

Pursuant to Article 21(1/5) of the Law on Protection of Competition (“Official Gazette of the Republic of Serbia”, no. 51/2009), the Council of the Commission for Protection of Competition on its 30th Session held on May 19, 2011, enacts the following

G U I D E L I N E S

for implementation of the Regulation on criteria for setting the amount payable on the basis of measure for protection of competition and sanctions for procedural breaches, manner and terms for payment thereof and conditions for determination of respective measures

Introduction

This Guidelines shall in more details stipulate the criteria and manner for setting the amount payable on the basis of measure for protection of competition and sanctions for procedural breaches, manner and terms for payment thereof, envisaged by the Law on Protection of Competition (“Official Gazette of the Republic of Serbia”, no. 51/2009, hereinafter: the Law) and Regulation on criteria for setting the amount payable on the basis of measure for protection of competition and sanctions for procedural breaches, manner and terms for payment thereof and conditions for determination of respective measures (“Official Gazette of the Republic of Serbia”, no. 50/2010, hereinafter: the Regulation).

The Council of the Commission enacts this Guidelines for harmonizing purpose against the Law and Regulation aimed at standardization of its practice, thus achieving equal treatment in homogenous or similar situations against all undertakings – parties in proceeding before the Commission, as well as aimed at achieving transparency in the Commission’s treatment. Although this Guidelines have no power as bylaw legislation, they enable undertakings to pre-familiarize with the Commission’s position in implementing provisions of the Law and Regulation, and thus in this regard, the Guidelines also achieve the overall prevention of competition infringement.

Measure for protection of competition

Setting the amount payable

1. The amount payable is set by way of correcting the headline amount by applying other criteria, in addition to implementing the mitigating circumstances determined by the Regulation and specified by this Guidelines, whereby the total amount of measure for protection of competition cannot exceed the maximum amount payable on the basis of measure for protection of competition envisaged by Article 68(1) of the Law, i.e. 10% of the total annual revenue.

The headline amount is set by multiplying the baseline with the gravity of infringement factor, and later the duration of infringement factor.

- Baseline – factor 1

- Gravity of infringement – influence of the infringement on competing parties on the relevant market

Per gravity, competition infringements are classified as:

- very severe competition infringements, including: restrictive agreements that directly or indirectly set purchase or selling prices or other conditions of trade; restrictive agreements on collective boycott of competing parties; restrictive agreements on segmentation of markets or sources of procurement, including restrictive agreements of bidders – competing parties in public procurement procedure; forms of abuse of a dominant position that as their purpose or effect have direct or indirect impose the unfair purchase or selling prices or other unfair business conditions, and/or competing parties' exclusion from markets; forms of abuse of a dominant position that limit production, markets or technical development;
- severe competition infringements, including horizontal restrictive agreements that are not classified as very severe competition infringements, and forms of abuse of a dominant position, such as implementation of dissimilar business conditions or linked trades that are not classified as very severe competition infringements;
- minor competition infringements including vertical restrictive agreements that are not directly targeted to prices or conditions of sales, implemented concentration that is not approved for implementation pursuant to Article 65 of the Law, and concentration implemented contrary to the requirement to interrupt concentration pursuant to Article 64 of the Law.

The gravity of infringement factor:

- very severe competition infringements – from 2 to 3,
- severe competition infringements – from 1 to 2,
- minor competition infringements – 1.

- Duration of infringement

In terms of duration of infringement, the Commission takes into consideration the period encompassed by the decision on competition infringement:

The duration of infringement factor:

- infringements of short duration (up to one year) – 1,
- infringements of medium duration (from one to three years) – from 1 to 2,
- infringements of long duration (more than three years) – from 2 to 3.33.

2. The headline amount may be corrected by implementing other criteria for determining the amount payable on the basis of measure for protection of competition, which is determined during the proceeding. This thereby does not mean that the Commission shall in every proceeding determine the existence of all mentioned criteria, but that the Commission shall value the criteria determined in the proceeding, in a manner further substantiated.

The headline amount may be increased by the value of factor from 1.1 to 1.9, in particular for the following criteria, and separately for each determined criteria:

- undertaking's intent to execute competition infringement, in particular in the case of restrictive agreements from Article 14(2) of the Law, which are exempt from the de minimis rule;
- repeated infringement of undertakings;
- incitement of other undertakings to perform acts that as the purpose or effect have or may have significant restriction, distortion, or prevention of competition;
- refusal of cooperation in competition infringement proceedings;
- prevention and/or disruption of the Commission's acts in competition infringements proceedings.

Exceptionally, the headline amount is increased by factor 2, in the case when undertaking is repeating the act of competition infringement that is homogeneous to the act already determined with the measure for protection of competition (homogeneous repeated infringement). As homogeneous repeated infringement shall be implied the repeated infringement acts as defined by Items 1-5 from Paragraph 2, Article 10 of the Law, and as defined by Items 1-4 from Paragraph 2, Article 16 of the Law.

The headline amount may be reduced by the value of factor from 1.1 to 1.9, in particular for the following criteria that have a character of mitigating circumstances, and separately for each determined criteria:

- negligent infringement of competition, when undertaking committed the competition infringement act, aware that action taken may violate competition but carelessly assumed it will not happen, or when the said was unaware that his action may violate competition, but under the circumstances of performed activities and with respect to his features was obliged and should have been aware of the possibility;
- extremely short-lived competition infringement (less than 6 months) or very minor infringement of competition, or absence of adverse effects of competition infringement, or minor scale infringement;
- suspension of acts, all or individual, representing the infringement of competition, prior to gaining awareness of undertaking that the infringement was detected or immediately after following the first procedural act taken by the Commission in accordance with the Law;
- taking measures for removal of consequences caused by performed infringement that significantly removed the incurred consequences, whereby the Commission shall take into particular consideration the statement of other undertakings, as well as other regulatory authorities, i.e. state authorities and organizations.

- voluntary cooperation of undertakings with the Commission aimed at faster, more efficient and cost-effective completion of proceeding, removal of consequences caused by performed infringement or disclosure or evidencing other undertakings' infringement acts.

The amounts of headline amount's increase based on other criteria, as well as amounts of deduction based on criteria that have the character of mitigating circumstances (mitigating criteria), shall be determined by the formula which reads:

amount of increase/deduction for criteria = (headline amount X factor for criteria) – headline amount

The formula for calculating the final amount payable reads:

MPC = (headline amount + total amount for other criteria) – total amount for mitigating criteria

i.e.

MPC = (baseline x gravity of infringement factor x duration of infringement factor + total amount for other criteria) – total amount for mitigating criteria

If during the proceeding other criteria or mitigating circumstances are not determined, the final amount payable shall be equal to the headline amount.

Calculated final amount payable represents the percentage of total annual revenue of undertaking or forms of association of undertakings determined in accordance with Article 7 of the Law.

Measure for sanctions of procedural breaches

When determining the amount payable on the basis of measure for sanctions of procedural breaches, the Commission shall implement the criteria set in Article 57(2) of the Law, other criteria determined by the Regulation, as well as the following criteria:

- importance of ordered treatment for the outcome of proceeding,
- repeat of homogeneous or similar behavior in the same or some other proceeding before the Commission,
- gravity and importance of competition infringement determined in the proceeding.

Setting the amount payable on the basis of measure for sanctions of procedural breaches

When setting the amount payable on the basis of measure for sanctions of procedural breaches, the baseline is EUR500.00, as the minimal amount prescribed in Article 70 of the Law.

The amount of baseline may be increased in the following manner and under following conditions:

- by multiplying with the factor based on the importance of ordered treatment for the outcome of proceeding, and in particular, if the ordered treatment holds a greater importance for the outcome of proceeding – no more than 2, and if the ordered

treatment holds a crucial importance for conducting and completion of proceeding (in a manner altering the decision) – from 2 to 3;

- by multiplying with the factor based on the repeat of homogeneous or similar behavior in the same or some other proceeding before the Commission, i.e. in other proceeding before the Commission that is sanctioned by the measure of procedural breach, valued from 2 to 3;
- by multiplying with the factor based on the intent to interrupt or prevent the conduct of proceeding, valued from 2 to 3, if the Commission estimate that such intent is valid, per circumstances of the concrete case and previous homogeneous or similar treatment.

The final amount payable on the basis of measure for sanctions of procedural breaches for every day behaving opposite to the order of the Commission, i.e. failure to act as per order, shall be determined by summing the headline amount and amounts determined by implementing other factors, whereby this amount cannot exceed EUR5,000.00 per day.

The total monetary amount that undertaking is obliged to pay based on the measure for sanctions of procedural breaches (TMPB) shall be determined by multiplying the final amount payable on the basis of measure for sanctions of procedural breaches with the number of days behaving opposite to the Commission's order, i.e. failure to act as per order.

The formula for calculating the total monetary amount payable based on the measure for sanctions of procedural breaches reads:

TMPB = final amount payable on the basis of measure for sanctions of procedural breaches per day x number of days behaving opposite to the Commission's order, i.e. failure to act as per order of the Commission.

i.e.

TMPB = [headline amount + (headline amount x importance of ordered treatment factor) + (headline amount x repeat of infringement factor) + (headline amount x intent to interrupt or prevent the conduct of proceeding factor)] x number of days behaving opposite to the Commission's order, i.e. failure to act as per order of the Commission.

Terms and manners for effecting the amount payable on the basis of measure for protection of competition and sanctions for procedural breaches

When determining the deadline for effecting the amount payable on the basis of measure for protection of competition and sanctions for procedural breaches, the Commission shall take into consideration the financial strength of undertaking against whom the concrete measure is determined.

Measures for protection of competition and sanctions for procedural breaches shall be paid in full. In cases and under conditions determined by the Law and Regulation, at the request of undertaking to effect the payment in installments, the Commission may exceptionally approve the payment of amount imposed as the measure for protection of competition in such manner.

Undertakings are obliged to submit to the Commission the evidence on effected amount payable on the basis of measure for protection of competition, i.e. sanctions for procedural breaches, immediately following the effected payment, and no longer than five business days from the day of effecting the payment. In the case of approved payment in installments of the amount payable on the basis of measure for protection of competition by the Commission, undertakings are obliged to submit in the identical timeframe the evidence on effected payment of each separate installment.

If undertaking fails to fulfill the commitment of effecting the amount payable on the basis of measure for protection of competition or sanctions for procedural breaches in the determined timeframe, or fails to submit the evidence of such, the Commission shall initiate the enforcement measure procedure pursuant to the tax enforcement procedure.

Final provisions

This Guidelines shall come into force on the day of their enacting.

By coming into force of this Guidelines, the previous shall cease to apply.