

Opinion

on the implementation of Article 16(2/3) of the Law on Protection of Competition

The Commission for Protection of Competition is submitted a request for issuing official opinion on the interpretation and implementation of Article 16(2/3) of the Law on Protection of Competition (“Official Gazette of the RS”, no. 51/09), entered into force on November 1, 2009. The applicant has stated that legal provisions fail to offer a clear explanation on the matter of dissimilar business conditions mentioned in the above referenced provision of the Law, particularly in cases when an undertaking holds a dominant market position and when there are multiple distributors for the territory of the Republic of Serbia, and to that effect has presented the following questions:

1. does the approval of different rebates to distributors of identical manufacturer’s products, depending on the quantity of purchased goods on the part of each individual distributor from the specific undertaking, and
2. does the approval of different rebates to distributors of identical manufacturer’s products, depending on the duration or successfulness of cooperation achieved on the part of each individual distributor with the specific undertaking, as well as
3. does the approval of different rebates to distributors of identical manufacturer’s products, depending on the payment guarantees offered on the part of each individual distributor to the specific undertaking,

represent the implementation of dissimilar business conditions on the part of specific undertaking against its distributors.

Pursuant to Article 21, Item 8) of the Law on Protection of Competition, following consideration of the request concerned, Council of the Commission for Protection of Competition on the 139th session held on November 19, 2009, issues the following

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Pursuant to the statements presented in the request concerned, Council of the Commission establishes that the said relate to the impact assessment of rebate policy implemented by the dominant undertaking against its distributors, that is, assessment of competitive conditions between distributors of identical products (the so-called, intra brand competition). At the same time, described situation may produce particular effects both on the production and distribution markets, as well as potentially on all other vertically integrated markets in relation to the market of defined dominant undertaking, which is the subject of assessment of undertakings themselves and of the Commission for Protection of Competition *on a case-by-case basis* given the specific competitive conditions on observed markets.

Thus, Council of the Commission emphasizes that the rebate policy implemented on the part of dominant undertaking must be assessed on a case-by-case basis, meaning that is necessary to establish the relevant market where dominant undertaking is active, competitive conditions on that market (openness to new entries, market entry costs, number and power of competitors, openness of other connected markets, etc.), as well as likely effects of the rebate policy on competitive conditions implemented on the part of dominant undertaking, and thus accordingly also the permissibility for implementation of various types of rebates (particularly of listed in the request for issuing opinion – quantitative rebate; fidelity rebate; time limits for the fulfillment of rebate conditions; clearance rebate etc.). To that end, it is necessary to emphasize that effects of the rebate policy of dominant undertaking operating on the relevant market are foremost assessed in relation to the competitive conditions on the relevant market where its competitors operate with identical or similar, that is, interchangeable products (influence on the so-called inter brand competition). Therefore is necessary that types and transparency of implemented rebates be determined on a case-by-case basis, as well as their permissibility providing the relevant market and effects of rebate policy on such markets, followed by effects of implemented rebate policy on the competitive conditions between distributors of identical product.

In accordance with the above-mentioned, we emphasize that distribution agreement, that is, vertical agreements must fulfil all conditions from Article 11 of the Law, and point to the obligation to submit request for individual exemption from the prohibition within the meaning of provisions of Article 12 of the Law on Protection of Competition.

COUNCIL OF THE COMMISSION