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BAN ON COMPETITION IN LIMITED LIABILITY COMPANY (SLOVAKIA)¹

1. General regulation of ban on competitive conduct

According to legal regulation of ban on competitive conduct (in general) regulated in provisions of Act no. 513/1991 Coll. Commercial Code as amended (hereinafter as “Commercial Code”), persons as a subjects of competitive conduct and the extent of competitive conduct are in concreto listed in provisions of individual legal entities as individual forms of companies.

Claims arising from breaching ban on competition are established by law – legal duty to surrender any benefits gained from the transaction concluded when ban on competition was breached; legal duty to transfer corresponding gained rights in favour of affected company. The person legally obliged to these actions is the one who violated the ban².

It is necessary to claim related rights in specific time period (three months starting from the day of getting knowledge of unlawful acting, but no later than one year from the originate of related rights), otherwise these rights get null and void. It is also necessary to make a claim against a liable person, not only upon the court³.

1 Príspevok bol vypracovaný v rámci grantového projektu APVV č. 14-0061 „Rozširovanie sociálnej funkcie slovenského súkromného práva pri uplatňovaní zásad európskeho práva“.

2 Commercial Code section 65 par. 2: “A company may demand from a person who violates the ban that they surrender to the company any benefits gained from the transaction by which such person violated the ban on competition, or that they transfer the corresponding rights to the company. This shall not affect the right to damages.”

3 Commercial Code section 65 par. 3: “The company’s rights under Subsection 2 above shall be null and void unless they are exercised against the liable person

Claiming the rights arising from breaching the ban on competition does not affect the right to damages¹.

As stated above, on one hand (in general provisions) Commercial Code provides general rules for concrete right arising from breaching the ban, it also stipulates time periods given to affected subjects for claiming, the issue of (otherwise) possible dispute between different claims (rights to damages and the other rights).

On the other hand, in case of detailed specification of acting in contrary to ban on competitive conduct (and its legal definition), the legal regulation varies from individual forms of companies (and specific types can be found only in individual provisions of specific company) but without any (at least general) specification of competitive conduct as a whole. It is not considered to be a technical approach from general to specific, as would be anticipated because of the structure of Commercial Code. It would be more preferable to settle down (at least basic) definition (such as a general clause) of competitive conduct and only when this is determined, it is possible to deal with related rights and conditions of their exercise.

2. Ban on competitive conduct in Limited Liability Company

Related legal ground is contained in sections 136 and 139 par. 4 Commercial Code.

Scope of the subject matter can be divided according to the subject of regulation of competitive conduct – if it is aimed to executive director (statutory body), shareholder and supervisory body – its members.

2.1. Statutory body / Executive officer

List of banned actions is given by law (mandatory) or (additional) by agreement of association.

According to mandatory legal regulation, basically, executive officer must not (i) conclude business that relates to entrepreneurial activity of company, (ii) to be so called go between-er for business of company in favour of third party, (iii) to be participating on business as a shareholder in other company with unlimited liability, (iv) do actions as executive officer of another company with a similar subject of entrepreneurial activity in case when mentioned

within three months of the day on which the company learnt of the relevant fact; however, no later than one year from the origination thereof.

1 Commercial Code section 65 par. 3, last sentence: “This shall not affect the right to damages.”

another company does not have common ground with company of persons origin¹.

All mentioned banned activities are considered to be banned in a mandatory way with no possibility of change even by the agreement of association. Regulation given by shareholders / company itself (agreement of association) is considered to be additional. It has to be done with respect to mandatory regulation and in case of their conflict, additional regulation is invalid due to breaching of law.

In case of activities stipulated in section 136 par. 1 letter a) (“Unless additional limitations arise from the agreement of association or articles of association, executive officers must not: a) *conclude, in his/her own name or on his/her own account, business deals related to the company’s entrepreneurial activity,*”) and b) (“Unless additional limitations arise from the agreement of association or articles of association, executive officers must not: ... b) *mediate the company’s business deals for other parties,*”) it is considered to be questionable to determine whether specific action should be considered to be banned or not (mainly due to the fact that for conditions settled down by legal regulation only relation and not sameness is sufficient).

E. g. in case of a person performing a position of a statutory body in a company that makes a business – selling fast food and the same person in the same time is a member of statutory body of another company that deals with selling bio products: according to formalistic interpretation of stated above, this acting of person should be reckoned as *contra legem*. When assessing whether a particular action is or is not a competitive conduct, not only strict comparison of subjects of objects of the company listed in Commercial register should be taken into account, but also a real sphere of making business². In

1 Commercial Code section 136 par. 1: „Unless additional limitations arise from the agreement of association or articles of association, executive officers must not:

a) conclude, in his/her own name or on his/her own account, business deals related to the company’s entrepreneurial activity,
b) mediate the company’s business deals for other parties,
c) participate in the entrepreneurial activity of another company as a member with unlimited liability, and
d) perform activities as a statutory body or member of a statutory body or other body of another legal entity with a similar subject of entrepreneurial activity, unless the company in which he/she exercises the powers of executive officer participates in the entrepreneurial activity of such legal entity.“

2 Entrepreneurial activity (real sphere of doing business) and objects of the company (more general object of the company’s interest listed in official register that

outlined example, as a appropriate solution should be adopted the result, that it is not considered to be a competitive conduct. It automatically does not mean that, for instance, in case of comparison doing business with selling (only) chocolate and selling (only) cocoa products, the same conclusion should be accepted.

To conclude, when it is necessary to determine whether a particular acting is or is not a competitive conduct banned by law, not only formalistic approach should apply. It is highly required to inspect each case individually and properly according to all relevant criteria and facts of the case.

Broadly speaking, competitive conduct (as a banned acting) falls within the duty to exercise the power of statutory body as an executive officer with professional care and in accordance with the interests of the company and all of its shareholders¹. When breaching this legal duty (to exercise the power of an executive officer with professional care), related legal consequences can occur², but these are kind of different from general legal consequences or claims that can be enforced according to the section 65 Commercial Code.

represents group classification of more particular spheres of doing business) are two different categories and it is not possible.

1 Commercial Code section 135a par. 1: „Executive officers are obliged to exercise their powers with professional care and in accordance with the interests of the company and all of its shareholders. In particular, they are obliged to obtain and take into account in their decision-making all available information relating to the subject of their decision, to keep in confidence confidential information and facts whose disclosure to third parties could cause harm to the company or endanger its interests or the interests of the company’s shareholders, and while exercising their powers, must not give priority to their own interests, the interests of only certain shareholders or the interests of third parties over the company’s interests.“

2 Commercial Code section 135a par. 2: „Executive officers who breach their obligations while exercising their powers are obliged to jointly and severally compensate the damage thus caused to the company. In particular, they are obliged to compensate the damage incurred by the company due to the fact that they

- a) provided shareholders with benefits contrary to this Act,
- b) acquired property contrary to Section 59a.“

For the comprehensiveness, another paragraphs of cited section listed here:
„(3) An executive officer shall not bear liability for damage if they can prove that they proceeded in exercising their powers with professional care and in good faith that they were acting in the company’s interest. Executive officers shall not bear liability for any damage caused to the company by their conduct in executing a decision of the general meeting; this shall not apply if the general meeting’s decision is contrary to legal regulations, the agreement of association or articles of association or if it concerns the obligation to file the petition in bankruptcy. If the company has

However, legal consequences derived from breaching the ban on competitive conduct, are specifically stipulated in Commercial Code section 136 par. 2¹, which refers to general legal regulation of consequences settled down by section 65.

To sum up, there is a variability of legal consequences, these are accessible for entitled entities due to the way of breaching.

2.2. Shareholders

Legal regulation of ban on competitive conduct aimed on shareholders is very strict – determination of the scope of banned acting applying to shareholders can be settled down only by the agreement of association².

Due to the literal interpretation, it should be accepted that the ban on competition for shareholders does not have anything to do with the ban on competition for executive officers. However, this question is a subject of controversy. According to the opinion found in legal doctrine, it is not possible to settle down the ban on competition for shareholders broader than for executive officer. From our point of view, there is no reason for this conclusion

established a supervisory board, approval of the executive officers' conduct by the supervisory board shall not relieve them of liability.

(4) Agreements between the company and its executive officer that exclude or limit the executive officer's liability are prohibited; neither the agreement of association nor articles of association may limit or exclude an executive officer's liability. A company may waive claims for damages it has against its executive officers, or may conclude a settlement agreement with them only after three years since such claims arose, provided that the general meeting consents to such waiver and that no shareholder or shareholders whose investment contributions amount to 10% of the registered capital register their protest against such decision at the general meeting in the minutes.

(5) Claims for damages that a company has against its executive officers may be exercised by a creditor of the company acting in the creditor's name and on their own account, if they are unable to satisfy their receivable from the company's property. The provisions of Subsection 1 through 3 shall apply accordingly. Claims made by the company's creditors against executive officers shall not expire if the company waives claims for damages or concludes a settlement agreement with its executive officers. If bankruptcy is declared against the company's property, claims of the company's creditors against the executive officers shall be exercised by the bankruptcy trustee.“

1 Commercial Code section 136 par. 2: “Any breach of Subsection 1 has the consequences stipulated in Section 65.”

2 Commercial Code section 136 par. 3: „The agreement of association or articles of association may determine the scope in which the ban on competition also applies to shareholders.“

coming from legal regulation and banned actions for executive officer and for shareholders do not meet this restriction.

2.3. Supervisory Board

Legal regulation of ban on competition for executive officers applies to members of supervisory board supportively¹.

We do not consider legislative note in section 139 par. 4 Commercial Code to section 136 Commercial Code to be an appropriate way for regulating this topic.

Scope of section 136 Commercial Code distinguishes between ban on competition for executive officer (par. 1-2) and for shareholder (par. 3), both are designed different. On one hand, mandatory regulation applies that cannot be excluded only broaden (executive officer), on the other hand agreement of association can / but still does not have to stipulate any restrictions (shareholders). Which regulation should be applied? The answer is not clear². Till legal regulation settles down the answer indisputable, we prefer the interpretation in favour of the scope of ban on competition to executive officer to be applied.

Except from not any good regulation of ban on competition for members of supervisory board, importance of related legal regulation can be seen in the way of noting to another section – 135a Commercial to be applied accordingly. The conclusion of unlimited (at least not definite as for those listed in section 65 par. 2 Commercial Code) consequences of breaching the ban on competition could be derived from this approach of legislator.

3. Consequences of breaching of ban on competition

As listed above, breach of ban on competition results in consequences that are given by law, especially in sections 65 par. 2, 135a par. 2-5 (subsidiary). These consequences are considered by legal doctrine as the only ones that come into account. Namely: to surrender to the company any benefits gained from the transaction, transfer corresponding rights to the company, right to damages.

According to chosen judicial practise³, breach of ban on competition is also a reason for invalidity of legal acts coming from breaching action because of violation of good manners (we add that also because of another violation

1 Commercial Code section 139 par. 4: „The ban on competition (Section 136) and the provisions of Section 135a shall apply to members of the supervisory board accordingly.“

2 „Mistake“ was made by Act no. 11/1998 Coll. making amends not very systematically and properly.

3 Regional Court in Bratislava 3Cob/166/2006.

stated in section 39 Civil Code¹). We incline to this evaluation made by the court, however legal doctrine rejects it explicitly. Main reason for inclining to stated interpretation of (possible) consequence of violation of law – competitive conduct is that this interpretation allows not only subjects inside the company or company itself to claim any rights in case these are violated by illegal conduct.

It is necessary to claim for related right in period of 3 months (subjective period), at most 1 year (objective period) against the liable person (except rights to damage)².

4. Conclusion

Main idea of ban on competitive conduct is to prevent from misusing holding certain post.

Legal order explicitly gives priority to settle down the list of misbehaving conduct for executive officers before shareholders. It is justified his rights – in most cases the executive officer evinces the will of company.

We assume that restricted interpretation of consequences arising from misusing conduct (without any explicit legal regulation for this conclusion) shall not prevail over justified interests of the third persons that cannot be demand other way. It is not rare that Limited Liability Company is owned and governed by the same person who evinces its will as well. It means that all actions are under the control of 1 person and when this 1 person decides himself to “have” not only 1, but 2 (so called single-person) companies, there is absolutely no one who would be entitled to make a claim if these two companies would do the same business. If their business activities negatively intervene the third person, pointing out to breaching the ban on competition could be appropriate remedy, but only in case when this remedy comes into account from the point of law. That is why, if necessary, extended interpretation is possible. If any action is considered by law to be illegal, there is no reason for limiting the third persons to call for reparation. Society (and every member of society) needs to have a right for clearing away unlawfulness.

Mészáros P. Ban on competition in Limited Liability Company (Slovakia)

The article is dedicated to the ban of competition in a limited liability company according to the Slovakian legislation. The author analyzes the provisions of Slovakian

1 Section 39 Civil Code: „A legal act is invalid if the content or the purpose thereof violates or evades the law or is inconsistent with good morals.“

2 Commercial Code section 65 par. 3: „The company’s rights under Subsection 2 above shall be null and void unless they are exercised against the liable person within three months of the day on which the company learnt of the relevant fact; however, no later than one year from the origination thereof. This shall not affect the right to damages.“

Commercial Code. The author emphasizes that the claims arising from breaching ban on competition are established by Slovakian law: 1) legal duty to surrender any benefits gained from the transaction concluded when ban on competition was breached; 2) legal duty to transfer corresponding gained rights in favour of affected company.

On one hand (in general provisions) Commercial Code provides general rules for concrete right arising from breaching the ban, it also stipulates time periods given to affected subjects for claiming, the issue of possible dispute between different claims (rights to damages and the other rights). On the other hand, in case of detailed specification of acting in contrary to ban on competitive conduct (and its legal definition), the legal regulation varies from individual forms of companies (and specific types can be found only in individual provisions of specific company) but without any (at least general) specification of competitive conduct as a whole.

In author's opinion, restricted interpretation of consequences arising from misusing conduct (without any explicit legal regulation for this conclusion) shall not prevail over justified interests of the third persons that cannot be demanded in other way.

Keywords: competitive conduct, limited liability company, shareholder, statutory body, Slovakian Commercial Code.