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**COMPETITION ADVOCACY DURING AND IN THE AFTERMATH OF
THE COVID-19 CRISIS**

Contribution of

Commission for Protection of Competition of the Republic of Serbia

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COMPETITION ADVOCACY DURING AND IN THE AFTERMATH OF THE COVID-19 CRISIS

Hardly any industry was left unaffected to a greater or lesser extent by the Covid-19 pandemic. One of the industries most affected by the pandemic, without a doubt, is the tourism industry. Travel agencies – tour operators in the Republic of Serbia have been experiencing certain issues even before the pandemic hit, partially caused by the deficiencies in the regulatory framework and, to an extent, behaviors of individual undertakings when obtaining necessary travel guarantees. The Commission for Protection of Competition conducted a sector inquiry into competitive conditions on the tour operators market, after which it has informed the Ministry of Trade, Tourism and Telecommunications of the Republic of Serbia - Department of Tourism, National Bank of Serbia, contracting authorities in public procurements and undertakings on the tourism market, by providing conclusions and recommendations, of the inadequacies and issues that have been identified and analyzed, some of them being sparked or amplified by the coronavirus pandemic.

Introduction

The tour operators (hereinafter, TOs or travel agencies) have filed multiple antitrust complaints before the Commission for Protection of Competition (hereinafter, Commission or CPC) in which they have presented own views on the issues and distortions on the tour operators market, mainly concerning the tour operators' licensing process, i.e., mechanisms of providing, and the availability of necessary financial guarantees. This was one of the reasons for the Commission, under Article 47 of the Law on Protection of Competition (Official Gazette of the RS 51/2009 and 95/2013 – hereafter, the Law), to launch the Sector inquiry into competitive conditions on the tour operators market (hereinafter, Inquiry or SI).

The Commission launched the Inquiry in February 2020, just before the Covid-19 outbreak in the Republic of Serbia, recognizing the existence of certain issues on the target market causing difficulties in TOs operations. The pandemic outbreak worsened the conditions in the tourism industry, further highlighting the deficiencies that have already existed in the travel agency licensing process. The Inquiry enabled the Commission to grasp the overall regulatory framework, with particular reference to potential inadequacies in regulations and rules governing the sector, while simultaneously identifying certain irregularities in behaviors of individual undertakings operating on the market (insurance companies, banks, TO associations, etc.).

The Inquiry covered a three-year period (2017-2019), including data from the incomplete Q1 2020 (up until the introduction of the state of emergency in the Republic of Serbia to curb the spread of the coronavirus, 15 March 2020). Noting the amendments to relevant regulations adopted by competent authorities during the drafting of the Inquiry, inter alia due to the pandemic, introducing a set of new legislation, the Commission also covered the time period leading to 3 December 2020.

Regulatory framework

The relevant regulations governing tourism activity include the following: Law on Tourism (Official Gazette of the RS 17/19); Rulebook on the type, amount and terms and conditions of travel guarantee, deposit limits regulated by tourism licence categories, calling on and use of the guarantee funds, and other mandatory terms and conditions for tour operators (Official Gazette of the RS 124/20, 137/20, and 81/19 – hereinafter, Travel Guarantee Rulebook); Rulebook on the conditions and classification of travel agent licenses by categories, method of administration of licence categories, content of requests for issuance and renewal of licenses,

and terms and conditions for issuance of solemn form of licenses (Official Gazette of the RS 81/19 and 137/20 – hereinafter, Travel Licence Rulebook); Rulebook on travel conditions and methods of payment of travel arrangements, methods of regulating mutual relationships between tour operators and intermediaries, and relationships between tour operators and intermediaries towards passengers (Official Gazette of the RS 50/12, 44/13, and 2/16); and, Rulebook on the content of the Register of Tourism and registration documents and record-keeping requirements (Official Gazette of the RS 81/19).

Scope of the Inquiry and data sources

The Commission obtained data from the following relevant entities: Business Registers Agency, in charge of running the Register of Tourism (hereinafter, BRA); Ministry of Trade, Tourism and Telecommunications of the Republic of Serbia - Department of Tourism (hereinafter, Ministry or line ministry); National Bank of Serbia (hereinafter, NBS); non-life insurance companies (offering the “Liability Insurance of Travel Agencies” coverage); National Association of Travel Agencies PU „JUTA“ Beograd, as the policyholder (hereinafter, PU “JUTA”)¹; and travel agencies.

The Commission forwarded requests for the provision of information to more than 40 TOs registered under the Standard Industrial Classification code “Travel agency activities” and “Tour operator activities”, selected by using the stratified sampling method. The sample included TOs who are members of various professional associations (PU “JUTA”, Association of Serbian Travel Agencies – UTAS, Association of Independent Travel Agencies of Serbia – ANTAS), as well as TOs who are not members of any travel association.

In early 2020, the first amendments to the regulatory framework came into force, foremost relating to the changes in the licensing method, deposit and travel guarantee limits, and necessary conditions for tour operator licensing.

In the replies provided to the Commission, in giving their opinion on current legal solutions, 27 TOs have commented on challenges to regulatory enforcement action by stating the following as the main issues:

- Multiple increases in insurance premium costs, making the insurance premiums almost identical with all the insurers; only a few insurance companies are interested in providing this sort of insurance; insurance policies provide the coverage for less than a year; banks are not willing to offer bank guarantees;²
- Law on Tourism and accompanying rulebooks are incomplete in the section relating to the classification of travel agent licenses by categories (and consequently, on the total coverage and deposit limits); licence categories are being set off one criterium only, without taking into account the indicators such as turnover level, the volume of sales, the average price of travel arrangements;
- Procedure and a new way of data recording by TOs in the Association of Insurers of Serbia (AIS) system is complicated, requiring the data to be entered into the passenger booking system first, and only then in the AIS system;

¹ Besides PU JUTA, there are other TO associations on the market.

² Under the Travel Guarantee Rulebook in force until October 2020, the travel guarantor can be either a bank or insurance company (policyholder).

- Travel guarantee and deposit amounts are inappropriate, with a vague intended purpose of deposits in case of an insured event.

Commission's findings:

Based on the information obtained and analysis based thereon, the Commission carried out an assessment. For the purposes of this paper, the Commission will outline some of the findings that, to an extent, represent a source of its concern for the state of competition on the analyzed market.

- The Commission assessed that the purpose and intended nature (legally established) of the deposit institute are not entirely clear, potentially being burdensome to travel agencies' operations and causing a rise in the price of travel arrangements.
- The Commission assessed that the registration of sold travel arrangements, via a software application through AIS, may represent a platform for the prohibited exchange of business sensitive information between insurance companies (for example, on insurance rates), which may represent an infringement within the meaning of regulations governing competition.
- The Commission established that only a few insurance companies, 4 or 5 (varies from year to year) out of 12 insurers registered for this kind of insurance coverage have provided the travel guarantees, with no participating banks.³ The Commission's concern is based on a reduced number of travel guarantee providers and reduced choice for TOs, potentially creating grounds for collusion and various types of prohibited arrangements between a relatively few providers of this type of insurance coverage, notably in light of almost identical insurance premiums;⁴
- By analyzing the information available, the Commission tried to recognize the primary causes and justifications behind multiple increases in insurance premiums, but failed to find a comprehensive justification, even when taking into account an increase of policy worth caused by the Ministry's decision and a series of major insurance claims of 2018⁵, meaning that it could not exclude the possibility that the increase in insurance premiums has resulted from the potential coordination or even collusive behavior of insurance companies;
- The only policyholder (in cases when the insured and policyholder are not the same person) was PU "JUTA" until October 2020. During the period covered by this Inquiry, the number of insurers has increased, providing the insurance where the insured and policyholder are not the same person. In this regard, the Commission has voiced its concern, given the lack, in a large number of cases, of direct contracting between the insurance companies and tour operators. For this intermediary service, PU "JUTA" kept a certain percentage from insurance premiums. The Commission assessed that there are substantial grounds for believing that (in the absence of such a manner of contracting the insurance coverage, i.e., intermediary services of PU "JUTA") conditions creating fertile ground for the lower prices of travel arrangements could exist. At the same time, the Commission has not recognized the contribution of PU "JUTA" to the

³ The reply of the Ministry to the Commission's request contained information indicating that individual banks have started to provide guarantees.

⁴ The Commission considered that the baseline estimates of premiums are almost identical (insured sums set by the Ministry, identical terms and conditions of insurance coverage, etc.).

⁵ The damage exceeded the total annual premium of all insurance companies providing this type of insurance coverage.

insurance system versus the insurance coverage directly arranged by tour operators with insurers;⁶

- In relation to the aforementioned, the Commission assessed that there is a possibility that PU “JUTA”, as a policyholder, can use the activity to generate additional income that is not in conformity with regulations governing the sector. In its reply to the Commission’s request, NBS clarified that “When concluding insurance contracts with insurance companies, whether on its behalf or in the case referred to in the Law of contract and torts (Article 905), the policyholder holds no right to agents’ commissions or any other fee paid by the insurance company”. Therefore, the Commission voiced its concern that such additional income generation can cause demand-side disturbances on account of the fact that PU “JUTA”, in an effort to maintain the level of additional income, can affect the ability in making choices and decisions on insurance companies independently and lead to favoring of individual insurers on the supply-side;

- Some of the travel agencies, members of PU “JUTA”, said the selection of insurance companies was made upon instructions/recommendations provided by PU “JUTA” itself. In conducting the sector inquiry, the Commission was not able to gain knowledge about criteria on which PU “JUTA” based its recommendations/suggestions for the selection of insurers and, therefore, expressed its concern that such PU “JUTA” activities, in case of favoritism of individual insurance companies, could have impacted the competitive conditions on the market concerned;

- Individual public procurements envisaged the membership of tour operators in PU “JUTA” as a mandatory requirement for participation in tender procedures. The Commission expressed its position that membership in professional associations can only be based on a voluntary basis and assessed that the membership requirement creates advantages against TOs that are not members in some of the associations. Such request in public procurements can be considered a discriminatory criterium that is contrary to the principle of ensuring competition under the Law on Public Procurement and which affects the competitive conditions by favoring, without objective justification, tour operators that are PU “JUTA” members;

- In drafting the Inquiry, the Commission learned about a number of already existing coinsurance agreements, entered into between insurance companies providing the liability insurance of travel agencies, of which the Commission had no previous knowledge;⁷

- The Commission presented its opinion indicating that insufficiently precise and clear terms governing the provision of bank guarantees as travel guarantees, could to some extent affect the banks’ decisions, previously not providing the guarantees;

- The Commission welcomed the Ministry’s efforts to remove any ambiguity and extend the number of undertakings on the supply-side by amending the regulatory framework, and in particular, defining the guarantee holder.

⁶ The Commission established that from October 2020 up to and including 3 December 2020, all surveyed tour operators, with provided travel guarantees, have obtained the insurance coverages independently.

⁷ The institute of individual exemption of restrictive agreement form prohibition is still existing in the Republic of Serbia.

Commission's recommendations

Based on the conclusions from the analysis of the information obtained, the Commission provided 12 recommendations out of which, as previously mentioned, will present the most relevant ones here below:

Recommendations for the Ministry and NBS:

1. It is recommended to the Ministry that it consider amending the Travel Guarantee Rulebook. The amendments should relate to the section that governs the total amount of cover regulated by tourism licence categories. Minimum deposit limits for each travel agency, plus the appropriate amount of cover depending on the travel arrangement sales, potentially capped at a certain percentage of the tour operator's turnover, could be adopted as one of the possible solutions.
2. It is recommended to review the justification of the established deposit institute given that its purpose and intended use are not fully clear, potentially causing a financial burden on tour operators' operations and thus affecting the price of travel arrangements.
3. It is recommended to the Ministry and NBS that they review the reasons behind the inactivity of the majority of insurance providers, insurance companies and banks meeting the regulatory requirements, on the travel insurance market, i.e., reasons why only a certain, smaller number of insurers and no bank, is involved in the travel guarantee provision.

Recommendations for insurance companies:

1. It is recommended that insurance companies, looking to conclude a coinsurance agreement for the liability insurance of travel agencies, consider that coinsurance represents cooperation between competitors on the relevant market for insurance services and that such cooperation, within the meaning of regulations governing competition, represents an agreement that, for the purposes of exemption from the general prohibition, should be submitted to the Commission for preliminary analysis and potential granting of the exemption from prohibition on restrictive agreements.
2. It is recommended that based on estimates and recommendations of their actuaries, insurance companies consider the possibilities and modalities of underwriting, i.e., define the underwriting terms and conditions and tariffs for the sake of variety in premium amounts.

Recommendations for contracting authorities in public procurements and the Ministry of Education, Science and Technological Development:

The contracting authorities are recommended that in public procurements which concern travel tours, bidding should not be conditional on PU "JUTA" membership. The Commission provided the identical recommendation to the Ministry of Education, Science and Technological Development with regard to public procurements of student excursions, upon learning in drafting the Inquiry that schools rely on this discriminatory criterium when selecting TOs in public procurements.

Recommendation for the software developer:

It is recommended that the software developer examine whether the software developed for the Association of Insurers of Serbia allows for the exchange of business sensitive information between insurance companies.

Recommendation for TOs:

The Commission recommended TOs that their own choices when selecting the method in which to conclude insurance policies, by purchasing insurance independently or from policyholders, be made in a manner where they would not be conditioned in any way. If tour

operators opt for insurance through policyholders, it is necessary that the criteria when selecting an insurance carrier be clearly defined in advance.

General recommendation:

It is recommended that competent authorities, given the current regulatory framework and possibility of partial compensation for passengers, consider the setting up of a guarantee fund that would allow for gradual accumulation of funds and full compensation on behalf of all tour operators in case of insolvency.

Conclusion

The challenging situation the entire world has faced in the previous period has highlighted to a degree the shortcomings and imperfections on individual markets, which went quite unnoticed under the regular social-economic circumstances. Needless to say, the coronavirus pandemic must not be used as an excuse for breaking the law, which argues that all undertakings on the market concerned must be aware that great changes caused by the pandemic cannot and should not serve as an excuse for potential abusive or collusive behaviors that are incompatible with the legal framework governing antitrust actions.

Travel agencies have suffered great losses due to the pandemic, weaknesses of the regulatory framework and to an extent, behaviors of individual undertakings. Only time will tell how the pandemic will play out, how soon the travel agency business will return to normal and whether the Commission's recommendations will contribute to improved competitiveness on the TO market. The advancements made in the regulatory framework are important, although require further significant joint efforts by all stakeholders and competent authorities to overcome the issues found and identify best solutions both for TOs and all other undertakings on this market, which is why the Commission will continue to monitor this dynamic and complex market.

In the light of all the findings reached by the Commission in the Inquiry, conclusions and recommendations made, considering the fact that the regulatory framework was amended in 2020 and changes on the market resulting from the Covid-19 pandemic, the Commission came to a final conclusion of the Inquiry that further monitoring of this market is needed.

Ms. Sunčica Đorđević, Senior Adviser
Commission for Protection of Competition of the Republic of Serbia