



Republic of Serbia
**COMMISSION FOR PROTECTION
OF COMPETITION**

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Belgrade

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SUBJECT: Opinion on the implementation of Article 71(5) of the Law on Protection of Competition (“Official Gazette of the RS”, no. 79/05)

In the submission of October 15, 2009, attorney at law Zvonko Radovanović from Belgrade, 49/4 Dr Ivana Ribara Street, has submitted a request for issuing opinion on the implementation of Article 71(5) of the Law on Protection of Competition (“Official Gazette of the RS”, no. 79/05 hereinafter referred to as the Law), within the meaning of determining whether the relief from the measure for protection of competition pertains to the party in the agreement from Article 7 of the Law which was the first to report on the existence of agreement prior to the enactment of conclusion on instituting proceeding, or whether the mentioned provision is implemented on all or significant number of parties to the agreement which simultaneously or subsequently jointly report on the existence of agreement, in addition to the inquiry whether the mentioned provision also relates to the parties in vertical agreements, that is, distribution agreements between manufacturers and distributors or between manufacturers and retailers.

Pursuant to Article 35(1/6) of the Law on Protection of Competition in reference to the implementation of Article 71(5) of the Law, Council of the Commission for Protection of Competition on the 136th session held on October 21, 2009, issues the following opinion.

The objective of Article 71(5) of the Law was to introduce the institute known as the leniency program, that is, the program for exemption from liability of the party to the prohibited agreement which was the first to report to the competition authority on the existence of agreement and participating parties. The substance of the program is that by offering a relief from the measure for protection of competition attracts one party to the prohibited agreement to report other parties to such agreement, and to deliver evidence to the competition authority based on which it will be evidenced on the existence of agreement and established on the participating parties, provided that competition authority had no prior knowledge of the evidence presented at the time when the party to the restrictive agreement has reported other parties to such agreement to the competition authority. In addition to the mentioned, the first party to the agreement to report on prohibited agreement acquires immunity from the procedural penalty measure, provided full cooperation with

the competition authority for the entire duration of the proceeding concerned and immediate termination of participation in the prohibited agreement.

Rules of the EU leniency program most often also imply lenient punishment to a certain percentage for participating parties to the prohibited agreement which are the second or third to report, conditioned that they deliver additional evidence which previously were not submitted to the competition authority by the first notifying party, or not at disposal to the competition authority at the time of submission of evidence.

Provision of Article 71(5) of the Law stipulates that the penalty measure is not imposed to the participating party to the agreement from Article 7(1) of the Law, as well as to the person in charge, if the participating party has reported to the Commission on the existence of agreement and related participants prior to the enactment of decision on instituting proceeding, which sets the extent to which this provision transmits the leniency program. Initiating from the purpose of this provision and all stated in the said, **the exemption from penalty measure is secured for the first participating party to report on the existence of agreement from Article 7(1) of the Law, provided that the said is reported to the Commission prior to the enactment of decision on instituting proceeding. The reporting of agreement implies submission of evidence pursuant to which the existence of such agreement and related participants will be established, as well as full cooperation of the party to the agreement that was the first to report on the existence of agreement with the Commission. Also, necessary precondition for the relief from the measure for protection of competition is that the party to the agreement that was the first to report on the existence of agreement immediately cease with the participation in such agreement, provided the submission of evidence on the said. If the Commission was already in disposal of evidence offered by the party to the agreement that was the first to report on the agreement, and related decision on instituting proceeding is not enacted, necessary preconditions for the relief from the measure for protection of competition are not fulfilled.**

The above-mentioned provision stipulates that the relief from the measure for protection of competition is provided to the party to the agreement from Article 7(1) of the Law, and being that such agreements may be horizontal and vertical, the immunity from penalty measure belongs to the party in any agreement (horizontal or vertical) from Article 7 of the Law, provided that the above-mentioned conditions are already fulfilled.

The intention of legislator that in the provision of Article 71(5) of the Law introduce the institute of leniency program is also demonstrated by the provisions of Article 69 of the Law on Protection of Competition (“Official Gazette of the RS”, no. 51/09) titled “Relief from the measure for protection of competition”, which also introduce the above-mentioned program in somewhat more wider sense. To this extent, in addition to the relief provided for the party to the agreement that was the first to report on the agreement from commitment payment from measure for protection of competition, provisions of Article 69 of the Law on Protection of Competition, entered into force on November 1, 2009, stipulate the deduction of commitment payment from the measure for protection of competition for other participating parties to the agreement which submit additional evidence. In addition to the first notifying party to be relieved from the commitment to pay a monetary sum from the measure for protection of competition, the number of other agreement participants that are eligible for the deduction will be more closely determined in the regulation enacted by the Government of the RS.

One additional important characteristic can be distinguished between the provisions of Article 71(5) of the Law (“Official Gazette of the RS”, no. 79/05) and provisions of Article 69 of the Law (“Official Gazette of the RS”, no. 51/09), reflected in the provisions of Article 69 of the Law which enable the relief from the measure for protection of competition only to the party to the agreement who has not initiated agreement conclusion from Article 10 of the Law, while Article 71(5) of the Law does not differentiate between the roles that parties to the agreement have had in the conclusion of related agreement.

Under the provisions of the Law on Protection of Competition from 2005, enactment of the measure for protection of competition or relief from the measure for protection of competition is entrusted to the other authority, while in accordance with competences set in Article 35(1/6) of the Law, the Commission issues opinions in reference to the implementation of provisions from Article 75(1) of the Law, as here presented.

The relief from the measure for protection of competition stipulated in Article 71(5) of the Law does not imply the immunity from conducting proceeding in which the Commission will establish potential infringement of the Law. If the Commission determines infringement of the Law, it shall set measures and terms for related implementation of measures toward reestablishing competition in the relevant market and removal of adverse consequences of the agreement concluded contrary to the Law.

PRESIDENT OF THE COUNCIL

Prof. Dr. Dijana Marković Bajalović