



Commission for Protection of Competition pursuant to article 28 paragraph (3), in relation to article 25 of the Law on Protection of Competition (Official Gazette of the Republic of Macedonia no. 145/10 and 136/11) on its session held on 26.11.2011 adopted the following

Guidelines on restrictions directly related and necessary to concentration¹

I. INTRODUCTION

1. Article 25 of the Law on protection of competition (Official Gazette of the Republic of Macedonia no. 145/10 and 136/11) (hereinafter: Law) stipulates that "The decision whereby the Commission for Protection of Competition determines that the concentration is compliant with the provisions of this Law shall be considered also to cover the restrictions which are directly related and indispensable for/necessary to/ the implementation of the concentration".

2. This provision introduces a principle of self-assessment of such restraints by the undertakings itself, which means that the Law does not oblige the Commission for Protection of Competition (hereinafter: Commission) to assess and individually address ancillary restraints.

3. It remains, the undertakings concerned to assess for themselves whether and to what extent their agreements can be regarded as ancillary to a transaction.

4. According to Article 28 paragraph (5) of the Law, the Commission upon a request by the undertakings shall provide expert opinions on issues in the area of competition policy and protection of competition. Thus the undertakings concerned can request from the Commission opinion on the additional ancillary character of restrictions if a case presents novel and unresolved questions giving rise to genuine uncertainty and is not covered by this Guidelines. Subject to confidentiality requirements, the Commission will provide adequate publicity as regards such assessments that further develop the principles set out in this Notice.

5. In order to provide legal certainty to the undertakings concerned, this Notice provides guidance on the interpretation of the notion of ancillary restraints. This Guidelines sets out principles for assessing whether and to what extent the most common types of agreements are deemed to be ancillary restraints.

6. If the restrictions are directly related and necessary to the implementation of the concentration, Article 25 of the Law that chapter three of the Law alone applies. If the restrictions cannot be

¹ These Guidelines are aligned with Commission Notice directly related and necessary to concentration, OJ C 56,5.3.2005 str.24-31, CELEX number 52005XC0305(02).



regarded as directly related and necessary to the implementation of the concentration, Articles 7 and 11 of the Law remain applicable.

II. GENERAL PRINCIPLES

10. A concentration consists of contractual arrangements and agreements establishing control within the meaning of Article 12 paragraph (2) of the Law. All agreements which carry out the main object of the concentration, such as those relating to the sale of shares or assets of an undertaking, are integral parts of the concentration. In addition to these arrangements and agreements, the parties to the concentration may enter into other agreements which do not form an integral part of the concentration but can restrict the parties' freedom of action in the market. If such agreements contain ancillary restraints, these are automatically covered by the decision declaring the concentration compatible with the provisions of the Law.

11. The criteria of direct relation and necessity are objective in nature. Restrictions are not directly related and necessary to the implementation of a concentration simply because the parties regard them as such.

12. For restrictions to be considered 'directly related to the implementation of the concentration', they must be closely linked to the concentration itself. It is not sufficient that an agreement has been entered into in the same context or at the same time as the concentration². Restrictions which are directly related to the concentration are economically related to the main transaction and intended to allow a smooth transition to the changed company structure after the concentration.

13. Agreements must be 'necessary to the implementation of the concentration', which means that, in the absence of those agreements, the concentration could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty. Agreements necessary to the implementation of a concentration are typically aimed at protecting the value transferred, maintaining the continuity of supply after the break-up of a former economic entity, or enabling the start-up of a new entity. In determining whether a restriction is necessary, it is appropriate not only to take account of its nature, but also to ensure that its duration, subject matter and geographical field of application does not exceed what the implementation of the concentration reasonably requires. If equally effective alternatives are available for attaining the legitimate aim pursued, the undertakings must choose the one which is objectively the least restrictive of competition.

14. For concentrations which are carried out in stages, the contractual arrangements relating to the stages before the establishment of control within the meaning of Article 12 paragraph (1) and (2) of the Law cannot normally be considered directly related and necessary to the implementation of the concentration. However, an agreement to abstain from material changes in the target's business until completion is considered directly related and necessary to the implementation of the joint bid. The same applies, in the context of a joint bid, to an agreement by the joint purchasers of an undertaking to abstain from making separate competing offers for the same undertaking, or otherwise acquiring control.

² Likewise, a restriction could, if all other requirements are fulfilled, be 'directly related' even if it has not been entered into at the same time as the agreement carrying out the main object of the concentration.



15. Agreements which serve to facilitate the joint acquisition of control are to be considered directly related and necessary to the implementation of the concentration. This will apply to arrangements between the parties for the joint acquisition of control aimed at implementing the division of assets in order to divide the production facilities or distribution networks among themselves, together with the existing trademarks of the undertaking acquired jointly.

16. To the extent that such a division involves the break-up of a pre-existing economic entity, arrangements that make the break-up possible under reasonable conditions are to be considered directly related and necessary to the implementation of the concentration, under the principles set out below.

III. PRINCIPLES APPLICABLE TO COMMONLY ENCOUNTERED RESTRICTIONS IN CASES OF ACQUISITION OF AN UNDERTAKING

17. Restrictions agreed between the parties in the context of a transfer of an undertaking may be to the benefit of the purchaser or of the vendor. In general terms, the need for the purchaser to benefit from certain protection is more compelling than the corresponding need for the vendor. It is the purchaser who needs to be assured that she/he will be able to acquire the full value of the acquired business. Thus, as a general rule, restrictions which benefit the vendor are either not directly related and necessary to the implementation of the concentration at all, or their scope and/or duration need to be more limited than that of clauses which benefit the purchaser.

A. Non-competition clauses

18. Non-competition obligations which are imposed on the vendor in the context of the transfer of an undertaking or of part of it can be directly related and necessary to the implementation of the concentration. In order to obtain the full value of the assets transferred, the purchaser must be able to benefit from some protection against competition from the vendor in order to gain the loyalty of customers and to assimilate and exploit the know-how. Such non-competition clauses guarantee the transfer to the purchaser of the full value of the assets transferred, which in general include both physical assets and intangible assets, such as the goodwill accumulated or the know-how developed by the vendor. These are not only directly related to the concentration but are also necessary to its implementation because, without them, there would be reasonable grounds to expect that the sale of the undertaking or of part of it could not be accomplished.

19. However, such non-competition clauses are only justified by the legitimate objective of implementing the concentration when their duration, their geographical field of application, their subject matter and the persons' subject to them do not exceed what is reasonably necessary to achieve that end.

20. Non-competition clauses are justified for periods of up to three years, when the transfer of the undertaking includes the transfer of customer loyalty in the form of both goodwill and know-how. When only goodwill is included, they are justified for periods of up to two years.

21. By contrast, non-competition clauses cannot be considered necessary when the transfer is in fact limited to physical assets (such as land, buildings or machinery) or to exclusive industrial and



commercial property rights (the holders of which could immediately take action against infringements by the transferor of such rights).

22. The geographical scope of a non-competition clause must be limited to the area in which the vendor has offered the relevant products or services before the transfer, since the purchaser does not need to be protected against competition from the vendor in territories not previously penetrated by the vendor. That geographical scope can be extended to territories which the vendor was planning to enter at the time of the transaction, provided that he had already invested in preparing this move.

23. Similarly, non-competition clauses must remain limited to products (including improved versions or updates of products as well as successor models) and services forming the economic activity of the undertaking transferred. This can include products and services at an advanced stage of development at the time of the transaction, or products which are fully developed but not yet marketed. Protection against competition from the vendor in product or service markets in which the transferred undertaking was not active before the transfer is not considered necessary.

24. The vendor may bind herself/himself, her/his subsidiaries and commercial agents. However, an obligation to impose similar restrictions on others would not be regarded as directly related and necessary to the implementation of the concentration. This applies, in particular, to clauses which would restrict the freedom of resellers or users to import or export.

25. Clauses which limit the vendor's right to purchase or hold shares in a company competing with the business transferred shall be considered directly related and necessary to the implementation of the concentration under the same conditions as outlined above for non-competition clauses, unless they prevent the vendor from purchasing or holding shares purely for financial investment purposes, without granting him/her, directly or indirectly, management functions or any material influence in the competing company.

26. Non-solicitation and confidentiality clauses have a comparable effect and are therefore evaluated in a similar way to non-competition clauses³.

B. Licence agreements

27. The transfer of an undertaking or of part of it can include the transfer to the purchaser, with a view to the full exploitation of the assets transferred, of intellectual property rights or know-how. However, the vendor may remain the owner of the rights in order to exploit them for activities other than those transferred. In these cases, the usual means for ensuring that the purchaser will have the full use of the assets transferred is to conclude licensing agreements in his/her favour. Likewise, where the vendor has transferred intellectual property rights with the business, she/he may still want to continue using some or all of these rights for activities other than those transferred; in such a case the purchaser will grant a licence to the vendor.

28. Licences of patents⁴, of similar rights, or of know-how⁵, can be considered necessary to the implementation of the concentration. They may equally be considered an integral part of the

³ Confidentiality clauses on customer details, prices and quantities cannot be extended. By contrast, confidentiality clauses concerning technical know-how may exceptionally be justified for longer period.

⁴ Including patent applications, utility models, applications for registration of utility models, designs, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection



concentration and, in any event, need not be limited in time. These licences can be simple or exclusive and may be limited to certain fields of use, to the extent that they correspond to the activities of the undertaking transferred.

29. However, territorial limitations on manufacture reflecting the territory of the transferred activity are not necessary to the implementation of the operation. As regards licences granted by the seller of a business to the buyer, the seller can be made subject to territorial restrictions in the licence agreement under the same conditions as laid down for non-competition clauses in the context of the sale of a business.

30. Restrictions in licence agreements going beyond the above provisions, such as those which protect the licensor rather than the licensee, are not necessary to the implementation of the concentration⁶.

31. Similarly, in the case of licences of trademarks, business names, design rights, copyrights or similar rights, there may be situations in which the vendor wishes to remain the owner of such rights in relation to activities retained, but the purchaser needs those rights in order to market the goods or services produced by the undertaking or part of the undertaking transferred. Here, the same considerations as above apply.

C. Purchase and supply obligations

32. In many cases, the transfer of an undertaking or of part of it can entail the disruption of traditional lines of purchase and supply which have existed as a result of the previous integration of activities within the economic unity of the vendor. In order to enable the break-up of the economic unity of the vendor and the partial transfer of the assets to the purchaser under reasonable conditions, it is often necessary to maintain, for a transitional period, the existing or similar links between the vendor and the purchaser. This objective is normally attained by purchase and supply obligations for the vendor and/or the purchaser of the undertaking or of part of it. Taking into account the particular situation resulting from the break-up of the economic unity of the vendor, such obligations can be recognised as directly related and necessary to the implementation of the concentration. They may be in favour of the vendor as well as the purchaser, depending on the particular circumstances of the case.

33. The aim of such obligations may be to ensure the continuity of supply to either of the parties of products necessary for carrying out the activities retained by the vendor or taken over by the purchaser. However, the duration of purchase and supply obligations must be limited to a period necessary for the replacement of the relationship of dependency by autonomy in the market. Thus,

certificates may be obtained and plant breeder's certificates (as referred to in Article 2 paragraph (1) point (i) of Regulation on the detailed conditions for block exemption of certain types of agreements for transfer of technology, license or know-how).

⁵ As defined in Article 2 paragraph (1) point (j) of the Regulation on the detailed conditions for block exemption of certain types of agreements for transfer of technology, license or know-how.

⁶ To the extent that they fall within Article 7 paragraph (1) of the Law, such agreements may nevertheless fall under the Regulation on the detailed conditions for block exemption of certain types of agreements for transfer of technology, license or know-how.



purchase or supply obligations aimed at guaranteeing the quantities previously supplied can be justified for a transitional period of up to five years.

34. Both supply and purchase obligations providing for fixed quantities, possibly with a variation clause, are recognised as directly related and necessary to the implementation of the concentration. However, obligations providing for unlimited quantities⁷, exclusivity or conferring preferred-supplier or preferred-purchaser status, are not necessary to the implementation of the concentration.

35. Service and distribution agreements are equivalent in their effect to supply arrangements; consequently, the same considerations as above shall apply.

IV. PRINCIPLES APPLICABLE TO COMMONLY ENCOUNTERED RESTRICTIONS IN CASES OF JOINT VENTURES WITHIN THE MEANING OF ARTICLE 3(4) OF THE MERGER REGULATION

A. Non-competition obligations

36. A non-competition obligation between the parent undertakings and a joint venture may be considered directly related and necessary to the implementation of the concentration where such obligations correspond to the products, services and territories covered by the joint venture agreement or its bylaws. Such non-competition clauses reflect, inter alia:

- the need to ensure good faith during negotiations;
- they may also reflect the need to fully utilise the joint venture's assets or to enable the joint venture to assimilate know-how and goodwill provided by its parents; or
- the need to protect the parents' interests in the joint venture against competitive acts facilitated, inter alia, by the parents' privileged access to the know-how and goodwill transferred to or developed by the joint venture.

Such non-competition obligations between the parent undertakings and a joint venture can be regarded as directly related and necessary to the implementation of the concentration for the lifetime of the joint venture.

37. The geographical scope of a non-competition clause must be limited to the area in which the parents offered the relevant products or services before establishing the joint venture. That geographical scope can be extended to territories which the parent companies were planning to enter at the time of the transaction, provided that they had already invested in preparing this move.

38. Similarly, non-competition clauses must be limited to products and services constituting the economic activity of the joint venture. This may include products and services at an advanced stage of development at the time of the transaction, as well as products and services which are fully developed but not yet marketed.

39. If the joint venture is set up to enter a new market, reference will be made to the products, services and territories in which it is to operate under the joint venture agreement or by-laws. However, the presumption is that one parent's interest in the joint venture does not need to be

⁷ In line with the principle of proportionality, obligations providing for fixed quantities with a variation clause are, in these cases, less restrictive on competition.



protected against competition from the other parent in markets other than those in which the joint venture will be active from the outset.

40. Additionally, non-competition obligations between non-controlling parents and a joint venture are not directly related and necessary to the implementation of the concentration.

41. The same principles as for non-competition clauses apply to non-solicitation and confidentiality clauses.

B. Licence agreements

42. A licence granted by the parent undertakings to the joint venture may be considered directly related and necessary to the implementation of the concentration. This applies regardless of whether or not the licence is an exclusive one and whether or not it is limited in time. The licence may be restricted to a particular field of use which corresponds to the activities of the joint venture.

43. Licences granted by the joint venture to one of its parents, or cross-licence agreements, can be regarded as directly related and necessary to the implementation of the concentration under the same conditions as in the case of the acquisition of an undertaking. Licence agreements between the parents are not considered directly related and necessary to the implementation of a joint venture.

C. Purchase and supply obligations

44. If the parent undertakings remain present in a market upstream or downstream of that of the joint venture, any purchase and supply agreements, including service and distribution agreements are subject to the principles applicable in the case of the transfer of an undertaking