COMPETITION LAW

LEGAL FRAMEWORK

JANKOVIĆ POPOVIĆ MITIĆ

CONTENTS:

INTRODUCTION 3

COMMISSION FOR PROTECTION OF COMPETITION 4

RESTRICTIVE AGREEMENTS 4

- Individual exemption 5
- Block exemption 5
- Research and development agreements between market
- participants operating at the same level of production or distribution 5
- Specialization agreements between market participants operating at the same level of production or distribution 6
- Agreements between market participants operating at different levels of production or distribution 8

DOMINANT POSITION 9

CONCENTRATION 10

NOTIFICATION OF CONCENTRATION 11

- Protection of competition and procedural penalties 12

ADMINISTRATIVE DISPUTES 13

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If you have any queries regarding the issues raised or other legal topics, please get in touch with your usual contact at JPM Jankovic Popovic Mitic.

Negotiating commercial contracts with business partners, conducting company takeovers, partial takeovers, and setting prices and other terms under which products are sold are all cases when competition rules could potentially be violated.

Regardless of the market they operate in all companies can be subject to competition law, and penalties for violations can have a significant effect on business due to amounts involved. Therefore timely and reliable legal advice and service quality are of key importance to clients. JPM team recognizes this in its daily , legal advisory of clients , aimed at avoiding practical issues that could arise if the rules of competition law are not appropriately followed and applied.

INTRODUCTION

One of the more important success indicators of any country is the social welfare of its citizens. This is impacted by numerous factors, one of them being the country's ability to ensure a competitive market. Highly competitive markets are efficient markets. They are characterized by:

- Allocative efficiency – the market produces the very products that are in demand;
- Productive efficiency – everything produced is produced at the lowest possible cost per production unit. Every market participant strives to offer a higher quality product at the same price, or to offer a better quality product at a lower price, as that is the only way to generate higher profit;
- Dynamic efficiency – investing in improvement of products and the production process;
- Selective efficiency – separating successful from unsuccessful companies. Competition is a process where market participants compete, creating pressure which the less successful competitors are not able to withstand.

As all these facts contribute to economic development, every country strives to introduce regulations and mechanisms to prevent hindering of competition. Therefore competition law can be defined as a set of regulations intended to ensure that market competition is not hindered in such a way to be detrimental or harmful to economic development, consumers' rights and social welfare in general.

COMMISSION FOR PROTECTION OF COMPETITION

Protection of competition is entrusted to the Commission for Protection of Competition ("the Commission"), an non-partisan and independent organization with public powers and competences specified by the Law on Protection of Competition ("the Law"). The Commission is a legal entity which answers to the National Assembly of the Republic of Serbia. The competence and duties of the Commission are numerous and can be classified into several main categories:

- Deciding on the rights and obligations of market participants and adjudicating as to whether competition has been harmed, and reaching decisions on permissibility of concentrations;
- Drafting regulations, proposing implementation bylaws to the Serbian Government and providing guidelines for application of the Law;
- Gathering and monitoring data relating to competition conditions on specific markets;
- Cooperation with local and foreign authorities.

The particulars relating to internal organization, manner of operation and procedures conducted before the Commission, as well as powers to enact other acts of the Commission are regulated by the Statute of the Commission for Protection of Competition. The Commission for Protection of Competition finances its work by charging fees for decisions and acts rendered in response to applications in accordance witha specified tariff book. These fees are as a rule not inexpensive. However, as a matter in question is usually a high-value legal transaction, it is in the interest of the parties to obtain a positive opinion from the Commission as a form of security that a transaction or a business deal will not be declared null and void.

The Commission protects competition on the market by primarily controlling restrictive agreements, abuse of dominant position and concentration.

RESTRICTIVE AGREEMENTS

If a market participant applies different terms of business to the same business with different participants in the relevant market, it faces the potential risk of such agreements being pronounced null and void.
Therefore when concluding an agreement it is necessary to consider whether it is a restrictive agreement, that is, whether the specific agreement:

- Directly or indirectly sets buying or selling prices or other commercial terms;
- Restricts and controls manufacture, trade, technical development or investments;
- Applies different terms of business to the same business with different participants in the relevant market, whereby market participants are placed in a less favorable position than competitors;
- Imposes terms such that concluding an agreement or a contract is conditional upon acceptance of additional obligations, which, given their nature and trade practices, are not related to the underlying agreement;
- Divides markets or procurement sources.

When a restrictive agreement is concluded, the Commission renders a decision finding that the agreement has harmed competition. Apart from this agreement being null and void and not having legal effect, the parties to restrictive agreements are additionally penalized by fines. Such was the case, for instance, with the Annex to the sales contract between "IDEA d.o.o" Beograd and "GRAND PROM a.d." Beograd. The Commission found that the provisions of the Annex specifying the seller's obligation to approve the buyer a 2% discount for observing the seller's recommended prices within a 10% discount on invoices for products from a specified product range harmed competition in the wholesale and retail markets, and the Annex was deemed a prohibited restrictive agreement. Therefore, the agreement was pronounced null and void, and the ordered measure for protection of competition was the obligation to pay a fine amounting to 1.5% of the total annual income for 2008 for "IDEA d.o.o" Beograd, and 2% of the total annual income for 2008 for "GRAND PROM a.d." Beograd.

The measures ordered by the Commission aimed at protection of competition can be extremely strict, since the fines reflect a percentage of total annual income, not of the profit generated by the parties to the agreement. In some cases the legislator leaves the possibility for a restrictive agreement to be exempt from prohibition. It is recommendable for parties to an agreement to obtain clearance from the Commission before concluding the contemplated agreement. They can also seek clearance from the Commission for Protection of Competition after concluding a contract or agreement, but in that case the parties are exposed to the risk of the agreement not being cleared.

Exemption of restrictive agreements relates to individual agreements or certain categories of agreements.

Individual exemption

Parties can request individual exemption if their agreement meets the basic requirement specified by the Law, namely that the agreement is beneficial to advancement of production and trade, or to stimulation of technical or economic advancement, and ensures an equitable portion of the benefit to customers, provided that it does not impose restrictions on market participants which are not essential for achieving the aim of the agreement, that is, that it does not exclude competition on the relevant market or the relevant part of the market.

Competition on the relevant market is taken to mean the market encompassing the relevant product market in the relevant geographic market.

When applying to the Commission parties have to submit evidence demonstrating that the above condition has been met. If the Commission clears a specific individual agreement, it can then be exempt from prohibition for maximum of eight years..
The content of the request to be submitted to the Commission is specified by a separate Decree on the Content of the Request for Individual Exemption of Restrictive Agreements.

Block exemption

There are cases when parties do not have to submit requests for exemption, as separate decrees specify categories of agreements included in a block exemption if they fulfill the list of conditions.

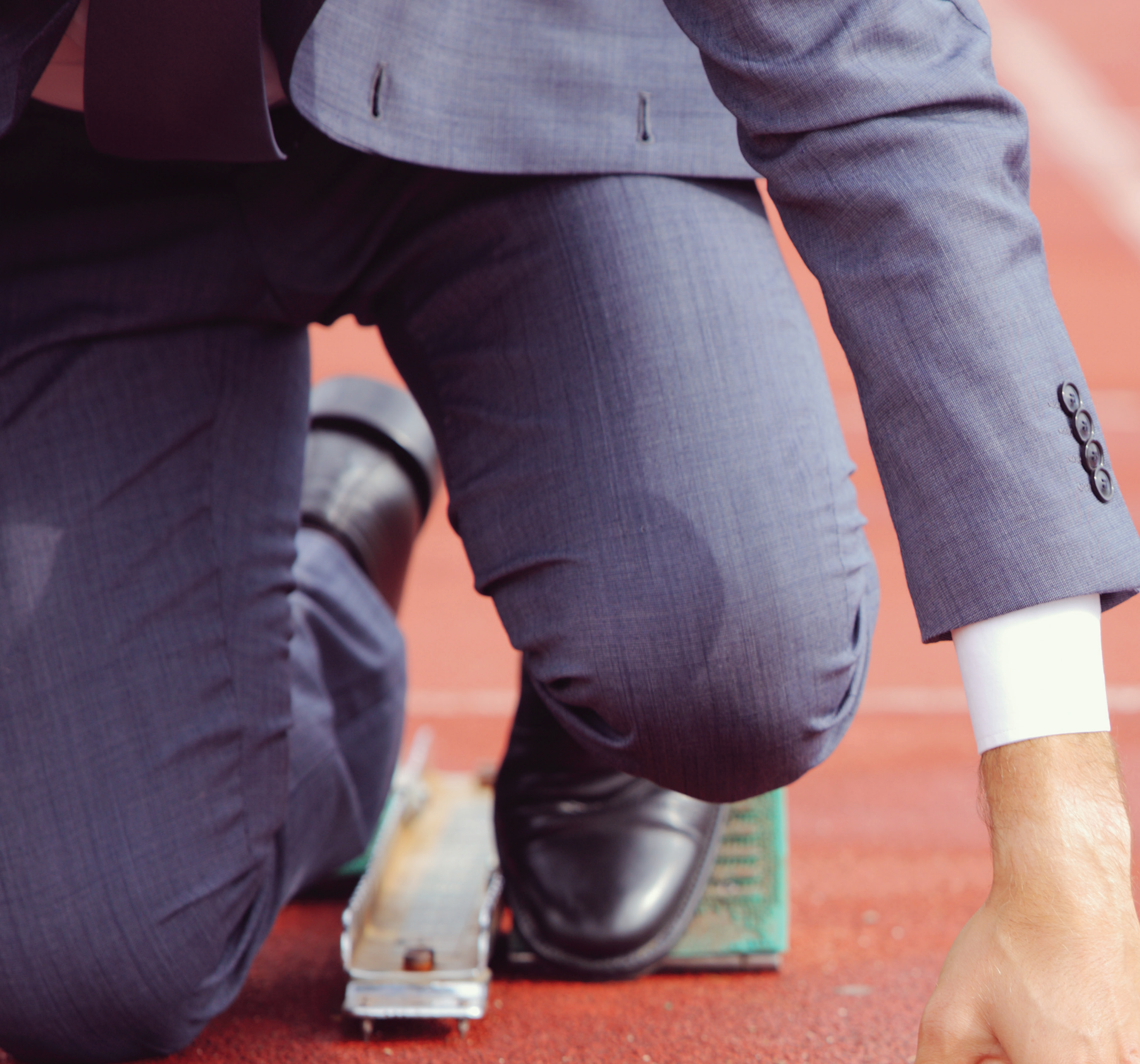
Restrictive agreements for which a request does not have to be submitted to the Commission:

- Research and development agreements between market participants operating at the same level of production or distribution;
- Specialization agreements between market participants operating at the same level of production or distribution;
- Agreements between market participants operating at different levels of production or distribution.

Research and development agreements between market participants operating at the same level of production or distribution

Market participants operating at the same level of production or the same level of distribution chain may conclude so called horizontal agreements. A horizontal agreement aiming at comprehensive prevention of competition between parties to the agreement is called a cartel and such agreements fall within the category of restrictive agreements. However, not all horizontal agreements are necessarily restrictive.

Namely, when the intention behind the concluding of a horizontal agreement is cooperation between the market participants, this cannot be a case of a restrictive agreement. If there is cooperation, there can be no competition.



A great Serbian firm that represents big commercial companies, and has brilliant communication skills."

CHAMBERS AND PARTNERS

For this very reason a special Decree has regulated the concluding of those horizontal agreements aimed at joint research and development of a product and/or production process and joint benefit from the results of such research and development. Such agreements are called research and development (R&D) agreements.

In order for an R&D agreement to be exempt, the following conditions must be fulfilled:

- All parties to the agreement have access to the results of the R&D;
- Each party to the agreement may independently use the results of the R&D;
- Any joint use of the results of the R&D refers to results protected by intellectual property rights or results constituting know-how;
- The parties to the agreement in charge of production are obliged to fulfill the supply Purchase orders of all parties to the agreement, except if the agreement itself specified joint distribution as well.

These agreements will not be exempt if they restrict production or sale, set the prices of contractual products towards third parties, restrict the right of use of intellectual property, and in all other cases specified by the relevant Decree.

When parties to the agreement are not competitors, the R&D agreement may remain in force until the R&D process is completed. In case of a joint use of the results of the R&D, the agreement may remain in force for up to seven years from the date of marketing the contractual product. This deadline may be applied only if the joint share of the parties to the agreement in the relevant market does not exceed 25%.

Specialization agreements between market participants operating at the same level of production or distribution

Agreements concluded between market participants operating at the same level of the commercial or distribution chain are called specialization agreements.
In order for a specialization agreement to be exempt, the conditions specified in a separate Decree have to be fulfilled. The conditions are as follows:

- By a unilateral specialization agreement one party undertakes to discontinue production of the relevant products or to refrain from production of these products and buy these products from the other party to the agreement, while the other party undertakes to produce and sell such products;
- By a mutual specialization agreement two or more parties to the agreement undertake to discontinue production or refrain from production of specific but different products and to buy them from other parties to the agreement who undertake to sell them;
- By a joint production agreement two or more parties to the agreement undertake to jointly produce certain products.

Apart from the above, specialization agreements also have to fulfill additional conditions in order to be exempt, namely parties to the agreement have to:

- Accept the obligation of exclusive sale or exclusive purchase within unilateral or mutual specialization agreements or joint production agreements;
- Accept the obligation not to independently market the products being the subject-matter of the specialization agreement, but to take part in joint distribution or to agree to authorize a third party to sell the products, provided such third party is not their competitor.

However, even if all the above conditions are fulfilled, the joint share of the parties to the agreement in the relevant market must not exceed 20%.

Specialization agreements which provide for the production of a completely new product or service on the market may be exempt for the first three years from their execution date or date of implementation if they fulfill all the above conditions.

In order for a specialization agreement to be exempt, it must not contain provisions aimed at setting the prices of products to be sold to third parties, restriction of the volume of production and/or sale or dividing the market and/or the consumers.

Agreements between market participants operating at different levels of production or distribution

Agreements on sale, purchase or distribution of goods and services between market participants who operate at different levels of production or distribution for the purpose of concluding and implementing the agreement are called vertical agreements.

As parties to a vertical agreement operate on different markets they are not mutual competitors. However, this does not mean that vertical agreements have no effect on competition. If a vertical agreement disrupts or restricts competition it is called a restrictive vertical agreement.

Thus, not all vertical agreements are restrictive. A special Decree specifies the types of vertical agreements that may be exempt, such as, for instance:
- Exclusive distribution agreements whereby the seller undertakes to sell the products being the subject-matter of the agreement to only one distributor in a specific geographic area or to a specific customer group exclusively assigned to one distributor;
- Agreements on exclusive assignment of customers whereby the seller undertakes to sell the contractual product to only one distributor for resale to a specific group of customers;
- Exclusive purchase agreements whereby the buyer directly or indirectly undertakes to buy the contractual product from one seller exclusively;
- Exclusive sales agreements whereby the seller undertakes to sell the contractual product to only one buyer in a specific geographic area.

Vertical agreements may also be exempt if they are concluded between associations of retail market participants and the members of such associations, as well as between such associations and their suppliers if:
- All members of the association are retailers who sell the contractual products to end consumers;
- No member of the association together with its related market participant generates total annual income exceeding EUR 2 million.

In order for a vertical agreement to be exempt, the market share of each party to the agreement in the relevant market must not exceed 25%, and the total market share of the parties in the relevant market must not exceed 40%.

The Decree that specifies the conditions for exemption of vertical agreements contains a list of restrictions relating to the content of vertical agreements. Vertical agreements will not be exempt if they contain the following restrictions:
- Restricting the territory in which the buyer may sell the products being the subject-matter of the agreement or restricting the sale of the contractual products to a specific group of end consumers;
- Restricting mutual supply between the members of a selective distribution system, including supply of members who do not operate at the same level of sale;
- Restricting a seller selling parts to a buyer for manufacture of a new product so that the seller has to sell such parts as spare parts to end consumers or repair shops or other service providers whom the buyer did not authorize for maintenance and/or repair of its products.

Finally, vertical agreements, as well as horizontal agreements, may also be exempt if they fall in the category of agreements of minor importance. Agreements of minor importance are agreements where the parties have less than:
- 10% market share, if the parties to the agreement operate at the same level of the production and trade chain (horizontal agreements);
- 15% market share, if the parties to the agreement operate at different levels of the production and trade chain (vertical agreements);
- 10% market share, if the agreement has characteristics of both a horizontal and a vertical agreement or if it is hard to determine if it is a horizontal or a vertical agreement;
- 30% market share, in the case of agreements with similar influence on the market concluded between different participants, if the individual market share of each of them does not exceed 5% on each individual market in which the impacts of the agreement can be felt.

Agreements of minor importance are permitted, unless the intent of a horizontal agreement is to set prices or restrict production or sale, or to divide the supply market, and/or if the intent of a vertical agreement is to set prices or divide the market.

DOMINANT POSITION

The Law defines a dominant position as the position held by a market participant that, due to its market strength, can operate on the relevant market significantly independently from actual or potential competitors, buyers, vendors or consumers. Based on this provision of the Law it is clear that dominant position also includes monopoly. Dominant position exists when one competitor holds significant market power. The most important factors of market power, that is, criteria for determining dominant position, are:

- Market share;
- Barriers to entry into the relevant market;
- Buyer power.

Market share – The greater the share of one market participant, the higher the likelihood that this participant has greater market power. However, the mere fact that a certain market participant has greater market power need not necessarily mean that the participant holds a dominant position. In EU law the existence of a dominant position can only be indicated if the participant has a market share exceeding 40%. But in order to gain a full picture of whether a market participant holds a dominant position or not, the participation of this participant in the market has to be observed as well.

Barriers to entry into the relevant market – In cases where there are barriers to entry into the relevant market, the chances for entry of new participants into a specific market are smaller, and therefore the likelihood that the participant already in such market holds a dominant position is greater.

Buyer power – When there is a powerful buyer whose purchases purchases makes up a large part of the specific market participant's sales, the buyer's influence on creating the seller's dominant position can be of immense significance. Namely, in order for one market participant to have a dominant position it is necessary for it to have a sufficient number of buyers to whom it will sell its goods, or to have just one or two buyers of extreme economic power. Therefore, if one such buyer were to change supplier, it could eliminate the supplier's dominant position.

In order for a dominant position to exist it is necessary for all the above conditions to be cumulatively fulfilled, but it must be noted that competition law does not prohibit the existence of dominant position, or the holding of market power, but rather strives to prevent any abuse of such dominant position.

- The Law specifies that the following in particular constitutes abuse of dominant position:
- Imposing unfair buying or selling prices or other unfair terms of business;
- Restricting production, the market or technical development;
- Imposing unfair terms of business whereby certain market participants are placed in a less favorable position than their competitors;
- Conditioning entering into agreements with the other party upon acceptance of additional obligations which, according to customary business practices, are not related to the subject-matter of the agreement itself.

One of the better-known cases when the Commission for Protection of Competition found abuse of dominant position had been committed is the case of companies "Mlekara" a.d. from Subotica and milk and dairy producer "Imlek" from Belgrade. These companies, which constitute one participant on the relevant market, were found by the Commission for Protection of Competition to have abused their dominant position in the relevant market of buying unprocessed (cow) milk intended for further industrial processing in the territory of the Republic of Serbia by imposing unfair terms of business, including by setting the purchase price of unprocessed milk formed on the basis of a pricelist where the terms under which the pricelist could be changed were not specified, nor was the right of producers to unilateral termination of the agreement under reasonable conditions in case of dissatisfaction with the purchase price provided for. Lawsuits arising from this decision of the Commission for Protection of Competition are still ongoing.

CONCENTRATION

Concentration is taken to mean all changes that cause the consolidation, merger or takeover of companies, or one market participant to exercise control over another market participant in some other manner.

There are three basic forms of concentration:
- Consolidation – concentration involving the disappearance of one or more companies or market participants and appearance of one new market participant which is their legal successor, with the corresponding rights and obligations;
- Merger – concentration involving the disappearance of only one company, or market participant, whose rights and obligations are acquired by the surviving company;
- Takeover – concentration where the market participant that has been taken over still operates as an independent company, but is controlled only by those legal or natural persons that have taken over the company.

Apart from these three basic forms, concentration can also occur in other cases as well, such as taking over part of the assets of one company by another company, acquisition of real estate, transfer of an insurance portfolio from one insurance company to another and so forth.

Depending on who the market participants are, concentration can be:
- Horizontal – when the parties to the concentration are competitors operating at the same level of production or trade;
- Vertical – when the parties to the concentration are competitors operating at different levels of production or trade;
- Conglomerate – concentrations where there is no market connection between the market participants.

Since concentration can have a potential negative impact on competition, as it provides the opportunity for decisive influence on the business of one or more other market participants, there is need to control it. The negative impacts of concentration can be seen either in its potentially causing a market participant to hold significant market power, and therefore the possibility to abuse it, or in its increasing the possibility of forming and maintaining of cartels.

NOTIFICATION OF CONCENTRATION

As already mentioned, concentration can have a negative impact on competition in a specific market. Therefore the Law specifies cases in which market participants are obliged to submit notifications of their concentration. Such obligation exists if the concentration exceeds the so-called "notification threshold", that is if:

- The total annual globally generated income of all parties to the concentration for the previous accounting year exceeds EUR 100 million, with at least one party to the concentration having generated income exceeding EUR 10 million in the Serbian market;
- The total annual income of at least two parties to the concentration generated in the Serbian market exceeds EUR 20 million for the precious accounting year, with at least two parties to the concentration having generated more than EUR 1 million each in the Serbian market in the same accounting period.

If the concentration is by way of a takeover bid in the context of regulations governing takeovers of joint stock companies, it has to be notified even when the above conditions have not been fulfilled. Prilikom obračuna godišnjeg prihoda koji učesnici u koncentraciji ostvare ne računaju se prihodi koji ti učesnici ostvare u međusobnoj saradnji.

A notification of concentration contains general information on the notifying entity, a detailed description of the concentration, data on the total annual income of each party to the concentration for the three years preceding the year in which the notification is being submitted, an assessment of the relevant market, a list and estimation of the market shares of the major competitors of the parties to the concentration, etc. The notifying entity is obliged to comply with any request of the Commission to submit additional data the Commission finds to be relevant.

When calculating the annual income generated by the parties to the concentration, income generated in mutual business dealings between the parties is not taken into account.

Notifications of concentration are submitted to the Commission within 15 days of the date of one of the following:
- Concluding the agreement or contract;
- Announcing the public invitation or bid or closing the public bid;
- Acquiring control.

The concentration may also be notified when the market participants display serious intent to conclude an agreement, by signing a letter of intent, announcing their intent to make a bid or in some other manner. In case of concluding an agreement or a contract, the concentration should be suspended until the Commission reaches its decision; otherwise the Commission may penalize implementation of the agreement before the concentration has been cleared.

The Law specifies that the Commission may investigate concentrations ex officio if the joint share of the parties to a concentration exceeds 40% in the Serbian market.

Whether the concentration is investigated based on a notification or ex officio, the parties to the concentration are obliged to suspend the carrying out of the concentration until the Commission has reached its decision.

In certain cases the Commission may grant parties to a concentration so-called provisional clearance. By such provisional clearance the Commission prescribes specific conditions and deadlines for completing the concentration and the manner of verifying whether there conditions have been met.

Protection of competition and procedural penalties

If parties to a concentration carry out a concentration that has either not been cleared or not all the conditions specified in the provisional clearance have been met, the Commission may render a special decision in which it pronounces the measures that parties to the concentration have to take for establishing or preserving competition in the relevant market. In the interest of protection of competition, the Commission may pronounce the payment obligation measure amounting to a sum of 10% of the annual income generated on the territory of the Republic of Serbia. This measure is not pronounced only when the parties to a concentration carry out a concentration for which clearance has not yet been received or for which not all the conditions specified in the provisional clearance have been met, but also if a market participant:

- Abuses its dominant position in the relevant market;
- Concludes or carries out a non-exempt restrictive agreement;
- Fails to carry out the measures for rectifying violation of competition, i.e. deconcentration measures;
- Carries out a concentration despite the obligation to suspend, that is, a concentration for which clearance has not been issued.

The deadline for paying the sum for the competition protection measure is defined in the same decision in which the measure is pronounced, and may not be shorter than three months or longer that one year from the date of receipt of the decision.

If a market participant:

- Fails to comply with a request from the Commission to deliver or communicate requested data or delivers or communicates untrue, incomplete or false data;
- Fails to comply with a temporary measure pronounced by the Commission;
- Fails to notify the concentration by the legal deadline;

the measure of payment of procedural penalties shall be pronounced, in the amount of EUR 500 to EUR 5000 for each day of failure to comply with the Commission's order issued during the procedure, or failure to act upon such order.

ADMINISTRATIVE DISPUTES

If parties to a concentration are not satisfied with the Commission's decision, they may file a lawsuit with the Administrative Court within 30 days of the date of receiving the Commission's decision. However, filing a lawsuit with the Administrative Court does not delay enforcement of the Commission's decision, unless a separate request was also to be submitted to the Commission seeking suspension of enforcement of the decision until finalization of the court proceedings because enforcement would cause irreparable damages to the plaintiff. Such requests are decided by the Council of the Commission.

The same option is also available during the administrative dispute itself. Namely, suspending enforcement may also be sought from the Administrative Court, if the enforcement would cause the plaintiff damage that would be difficult to compensate and the suspension does not harm public interest and would not cause major or irreparable damage to the counterparty or a stakeholder. Suspension may be sought simultaneously with filing of the lawsuit or at a later time during the procedure (with reference to the filed lawsuit), but may also be sought before filing the lawsuit. A request for suspension may be submitted before filing the lawsuit if the matter is urgent.

The court decides on the dispute by pronouncing a judgment. By this judgment the court accepts the lawsuit or rejects it as unfounded. If the lawsuit is rejected, the administrative procedure is finally concluded. Judgments by which a lawsuit is accepted are classified as judgments rendered in dispute with limited jurisdiction and in dispute with full jurisdiction. In the first type of judgment the court nullifies the administrative act in full or in part and returns the matter to the competent authority for a new decision. In the second type, the court nullifies the administrative act in full or in part and settles the matter itself by the judgment. In the latter case the judgment finally concludes the administrative procedure. It should be noted that the Administrative Court deciding in full jurisdiction is in practice very rare.

If it should be found in a procedure before the Administrative Court that a decision rendered by the Commission is unlawful, the plaintiff would be entitled to seek compensation for the damages caused by such unlawful act. Parties can exercise their right to compensation of damages in a separate civil procedure. However, such decision rendered by the Administrative Court does not mean that damages have been sustained, but only that the decision the Commission rendered is unlawful, meaning that the parties would have to prove in a separate civil procedure that damages were sustained. The decision rendered by the Administrative Court merely constitutes legal grounds for initiating civil proceedings before the competent court of law.

JANKOVIĆ POPOVIĆ MITIĆ

Vladimira Popovića 6 | NBGP Apartments
11070 Belgrade | Serbia | tel: +381 11 207 6850
fax: +381/11/207-6899

www.jpm.rs