



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

Number: 1/0-06-409/09-2

Date: November 11, 2009

Belgrade

The Securities Commission
1 Omladinskih brigada St.
Belgrade, Republic of Serbia

The Securities Commission (hereinafter referred to as the Applicant) has addressed the Commission for Protection of Competition by submitting a request entered under number 1/0-06-409/09-1 of October 19, 2009, requesting opinion in reference to the implementation of provisions of Articles 17, 61 and 63 of the Law on Protection of Competition (“Official Gazette of the RS”, no. 51/2009, hereinafter referred to as the Law) with the objective of amending Article 5(2/10) of the Rulebook on the content and form of take-over bids of shares (“Official Gazette of the RS”, nos. 53/08, 100/06 and 30/08).

The Applicant has requested responses to several hypothetical questions, considering that such issues are not regulated in the transitional and final provisions of the Law.

Pursuant to the provisions of Article 21(1/8) of the Law, in reference to the request concerned, the Commission for Protection issues the following

OPINION

The obligation to notify concentration from Article 63 of the Law is immanent to the provision from Article 25(1) of the previously valid Law on Protection of Competition (“Official Gazette of the RS”, no. 79/2005, hereinafter referred to as the previous Law), envisaging the preclusive term for notifying concentration that has occurred, provided creation of conditions laid down in Articles 21 and 23 of the previous Law, that is, Articles 17, 61 and 63 of the Law. In this respect, and particularly in the light of the provision from Article 63(1/2), it is clear that the notification of concentration can be submitted to the Commission within 15 days from the announcement of public invitation, offer or closing of offer. Accordingly, it is possible to avoid situation in which the party to potentially assume shares would be forced to perform related notification, although following the publication and/or closing of offer has failed to become the majority shareholder nor has acquired the decisive managerial influence in the target company.

Obligation to notify on concentration laid down in Article 63 of the Law relates to undertakings partaking in business transactions more closely described in Article 17 of the Law, and only in the case of fulfilment of conditions from Article 61(1) of the Law. However, Article 61(3) of the Law stipulates the obligation to notify on concentration implemented by means of a takeover bid within the meaning of regulation governing takeover of joint stock companies, regardless of the fulfilment of conditions from Article 61(1) of the Law. At the same time, the change of control in the planned business transaction represents an important fact for assessing the obligation to notify on concentration, thus the Commission for Protection of Competition takes as an important moment the acquisition of the controlling interest in the share capital, but also the acquisition of possibility to perform a decisive managerial influence in the target company, or respectively, the quality of control executed on the part of a single or several shareholders in the company acquired following the implemented transaction, regardless of the simple percentual share which may, but does not necessarily imply the controlling interest in the share capital.

In the case that an undertaking has acquired the controlling stock prior to the entry into force of the Law, and subsequently submits the request for takeover of remaining shares in the target company, it is clear that such party is not obligated to submit notification for approval of concentration being that the control has already been acquired, as per your statement, of controlling stock, thus the change of control in the target company has already taken place. However, in the case of acquiring the controlling stock where related concentration is not notified before the Commission prior to the entry into force of the Law, such transaction must be notified under the provisions of Article 63 of the Law; that is, in the case that the share takeover transaction executed prior to the entry into force of the Law has not secured the effective control over the target company (i.e. independent decision making pertaining to the most important, strategic business decisions, independent disposal of assets of higher value, minority shareholder's veto right not exclusive toward the protection of minority shareholders' interests, etc.), but the full control is acquired only by acquiring the additional share capital following the entry into force of the Law, that would imply that created concentration should also be notified under the provisions of Article 63 of the Law.

In the case that the party has acquired the controlling stock package prior to the bid, and following the start of implementation of the Law, the party acquiring the controlling interest (by executing a takeover over controlling package of stocks and/or management rights) is obligated to notify the Commission on created concentration under the provisions of Article 63 of the Law.

In the case that the party is not in disposal of the controlling interest in the target company when submitting the bid for takeover of shares in the target company, it is not obligated to submit notification on concentration, but the said notification may be submitted following the closure of bid within 15 days, as stipulated in Article 63 of the Law. This is particularly expedient given that the bidder does not need to acquire the controlling stock package or the package securing the controlling management rights, thus it cannot be considered that the concentration between undertakings has occurred at all.

PRESIDENT OF THE COMMISSION

Prof. Dr. Dijana Marković Bajalović

