exempt some restrictive agreements from prohibition in the Republic of Serbia. However, a general decision, which is in force for all the

restrictive agreements, can be enacted, and a restrictive agreement like that cannot be withdrawn by the Commission either when it infringes the competition or when it is exempted from prohibition. These types of the restrictive agreements are given through regulations by the government of the Republic of Serbia.

According to Article 14 of the Law, agreements of minor importance shall be allowed, even though apart from the mentioned elements restrictive agreements shall possess a restriction of greater importance as well.

3.2. The proceeding of restrictive agreements disclosing in the Republic of Serbia

According to Article 23 of the Law, the Council numbers four members of the Commission and the president of the Commission. The president of the Commission and the Council member are elected from a number of experts in the field of law and economics with at least ten years of relevant professional experience. They are also supposed to have significant and recognized work or practice in the relevant field, especially in the field of protection of competition and the European Law, and they are supposed to be objective and impartial. The decision is made by the absolute majority in the Council. This way of deciding protects members of the Council even when they do not want to be present or to vote for or against a certain proposition.

Namely, the regulations for protection from competition infringement do not only include penalties and sanctions which exist to make participants behave and restrain themselves from a negative impact on the market. It seems essential to have more than one tactic for defending the market from the negative impact of competition infringement.

Parties in the restrictive agreements are faced with discrepancy since restrictive agreements are characterized by the inherent instability. On one hand, participants are encouraged to cooperate in order to avoid competition and gain additional profit. On the other hand, they are encouraged to abandon collusionand increase their production (with a decline in prices) in order to maximize their profits. That's the reason why each participant has an inherent encouragement to abandon collusion before being abandoned himself. A participant is quite aware that all parties, who are collusive, think alike. Moreover, that that behavior can lead to a collapse among parties on the market (Rakić, 2014, p. 246).

Taking in consideration all previously stated which undoubtedly comes from game theory, it would be tempting for a participant to report a collusion

on the market since that participant is aware that he will be discredited on the market which can bringgreater harm than gain.

3.3. Sanctions against restrictive agreements in the Republic of Serbia

In order for a norm to be complete, it needs to have a possible sanction too. Legal regulations are always protected by some adequate measures against violation of the rights. This paragraph will explore types and effects of the sanctions.

Measures stated in the Law are the following:

1. Measures for removal of competition infringement
2. Measure of deconcentration
3. Measure for protection of competition
4. Procedural penalty measure.

Firstly, measures for removal of competition infringement from Article 59 of the Law, represent a set of measures with the aim to remove competition infringement, i.e., to prevent probable occurrence of the same or similar infringement, and to give orders to undertake certain behavior or prohibit certain behavior. Apart from these measures, there is also a possibility of setting structural measures aiming to eliminate the risk of repeating the same or similar infringement. Structural measures are set by the Commission. The government is responsible for prescribing conditions for setting these measures, however, there has not been any regulation issued since 2009 when the Law was passed. Thus, there is not any possibility for the Commission to use these measures due to violation of the principle of legal certainty.

Secondly, measure of deconcentration, which is explored in Article 67 of the Law, refers to a situation when the Commission determines the conduct of concentration for which the approval is not issued, or failure to fulfill conditions and obligations of conditional approval of concentration, it may enact a decision imposing measures to concentration participants that are necessary for establishing or preserving competition on the relevant market.

Thirdly, Article 68 of the Law states that a measure for protection of competition will be set to a participant in the form of an obligation to pay a monetary sum in the amount up to 10% of the total annual revenue generated on the territory of the Republic of Serbia, if it:

abuses a dominant position in the relevant market;

1. concludes or implements a restrictive agreement;

2. fails to perform or implement measures to eliminate competition infringement, or measure of deconcentration;
3. conducts a concentration oppose to the obligation of interruption, or for which the approval for implementation of concentration is not issued.

Lastly, procedural penalty measures are stated in Article 70 of the Law and issued by the Commission in the amount between 500 EUR and 5,000 EUR per day, for each day of the conduct contrary to the orders issued by the Commission, if it:

1. fails to comply with the Commission's request to submit, disclose, make available or provide access to the requested data, disables the entry into premises, or disable investigation in other manner, that is, deliver or provide incorrect, incomplete or false information;
2. fails to comply with the interim measure;
3. fails to submit notification of concentration within the given time period.

It should be stated here that 10% of the total annual revenue in the Republic of Serbia is not a harsh penalty since this number can be easily manipulated. It may be also determined that the "gain" of competition infringement is greater than the amount of 10% of the total annual revenue.

4. Restrictive agreements in the European Union

A regulation that regulates the concept of prohibition of restrictive agreements in the European Union is stated in Article 101 (ex Article 81 TEC) of the Treaty on the functioning of the European Union (hereinafter: the Treaty).

The first paragraph of Article 101 of the Treaty prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

In order to make this regulation more precise, there are five provisions, which are considered to be restrictive agreements, listed: agreements that directly or indirectly fix purchase or selling prices or any other trading conditions; agreements that control production, market, technical development, or investment; agreements that make the market or sources of supply divided; agreements that provide dissimilar conditions to equivalent transactions with

other trading parties, thereby placing them at a competitive disadvantage; agreements that require acceptance from the other parties that has no connection either with the subject of that contract or with the agreements itself.

As stated in the second paragraph of the Article of the Treaty, any prohibited agreement or decision will be declared void.Article 3 states that it is possible for an agreement to have all provisions from the first paragraph and still be valid if it contributes to improving the production or distribution of goods, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit if that benefit is greater than the "cost" of the agreement. Moreover, the agreement must not provide conditions to eliminate competition from the market.

The system of exemption from prohibition of restrictive agreements by the Commission used to exist in the European Union from 1962 to 2004. Due to a big number of requests for individual exemption from prohibition submitted to the Commission, on May 1, 2004 a decision no. 1/ 2003, which was issued by the Council of the European Union on December 16, 2002, entered into force, and it is still in use. This decision made all the restrictive agreements, decisions, and practices not prohibited without issuing a special decision by the European Commission for exemption from the prohibition. This regulation made the Commission not responsible by making the participants on the market accountable for verifying restrictions of agreements.

According to all previously said, the system established after the decision 1/2003 relies on participants on the market to behave according to the regulations of the European Union, and misbehavior is directed to post control by the Commission, national bodies for protection of competition and courts (Fišer Šobot, 2019, p. 962).

5. Conclusion

Taking in consideration great benefit of intense competition in flourishing industries, it can be said that The Republic of Serbia should be persistent in improving the position of the participants on the market. Since the European Union uses the model of self-accountability and government intervention on the market, the Republic of Serbia falls behind when it comes to the methods for protection of competition used in the world.

Regulations for competition infringement are incomplete in the Republic of Serbia, and by being incomplete they are not used properly since there are some cases where these incomplete regulations cannot be applied. The protection of the market in the Republic of Serbia provided by five responsible

people seems to be absurd. Apart from regular tasks, the Commission does not have means to plan and project decisions which shall be used to improve competition in the long term.

I personally think that due to disorganization and inconsistency in the practice of protection of competition, the protection of the market should be given to some specialized courts for protection of competition. In addition, the right for procedural initiation should be given to a potentially aggrieved party which will undoubtedlyprovide results.

Blagojević Bojan
Advokat, Advokatska komora Niš, Srbija

UREĐENJE RESTRIKTIVNIH SPORAZUMA U REPUBLICI SRBIJI SA OSVRTOM NA PRAVO EVROPSKE UNIJE

REZIME: U ovom radu su razmotrena pitanja pravnog regulisanja pojma restriktivnog sporazuma u Republici Srbiji i načelno uređenje pojma restriktivnog sporazuma u Evropskoj uniji. Takođe, je objašnjen i pojam konkurencije da bi se videla celishodnost zabrane sporazuma čiji je cilj povreda konkurencije. Razmotreno je i pitanje potrebe i načina zaštite konkurencije. Cilj ovog rada jeste objašnjenje potrebe postojanja restriktivnih sporazuma i zbog čega se tržište od njih treba štititi i da li se treba štititi od svih ili samo od pojedinih restriktivnih sporazuma. Takođe je razmotreno pitanje da li se konkurencija štiti od svih povreda ili samo od pojedinih. Na osnovu svega iznetog se može zaključiti da postoje velike praznine u regulisanju povreda konkurencije u pozitivnom pravu Republike Srbije u odnosu na pravo Evropske unije.

Ključne reči: *Restriktivni sporazum, povreda konkurencije, mere zaštite konkurencije, konkurencija u Evropskoj uniji.*

References

1. European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01
2. Fišer Šobot, S. (2019). Da li je vreme za uvođenje samoprocene restriktivnih sporazuma u pravo konkurencije Republike Srbije? [Is it Time for the Introduction of Self-Assesment of Restrictive Agreements into Serbian Competition Law?]. *Zbornik radova Pravnog fakulteta u Novom Sadu*, *53* (3), pp. 955–973
3. Porter, M. (2008). *O konkurenciji* [*Competitive strategies*]. Beograd: Fakultet za ekonomiju, finansije i administraciju
4. Rakić, I. (2014). Pokajnički program i odgovornost za štetu zbog povrede prava konkurencije [Leniency programme and liability for damage caused by competition law infringements]. *Anali Pravnog fakulteta u Beogradu*, *62* (2), pp. 244–260
5. Uredba o sporazumima o specijalizaciji između učesnika na tržištu koji posluju na istom nivou proizvodnje ili distribucije koji se izuzimaju od zabrane [Regulation on agreements on specialization between undertakings operating on the same level of production or distribution chain exempted from prohibition]. *Službeni glasnik RS*, br. 11/10
6. Uredba o sporazumima između učesnika na tržištu koji posluju na različitom nivou proizvodnje ili distribucije koji se izuzimaju od zabrane [Regulation on agreements between undertakings operating at the different level of production or distribution chain exempted from prohibition]. *Službeni glasnik RS*, br. 11/10
7. Uredba o uslovima za oslobođenje obaveze plaćanja novčanog iznosa mere zaštite konkurencije [Regulation on the conditions for relief from the commitment of payment of the monetary amount of the measure for protection of competition]. *Službeni glasnik RS*, br. 50/10
8. Uredba o sadržini zahteva za pojedinačno izuzeće restriktivnih sporazuma od zabrane [Regulation on the content of request for individual exemption of restrictive agreements from prohibition]. *Službeni glasnik RS*, br. 107/09
9. Uredba o kriterijumima za određivanje visine iznosa koji se plaća na osnovu mere zaštite konkurencije i procesnog penala, načinu i rokovima njihovog plaćanja i uslovima za određivanje tih mera [Regulation on criteria for setting the amount payable on the basis of measure for protection of competition and sanctions for procedural breaches, manner and terms

for payment thereof and conditions for determination of respective measures]. *Službeni glasnik RS*, br. 50/10
10. Uredba o kriterijumima za određivanje relevantnog tržišta [Regulation on the criteria for defining the relevant market]. *Službeni glasnik RS*, br. 89/09
11. Uredba o sporazumima o istraživanju i razvoju između učesnika na tržištu koji posluju na istom nivou proizvodnje ili distribucije koji se izuzimaju od zabrane [Regulation on research and development agreements between undertakings operating on the same level of production or distribution]. *Službeni glasnik RS*, br. 11/10
12. Zakon o zaštiti konkurencije [Law on Protection of Competition]. *Službeni glasnik RS*, br. 51/09 i br. 95/13