The Commission for Protection of Competition has received an inquiry in reference to entering into consignment agreement that as necessary contains individual restrictive provisions, in addition to potentially having provisions on price fixing in further sales (on the part of consignor) obligatory for the consignee. It is inquired whether the consignment agreement could be considered as a "genuine agency" agreement within the meaning of domestic and EU competition policy regulations, or respectively whether such agreement would fall under Article 10 of the Law on Protection of Competition ("Official Gazette of the RS", no. 51/2009).

On the basis of previously presented, as well as other related inquiries specified in the request concerned, the Commission has issued the following

REPLY

When preparing the reply concerned, the Commission has instituted from the domestic and EU related regulations, while fully agreeing with the requesting party's statement on the equal implementation of EU regulations governing the "agency agreements" instrument when assessing the restrictiveness of particular agreement. To that end, below presented statements fully relate to the so-called "genuine agency".

The term "agent" shall mean legal entity or natural person vested with the power to negotiate and/or conclude agreements on behalf of another person ("the principal"), either in the agent's own name or in the name of the principal, for the purchase of goods or services by the principal, or the sale of goods or provision of services supplied by the principal.

The decisive factor when defining an agency agreement, within the meaning of Article 10 of the Law on Protection of Competition ("Official Gazette of the RS", no. 51/2009, hereinafter referred to as 'Law'), represent a financial or commercial risk borne by the agent for activities authorized by the principal. To that end, the subject of assessment is not a situation where the agent works for one or several principals, nor the qualification given by the parties to such agreement or national legislation.

There are three types of financial or commercial risk that are material to the definition of an agency agreement for the application of Article 10 of the Law. First there are the contract-specific risks which are directly related to the contracts concluded and/or negotiated by the agent on behalf of the principal, such as financing of stocks. Secondly, there are the risks related to market-specific investments. These are investments specifically required for the type of activity for which the agent has been appointed by the principal, i.e. which are required to enable the agent to conclude and/or negotiate this type of contract. Thirdly, there are the risks related to other activities undertaken in the same product market (of goods and services), to the extent that

the principal requires the agent to undertake such activities, but not as an agent on behalf of the principal but for its own risk.

For the purposes of applying Article 10 of the Law, the agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, risks in relation to the contracts concluded and/or negotiated on behalf of the principal, in relation to market-specific investments for that field of activity, and in relation to other activities required by the principal to be undertaken in the same relevant product market. However, risks that are related to the activity of providing agency services in general, are not material to this assessment.

For the purpose of applying Article 10 of the Law, an agreement will thus generally be considered an agency agreement where property in the contract goods or services bought or sold does not vest in the agent, or the agent does not himself supply the contract services and where the agent:

- does not contribute to the costs relating to the supply/purchase of the contract goods or services, including the costs of transporting the goods;

- does not maintain at his own cost or risk stocks of the contract products, including the costs of financing the stocks and the costs of loss or damage of stocks and can return unsold goods to the principal without charge, unless the agent is liable for fault (for example, by failing to comply with reasonable security measures to avoid loss or damage of stocks);

- does not undertake responsibility towards third parties for damage caused by the product sold (product liability), unless, as agent, he is liable for fault in this respect;

- does not take responsibility for customers' non-performance of the contract, unless the agent is liable for fault in this respect;

- is not directly or indirectly obliged to invest in sales promotions, such as contributions to the advertising budgets of the principal;

- does not make market-specific investments in equipment, premises or training of personnel;

- does not undertake other activities within the same product market required by the principal, unless these activities are fully reimbursed by the principal.

The above presented "list" is not exhaustive. However, where the agent incurs one or more of the above risks or costs, the agreement between agent and principal will not be qualified as an agency agreement for the purpose of applying Article 10 of the Law.

The question of "risk" must be assessed on a case-by-case basis, and with regard to the economic

reality of the situation rather than the legal form of each observed agreement (contract).

In the case of agency agreements as defined above, the selling or purchasing function of the agent forms part of the principal's activities. Since the principal bears the commercial and financial risks related to the selling and purchasing of the contract goods and services, all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 10 of the Law.

In terms of previously presented, the following obligations on the agent's part will be considered to form an inherent part of an agency agreement, thus would fall outside Article 10 of the Law:

- limitations on the territory in which the agent may sell these goods or services;

- limitations on the customers to whom the agent may sell these goods or services;

- the prices and conditions at which the agent must sell or purchase these goods or services.

It is of vital importance to also emphasize the following: in addition to governing the conditions of sale or purchase of the contract goods or services by the agent on behalf of the principal, agency agreements often contain provisions which concern the relationship between the agent and the principal – and in such manner, although could be considered as agreement on “genuine agency”, such agreement can fall under Article 10 if provisions regulating such relation are unacceptable from the implementing perspective of the Law, or respectively if they infringe competition in its own right.

A “genuine agency” agreement may also fall within the scope of Article 10 of the Law, even if the principal bears all the relevant financial and commercial risks, where it facilitates collusion.

Where the agreement between agent and principal does not constitute a “genuine agency” agreement as previously described, the agent will be treated as an independent undertaking and the agreement (contract) between agent and principal would fall within the scope of Article 10 of the Law as any other vertical agreement.