

Pursuant to Article 13, Paragraph 3 of the Law on Protection of Competition ("Official Gazette of the Republic of Serbia", no. 51/09) and Article 42, Paragraph 1 of the Law on Government ("Official Gazette of the Republic of Serbia", no. 55/05, 71/05-corr., 101/07 and 65/08),

The Government adopts the following

REGULATION
ON AGREEMENTS BETWEEN UNDERTAKINGS OPERATING AT THE
DIFFERENT LEVEL OF PRODUCTION OR DISTRIBUTION CHAIN EXEMPTED
FROM PROHIBITION

*Regulation was published in the "Official Gazette of the Republic of Serbia", no. 11/2010,
dated March 5, 2010*

Subject

Article 1

This Regulation shall stipulate categories of agreements for the sale, purchase or distribution of goods and services among undertakings operating at the different level of production or distribution chain with the object to conclude and implement agreements (hereinafter: vertical agreements), and more closely prescribe specified conditions under which the said agreements may be exempted from prohibition.

Definition

Article 2

Specified terms used in this Regulation, shall have the following meaning:

- 1) 'party to the agreement' means a party to the agreement and its affiliated undertakings;
- 2) 'distributor' means a buyer who is purchasing product for resale or processing purpose;
- 3) 'competing undertaking' means an undertaking operating on the same relevant market (actual competitor), or undertaking which could within a short period of time be likely to undertake necessary additional investments or other necessary switching costs to enter the relevant market in case of a small but permanent increase in prices (potential competitor);
- 4) 'products' means goods and/or services, including semi-products;
- 5) 'substitutable products' means products that costumers consider as interchangeable with contractual product, particularly in term of their characteristics, common purpose and price;
- 6) 'non-compete obligation' means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services on the same relevant market, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the product;
- 7) 'active sale' means search and access to buyers or certain group of buyers located in the territory reserved for other party to the agreement and conducting acts aimed at sale of products to such buyers, including visits, sending letters and emails, advertising in the media intended exclusively for such buyers or group of buyers, founding affiliated companies, branches or organizational units in the territory reserved for other party to the agreement aimed at reaching the buyers and organizing sale, as well as concluding individual agreements with such buyers;

- 8) 'passive sale' means sale on the basis of order made by the buyer from location reserved for other party to the agreement, including orders driven by advertising in the media and Internet, available in the territory broader than the territory exclusively intended for a single distributor or specified group of buyers, being the result of a free and unlimited access to advertising message by every buyer or group of buyers;
- 9) 'selective distribution system' means a distribution system where the supplier undertakes to sell contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria, and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system;
- 10) 'know-how' means a package of non-patented practical knowledge and information resulting from experience and testing which are secret (not generally known or easily accessible), substantial (the know-how is significant for production of contract products or implementation of contract process), and identified (described in sufficiently clear manner to enable confirmation of criteria of secrecy and substantiality);
- 11) 'intellectual property rights' means rights of industrial property, copyrights and neighboring rights.

Vertical agreements exempted from prohibition

Article 3

Vertical agreements that relate to the conditions under which parties to the agreement may purchase, sell or resell certain goods or services shall be exempted from prohibition, and particularly:

- 1) agreements on exclusive distribution under which the seller undertakes to sell contract product only to the single distributor in particular geographic territory or to a particular group of buyers exclusively allocated to the single distributor;
- 2) agreements on the exclusive allocation of buyers under which the seller undertakes to sell contract product only to the single distributor for resale to a particular group of buyers;
- 3) agreements on selective distribution under which the seller undertakes to either directly or indirectly sell contract product only to distributors selected on the basis of clear and objective criteria, whereas the distributor undertakes not to sell contract product to distributors outside the established selective distribution system, if such agreements do not contain additional restrictions that are not indispensable for establishment of selective distribution system;
- 4) agreements on exclusive purchase under which the buyer undertakes to either directly or indirectly purchase contract product exclusively from a single seller;
- 5) agreements on exclusive sale under which the seller undertakes to sell contract product to the single buyer only in particular geographic territory;
- 6) agreements on trade representation granting an exclusive right to the agent to act as an intermediary, negotiate and conclude sales agreements, in the name and on behalf of a principal without taking on trade risk;
- 7) agreements on franchising under which the party to the agreement (franchisor), based on the commission, grants the right for exploitation of intellectual property rights and know-how to other party to the agreement (franchisee) for manufacture and/or sale of contract product;
- 8) agreements containing provisions transferring or granting rights to exploitation of intellectual property rights to the buyer, conditioned that such provisions do not represent the primary aim of these agreements and are in direct relation to utilization,

sale and/or resale of contract products by direct or indirect buyers, and that their aim or consequence is not restriction prohibited pursuant to this Regulation.

The exemption of agreement from prohibition provided for Paragraph 1 of this Article shall also apply to agreements concluded between associations of undertakings in the field of retail trade and members of such associations, as well as between those associations and their suppliers if:

- 1) all members of those associations are retail traders selling contract products to end consumers;
- 2) no members of those associations, cooperatively with its affiliated undertakings, hold a total annual revenue in excess to two million EUR.

Relevant market share threshold

Article 4

Vertical agreements shall be exempted from prohibition provided that the market share of each party to the agreement on the relevant market does not exceed 25%.

Market share of each party to the agreement shall be calculated on the basis of sales turnover, i.e. value of purchase or volume of production of the relevant product in the calendar year preceding year of the conclusion of agreement.

Market share of parties to the agreement provided for in Paragraph 1 of this Article also includes market share of their affiliated undertakings provided for in Paragraph 1 and 2 of this Article.

Restrictions regarding content of vertical agreements

Article 5

Vertical agreements shall not be exempted from prohibition if they directly or indirectly, in isolation or combination with other factors under the control of parties to the agreement contain restrictions that have as their object:

- 1) direct or indirect restriction of the buyer's ability to freely determine its sale price without prejudice to the possibility of the seller to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, conditioning of operations, or incentives offered by, any of the parties;
- 2) restriction of the territory into which, or of the customers to whom, a buyer party to the agreement may sell the contract goods;
- 3) restriction of active or passive sales to end users by members of established selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the selective distribution system from operating out of an unauthorized place of establishment;
- 4) restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at the different level of trade;
- 5) restriction agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its products.

Notwithstanding Paragraph 1, Item 2 of this Article, the vertical agreements may contain provisions that have as their objective:

- 1) restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer;

- 2) restriction of active and passive sales of contract products to end users by a buyer operating at the wholesale level of trade;
- 3) restriction of active and passive sales of contract products by the members of a selective distribution system to unauthorized distributors within the territory reserved by the supplier to operate that system;
- 4) restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to end-users who would use them to manufacture the same type of goods as those produced by the supplier.

Vertical agreements entered into competing undertakings shall not be exempted from the prohibition, however, it shall apply where competing undertakings enter into a non-reciprocal vertical agreement, and if:

- 1) seller is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; or
- 2) seller is a provider of services at the wholesale and retail level of trade, while the buyer provides its goods or renders services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

Vertical agreements shall not be exempted from prohibition if there are several vertical agreements on the relevant market which, due to cumulative effect do not meet conditions for exemption from prohibition referred to in Article 11 of the Law and this Regulation, particularly when agreements containing similar restrictions cover more than 40% of the relevant market.

Non-compete obligation in vertical agreements

Article 6

Vertical agreements from Article 3 of this Regulation shall not be exempted from prohibition if they contain:

- 1) direct or indirect non-compete obligation contracted for unlimited period of time or for period beyond five years, whereby the clause referring to the non-compete obligation which is tacitly renewable beyond five year period shall be deemed to have been concluded for an indefinite duration;
- 2) direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services limited to the period of one year, except when related to products interchangeable with the contract products, and is limited to the premises and land from which the buyer has operated during the contract period, and is indispensable to protect know-how transferred by the seller to the buyer;
- 3) direct or indirect obligation of members of selective distribution system not to sell products or render services of the particular competing parties to the agreement.

As an exemption provided for in Paragraph 1, Item 1 of this Article, it is permitted to contract a clause on non-compete obligation for the period beyond five years if the buyer sells contract product in business premises or land owned or rented by seller, provided that the lessor is not a party affiliated with buyer pursuant to Article 5 of the Law, if the non-compete obligation is not in force beyond the period in which the buyer uses business premises or land of seller.

As an exemption provided for in Paragraph 1, Item 2 of this Article, it is allowed to restrict use and disclosure of know-how for the period beyond one year upon the expiry of the agreement, provided that such know-how has not entered the public domain or is easily accessible.

Transitional and final provisions

Article 7

Vertical agreements concluded prior to the date of coming into force of this Regulation, shall be harmonized with provisions of this Regulation within the period of three months from the date of coming into force.

Regarding vertical agreements that are concluded prior to the date of coming into force of this Regulation and harmonized with its provisions within the period provided for in Paragraph 1 of this Article, the market share shall be calculated on the basis of revenue generated in the financial year preceding the year this Regulation came into force.

Article 8

This Regulation shall come into force on the eighth day from the date of publication in the "Official Gazette of the Republic of Serbia".

No.
Belgrade

GOVERNMENT

DEPUTY PRIME MINISTER
