Republic of Serbia
COMMISSION FOR PROTECTION OF COMPETITION
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Belgrade

MINISTRY OF EDUCATION, SCIENCE AND TECHNOLOGICAL DEVELOPMENT

Belgrade
22-26 Nemanjina St.

Subject: Opinion on the Draft Law on Amendments to the Law on Trademarks

On May 3, 2018, the Ministry of Education, Science and Technological Development has submitted to the Commission for Protection of Competition, with a request for its opinion, the Draft Law on Amendments to the Law on Trademarks.

Pursuant to Article 21(1/7) of the Law on Protection of Competition (Official Gazette of the RS 51/09 and 95/13), at the 152nd session held on May 7, 2018, the Council of the Commission for Protection of Competition issues the following

OPINION

Considering the text of the Draft Law on Amendments to the Law on Trademarks, it is established that the subject-matter of related amendments is not Article 40 of the Law on Trademarks (Official Gazette of the RS 104/2009 and 10/2013). As regards this consideration, we hereby indicate that the current legal solution therein envisages the principle of national exhaustion of trademark rights, instead of the generally accepted concept of international exhaustion of trademark rights. Pursuant to the said provision, a trademark does not entitle its holder to bar its use in connection with goods marked with such trademark when placed into circulation for the first time in the Republic of Serbia by the holder of the trademark or other person authorized by the holder.

From the provision mentioned follows the *argumentum a contrario*, that the holder of the trademark (importer) has a right to oppose further placement into circulation of goods marked with such trademark by third parties if they have placed such goods into circulation in the Republic of Serbia without knowledge or consent of the trademark proprietor (prohibition of parallel imports).

In order to address the effects caused by the current legal solution therein affecting the market of the Republic of Serbia, we hereby propose to amend Article 40(1) by replacing "in the Republic of Serbia" by "anywhere in the world".

During the previous period (starting from the date of application of the contested legal provision), the Commission has received a great number of requests for opinions on the conflict between the said legal solution and the basic principles governing competition, as well as requests for opinions on the Commission's competences which may be potentially derogated due to the further continuity of this legal solution. Despite the fact that a great number of importers have openly declared against the prohibition of parallel imports, but committed to using this right solely in cases of unfair competition, when analyzing the state of competition on the market, the Commission has noted a significant degree of protectionism by importers, particularly relating to those consumer products/brands in respect of which consumers are exhibiting the highest degree of sensitivity and showing the most prominent extent of consumer habits. The production of such goods in Serbia is negligible or has a minor importance in terms of substitution, thus indicating the imports as the most prominent supply source of said products.

In such manner, exclusive importers/distributors are becoming the sole and exclusive importers of certain brands, lacking a market correction factor, while the institute of national exhaustion of trademark rights becomes a barrier to entry for identical products at lower prices. With the existence of appropriate legally available mechanisms protecting statutory rights and by using such rights, exclusive importers/distributors control the imports and placement on the Serbian market of goods under the regime of intellectual property rights protection in terms of national exhaustion of trademark rights (with a notable increase in the number of claims filed before the Commercial Court in practice).

The extension of exclusive rights directed at the prohibition of parallel imports in a manner as defined in the specific case, by the Law on Trademarks, can truly exert a significant influence on competition and free movement of goods on the market, and in that regard can restrict the price and qualitative competition of identical products.

More prominent price disparities, as a consequence of the said legal solution, can most notably be seen in the case of consumer goods (technical appliances, food, clothing, footwear, building materials, industrial machinery, etc.). In terms of substitution, the existence of parallel imports is also significant from the standpoint of public procurements since the current legal solution restricts both the number of potential bidders and price competition. Parallel imports could enable an increased number of potential bidders that procure goods from different sources for public procurement needs, lower initial price of goods, which at the same time reduces the value of procurement, resulting in budget savings from reductions in public expenditure (of schools, hospitals and other public funds beneficiaries).

Namely, parallel imports imply the imports and sales of goods by independent traders operating outside a selective distribution system, and without supplier's prior consent. Parallel importers purchase related goods in one country (neighboring or in the EU) at a relatively lower price, which they later sell in a country at prices lower than those currently offered in that country of destination (where the product prices are significantly higher). Price competition between traders selling identical products is in such manner created (the so-called, Intra brand competition).

Although the most common excuse for the introduction of this prohibition is the existence of unfair competition (defined by the Law on Trade), parallel imports as such serve exclusively for the restoration of balance in price disparities within a certain market, that is, for the market equilibrium purposes between neighboring countries. For that reason, it is necessary to distinguish between unfair competition originating from the black market (trade of identical products procured in a manner not regulated by positive law – such as the sales on open markets, in unregistered stores, via Internet, etc.), and importers of identical products cleared through all relevant procedures (by customs and other inspection authorities) which are prerequisite for the placement into circulation of such products.

Finally, and most importantly, in addition to instigating healthy competition, parallel imports also instigate and develop the well-being of consumers given that imports from countries offering lower prices of goods create a pressure on existing merchants in the country of destination to reduce prices.

Also, parallel importation restrictions within the EU is observed from the viewpoint of infringement of competition under Article 101(1) of the TFEU, which as their purpose have a significant restriction, distortion or prevention of competition. Pursuant to the established practice of the European Commission[1] and the European Court[2], parallel importation restrictions jeopardize a fundamental principle of the single internal market by imposing different price levels of identical products between member states, which deprives consumers of the benefits.

For the reasons indicated, parallel imports represent a foundation for the functioning of the EU single market, whose purpose is the elimination of big price and qualitative disparities between identical and equivalent goods.

[1] COMMISSION DECISION of 26 May 2004 relating to a proceedings under Article 81 of the EC Treaty against The Topps Company Inc, Topps Europe Limited, Topps International Limited, Topps UK Limited, and Topps Italia SRL;

[2] Case T-13/03 Nintendo Co., Ltd and Nintendo of Europe GmbH v Commission of the European Communities; Judgment of the Court of First Instance of 30 April 2009 — Itochu v Commission; Judgment of the Court of First Instance of 30 April 2009 — Nintendo and Nintendo of Europe v Commission;