R E P U B L I C O F A L B A N I A
COMPETITION AUTHORITY
COMPETITION COMMISSION

GUIDELINE[1]
No. 1, date 25.06.2018

"On restrictions directly related and necessary to concentrations"

The Competition Commission, based on articles 10,13, 24, letter dh, 25, letter c, of Law no. 9121, dated 28.07.2003 "On Protection of Competition", as amended,

GUIDED:

The adoption of the Guideline "On restrictions directly related and necessary to concentrations"

INTRODUCTION

The Guidelines aim to provide the concerned undertakings with legal certainty by interpreting the concepts of direct and necessary restrictions with concentrations. The rules provided in the provisions of this Guideline reflect the substance of the European Commission practices and lay down the principles for the assessment and authorization of concentrations by the National Authorities.

I. GENERAL PRINCIPLES

1. A concentration it refers to contractual agreements and agreements that bring about a consistent change of control, pursuant to article 10 of law no. 9121/2003 "On Protection of Competition", as amended (hereafter the law no. 9121/2003). All agreements that focus on the concentration, such as the sale of shares or assets of an undertaking, are an integral part of the concentration itself. In addition to these agreements, the parties to the concentration may conclude other agreements, which are not an integral part of the concentration, but may limit to some extent the freedom of the parties to act on the market. If such agreements contain additional restrictions, which are directly related to the concentration and necessary for the implementation of this concentration, these restrictions will be part of the decision of the Competition Commission declaring the concentration in accordance with law no. 9121/2003 and the relevant market where the concentration takes place. Otherwise, if they are not evaluated as such, then we will be

[1] *According to the European Commission Notice (2005/C56/03) "On restrictions directly related and necessary to concentrations".*

in the case when these limiting effects will be assessed under articles 4 and 9 of law no. 9121/2003.

2. The direct and necessary linkage criteria for concentrations should be objective. Consequently, the restrictions will not be considered directly related and necessary for the implementation of a concentration, only because the parties consider them to be such.

3. In order for the restrictions to be considered as "directly related to the implementation of a concentration", they should be closely linked to the concentration itself. For this, it is not enough that the agreement is linked in the same context or at the same time as the concentration. Direct restrictions related to the concentration are economically linked to the main transaction and are intended to allow a smooth transition to the changing structure of the company after the concentration.

4. Arrangements should be "necessary for the implementation of the concentration", which means that, in the absence of such agreements, the concentration cannot be implemented or can only be applied in very uncertain, higher cost terms for a long period of time, or with much greater difficulty. The agreements necessary for the implementation of a concentration typically aim to protect the transferred value, to preserve the continuity of supply after the dissolution of the former economic entity, or to enable the creation of a new legal entity. In order to determine whether a restriction is necessary, it should be taken into account not only its nature but also to ensure that its duration, scope and geographical scope of application does not exceed what reasonably requires the application of the concentration. If other alternatives are available, which are equally effective in achieving the legitimate intent, the undertakings should choose what is objectively less restrictive of competition.

5. For concentrations carried out in several phases, contractual arrangements with regard to the stages before the acquisition of control cannot normally be considered as necessary and directly related constraints to the application of the concentration.

6. However, the agreement to waive material changes in the business activity of the undertaking until the completion of the concentration is considered directly related and necessary for the implementation of the joint bid. The equivalent would be, in the context of a joint bid, for an agreement between joint buyers of a company, not to make individual competitive bids for the same undertaking, or to gain control.

7. Agreements that serve to facilitate the joint benefit of control should be considered directly related and necessary for the implementation of the concentration. This will apply to agreements between the parties for the joint benefit of control aimed at enforcing asset allocation in order to divide the production facilities or distribution networks between them together with the existing jointly acquired company trademarks.

8. If such a split involves the dissolution of an existing economic entity, the arrangements that make this separation fit under reasonable conditions are considered directly related and necessary for the implementation of the concentration, according to the characteristics set out below.

II. APPLICABLE PRINCIPLES IN CASES OF LIMITATIONS DURING THE AQUISITION OF CONTROL ON AN UNDERTAKING

9. Restrictions agreed between the parties in case of transfer of an undertaking may be to the benefit of buyers or sellers. In general, the buyer's need to benefit from a particular protection is more binding than the seller's need. The buyer is the one who needs to be assured that he will benefit and enjoy the full value of the purchased business. As a general rule, limitations that favour the seller or are not directly related or necessary for the implementation of the concentration, or their purpose and/or duration, should be more limited than those clauses that favour the buyer.

A. Non-competitive clause[2]

10. Non-competitive obligations imposed on sellers in the case of the transfer of an undertaking, or part of it, may be directly related and necessary for the implementation of the concentration. To ensure the full value of the transferred assets, the acquirer should benefit from some sort of protection against the retailer's competition, gaining customer confidence, and acquiring and utilizing (the know-how). These non-competitive clauses guarantee buyers the full value transfer of assets, which generally include tangible assets and intangible assets, such as credibility or know-how developed by the seller. These clauses not only relate directly to concentration, but are also necessary for its implementation, because their absence would make it harder or hinder the sale of the enterprise or part of it.
11. However, these non-competitive clauses are justified only by the legitimate objectives of the implementation of the concentration, in case their duration, geographical area of application, object and related persons do not exceed what is necessary for achieving them.
12. Non-competitive clauses are justified for periods of up to 3 (three) years, when the transfer of the undertaking involves transferring customer confidence in the form of credibility and know-how. If cases when only the credibility is included (without the know-how), they are justified for a period up to 2 (two) years.
13. Otherwise, non-competitive clauses may not be considered necessary if the transfer is restricted to property-related assets (such as land, buildings, or machinery-equipment), or in exclusive industrial rights and commercial property, whose holders may take immediate action against infringements by the transferor of these rights.
14. The geographic scope of a non-competitive clause should be limited to the area in which the seller has provided the products or services concerned before the transfer, since the buyer need not be protected from the seller's competition in previously untouched territories. Geographic coverage operates in the territories in which the seller plans to enter the moment of the transaction, provided he has previously invested in the transaction.

[2] In a contract, a non-competitive clause is a clause in which one party (usually one employee) agrees not to perform a similar occupation or to not compete with the other party (usually the employer). Some courts refer to these agreements as "restrictive agreements". https://en.wikipedia.org/wiki/Non-compete_clause

15. In addition, non-competitive clauses should be limited to products (including upgraded or updated versions of products as well as successive models) and services that constitute the economic activity of the transferred undertaking. These may include products and services at an advanced stage of development, at the time of the transaction, or products that are fully developed but not yet traded. The protection against competition from the seller in the markets of products or services where the displaced enterprise was not active before the transfer is not considered necessary.

16. The seller can make the obligation subject himself, his affiliates and merchant agents. However, the obligation to impose similar restrictions on others shall not be regarded as directly related and necessary for the implementation of the concentration. This applies, in particular, to clauses restricting the freedom to resell, or users to import, or export.

17. The clauses restricting the seller's right to buy or hold shares in a competing business of a transferred business are considered directly related and necessary for the implementation of the concentration under the same conditions as described above for non-competitive clauses, unless they prevent the seller from buying or owning shares for financial investment purposes without giving to him/her directly or indirectly management functions or any other relevant function in the competing company.

18. Non-inclusive[3] and confidentiality[4] clauses have a comparable effect and as such they are evaluated in a similar manner to non-competitive clauses.

B. Licensing Agreements

19. The transfer of an undertaking, or part of it, may involve the transfer to the buyer to make full use of transferable assets, intellectual property rights, or the experience (know-how). However, the seller may remain a holder of rights to use them for activities other than those transferred. In these cases, the usual way to ensure that the buyer will enjoy the full use of the transferred assets is the signing of licensing agreements in his/her favour. Likewise, when the seller transfers, together with commercial activity, intellectual property rights, he may continue to use some or all of these rights for other activities other than those transferred. In such cases the buyer gives a license to the seller.

20. Patents, industrial property rights, or similar rights as well as the experience (know-how) licenses may be considered necessary for the implementation of the concentration. They may also be considered as an integral part of the concentration and in any case it is not necessary to be of limited duration. These licenses may be simple or exclusive

[3] A non-incurring agreement is a promise made between the buyer and the target company that for a certain period of time after the transaction they will not engage in trading relationships that would be competitive with the existing or acquired company and would not try to take each other's clients or employees. This agreement is particularly important when a larger venture buys a smaller company operating in the same industry. (https://www.divestopedia.com/definition/4943/non-solicitation-agreement)

[4] A confidentiality agreement is a contract between at least two parties describing the importance of confidentiality, knowledge or information that the parties want to share with each other for specific purposes but want to restrict access by third parties. This agreement establishes a confidential relationship between the parties to protect any kind of confidential information and / or trade secrets. (https://en.wikipedia.org/wiki/Non-disclosure_agreement)

and may be limited to certain areas of use to the extent that they relate to the activities of the transferred undertaking.

21. However, the territorial constraints on production that reflect the territory of the transferred activity are not necessary for the implementation of the transaction. Regarding the licenses that the seller of a business activity gives to the buyer, the seller may become subject to territorial restrictions in the licensing agreement, under the same conditions as for non-competitive clauses in the context of the sale of a business activity.

22. Restrictions on licensing agreements that go beyond the above provisions, such as those that protect the licensor and not the licensee are not necessary for the implementation of the concentration.

23. Also, in the case of trademark licenses, trade names, design rights, copyrights or other related rights, there may be situations where the seller wishes to remain the owner of the rights such in respect of the activities held by him, but on the other hand the buyer shall have such rights to sell the goods or services offered by the undertaking or that part of the undertaking which has been transferred. Here, are being applied the same elements as above.

C. Purchase and Supply Liabilities

24. In many cases, the transfer of an undertaking or part of it may lead to discontinuance of traditional purchasing and supply lines which have existed as a result of the previous integration of activities within the economic unity of the seller. In order to enable the seller to unbundle the economic unity and the partial transfer of the assets to the buyer, under reasonable conditions, it is often necessary to preserve, for a temporary period, existing or similar links between the seller and the buyer. This objective is normally achieved through the purchasing and supply obligations for the retailer and/or the buyer of the undertaking or part of it. Taking into account the specific situation resulting from the dissolution of the seller's economic unity, such obligations, which may lead to restrictions on competition, may be recognized as necessary and directly related to the implementation of the concentration. They may be in favour of sellers as well as buyers, depending on the particular circumstances of the case.

25. The purpose of such obligations may be to guarantee continuity of supply as to the seller's part in relation to the products necessary to carry out the activity held by him and the buyer in respect of the activity undertaken by him. However, the duration of purchase and supply obligations should be limited to a period necessary to replace the relationship of dependence on market autonomy. Thus, purchase or supply obligations intended to guarantee the quantities previously supplied may be justified for a temporary period of up to 5 (five) years.

26. Both supply and purchasing obligations for fixed quantities, possibly with a change clause, are recognized as directly related and necessary for the implementation of the concentration. However, obligations with respect to unlimited quantities, exclusivity, or the granting of preferred supplier status or preferred buyer are not necessary for the implementation of the concentration.

27. Service and distribution agreements are equivalent to supply agreements, and consequently the same elements apply as above.

III. APPLICABLE PRINCIPLES IN CASES OF RESTRICTIONS DURING JOINT VENTURE UNDERTAKINGS ESTABLISHMENT

A. Non-competitive liabilities

28. Joint ventures, are formed as a result of the concentrations pursuant to article 10, paragraph 1, letter c; and point 3 of law no. 9121/2003. A non-competitive obligation between the parent undertaking and a joint venture may be considered directly related and necessary for the implementation of the concentration where such obligations coincide with the products, services and territories covered by the joint venture agreement societies, or by their statute/regulation. Such non-competitive clauses reflect, *inter alia*, the need to provide confidence in the negotiations. They may also reflect the need to fully exploit joint venture assets, or to enable it to acquire know-how experience and the credibility by the "parent undertaking"; or the need to protect the interests of the "parent undertaking" in this joint venture, in spite of other competitive actions, *inter alia* through the privileged access of the "parent" to the know - how experience and the credibility transferred, or developed by a joint venture. These non-competitive obligations between "parent companies" and joint ventures may be considered directly related and necessary to implement the concentration throughout the life of the joint venture.

29. The geographic extension of a non-competitive clause should be limited to the area where "parent companies" have provided the products or services concerned, prior to the creation of a joint venture. This geographic extension can also be expanded to territories where "parent companies" are planning to enter the moment of the transaction, with the condition that they have previously invested in this transaction.

30. Also, non-competitive clauses should be restricted to products and services, which are part of the joint venture's economic activity. These can include products and services at an advanced stage of development at the moment of the transaction as well as products and services that are fully developed but are not yet traded.

31. If a joint venture is created to enter a new market, reference is made to the products, services and territories in which the joint venture will operate, in accordance with its agreement or regulations. However, it is presumed that the interest of a "parent" in a joint venture need not be protected from the competition of the other "parent company" in other markets, other than those where the joint venture will be active from the outset.

32. In addition, non-competitive liabilities between non-controlling "parent companies" and a joint venture are not directly related and necessary for the implementation of the concentration.

33. The same rules and features, as for non-competitive clauses, apply to non-compliant clauses and confidentiality clauses.

B. Licensing Agreements

34. Licenses given by "parent companies" for joint ventures may be considered directly related and necessary for the implementation of the concentration. This applies regardless of whether the licenses are exclusive and whether or not they are of a limited duration. The license may be limited to a particular use field, which coincides with the joint venture activity.
35. Licenses granted by a joint venture to one of the "parent companies" or cross-licensing agreements may be considered directly related and necessary for the implementation of the concentration, under the same conditions as in the case of an acquisition of an enterprise. License agreements between "parent companies" are not considered directly related and necessary for the implementation of the concentration.

C. Purchase or Supply Obligations

36. If "parent companies" remain present in the downstream or upstream market with the joint venture, any purchase and sale agreements including service and distribution agreements are subject to the same applicable principles as in the case of the transfer of an undertaking.

This guideline enters into force immediately.

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CHAIRWOMAN