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Amendments to the Criminal Code – criminalisation of restrictive agreements in Serbia. Who should be concerned?



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The recent amendments to the Criminal Code, which will take effect on 1 March 2018, introduce the criminal offence of conclusion of restrictive agreement. The new Article 229 of the Criminal Code provides as follows:

- (i) Any person concluding a restrictive agreement not exempted under the Law on the Protection of Competition (the "Law") which fixes prices, limits production or sales, or divides markets, shall be sanctioned to a prison sentence of between six months and five years and will be fined;
- (ii) The perpetrator may be released from sanction if he/she satisfies the criteria for immunity from fines.

These provisions have multiple consequences:

- (i) The person concluding a restrictive agreement may be sentenced to a prison term and fined;
- (ii) The definition of the crime covers all types of restrictive agreements and not only cartels as is usual in other jurisdictions;
- (iii) Criminal liability is abolished for abuse of a monopoly (dominant position);
- (iv) Those benefitting from a leniency program may be released from criminal sanction, but this applies only to those where full immunity from fines is applicable.



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1. Who can be convicted and punished

As opposed to the previous criminal offence, i.e. Abuse of Monopoly Position, which made the *responsible* person in the company (or the person who actually was entrusted with the tasks of the *responsible person*) criminally liable, the Criminal Code now applies to any person in the company entering into a restrictive agreement. Given that sharing of information (e-mail correspondence, exchange of messages, etc.) between market participants can also be considered a restrictive agreement, any person participating in such exchange of information might be identified as someone who entered into such an agreement. Such a person does not need to be the *responsible* person nor does he/she need to have internal authorisation to enter into agreements on behalf of the company in which he/she is employed.

2. The criminal offence covers all types of restrictive agreement

The main deficiency of the new provision of the Criminal Code is that it does not distinguish between cartels as the most severe forms of horizontal agreements, and other horizontal and vertical agreements. In jurisdictions that have criminalised breach of competition law (Germany, Austria, UK, Ireland, USA), criminal sanctions are imposed for the most severe breaches, ie cartels, as they constitute agreements between competitors fixing prices, limiting production and dividing markets.



An additional difficulty is created by the current Law and the way it is interpreted by the Commission for the Protection of Competition (the "Commission"). The restrictive agreement that is not exempted under the Law or following a procedure for individual exemption is considered null and void, and the contracting parties cannot not defend themselves in the procedure by claiming that the agreement meets the exemption requirements specified in Article 11 of the Law, as is the case in the EU or regional countries. The result is that breach of competition law can be established even if the restrictive agreement does not lead to significant limitation of competition in the market or if it would be exempted if it were submitted to the Commission for individual exemption. Putting this in the context of the amendments of the Criminal Code, someone can be convicted of the crime of *entering into a restrictive agreement* even though such agreement actually contributes to the improvement of production and efficiency and creates benefits for consumers rather than causes negative effects for the relevant market. This provision makes the Serbian system for the protection of competition more conservative and more distant from the EU system.

3. Abuse of dominant position does not constitute a criminal offence

As opposed to the previous provision of the Criminal Code, dominant companies, ie the *responsible persons* of such companies, should no longer be concerned about criminal liability or punishment if they commit the act of abuse of dominant position. As opposed to the above described deficiency of these amendments, this particular amendment is consistent with comparative practices and approaches in the fight against illegal behaviour of dominant companies, which mainly involves imposition of structural and behavioural measures, accompanied by appropriate fines.

4. The Criminal Code offers the possibility of release from criminal sanction, but not to all who benefit from a Leniency program

The Criminal Code provides that the perpetrator may be released from the imposition of punishment if he/she meets the conditions for the immunity from a fine in antitrust proceedings before the Commission (Leniency programme¹). However, not all who benefit from the leniency programme are covered by paragraph 2 of Article 229 of the Criminal Code. In particular, the possibility to be acquitted from a criminal sanction does not apply to beneficiaries of the reduction of fine who have delivered decisive evidence, based on which the Commission can prove the infringement. This fact and the threat of criminal proceedings and a prison sentence will certainly discourage market participants to use the leniency programme, which has still not produced significant results in Serbia.

Summary

The law-makers have not only criminalised cartels as the most severe breach of competition, but have subsumed all forms of restrictive agreements under the new criminal offence. This makes the competition protection system in Serbia stricter and more conservative than the system in the EU and its member states. This sends a clear message that all market participants, *responsible persons* and employees of such entities should be concerned and more careful when establishing cooperation and communicating with their business partners.

¹ The leniency programme (Article 69 of the Law on the Protection of Competition) allows the party in a restrictive agreement who first reports to the Commission the existence of the agreement and provide appropriate evidence thereof, to be exempted from paying the fine